Central Public Information Officer, Supreme Court of India v. Subhash Chandra Agarwal

(Civil Appeal No. 10045 of 2010 & Civil Appeal No. 2683 of 2010)*

Sanjiv Khanna, J.

1. This judgment … answer[s] the question as to 'how transparent is transparent enough'[1] under the Right to Information Act, 2005 ('RTI Act' for short) in the context of collegium system for appointment and elevation of judges to the Supreme Court and the High Courts; declaration of assets by judges, etc.

2. Civil Appeal No. 10045 of 2010 titled Central Public Information Officer, *Supreme Court of India v. Subhash Chandra Agarwal* arises from an application moved by Subhash Chandra Agarwal before the CPIO, Supreme Court of India on 6th July, 2009 to furnish a copy of the complete correspondence with the then Chief Justice of India as the Times of India had reported that a Union Minister had approached, through a lawyer, Mr. Justice R. Reghupathi of the High Court of Madras to influence his judicial decisions. The information was denied by the CPIO, Supreme Court of India on the ground that the information sought by the applicant-respondent was not handled and dealt with by the Registry of the Supreme Court of India and the information relating thereto was neither maintained nor available with the Registry. First appeal filed by Subhash Chandra Aggarwal was dismissed by the appellate authority vide order dated 05th September, 2009. On further appeal, the Central Information Commission ('CIC' for short) vide order dated 24th November, 2009 has directed disclosure of information observing that disclosure would not infringe upon the constitutional status of the judges. Aggrieved, the CPIO, Supreme Court of India has preferred this appeal.

3. Civil Appeal No. 10044 of 2010 arises from an application dated 23rd January, 2009 moved by Subhash Chandra Agarwal before the CPIO, Supreme Court of India to furnish a copy of complete file/papers as available with the Supreme Court of India inclusive of copies of complete correspondence exchanged between the concerned constitutional authorities with file notings relating to the appointment of Mr. Justice H.L. Dattu, Mr. Justice A.K. Ganguly and Mr. Justice R.M. Lodha superseding seniority of Mr. Justice A. P. Shah, Mr. Justice A.K. Patnaik and Mr. Justice V.K. Gupta, which was allegedly objected to by the Prime Minister. The CPIO vide order dated 25th February, 2009 had denied this information observing that the Registry did not deal with the matters pertaining to the appointment of the judges to the Supreme Court of India. Appointment of judges to the Supreme Court and the High Courts are made by the President of India as per the procedure prescribed by law and the matters relating thereto were not dealt with and handled by the Registry of the Supreme Court. The information was neither maintained nor available with the Registry. First appeal preferred by Subhash Chandra Agarwal was rejected vide order dated 25th March, 2009 by the appellate authority. On further appeal, the CIC has accepted the appeal and directed furnishing of information by relying on the judgment dated 02nd September, 2009 of the Delhi High Court in Writ Petition (Civil) No. 288 of 2009 titled *Central Public Information Officer, Supreme Court of India v. Subhash Chandra Agarwal & Another*. The CIC has also relied on the decision of this Court in *S.P. Gupta v. Union of India & Others*[2] to reach its conclusion. Aggrieved, the CPIO, Supreme Court of India has preferred the present appeal stating, inter alia, that the judgment in Writ Petition (Civil) No. 288 of 2009 was upheld by the Full Bench of the Delhi High Court in LPA No. 501 of 2009 vide judgment dated 12th January, 2010, which judgment is the subject matter of appeal before this Court in Civil Appeal No.2683 of 2010.

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* Decided on November 13th, 2019. Bench: Ranjan Gogoi CJI, N.V. Ramana, Dr. D.Y. Chandrachud, Deepak Gupta & Sanjiv Khanna JJ.

[1] Heading of an article written by Alberto Alemanno: "How Transparent is Transparent Enough? Balancing Access to Information Against Privacy in European Judicial Selection" reproduced in Michal Bobek (ed.) Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts (Oxford University Press 2015).

[2] (1981) Supp SCC 87.

4. Civil Appeal No. 2683 of 2010 arises from an application dated 10th November, 2007 moved by Subhash Chandra Agarwal seeking information on declaration of assets made by the judges to the Chief Justices in the States, which application was dismissed by the CPIO, Supreme Court of India vide order/letter dated 30th November, 2007 stating that information relating to declaration of assets of the judges of the Supreme Court of India and the High Courts was not held by or was not under control of the Registry of the Supreme Court of India. On the first appeal, the appellate authority had passed an order of remit directing the CPIO, Supreme Court of India to follow the procedure under Section 6(3) of the RTI Act and to inform Subhash Chandra Agarwal about the authority holding such information as was sought. The CPIO had thereafter vide order dated 07th February, 2008 held that the applicant should approach the CPIO of the High Courts and filing of the application before the CPIO of the Supreme Court was against the spirit of Section 6(3) of the RTI Act. Thereupon, Subhash Chandra Agarwal had directly preferred an appeal before the CIC, without filing the first appeal, which appeal was allowed vide order dated 06th January, 2009 directing:

> "… in view of what has been observed above, the CPIO of the Supreme Court is directed to provide the information asked for by the appellant in his RTI application as to whether such declaration of assets etc. has been filed by the Hon'ble Judges of the Supreme Court or not within ten working days from the date of receipt of this decision notice."

5. Aggrieved, the CPIO, Supreme Court of India had filed Writ Petition (Civil) No. 288 of 2009 before the Delhi High Court, which was decided by the learned Single Judge vide judgment dated 02nd September, 2009, and the findings were summarised as:

> "84. […] Re Point Nos. 1 & 2 Whether the CJI is a public authority and whether the CPIO, of the Supreme Court of India, is different from the office of the CJI; and if so, whether the Act covers the office of the CJI;
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> Answer: The CJI is a public authority under the Right to Information Act and the CJI holds the information pertaining to asset declarations in his capacity as Chief Justice; that office is a "public authority" under the Act and is covered by its provisions.
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> Re Point No. 3: Whether asset declaration by Supreme Court Judges, pursuant to the 1997 Resolution are "information", under the Right to Information Act, 2005.
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> Answer: It is held that the second part of the respondent's application, relating to declaration of assets by the Supreme Court Judges, is "information" within the meaning of the expression, under Section 2 (f) of the Act. The point is answered accordingly; the information pertaining to declarations given, to the CJI and the contents of such declaration are "information" and subject to the provisions of the Right to Information Act.
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> Re Point No. 4: If such asset declarations are "information" does the CJI hold them in a "fiduciary" capacity, and are they therefore, exempt from disclosure under the Act
>
> Answer: The petitioners' argument about the CJI holding asset declarations in a fiduciary capacity, (which would be breached if it is directed to be disclosed, in the manner sought by the applicant) is insubstantial. The CJI does not hold such declarations in a fiduciary capacity or relationship.
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> Re Point No. 5: Whether such information is exempt from disclosure by reason of Section 8(1)(j) of the Act.
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> Answer: It is held that the contents of asset declarations, pursuant to the 1997 resolution—and the 1999 Conference resolution—are entitled to be treated as personal information, and may be accessed in accordance with the procedure prescribed under Section 8(1)(j); they are not otherwise subject to disclosure. As far as the information sought by the applicant in this case is concerned, (i.e. whether the declarations were made pursuant to the 1997 resolution) the procedure under Section 8(1)(j) is inapplicable.

> Re Point No. (6): Whether the lack of clarity about the details of asset declaration and about their details, as well as lack of security renders asset declarations and their disclosure, unworkable.
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> Answer: These are not insurmountable obstacles; the CJI, if he deems it appropriate, may in consultation with the Supreme Court Judges, evolve uniform standards, devising the nature of information, relevant formats, and if required, the periodicity of the declarations to be made. The forms evolved, as well as the procedures followed in the United States—including the redaction norms—under the Ethics in Government Act, 1978, reports of the US Judicial Conference, as well as the Judicial Disclosure Responsibility Act, 2007, which amends the Ethics in Government Act of 1978 to: (1) restrict disclosure of personal information about family members of Judges whose revelation might endanger them; and (2) extend the authority of the Judicial Conference to redact certain personal information of judges from financial disclosure reports may be considered."

6. On further appeal by the CPIO, Supreme Court of India, LPA No. 501 of 2009 was referred to the Full Bench, which has vide its decision dated 12th January, 2010 dismissed the appeal. This judgment records that the parties were *ad-idem* with regard to point Nos. 1 and 2 as the CPIO, Supreme Court of India had fairly conceded and accepted the conclusions arrived at by the learned Single Judge and, thus, need not be disturbed. Nevertheless, the Full Bench had felt it appropriate to observe that they were in full agreement with the reasoning given by the learned Single Judge. The expression 'public authority' as used in the RTI Act is of wide amplitude and includes an authority created by or under the Constitution of India, which description holds good for the Chief Justice of India. While the Chief Justice of India is designated as one of the competent authorities under Section 2(e) of the RTI Act, the Chief Justice of India besides discharging his role as 'head of the judiciary' also performs a multitude of tasks assigned to him under the Constitution and various other enactments. In the absence of any indication that the office of the Chief Justice of India is a separate establishment with its own CPIO, it cannot be canvassed that "the office of the CPIO of the Supreme Court is different from the office of the CJI" (that is, the Chief Justice of India). Further, neither side had made any submissions on the issue of 'unworkability' on account of 'lack of clarity' or 'lack of security' *vis-à-vis* asset declarations by the judges. The Full Bench had, thereafter, re-casted the remaining three questions as under:

> "(1) Whether the respondent had any "right to information" under Section 2(j) of the Act in respect of the information regarding making of declarations by the Judges of the Supreme Court pursuant to 1997 Resolution?
>
> (2) If the answer to question (1) above is in affirmative, whether CJI held the "information" in his "fiduciary" capacity, within the meaning of the expression used in Section 8(1)(e) of the Act?
>
> (3) Whether the information about the declaration of assets by the Judges of the Supreme Court is exempt from disclosure under the provisions of Section 8(1)(j) of the Act?"

The above questions were answered in favour of the respondent-Subhash Chandra Aggarwal as the Full Bench has held that the respondent had the right to information under Section 2(j) of the RTI Act with regard to the information in the form of declarations of assets made pursuant to the 1997 Resolution. The Chief Justice did not hold such declarations in a fiduciary capacity or relationship and, therefore, the information was not exempt under Section 8(1)(e) of the RTI Act. Addressing the third question, the Bench had observed:

> "116. In the present case the particulars sought for by the respondent do not justify or warrant protection under Section 8(1)(j) inasmuch as the only information the applicant sought was whether 1997 Resolution was complied with. That kind of innocuous information does not warrant the protection granted by Section 8(1)(j).

> We concur with the view of the learned single Judge that the contents of asset declarations, pursuant to the 1997 Resolution, are entitled to be treated as personal information, and may be accessed in accordance with the procedure prescribed under Section 8(1)(j); that they are not otherwise subject to disclosure. Therefore, as regards contents of the declarations, information applicants would have to, whenever they approach the authorities, under the Act satisfy them under Section 8(1)(j) that such disclosure is warranted in "larger public interest."

7. The afore-captioned three appeals were tagged to be heard and decided together vide order dated 26th November, 2010, the operative portion of which reads as under:

> "12. Having heard the learned Attorney General and the learned counsel for the respondent, we are of the considered opinion that a substantial question of law as to the interpretation of the Constitution is involved in the present case which is required to be heard by a Constitution Bench. The case on hand raises important questions of constitutional importance relating to the position of Hon'ble the Chief Justice of India under the Constitution and the independence of the Judiciary in the scheme of the Constitution on the one hand and on the other, fundamental right to freedom of speech and expression. Right to information is an integral part of the fundamental right to freedom of speech and expression guaranteed by the Constitution. Right to Information Act merely recognizes the constitutional right of citizens to freedom of speech and expression. Independence of Judiciary forms part of basic structure of the Constitution of India. The independence of Judiciary and the fundamental right to free speech and expression are of a great value and both of them are required to be balanced."

8. This order while referring the matter to a larger bench had framed the following substantial questions of law as to the interpretation of the Constitution, which read as under:

> **"1. Whether the concept of independence of judiciary requires and demands the prohibition of furnishing of the information sought? Whether the information sought for amounts to interference in the functioning of the Judiciary?**
>
> **2. Whether the information sought for cannot be furnished to avoid any erosion in the credibility of the decisions and to ensure a free and frank expression of honest opinion by all the constitutional functionaries, which is essential for effective consultation and for taking the right decision?**
>
> **3. Whether the information sought for is exempt under Section 8(1)(j) of the Right to Information Act?"**

…

10. For clarity and convenience, we would deal with the issues pointwise, albeit would observe that Point no. 1 … was not contested before the Full Bench but as some clarification is required, it has been dealt below.

Point No. 1: Whether the Supreme Court of India and the Chief Justice of India are two separate public authorities?

…

12. Term 'public authority' under Section 2(h) of the RTI Act includes any authority or body or an institution of self-government established by the Constitution or under the Constitution. Interpreting the expression 'public authority' in *Thalappalam Service Cooperative Bank Limited and Others v. State of Kerala and Others*[3], this Court had observed:

[3] (2013) 16 SCC 82.

"30. The legislature, in its wisdom, while defining the expression "public authority" under Section 2(h), intended to embrace only those categories, which are specifically included, unless the context of the Act otherwise requires. Section 2(h) has used the expressions "means" and "includes". When a word is defined to "mean" something, the definition is prima facie restrictive and where the word is defined to "include" some other thing, the definition is *prima facie* extensive. But when both the expressions "means" and "includes" are used, the categories mentioned there would exhaust themselves. The meanings of the expressions "means" and "includes" have been explained by this Court in *DDA v. Bhola Nath Sharma* (in paras 25 to 28). When such expressions are used, they may afford an exhaustive explanation of the meaning which for the purpose of the Act, must invariably be attached to those words and expressions.

31. Section 2(h) exhausts the categories mentioned therein. The former part of Section 2(h) deals with:

(1) an authority or body or institution of self-government established by or under the Constitution,

(2) an authority or body or institution of self-government established or constituted by any other law made by Parliament,

(3) an authority or body or institution of self-government established or constituted by any other law made by the State Legislature, and

(4) an authority or body or institution of self-government established or constituted by notification issued or order made by the appropriate Government."

13. Article 124 of the Constitution, which relates to the establishment and constitution of the Supreme Court of India, states that there shall be a Supreme Court of India consisting of a Chief Justice and other judges. It is undebatable that the Supreme Court of India is a 'public authority', as defined vide clause (h) to Section 2 of the RTI Act as it has been established and constituted by or under the Constitution of India. The Chief Justice of India as per sub-clause (ii) in clause (e) to Section 2 is the competent authority in the case of the Supreme Court. Consequently, in terms of Section 28 of the RTI Act, the Chief Justice of India is empowered to frame rules, which have to be notified in the Official Gazette, to carry out the provisions of the RTI Act.

14. The Supreme Court of India, which is a 'public authority', would necessarily include the office of the Chief Justice of India and the judges in view of Article 124 of the Constitution. The office of the Chief Justice or for that matter the judges is not separate from the Supreme Court, and is part and parcel of the Supreme Court as a body, authority and institution. The Chief Justice and the Supreme Court are not two distinct and separate 'public authorities', *albeit* the latter is a 'public authority' and the Chief Justice and the judges together form and constitute the 'public authority', that is, the Supreme Court of India. The interpretation to Section 2(h) cannot be made in derogation of the Constitution. To hold to the contrary would imply that the Chief Justice of India and the Supreme Court of India are two distinct and separate public authorities, and each would have their CPIOs and in terms of subsection (3) to Section 6 of the RTI Act an application made to the CPIO of the Supreme Court or the Chief Justice would have to be transferred to the other when 'information' is held or the subject matter is more closely connected with the 'functions' of the other. This would lead to anomalies and difficulties as the institution, authority or body is one. The Chief Justice of India is the head of Civil Appeal No. 10044 of 2010 & Ors. Page 19 of 108 the institution and neither he nor his office is a separate public authority.

15. This is equally true and would apply to the High Courts in the country as Article 214 states that there shall be a High Court for each State and Article 216 states that every High Court shall consist of a Chief Justice and such other judges as the President of India may from time to time deem it appropriate to appoint.

Point No. 2: Information and Right to Information under the RTI Act

…

17. 'Information' as per the definition clause is broad and wide, as it is defined to mean "material in any form" with amplifying words including records (a term again defined in widest terms vide clause (i) to Section 2 of the RTI Act), documents, emails, memos, advices, logbooks, contracts, reports, papers, samples, models, data material held in electronic form, etc. The last portion of the definition clause which states that the term 'information' would include 'information relating to any private body which can be accessed by a public authority under any other law for the time being in force' has to be read as reference to 'information' not presently available or held by the public authority but which can be accessed by the public authority from a private body under any other law for the time being in force. The term – 'private body' in the clause has been used to distinguish and is in contradistinction to the term – 'public authority' as defined in Section 2(h) of the RTI Act. It follows that any requirement in the nature of precondition and restrictions prescribed by any other law would continue to apply and are to be satisfied before information can be accessed and asked to be furnished by a private body.

18. What is explicit as well as implicit from the definition of 'information' in clause (f) to Section 2 follows and gets affirmation from the definition of 'right to information' that the information should be accessible by the public authority and 'held by or under the control of any public authority'. The word 'hold' as defined in Wharton's Law Lexicon, 15th Edition, means to have the ownership or use of; keep as one's own, but in the context of the present legislation, we would prefer to adopt a broader definition of the word 'hold' in Black's Law Dictionary, 6th Edition, as meaning; to keep, to retain, to maintain possession of or authority over. The words 'under the control of any public authority' as per their natural meaning would mean the right and power of the public authority to get access to the information. It refers to dominion over the information or the right to any material, document etc. The words 'under the control of any public authority' would include within their ambit and scope information relating to a private body which can be accessed by a public authority under any other law for the time being in force subject to the pre-imposed conditions and restrictions as applicable to access the information.

19. When information is accessible by a public authority, that is, held or under its control, then the information must be furnished to the information seeker under the RTI Act even if there are conditions or prohibitions under another statute already in force or under the Official Secrets Act, 1923, that restricts or prohibits access to information by the public. In view of the non-obstante clause in Section 22[4] of the RTI Act, any prohibition or condition which prevents a citizen from having access to information would not apply. Restriction on the right of citizens is erased. However, when access to information by a public authority itself is prohibited or is accessible subject to conditions, then the prohibition is not obliterated and the pre-conditions are not erased. Section 2(f) read with Section 22 of the RTI Act does not bring any modification or amendment in any other enactment, which bars or prohibits or imposes pre-condition for accessing information of the private bodies. Rather, clause (f) to Section 2 upholds and accepts the said position when it uses the expression – "which can be accessed", that is the public authority should be in a position and be entitled to ask for the said information. Section 22 of the RTI Act, an overriding provision, does not militate against the interpretation as there is no contradiction or conflict between the provisions of Section 2(f) of the RTI Act and other statutory enactments/law. Section 22 of the RTI Act is a key that unlocks prohibitions/limitations in any prior enactment on the right of a citizen to access information which is accessible by a public authority. It is not a key with the public authority that can be used to undo and erase prohibitions/limitations on the right of the public authority to access information. In other words, a private body will be entitled to the same protection as is available to them under the laws of this country.

20. Full Bench of the Delhi High Court in its judgment dated 12th January 2010 in LPA No. 501 of 2009 had rightly on the interpretation of word 'held', referred to Philip Coppel's work 'Information

[4] Section 22 of the RTI Act reads: "22. Act to have overriding effect. -The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923 (19 of 1923), and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

Rights' (2nd Edition, Thomson, Sweet & Maxwell 2007)[5] interpreting the provisions of the Freedom of Information Act, 2000 (United Kingdom) in which it has been observed:

> "When information is "held" by a public authority. For the purposes of the Freedom of Information Act 2000, information is "held" by a public authority if it is held by the authority otherwise than on behalf of another person, or if it is held by another person on behalf of the authority. The Act has avoided the technicalities associated with the law of disclosure, which has conventionally drawn a distinction between a document in the power, custody or possession of a person. Putting to one side the effects of s.3(2) (see para.9-009 below), the word "held" suggests a relationship between a public authority and the information akin to that of ownership or bailment of goods. Information: - that is, without request or arrangement, sent to or deposited with a public authority which does not hold itself out as willing to receive it and which does not subsequently use it; - that is accidentally left with a public authority; - that just passes through a public authority; or - that "belongs" to an employee or officer of a public authority but which is brought by that employee or officer onto the public authority's premises, will, it is suggested, lack the requisite assumption by the public authority of responsibility for or dominion over the information that is necessary before it can be said that the public authority can be said to "hold" the information. …"

Thereafter, the Full Bench had observed:

> "59. Therefore, according to Coppel the word "held" suggests a relationship between a public authority and the information akin to that of an ownership or bailment of goods. In the law of bailment, a slight assumption of control of the chattel so deposited will render the recipient a depository (see Newman v. Bourne and Hollingsworth (1915) 31 T.L.R. 209). Where, therefore, information has been created, sought, used or consciously retained by a public authority will be information held within the meaning of the Act. However, if the information is sent to or deposited with the public authority which does not hold itself out as willing to receive it and which does not subsequently use it or where it is accidentally left with a public authority or just passes through a public authority or where it belongs to an employee or officer of a public authority but which is brought by that employee or officer unto the public authority's premises it will not be information held by the public authority for the lack of the requisite assumption by the public authority of responsibility for or dominion over the information that is necessary before the public authority can be said to hold the information… ."

Therefore, the word "hold" is not purely a physical concept but refers to the appropriate connection between the information and the authority so that it can properly be said that the information is held by the public authority.[6]

21. In *Khanapuram Gandaiah v. Administrative Officer and Others*[7], this Court on examining the definition clause 2(f) of the RTI Act had held as under:

> "10. […] This definition shows that an applicant under Section 6 of the RTI Act can get any information which is already in existence and accessible to the public authority under law. ...
>
> 12. […] the Public Information Officer is not supposed to have any material which is not before him; or any information he could (*sic* not) have obtained under law. Under Section 6 of the RTI Act, an applicant is entitled to get only such information which can be accessed by the "public authority" under any other law for the time being in force. …"

The aforesaid observation emphasises on the mandatory requirement of accessibility of information by the public authority under any other law for the time being in force. This aspect was again highlighted

[5] Also, see Philip Coppel, 'Information Rights' (4th Edition, Hart Publishing 2014) P. 361-62.
[6] *New Castle upon Tyne v. Information Commissioner and British Union for Abolition of Vivisection*, [2011] UKUT 185 AAC
[7] (2010) 2 SCC 1.

by another Division Bench in *Aditya Bandopadhyay (supra)*, wherein information was divided into three categories in the following words:

> "59. The effect of the provisions and scheme of the RTI Act is to divide "information" into three categories. They are:
>
> (i) Information which promotes transparency and accountability in the working of every public authority, disclosure of which may also help in containing or discouraging corruption [enumerated in clauses (b) and (c) of Section 4(1) of the RTI Act].
>
> (ii) Other information held by public authority [that is, all information other than those falling under clauses (b) and (c) of Section 4(1) of the RTI Act].
>
> (iii) Information which is not held by or under the control of any public authority and which cannot be accessed by a public authority under any law for the time being in force.
>
> Information under the third category does not fall within the scope of the RTI Act. Section 3 of the RTI Act gives every citizen, the right to "information" held by or under the control of a public authority, which falls either under the first or second category. In regard to the information falling under the first category, there is also a special responsibility upon the public authorities to suo motu publish and disseminate such information so that they will be easily and readily accessible to the public without any need to access them by having recourse to Section 6 of the RTI Act. There is no such obligation to publish and disseminate the other information which falls under the second category."

The first category refers to the information specified in clause (b) to sub-section (1) to Section 4 which consists of as many as seventeen sub-clauses on diverse subjects stated therein. It also refers to clause (c) to sub-section (1) to Section 4 by which public authority is required to publish all relevant facts while formulating important public policies or pronouncing its decision which affects the public. The rationale behind these clauses is to disseminate most of the information which is in the public interest and promote openness and transparency in government.

22. The expressions 'held by or under the control of any public authority' and 'information accessible under this Act' are restrictive15 and reflect the limits to the 'right to information' conferred vide Section 3 of the RTI Act, which states that subject to the provisions of the RTI Act, all citizens shall have the right to information. The right to information is not absolute and is subject to the conditions and exemptions under the RTI Act.

23. This aspect was again highlighted when the terms 'information' and 'right to information' were interpreted in *Thalappalam Service Cooperative Bank Limited (supra)* with the following elucidation:

> "63. Section 8 begins with a non obstante clause, which gives that section an overriding effect, in case of conflict, over the other provisions of the Act. Even if, there is any indication to the contrary, still there is no obligation on the public authority to give information to any citizen of what has been mentioned in clauses (a) to (j). The public authority, as already indicated, cannot access all the information from a private individual, but only those information which he is legally obliged to pass on to a public authority by law, and also only those information to which the public authority can have access in accordance with law. Even those information, if personal in nature, can be made available only subject to the limitations provided in Section 8(j) of the RTI Act. Right to be left alone, as propounded in *Olmstead v. United States* is the most comprehensive of the rights and most valued by civilised man.…
>
> 67. The Registrar of Cooperative Societies functioning under the Cooperative Societies Act is a "public authority" within the meaning of Section 2(h) of the Act. As a public authority, the Registrar of Cooperative Societies has been conferred with lot of statutory powers under the respective Act under which he is functioning. He is also duty-bound to comply with the obligations under the RTI Act and furnish information to a citizen under the RTI Act.

> Information which he is expected to provide is the information enumerated in Section 2(f) of the RTI Act subject to the limitations provided under Section 8 of the Act. The Registrar can also, to the extent law permits, gather information from a Society, on which he has supervisory or administrative control under the Cooperative Societies Act. Consequently, apart from the information as is available to him, under Section 2(f), he can also gather those information from the society, to the extent permitted by law. The Registrar is also not obliged to disclose those information if those information fall under Section 8(1)(j) of the Act. No provision has been brought to our knowledge indicating that, under the Cooperative Societies Act, a Registrar can call for the details of the bank accounts maintained by the citizens or members in a cooperative bank. Only those information which a Registrar of Cooperative Societies can have access under the Cooperative Societies Act from a society could be said to be the information which is "held" or "under the control of public authority". Even those information, the Registrar, as already indicated, is not legally obliged to provide if those information falls under the exempted category mentioned in Section 8(j) of the Act. Apart from the Registrar of Co-operative Societies, there may be other public authorities who can access information from a co-operative bank of a private account maintained by a member of society under law, in the event of which, in a given situation, the society will have to part with that information. But the demand should have statutory backing.
>
> 68. Consequently, if an information which has been sought for relates to personal information, the disclosure of which has no relationship to any public activity or interest or which would cause unwarranted invasion of the privacy of the individual, the Registrar of Cooperative Societies, even if he has got that information, is not bound to furnish the same to an applicant, unless he is satisfied that the larger public interest justifies the disclosure of such information, that too, for reasons to be recorded in writing."

Thus, the scope of the expressions 'information' and 'right to information' which can be accessed by a citizen under the RTI Act have to be understood in light of the above discussion.

Point No. 3: Sections 8, 9, 10 and 11 of the RTI Act 24.

To ensure transparency and accountability and to make Indian democracy more participatory, the RTI Act sets out a practical and pragmatic regime to enable citizens to secure greater access to information available with public authorities by balancing diverse interests including efficient governance, optimum use of limited fiscal operations and preservation of confidentiality of sensitive information. The preamble to the RTI Act appropriately summarises the object of harmonising various conflicts …

25. An attempt to resolve conflict and disharmony between these aspects is evident in the exceptions and conditions on access to information set out in Sections 8 to 11 of the RTI Act.….

Sub-section (1) of Section 8 begins with a *non-obstante* clause giving primacy and overriding legal effect to different clauses under the sub-section in case of any conflict with other provisions of the RTI Act. Section 8(1) without modifying or amending the term 'information', carves out exceptions when access to 'information', as defined in Section 2(f) of the RTI Act would be denied. Consequently, the right to information is available when information is accessible under the RTI Act, that is, when the exceptions listed in Section 8(1) of the RTI Act are not attracted. In terms of Section 3 of the RTI Act, all citizens have right to information, subject to the provisions of the RTI Act, that is, information 'held by or under the control of any public authority', except when such information is exempt or excluded.

26. Clauses in sub-section (1) to Section 8 can be divided into two categories: clauses (a), (b), (c), (f), (g), (h) and (i), and clauses (d), (e) and (j). The latter clauses state that the prohibition specified would not apply or operate when the competent authority in clauses (d) and (e) and the PIO in clause (j) is satisfied that larger public interest warrants disclosure of such information.[8] Therefore, clauses (d), (e)

[8] For the purpose of the present decision, we do not consider it appropriate to decide who would be the 'competent authority' in the case of other public authorities, if sub-clauses (i) to (v) to clause (e) of Section 2 are inapplicable.

and (j) of Section 8(1) of the RTI Act incorporate qualified prohibitions and are conditional and not absolute exemptions. Clauses (a), (b), (c), (f), (g), (h) and (i) do not have any such stipulation. Prohibitory stipulations in these clauses do not permit disclosure of information on satisfaction of the larger public interest rule. These clauses, therefore, incorporate absolute exclusions.

27. Sub-section (2) to Section 8 states that notwithstanding anything contained in the Official Secrets Act, 1923 or any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information if the public interest in disclosure outweighs the harm to the protected interests. The disclosure under Section 8(2) by the public authority is not a mandate or compulsion but is in the form of discretionary disclosure. Section 8(2) acknowledges and empowers the public authority to lawfully disclose information held by them despite the exemptions under sub-section (1) to Section 8 if the public authority is of the opinion that the larger public interest warrants disclosure. Such disclosure can be made notwithstanding the provisions of the Official Secrets Act. Section 8(2) does not create a vested or justiciable right that the citizens can enforce by an application before the PIO seeking information under the RTI Act. PIO is under no duty to disclose information covered by exemptions under Section 8(1) of the RTI Act. Once the PIO comes to the conclusion that any of the exemption clauses is applicable, the PIO cannot pass an order directing disclosure under Section 8(2) of the RTI Act as this discretionary power is exclusively vested with the public authority.

28. Section 9 provides that without prejudice to the provisions of Section 8, a request for information may be rejected if such a request for providing access would involve an infringement of copyright subsisting in a person other than the State.

29. Section 10 deals with severability of exempted information and sub-section (1) thereof reads as under:

> "10. Severability.– (1) Where a request for access to information is rejected on the ground that it is in relation to information which is exempt from disclosure, then, notwithstanding anything contained in this Act, access may be provided to that part of the record which does not contain any information which is exempt from disclosure under this Act and which can reasonably be severed from any part that contains exempt information."

30. Section 11, … deals with third party information, and incorporates conditional exclusion based on breach of confidentiality by applying public interest test… We shall subsequently interpret and expound on Section 11 of the RTI Act.

31. At the present stage, we would like to quote from *Aditya Bandopadhyay (supra)* wherein this Court, on the aspect of general principles of interpretation while deciding the conflict between the right to information and exclusions under Section 8 to 11 of the RTI Act, had observed:

> "61. Some High Courts have held that Section 8 of the RTI Act is in the nature of an exception to Section 3 which empowers the citizens with the right to information, which is a derivative from the freedom of speech; and that, therefore, Section 8 should be construed strictly, literally and narrowly. This may not be the correct approach. The Act seeks to bring about a balance between two conflicting interests, as harmony between them is essential for preserving democracy. One is to bring about transparency and accountability by providing access to information under the control of public authorities. The other is to ensure that the revelation of information, in actual practice, does not conflict with other public interests which include efficient operation of the governments, optimum use of limited fiscal resources and preservation of confidentiality of sensitive information. The Preamble to the Act specifically states that the object of the Act is to harmonise these two conflicting interests. While Sections 3 and 4 seek to achieve the first objective, Sections 8, 9, 10 and 11 seek to achieve the second objective. Therefore, when Section 8 exempts certain information from being disclosed, it

This 'anomaly' or question is not required to be decided in the present case as the Chief Justice of India is a competent authority in the case of the Supreme Court of India.

should not be considered to be a fetter on the right to information, but as an equally important provision protecting other public interests essential for the fulfilment and preservation of democratic ideals.

62. When trying to ensure that the right to information does not conflict with several other public interests (which includes efficient operations of the Governments, preservation of confidentiality of sensitive information, optimum use of limited fiscal resources, etc.), it is difficult to visualise and enumerate all types of information which require to be exempted from disclosure in public interest. The legislature has however made an attempt to do so. The enumeration of exemptions is more exhaustive than the enumeration of exemptions attempted in the earlier Act, that is, Section 8 of the Freedom to Information Act, 2002. The courts and Information Commissions enforcing the provisions of the RTI Act have to adopt a purposive construction, involving a reasonable and balanced approach which harmonises the two objects of the Act, while interpreting Section 8 and the other provisions of the Act.

63. At this juncture, it is necessary to clear some misconceptions about the RTI Act. The RTI Act provides access to all information that is *available and existing*. This is clear from a combined reading of Section 3 and the definitions of "information" and "right to information" under clauses (f) and (j) of Section 2 of the Act. If a public authority has any information in the form of data or analysed data, or abstracts, or statistics, an applicant may access such information, subject to the exemptions in Section 8 of the Act. But where the information sought is not a part of the record of a public authority, and where such information is not required to be maintained under any law or the rules or regulations of the public authority, the Act does not cast an obligation upon the public authority, to collect or collate such non-available information and then furnish it to an applicant. A public authority is also not required to furnish information which require drawing of inferences and/or making of assumptions. It is also not required to provide "advice" or "opinion" to an applicant, nor required to obtain and furnish any "opinion" or "advice" to an applicant. The reference to "opinion" or "advice" in the definition of "information" in Section 2(f) of the Act, only refers to such material available in the records of the public authority. Many public authorities have, as a public relation exercise, provide advice, guidance and opinion to the citizens. But that is purely voluntary and should not be confused with any obligation under the RTI Act."

Paragraph 63 quoted above has to be read with our observations on the last portion of clause (f) to Section 2 defining the word 'information', albeit, on the observations and findings recorded, we respectfully concur. For the present decision, we are required to primarily examine clauses (e) and (j) of sub-section (1) to Section 8 and Section 11 of the RTI Act.

Point No. 3 (A): Fiduciary Relationship under Section 8(1)(e) of the RTI Act

32. Clause (e) to Section 8(1) of the RTI Act states that information made available to a person in his fiduciary relationship shall not be disclosed unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information. The expression 'fiduciary relationship' was examined and explained in *Aditya Bandopadhyay (supra)*, in the following words:

"39. The term "fiduciary" refers to a person having a duty to act for the benefit of another, showing good faith and candour, where such other person reposes trust and special confidence in the person owing or discharging the duty. The term "fiduciary relationship" is used to describe a situation or transaction where one person (beneficiary) places complete confidence in another person (fiduciary) in regard to his affairs, business or transaction(s). The term also refers to a person who holds a thing in trust for another (beneficiary). The fiduciary is expected to act in confidence and for the benefit and advantage of the beneficiary, and use good faith and fairness in dealing with the beneficiary or the things belonging to the beneficiary. If the beneficiary has entrusted anything to the fiduciary, to hold the thing in trust or to execute certain acts in regard to or with reference to the entrusted thing, the fiduciary has to act in confidence and is expected not to disclose the thing or information to any third party.

> 40. There are also certain relationships where both the parties have to act in a fiduciary capacity treating the other as the beneficiary. Examples of these are: a partner *vis-à-vis* another partner and an employer *vis-à-vis* employee. An employee who comes into possession of business or trade secrets or confidential information relating to the employer in the course of his employment, is expected to act as a fiduciary and cannot disclose it to others. Similarly, if on the request of the employer or official superior or the head of a department, an employee furnishes his personal details and information, to be retained in confidence, the employer, the official superior or departmental head is expected to hold such personal information in confidence as a fiduciary, to be made use of or disclosed only if the employee's conduct or acts are found to be prejudicial to the employer.
>
> 41. In a philosophical and very wide sense, examining bodies can be said to act in a fiduciary capacity, with reference to the students who participate in an examination, as a Government does while governing its citizens or as the present generation does with reference to the future generation while preserving the environment. But the words "information available to a person in his fiduciary relationship" are used in Section 8(1)(e) of the RTI Act in its normal and well-recognised sense, that is, to refer to persons who act in a fiduciary capacity, with reference to a specific beneficiary or beneficiaries who are to be expected to be protected or benefited by the actions of the fiduciary—a trustee with reference to the beneficiary of the trust, a guardian with reference to a minor/physically infirm/mentally challenged, a parent with reference to a child, a lawyer or a chartered accountant with reference to a client, a doctor or nurse with reference to a patient, an agent with reference to a principal, a partner with reference to another partner, a director of a company with reference to a shareholder, an executor with reference to a legatee, a receiver with reference to the parties to a *lis*, an employer with reference to the confidential information relating to the employee, and an employee with reference to business dealings/transaction of the employer. We do not find that kind of fiduciary relationship between the examining body and the examinee, with reference to the evaluated answer books, that come into the custody of the examining body."

This Court held that the exemption under section 8(1)(e) of the RTI Act does not apply to beneficiaries regarding whom the fiduciary holds information. In other words, information available with the public authority relating to beneficiaries cannot be withheld from or denied to the beneficiaries themselves. A fiduciary would, ergo, be duty-bound to make thorough disclosure of all relevant facts of all transactions between them in a fiduciary relationship to the beneficiary. In the facts of the said case, this Court had to consider whether an examining body, the Central Board of Secondary Education, held information in the form of evaluated answer-books of the examinees in fiduciary capacity. Answering in the negative, it was nevertheless observed that even if the examining body is in a fiduciary relationship with an examinee, it will be duty-bound to disclose the evaluated answer books to the examinee and at the same time, they owe a duty to the examinee not to disclose the answer-books to anyone else, that is, any third party. This observation is of significant importance as it recognises that Section 8(1)(j), and as noticed below - Section 11, encapsulates another right, that is the right to protect privacy and confidentiality by barring the furnishing of information to third parties except when the public interest as prescribed so requires. In this way, the RTI Act complements both the right to information and the right to privacy and confidentiality. Further, it moderates and regulates the conflict between the two rights by applying the test of larger public interest or comparative examination of public interest in disclosure of information with possible harm and injury to the protected interests.

33. In *Reserve Bank of India (supra)* this Court had expounded upon the expression 'fiduciary relationship' used in clause (e) to subsection (1) of Section 8 of the RTI Act by referring to the definition of 'fiduciary relationship' in the Advanced Law Lexicon, 3rd Edition, 2005, which reads as under:

> "57. [...] Fiduciary relationship. — A relationship in which one person is under a duty to act for the benefit of the other on matters within the scope of the fiduciary relationship. Fiduciary relationship usually arises in one of the four situations: (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a

> duty to act for or give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognised as involving fiduciary duties, as with a lawyer and a client, or a stockbroker and a customer."

Thereafter, the Court had outlined the contours of the fiduciary relationship by listing out the governing principles which read:

> "58. [...] (i) *No conflict rule* — A fiduciary must not place himself in a position where his own interest conflicts with that of his customer or the beneficiary. There must be 'real sensible possibility of conflict'.
>
> (ii) *No profit rule* — A fiduciary must not profit from his position at the expense of his customer, the beneficiary.
>
> (iii) *Undivided loyalty rule* — A fiduciary owes undivided loyalty to the beneficiary, not to place himself in a position where his duty towards one person conflicts with a duty that he owes to another customer. A consequence of this duty is that a fiduciary must make available to a customer all the information that is relevant to the customer's affairs.
>
> (iv) *Duty of confidentiality* — A fiduciary must only use information obtained in confidence and must not use it for his own advantage, or for the benefit of another person."

34. Fiduciary relationships, regardless of whether they are formal, informal, voluntary or involuntary, must satisfy the four conditions for a relationship to classify as a fiduciary relationship. In each of the four principles, the emphasis is on trust, reliance, the fiduciary's superior power or dominant position and corresponding dependence of the beneficiary on the fiduciary which imposes responsibility on the fiduciary to act in good faith and for the benefit of and to protect the beneficiary and not oneself. Section 8(1)(e) is a legal acceptance that there are ethical or moral relationships or duties in relationships that create rights and obligations, beyond contractual, routine or even special relationships with standard and typical rights and obligations. Contractual or non-fiduciary relationships could require that the party should protect and promote the interest of the other and not cause harm or damage, but the fiduciary relationship casts a positive obligation and demands that the fiduciary should protect the beneficiary and not promote personal self-interest. A fiduciary's loyalty, duties and obligations are stricter than the morals of the market place and it is not honesty alone, but the punctilio of an honour which is the most sensitive standard of behaviour which is applied {See – Opinion of Cardozo, J. in *Meinhard v. Salmon*[9]}. Thus, the level of judicial scrutiny in cases of fiduciary relationship is intense as the level of commitment and loyalty expected is higher than non-fiduciary relationships. Fiduciary relationship may arise because of the statute which requires a fiduciary to act selflessly with integrity and fidelity and the other party, that is the beneficiary, depends upon the wisdom and confidence reposed in the fiduciary. A contractual, statutory and possibly all relationships cover a broad field, but a fiduciary relationship could exist, confined to a limited area or an act, as relationships can have several facets. Thus, relationships can be partly fiduciary and partly non-fiduciary with the former being confined to a particular act or action which need not manifest itself in entirety in the interaction and relationship between two parties. What would distinguish non-fiduciary relationship from fiduciary relationship or an act is the requirement of trust reposed, higher standard of good faith and honesty required on the part of the fiduciary with reference to a particular transaction(s) due to moral, personal or statutory responsibility of the fiduciary as compared to the beneficiary, resulting in dependence of the beneficiary. This may arise due to superior knowledge and training of the fiduciary or the position he occupies. 35. Ordinarily the relationship between the Chief Justice and judges would not be that of a fiduciary and a beneficiary. However, it is not an absolute rule/code for in certain situations and acts, fiduciary relationship may arise. Whether or not such a relationship arises in a particular situation would have to be dealt with on the tests and parameters enunciated above.

[9] (1928) 164 N.E. 545, 546.

Point No. 3 (B): Right to Privacy under Section 8(1)(j) and Confidentiality under Section 11 of the RTI Act

36. If one's right to know is absolute, then the same may invade another's right to privacy and breach confidentiality, and, therefore, the former right has to be harmonised with the need for personal privacy, confidentiality of information and effective governance. The RTI Act captures this interplay of the competing rights under clause (j) to Section 8(1) and Section 11. While clause (j) to Section 8(1) refers to personal information as distinct from information relating to public activity or interest and seeks to exempt disclosure of such information, as well as such information which, if disclosed, would cause unwarranted invasion of privacy of an individual, unless public interest warrants its disclosure, Section 11 exempts the disclosure of 'information or record…which relates to or has been supplied by a third party and has been treated as confidential by that third party'. By differently wording and inditing the challenge that privacy and confidentiality throw to information rights, the RTI Act also recognises the interconnectedness, yet distinctiveness between the breach of confidentiality and invasion of privacy, as the former is broader than the latter, as will be noticed below.

37. Breach of confidentiality has an older conception and was primarily an equitable remedy based on the principle that one party is entitled to enforce equitable duty on the persons bound by an obligation of confidentiality on account of the relationship they share, with actual or constructive knowledge of the confidential relationship. Conventionally a conception of equity, confidentiality also arises in a contract, or by a statute.[10] Contractually, an obligation to keep certain information confidential can be effectuated expressly or implicitly by an oral or written agreement, whereas in statutes certain extant and defined relationships are imposed with the duty to maintain details, communication exchanged and records confidential. Confidentiality referred to in the phrase 'breach of confidentiality' was initially popularly perceived and interpreted as confidentiality arising out of a preexisting confidential relationship, as the obligation to keep certain information confidential was on account of the nature of the relationship. The insistence of a pre-existing confidential relationship did not conceive a possibility that a duty to keep information confidential could arise even if a relationship, in which such information is exchanged and held, is not pre-existing. This created a distinction between confidential information obtained through the violation of a confidential relationship and similar confidential information obtained in some other way. With time, courts and jurists, who recognised this anomaly, have diluted the requirement of the existence of a confidential relationship and held that three elements were essential for a case of breach of confidentiality to succeed, namely – (a) information should be of confidential nature; (b) information must be imparted in circumstances importing an obligation of confidentiality; and (c) that there must be unauthorised use of information (See *Coco v. AN Clark (Engineers) Ltd.*[11]). The "artificial"[12] distinction was emphatically abrogated by the test adopted by Lord Goff of Chieveley in *Attorney-General v. Guardian Newspaper Limited* (No. 2)[13], who had observed:

> "a duty of confidence arises when confidential information comes to the knowledge of a person... in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others."

Lord Goff, thus, lifted the limiting constraint of a need for initial confidential relationship stating that a 'duty of confidence' would apply whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential. Therefore, confidential information must not be something which is a public property and in public knowledge/ public domain as confidentiality necessarily attributes inaccessibility, that is, the information must not be generally accessible, otherwise it cannot be regarded as confidential. However, self-clarification or certification will not be relevant

[10] See Prince Albert v. Strange, (1849) 1 Mac.&G 25, and Lord Oliver of Aylmerton, Spycatcher: Confidence, Copyright and Contempt, Israel Law Review (1989) 23(4), 407 [as also quoted in Philip Coppel, Information Rights, Law and Practice (4 th Edition Hart Publishing 2014)].
[11] [1969] RPC 41.
[12] *Campbell v. Mirror Group Newspapers Limited* (2004) UKHL 22.
[13] (1990) 1 AC 109.

because whether or not the information is confidential has to be determined as a matter of fact. The test to be applied is that of a reasonable person, that is, information must be such that a reasonable person would regard it as confidential. Confidentiality of information also has reference to the quality of information though it may apply even if the information is false or partly incorrect. However, the information must not be trivial or useless.

38. While previously information that could be considered personal would have been protected only if it were exchanged in a confidential relationship or considered confidential by nature, significant developments in jurisprudence since the 1990's have posited the acceptance of privacy as a separate right and something worthy of protection on its own as opposed to being protected under an actionable claim for breach of confidentiality. A claim to protect privacy is, in a sense, a claim for the preservation of confidentiality of personal information. With progression of the right to privacy, the underlying values of the law that protects personal information came to be seen differently as the courts recognised that unlike law of confidentiality that is based upon duty of good faith, right to privacy focuses on the protection of human autonomy and dignity by granting the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people (See - Sedley LJ in *Douglas v. Hello! Ltd*[14]). In *PJS v. News Group Newspapers Ltd*.[15], the Supreme Court of the United Kingdom had drawn a distinction between the right to respect private and family life or privacy and claims based upon confidentiality by observing that the law extends greater protection to privacy rights than rights in relation to confidential matters. In the former case, the claim for misuse of private information can survive even when information is in the public domain as its repetitive use itself leads to violation of the said right. The right to privacy gets the benefit of both the quantitative and the qualitative protection. The former refers to the disclosure already made and what is yet undisclosed, whereas the latter refers to the privateness of the material, invasion of which is an illegal intrusion into the right to privacy. Claim for confidentiality would generally fail when the information is in public domain. The law of privacy is, therefore, not solely concerned with the information, but more concerned with the intrusion and violation of private rights. Citing an instance of how publishing of defamatory material can be remedied by a trial establishing the falsity of such material and award of damages, whereas invasion of privacy cannot be similarly redressed, the Court had highlighted the reason why truth or falsity of an allegation or information may be irrelevant when it comes to invasion of privacy. Therefore, claims for protection against invasion of private and family life do not depend upon confidentiality alone. This distinction is important to understand the protection given to two different rights vide Section 8(1)(j) and 11 of the RTI Act. 39. In *District Registrar and Collector v. Canara Bank*[16] this Court had referred to the judgment of the U.S. Supreme Court in *United States v. Miller*[17] on the question of "voluntary" parting with information and under the heading 'Criticism of Miller' had observed:

> "48. ...(A) Criticism of Miller (i) The majority in Miller laid down that a customer who has conveyed his affairs to another had thereby lost his privacy rights. Prof. Tribe states in his treatise (see p. 1391) that this theory reveals "alarming tendencies" because the Court has gone back to the old theory that privacy is in relation to property while it has laid down that the right is one attached to the person rather than to property. If the right is to be held to be not attached to the person, then "we would not shield our account balances, income figures and personal telephone and address books from the public eye, but might instead go about with the information written on our 'foreheads or our bumper stickers'." He observes that the majority in Miller confused "privacy" with "secrecy" and that "even their notion of secrecy is a strange one, for *a secret remains a secret even when shared with those whom one selects for one's confidence*". Our cheques are not merely negotiable instruments but yet the world can learn a vast amount about us by knowing how and with whom we have spent our money. Same is the position when we use the telephone or post a letter. To say that one assumes great risks by

[14] (2001) QB 967.
[15] (2016) UKSC 26.
[16] (2005) 1 SCC 496.
[17] 425 US 435 (1976).

opening a bank account appeared to be a wrong conclusion. Prof. Tribe asks a very pertinent question (p. 1392):

'Yet one can hardly be said to have assumed a risk of surveillance in a context where, as a practical matter, one had no choice. Only the most committed — and perhaps civilly committable — hermit can live without a telephone, without a bank account, without mail. To say that one must take a bitter pill with the sweet when one licks a stamp is to exact a high constitutional price indeed for living in contemporary society.' He concludes (p. 1400):

'In our information-dense technological era, when living inevitably entails leaving not just informational footprints but parts of one's self in myriad directories, files, records and computers, to hold that the Fourteenth Amendment did not reserve to individuals some power to say *when and how and by whom* that information and those confidences were to be used, would be to denigrate the central role that informational autonomy must play in any developed concept of the self.'

(ii) Prof. Yale Kamisar (again quoted by Prof. Tribe) (p. 1392) says:

'It is beginning to look as if the only way someone living in our society can avoid 'assuming the risk' that various intermediate institutions will reveal information to the police is by engaging in drastic discipline, the kind of discipline of life under totalitarian regimes.'… "

Thereafter, it was noticed that with the enactment of the Right to Financial Privacy Act, 1978 the legal effect of 'Miller' was statutorily done away.

40. The right to privacy though not expressly guaranteed in the Constitution of India is now recognized as a basic fundamental right vide decision of the Constitutional Bench in *K.S. Puttaswamy and Another v. Union of India and Others*[18] holding that it is an intrinsic part of the right to life and liberty guaranteed under Article 21 of the Constitution and recognised under several international treaties, chief among them being Article 12 of the Universal Declaration of Human Rights, 1948 which states that no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. The judgment recognises that everyone has a right to the protection of laws against such interference or attack.

41. In *K.S. Puttaswamy (supra*) the main judgment (authored by D.Y. Chandrachud, J.) has referred to provisions of Section 8(1)(j) of the RTI Act to highlight that the right to privacy is entrenched with constitutional status in Part III of the Constitution, thus providing a touchstone on which validity of executive decisions can be assessed and validity of laws can be determined vide judicial review exercised by the courts. This observation highlights the status and importance of the right to privacy as a constitutional right. The ratio as recorded in the two concurring judgments of the learned judges (R.F. Nariman and Sanjay Kishan Kaul, JJ.) are similar. It is observed that privacy involves a person's right to his physical body; right to informational privacy which deals with a person's mind; and the right to privacy of choice which protects an individual's autonomy over personal choices. While physical privacy enjoys constitutional recognition in Article 19(1)(d) and (e) read with Article 21, personal informational privacy is relatable to Article 21 and right to privacy of choice is enshrined in Articles 19(1)(a) to (c), 20(3), 21 and 25 of the Constitution. In the concurring opinion, there is a reference to 'The Right to Privacy' by Samuel Warren and Louis D. Brandeis on an individual's right to control the dissemination of personal information and that an individual has a right to limit access to such information/shield such information from unwarranted access. Knowledge about a person gives another power over that person, as personal data collected is capable of effecting representations in his decision making process and shaping behaviour which can have a stultifying effect on the expression of dissent which is the cornerstone of democracy. In the said concurring judgment, it has been further held that

[18] (2017) 10 SCC 1.

the right to protection of reputation from being unfairly harmed needs to be zealously guarded not only against falsehood but also against certain truths by observing:

> "623. An individual has a right to protect his reputation from being unfairly harmed and such protection of reputation needs to exist not only against falsehood but also certain truths. It cannot be said that a more accurate judgment about people can be facilitated by knowing private details about their lives – people judge us badly, they judge us in haste, they judge out of context, they judge without hearing the whole story and they judge with hypocrisy. Privacy lets people protect themselves from these troublesome judgments."[19]

42. Privacy, it is uniformly observed in *K.S. Puttaswamy (supra)*, is essential for liberty and dignity. Therefore, individuals have the need to preserve an intrusion-free zone for their personality and family. This facilitates individual freedom. On the question of invasion of personal liberty, the main judgment has referred to a three-fold requirement in the form of – (i) legality, which postulates the existence of law (RTI Act in the present case); (ii) need, defined in terms of a legitimate State aim; and (iii) proportionality, which ensures a rational nexus between the objects and the means to be adopted to achieve them. The third requirement, we would observe, is achieved in the present case by Sections 8(1)(j) and 11 of the RTI Act and the RTI Act cannot be faulted on this ground. The RTI Act also defines the legitimate aim, that is a public interest in the dissemination of information which can be confidential or private (or held in a fiduciary relationship) when larger public interest or public interest in disclosure outweighs the protection or any possible harm or injury to the interest of the third party.
43. Privacy and confidentiality encompass a bundle of rights including the right to protect identity and anonymity. Anonymity is where an individual seeks freedom from identification, even when and despite being in a public space. In *K.S. Puttaswamy (supra)* reference is made to *Spencer v. R.*[20] which had set out three key elements of informational privacy: privacy as secrecy, privacy as control, and privacy as anonymity, to observe:

> "214. […] anonymity may, depending on the totality of the circumstances, be the foundation of a privacy interest that engages constitutional protection against unreasonable search and seizure.…
>
> […] The disclosure of this information will often amount to the identification of a user with intimate or sensitive activities being carried out online, usually on the understanding that these activities would be anonymous. A request by a police officer that an ISP voluntarily disclose such information amounts to a search."

Privacy and confidentiality, therefore, include information about one's identity.

44. In *K.S. Puttaswamy (supra)*, it is observed that the Canadian Supreme Court in Spencer (supra) had stopped short of recognising an absolute right of anonymity, but had used the provisions of Canadian Charter of Rights and Freedoms of 1982 to expand the scope of the right to privacy, used traditionally to protect individuals from an invasion of their property rights, to an individual's "reasonable expectation of privacy". Yet the Court has observed that there has to be a careful balancing of the requirements of privacy with legitimate concerns of the State after referring to an article[21] wherein it was observed that:

> "Privacy is the terrorist's best friend, and the terrorist's privacy has been enhanced by the same technological developments that have both made data mining feasible and elicited vast quantities of personal information from innocents …"

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[19] Daniel Solove: "10 Reasons Why Privacy Matters" published on 20th January 2014 and available at https://www.teachprivacy.com/10-reasons-privacy-matters/
[20] 2014 SCC Online Can SC 34: (2014) 2 SCR 212: 2014 SCC 43.
[21] Richard A. Posner, "Privacy, Surveillance, and Law", The University of Chicago Law Review (2008), Vol. 75, 251.

45. Referring to an article titled '*Reasonable Expectations of Anonymity*'[22] authored by Jeffrey M. Skopek, it is observed that distinction has been drawn between anonymity on one hand and privacy on the other as privacy involves hiding information whereas anonymity involves hiding what makes it personal by giving an example that furnishing of medical records of a patient would amount to an invasion of privacy, whereas a State may have legitimate interest in analysing data borne from hospital records to understand and deal with a public health epidemic and to obviate serious impact on the population. If the anonymity of the individual/patient is preserved, it would legitimately assert a valid State interest in the preservation of public health.

46. For the purpose of the present case, we are not concerned with the specific connotations of the right to anonymity and the restrictions/limitations appended to it. In the context of the RTI Act, suffice would be to say that the right to protect identity and anonymity would be identically subjected to the public interest test.

47. Clause (j) to sub-section (1) of Section 8 of the RTI Act specifically refers to invasion of the right to privacy of an individual and excludes from disclosure information that would cause unwarranted invasion of privacy of such individual, unless the disclosure would satisfy the larger public interest test. This clause also draws a distinction in its treatment of personal information, whereby disclosure of such information is exempted if such information has no relation to public activity or interest. We would like to, however, clarify that in their treatment of this exemption, this Court has treated the word 'information' which if disclosed would lead to invasion of privacy to mean personal information, as distinct from public information. This aspect has been dealt with in the succeeding paragraphs.

48. As per Black's Law Dictionary, 8th Edition, the word 'personal' means 'of or affecting a person or of or constituting personal property'. …

50. Gleeson CJ in *Australian Broadcasting Corporation v. Lenah Game Meats Pty Ltd.*[23] had distinguished between what is public and private information in the following manner:

> "An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private proper property, it has such measure of protection from the public gaze as the characteristics of the property, the property owner combine to afford. Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private, as may certain kinds of activity which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved. The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private."

51. This test had been adopted in several English decisions including decision of the House of Lords in *Campbell v. Mirror Group Newspapers Limited*[24] wherein Lord Hope of Craighead had further elucidated that the definition is taken from the definition of 'privacy' in the United States, where the right to privacy is invaded if the matter which is publicised is of a kind that – (a) would be highly offensive to a reasonable person and (b) not of legitimate concern to the public. Law of privacy in *Campbell (supra)*, it was observed, was not intended for the protection of the unduly sensitive and would cover matters which are offensive and objectionable to a reasonable man of ordinary sensibilities who must expect some reporting of his daily activities. The mind that has to be examined is not that of a reader in general, but that of the person who is affected by the publicising/dissemination of his information. The question is what a reasonable person of ordinary sensibilities would feel if he/she is subjected to such publicity. Only when publicity is such that a reasonable person would feel justified in

[22] Virginia Law Review (2015), Vol. 101, at pp. 691-762.
[23] (2001) 185 ALR 1.
[24] (2004) UKHL 22.

feeling seriously aggrieved that there would be an invasion in the right to privacy which gives rise to a cause of action.

52. In *Douglas (supra),* it was also held that there are different degrees of privacy which would be equally true for information given in confidentiality, and the potential for disclosure of the information to cause harm is an important factor to be taken into account in the assessment of the extent of the restriction to protect the right to privacy.

[…(various Indian case law were discussed explaining the scope and bounds of public and private information by the Court in the judgment, e.g. *Girish Ramchandra Deshpande v. Central Information Commissioner and Others*[25]*; Canara Bank v. C.S. Shyam and Another*[26]*; Subhash Chandra Agarwal v. Registrar, Supreme Court of India and Others*[27]*; R.K. Jain v. Union of India and Another*[28]; *Aditya Bandopadhyay (supra)*; *Arvind Kejriwal v. Central Public Information Officer and Another*[29]*etc.*)…]

69. The aforesaid passages highlight the relevance of confidentiality in the government and its functioning. However, this is not to state that plea of confidentiality is an absolute bar, for in terms of proviso to Section 11(1) of the RTI Act, the PIO has to undertake the balancing exercise and weigh the advantages and benefits of disclosing the information with the possible harm or injury to the third party on the information being disclosed. We have already referred to the general approach on the right of access to government records under the heading "Section 8(1)(j) and Section 11 of the RTI Act" with reference to the decisions of the High Court of Australia in *Heinemann Publishers Pty Ltd*. (supra) and *John Fairfax and Sons Ltd*. (supra).

70. Most jurists would accept that absolute transparency in all facets of government is neither feasible nor desirable,[30] for there are several limitations on complete disclosure of governmental information, especially in matters relating to national security, diplomatic relations, internal security or sensitive diplomatic correspondence. There is also a need to accept and trust the government's decision-makers, which they have to also earn, when they plead that confidentiality in their meetings and exchange of views is needed to have a free flow of views on sensitive, vexatious and pestilent issues in which there can be divergent views. This is, however, not to state that there are no dangers in maintaining secrecy even on aspects that relate to national security, diplomatic relations, internal security or sensitive diplomatic correspondence. Confidentiality may have some bearing and importance in ensuring honest and fair appraisals, though it could work the other way around also and, therefore, what should be disclosed would depend on authentic enquiry relating to the public interest, that is, whether the right to access and the right to know outweighs the possible public interest in protecting privacy or outweighs the harm and injury to third parties when the information relates to such third parties or the information is confidential in nature.

Point No. 4: Meaning of the term 'public interest'

… [References to various case law was made by the Court *viz. Union of India v. Association for Democratic Reforms and Another*[31]*;Mosley v. News Group Papers Ltd*.[32]*; Bihar Public Service Commission v. Saiyed Hussain Abbas Rizwi and Another*[33]*;*]…

[25] (2013) 1 SCC 212.
[26] (2018) 11 SCC 426
[27] (2018) 11 SCC 634.
[28] (2013) 14 SCC 794.
[29] AIR 2012 Delhi 29.
[30] Michael Schudson, 'The Right to Know vs the Need for Secrecy: The US Experience' The Conversation (May 2015) ; Eric R. Boot, 'The Feasibility of a Public Interest Defense for Whistleblowing', Law and Philosophy (2019). See generally Michael Schudson, The Rise of the Right to Know: Politics and the Culture of Transparency, 1945–1975 (Cambridge (MA): Harvard University Press 2015).
[31] (2002) 5 SCC 294.
[32] 2008 EWHC 1777 (QB).
[33] (2012) 13 SCC 61.

76. The public interest test in the context of the RTI Act would mean reflecting upon the object and purpose behind the right to information, the right to privacy and consequences of invasion, and breach of confidentiality and possible harm and injury that would be caused to the third party, with reference to a particular information and the person. In an article '*Freedom of Information and the Public Interest: the Commonwealth experience*' published in the Oxford University Commonwealth Law Journal,51 the factors identified as favouring disclosure, those against disclosure and lastly those irrelevant for consideration of public interest have been elucidated as under:

> "it is generally accepted that the public interest is not synonymous with what is of interest to the public, in the sense of satisfying public curiosity about some matter. For example, the UK Information Tribunal has drawn a distinction between 'matters which were in the interests of the public to know and matters which were merely interesting to the public (i.e. which the public would like to know about, and which sell newspapers, but... are not relevant).
>
> Factors identified as favouring disclosure include the public interest in: contributing to a debate on a matter of public importance; accountability of officials; openness in the expenditure of public funds, the performance by a public authority of its regulatory functions, the handling of complaints by public authorities; exposure of wrongdoing, inefficiency or unfairness; individuals being able to refute allegations made against them; enhancement of scrutiny of decision-making; and protecting against danger to public health or safety.
>
> Factors that have been found to weigh against disclosure include: the likelihood of damage to security or international relations; the likelihood of damage to the integrity or viability of decision-making processes: the public interest in public bodies being able to perform their functions effectively; the public interest in preserving the privacy of individuals and the public interest in the preservation of confidences.
>
> Factors irrelevant to the consideration of the public interest have also been identified. These include: that the information might be misunderstood; that the requested information in overly technical in nature; and that disclosure would result in embarrassment to the government or to officials."

77. In *Campbell (supra)*, reference was made to the Press Complaints Commission Code of Practice to further elucidate on the test of public interest which stands at the intersection of freedom of expression and the privacy rights of an individual to hold that:

> "1. Public interest includes: (i) Detecting or exposing crime or a serious misdemeanour. (ii) Protecting public health and safety. (iii) Preventing the public from being misled by some statement or action of an individual or organisation...."

78. Public interest has no relationship and is not connected with the number of individuals adversely affected by the disclosure which may be small and insignificant in comparison to the substantial number of individuals wanting disclosure. It will vary according to the information sought and all circumstances of the case that bear upon the public interest in maintaining the exemptions and those in disclosing the information must be accounted for to judge the right balance. Public interest is not immutable and even time-gap may make a significant difference. The type and likelihood of harm to the public interest behind the exemption and public interest in disclosure would matter. The delicate balance requires identification of public interest behind each exemption and then cumulatively weighing the public interest in accepting or maintaining the exemption(s) to deny information in a particular case against the public interest in disclosure in that particular case. Further, under Section 11(1), reference is made to the 'possible' harm and injury to the third party which will also have to be factored in when determining disclosure of confidential information relating to the third parties.

79. The last aspect in the context of public interest test would be in the form of clarification as to the effect of sub-section (2) to Section 6 of the RTI Act which does not require the information seeker to give any reason for making a request for the information. Clearly, 'motive' and 'purpose' for making

the request for information is irrelevant, and being extraneous cannot be a ground for refusing the information. However, this is not to state that 'motive' and 'purpose' may not be relevant factor while applying the public interest test in case of qualified exemptions governed by the public interest test. It is in this context that this Court in *Aditya Bandopadhyay (supra)* has held that beneficiary cannot be denied personal information relating to him. Similarly, in other cases, public interest may weigh in favour of the disclosure when the information sought may be of special interest or special significance to the applicant. It could equally be a negative factor when the 'motive' and 'purpose' is vexatious or it is a case of clear abuse of law.

80. In the RTI Act, in the absence of any positive indication as to the considerations which the PIO has to bear in mind while making a decision, the legislature had intended to vest a general discretion in the PIO to weigh the competing interests, which is to be limited only by the object, scope and purpose of the protection and the right to access information and in Section 11(1), the 'possible' harm and injury to the third party. It imports a discretionary value judgment on the part of the PIO and the appellate forums as it mandates that any conclusion arrived at must be fair and just by protecting each right which is required to be upheld in public interest. There is no requirement to take a fortiori view that one trumps the other.

Point No. 5: Judicial Independence

81. Having dealt with the doctrine of the public interest under the RTI Act, we would now turn to examining its co-relation with transparency in the functioning of the judiciary in matters of judicial appointments/selection and importance of judicial independence.

82. Four major arguments are generally invoked to deny third-party or public access to information on appointments/selection of judges, namely, (i) confidentiality concerns; (ii) data protection; (ii) reputation of those being considered in the selection process, especially those whose candidature/eligibility stands negated; and (iv) potential chilling effect on future candidates given the degree of exposure and public scrutiny involved.[34] These arguments have become subject matter of considerable debate, if not outright criticism at the hands of jurists and authors.[35] …

83. The United Kingdom's Data Protection Act, 2018 grants class exemption to all personal data processed for the purpose of assessing a person's suitability for judicial office, from certain rights including the right of the data subject to be informed, guaranteed under the European Union General Data Protection Regulation being given effect to by the Data Protection Act.[36] Similarly, in the context of the European Union, opinions of 'the Article 255 Panel'[37] and 'the Advisory Panel'[38] , entrusted with the task of advising on the suitability of candidates as judges to the Court of Justice of the European Union and the European Court of Human Rights are inaccessible to the public and their opinions have limited circulation, as they are exclusively forwarded to the representatives of governments of the

[34] *See*: How Transparent is Transparent Enough?: Balancing Access to Information Against Privacy in European Judicial Selections by Alberto Alemanno in Michal Bobek (ed.), Selecting Europe's Judges, 2015 Edition.
[35] Kate Malleson, 'Parliamentary Scrutiny of Supreme Court Nominees: A View from the United Kingdom' Osgoode Hall Law Journal (2007) 44, 557.
[36] Schedule 2, Part-2, Paragraph 14.
[37] Article 255, Treaty on the Functioning of the European Union states: "A panel shall be set up in order to give an opinion on candidates' suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court before the governments of the Member States make the appointments referred to in Articles 253 and 254…"
[38] Set up under Resolution 'Establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights', CM/Res (2010) 26 adopted by the Committee of Ministers on 10 November 2010.

member states in the case of European Union[39] and the individual governments in the case of Council of Europe[40] , respectively. …

84. More direct and relevant in the Indian context would be the decision of this Court in *Supreme Court Advocates-on-Record Association v. Union of India*[41], where a Constitutional Bench of five judges had dealt with the constitutional validity of the National Judicial Appointments Commission. A concurring judgment had dealt with the aspect of transparency in appointment and transfer of judges and the privacy concerns of the judges who divulge their personal information in confidence, to opine as under:

> "949. In the context of confidentiality requirements, the submission of the learned Attorney General was that the functioning of NJAC would be completely transparent. Justifying the need for transparency it was submitted that so far the process of appointment of Judges in the Collegium System has been extremely secret in the sense that no one outside the Collegium or the Department of Justice is aware of the recommendations made by the Chief Justice of India for appointment of a Judge of the Supreme Court or the High Courts. Reference was made to *Renu v. District & Sessions Judge*, (2014) 14 SCC 50 to contend that in the matter of appointment in all judicial institutions "*complete darkness in the lighthouse has to be removed*".
>
> 950. In addition to the issue of transparency a submission was made that in the matter of appointment of Judges, civil society has the right to know who is being considered for appointment. In this regard, it was held in *Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India* (1985) 1 SCC 641 that the people have a right to know. Reliance was placed on *Attorney General v. Times Newspapers Ltd*. 1974 AC 273: (1973) 3 WLR 298: (1973) 3 All ER 54 (HL) where the right to know was recognised as a fundamental principle of the freedom of expression and the freedom of discussion.
>
> 951. In *State of U.P. v. Raj Narain* (1975) 4 SCC 428 the right to know was recognised as having been derived from the concept of freedom of speech.
>
> 952. Finally, in *Reliance Petrochemicals Ltd. v. Indian Express Newspapers Bombay (P) Ltd.*, (1988) 4 SCC 592 it was held that the right to know is a basic right which citizens of a free country aspire in the broader horizon of the right to live in this age in our land under Article 21 of our Constitution.
>
> 953. The balance between transparency and confidentiality is very delicate and if some sensitive information about a particular person is made public, it can have a far-reaching impact on his/her reputation and dignity. The 99th Constitution Amendment Act and the NJAC Act have not taken note of the privacy concerns of an individual. This is important because it was submitted by the learned Attorney General that the proceedings of NJAC will be completely transparent and any one can have access to information that is available with NJAC. This is a rather sweeping generalisation which obviously does not take into account the privacy of a person who has been recommended for appointment, particularly as a Judge of the High Court or in the first instance as a Judge of the Supreme Court. The right to know is not a fundamental right but at best it is an implicit fundamental right and it is hedged in with the implicit fundamental right to privacy that all people enjoy. The balance between the two implied fundamental rights is difficult to maintain, but the 99th Constitution Amendment Act and the NJAC Act do not even attempt to consider, let alone achieve that balance.
>
> 954. It is possible to argue that information voluntarily supplied by a person who is recommended for appointment as a Judge might not have a right to privacy, but at the same time, since the information is supplied in confidence, it is possible to argue that it ought not to

[39] CJEU is the judicial branch of the European Union, administering justice in the 28 member states of the international organisation.
[40] Comprising of 47 member European states, Council of Europe adopted the European Convention on Human Rights, which established ECtHR.
[41] (2016) 5 SCC 1.

be disclosed to third party unconcerned persons. Also, if the recommendation is not accepted by the President, does the recommended person have a right to non-disclosure of the adverse information supplied by the President? These are difficult questions to which adequate thought has not been given and merely on the basis of a right to know, the reputation of a person cannot be whitewashed in a dhobi-ghat."

85. Earlier, the Constitution Bench of nine judges had in Second Judges' Case, that is *Supreme Court Advocates on Record Association and Others v. Union of India*[42] overruled the majority opinion in *S.P. Gupta (supra)* (the first Judge's case) and had provided for primacy to the role of the Chief Justice of India and the collegium in the matters of appointment and transfer of judges. Speaking on behalf of the majority, J.S. Verma, J., had with regard to the justiciability of transfers, summarised the legal position as under:

> "480. The primacy of the judiciary in the matter of appointments and its determinative nature in transfers introduces the judicial element in the process, and is itself a sufficient justification for the absence of the need for further judiciary review of those decisions, which is ordinarily needed as a check against possible executive excess or arbitrariness. Plurality of judges in the formation of the opinion of the Chief Justice of India, as indicated, is another inbuilt check against the likelihood of arbitrariness or bias, even subconsciously, of any individual. The judicial element being predominant in the case of appointments, and decisive in transfers, as indicated, the need for further judicial review, as in other executive actions, is eliminated. The reduction of the area of discretion to the minimum, the element of plurality of judges in formation of the opinion of the Chief Justice of India, effective consultation in writing, and prevailing norms to regulate the area of discretion are sufficient checks against arbitrariness.
>
> 481. These guidelines in the form of norms are not to be construed as conferring any justiciable right in the transferred Judge. Apart from the constitutional requirement of a transfer being made only on the recommendation of the Chief Justice of India, the issue of transfer is not justiciable on any other ground, including the reasons for the transfer or their sufficiency. The opinion of the Chief Justice of India formed in the manner indicated is sufficient safeguard and protection against any arbitrariness or bias, as well as any erosion of the independence of the judiciary.
>
> 482. This is also in accord with the public interest of excluding these appointments and transfers from litigative debate, to avoid any erosion in the credibility of the decisions, and to ensure a free and frank expression of honest opinion by all the constitutional functionaries, which is essential for effective consultation and for taking the right decision. The growing tendency of needless intrusion by strangers and busy-bodies in the functioning of the judiciary under the garb of public interest litigation, in spite of the caution in *S.P. Gupta* which expanding the concept of locus standi, was adverted to recently by a Constitution Bench in *Krishna Swami v. Union of India* (1992) 4 SCC 605. It is therefore, necessary to spell out clearly the limited scope of judicial review in such matters, t avoid similar situations in future. Except on the ground of want of consultation with the named constitutional functionaries or lack of any condition of eligibility in the cases of an appointment, or of a transfer being made without the recommendation of the Chief Justice of India, these matters are not justiciable on any other ground, including that of bias, which in any case is excluded by the element of plurality in the process of decision-making."

86. That the independence of the judiciary forms part of our basic structure is now well established. S. P. Gupta (supra) (the first Judge's case) had observed that this independence is one amongst the many other principles that run through the entire fabric of the Constitution and is a part of the rule of law under the Constitution. The judiciary is entrusted with the task of keeping the other two organs within the limits of law and to make the rule of law meaningful and effective. Further, the independence of judiciary is not limited to judicial appointments to the Supreme Court and the High Courts, as it is a

[42] (1993) 4 SCC 441.

much wider concept which takes within its sweep independence from many other pressures and prejudices. It consists of many dimensions including fearlessness from other power centres, social, economic and political, freedom from prejudices acquired and nurtured by the class to which the judges belong and the like. This wider concept of independence of judiciary finds mention in *C. Ravichandran Iyer v. Justice A.M. Bhattacharjee and Others*[43] , *High Court of Judicature at Bombay v. Shashikant S. Patil*[44] and *Jasbir Singh v. State of Punjab*[45] .

87. In *Supreme Court Advocates' on Record Association (2016) (supra)* on the aspect of the independence of the judiciary, it has been observed:

> "713. What are the attributes of an independent judiciary? It is impossible to define them, except illustratively. At this stage, it is worth recalling the words of Sir Ninian Stephen, a former Judge of the High Court of Australia who memorably said:
>
> "[An] independent judiciary, although a formidable protector of individual liberty, is at the same time a very vulnerable institution, a fragile bastion indeed."
>
> It is this fragile bastion that needs protection to maintain its independence and if this fragile bastion is subject to a challenge, constitutional protection is necessary.
>
> 714. The independence of the judiciary takes within its fold two broad concepts: (1) Independence of an individual Judge, that is, decisional independence; and (2) Independence of the judiciary as an institution or an organ of the State, that is, functional independence. In a lecture on Judicial Independence, Lord Phillips said:
>
> "In order to be impartial a Judge must be independent; personally independent, that is free of personal pressures and institutionally independent, that is free of pressure from the State." …
>
> 726. Generally speaking, therefore, the independence of the judiciary is manifested in the ability of a Judge to take a decision independent of any external (or internal) pressure or fear of any external (or internal) pressure and that is "decisional independence". It is also manifested in the ability of the institution to have "functional independence". A comprehensive and composite definition of "independence of the judiciary" is elusive but it is easy to perceive."

It is clear from the aforesaid quoted passages that the independence of the judiciary refers to both decisional and functional independence. There is reference to a report titled 'Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights'[46] which had observed that judges are not elected by the people (relevant in the context of India and the United Kingdom) and, therefore, derive their authority and legitimacy from their independence from political or other interference.

88. We have referred to the decisions and viewpoints to highlight the contentious nature of the issue of transparency, accountability and judicial independence with various arguments and counterarguments on both sides, each of which commands merit and cannot be ignored. Therefore, it is necessary that the question of judicial independence is accounted for in the balancing exercise. It cannot be doubted and debated that the independence of the judiciary is a matter of ennobled public concern and directly relates to public welfare and would be one of the factors to be taken into account in weighing and applying the public interest test. Thus, when the public interest demands the disclosure of information, judicial independence has to be kept in mind while deciding the question of exercise of discretion. However,

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[43] (1995) 5 SCC 457.
[44] (1997) 6 SCC 339.
[45] (2006) 8 SCC 294.
[46] Contributors: Professor Dr. Jutta Limbach, Professor Dr. Pedro Villalon, Roger Errera, The Rt Hon Lord Lester of Herne Hill QC, Professor Dr. Tamara Morschakova, The Rt Hon Lord Justice Sedley, Professor Dr. Andrzej Zoll.

we should not be understood to mean that the independence of the judiciary can be achieved only by denial of access to information. Independence in a given case may well demand openness and transparency by furnishing the information. Reference to the principle of judicial independence is not to undermine and avoid accountability which is an aspect we perceive and believe has to be taken into account while examining the public interest in favour of disclosure of information. Judicial independence and accountability go hand in hand as accountability ensures, and is a facet of judicial independence. Further, while applying the proportionality test, the type and nature of the information is a relevant factor. Distinction must be drawn between the final opinion or resolutions passed by the collegium with regard to appointment/elevation and transfer of judges with observations and indicative reasons and the inputs/data or details which the collegium had examined. The rigour of public interest in divulging the input details, data and particulars of the candidate would be different from that of divulging and furnishing details of the output, that is the decision. In the former, public interest test would have to be applied keeping in mind the fiduciary relationship (if it arises), and also the invasion of the right to privacy and breach of the duty of confidentiality owed to the candidate or the information provider, resulting from the furnishing of such details and particulars. The position represents a principled conflict between various factors in favour of disclosure and those in favour of withholding of information. Transparency and openness in judicial appointments juxtaposed with confidentiality of deliberations remain one of the most delicate and complex areas. Clearly, the position is progressive as well as evolving as steps have been taken to make the selection and appointment process more transparent and open. Notably, there has been a change after concerns were expressed on disclosure of the names and the reasons for those who had not been approved. The position will keep forging new paths by taking into consideration the experiences of the past and the aspirations of the future.

Questions referred to the Constitution Bench are accordingly answered, observing that it is not possible to answer these questions in absolute terms, and that in each case, the public interest test would be applied to weigh the scales and on balance determine whether information should be furnished or would be exempt. Therefore, a universal affirmative or negative answer is not possible. However, independence of judiciary is a matter of public interest.

Conclusions

89. In view of the aforesaid discussion, we dismiss Civil Appeal No.2683 of 2010 and uphold the judgment dated 12th January, 2010 of the Delhi High Court in LPA No. 501 of 2009 which had upheld the order passed by the CIC directing the CPIO, Supreme Court of India to furnish information on the judges of the Supreme Court who had declared their assets. Such disclosure would not, in any way, impinge upon the personal information and right to privacy of the judges. The fiduciary relationship rule in terms of clause (e) to Section 8(1) of the RTI Act is inapplicable. It would not affect the right to confidentiality of the judges and their right to protect personal information and privacy, which would be the case where details and contents of personal assets in the declaration are called for and sought, in which event the public interest test as applicable vide Section 8(1)(j) and proviso to Section 11 (1) of the RTI Act would come into operation.

90. As far as Civil Appeal Nos. 10045 of 2010 and 10044 of 2010 are concerned, they are to be partly allowed with an order of remit to the CPIO, Supreme Court of India to re-examine the matter after following the procedure under Section 11(1) of the RTI Act as the information relates to third parties. Before a final order is passed, the concerned third parties are required to be issued notice and heard as they are not a party before us. While deciding the question of disclosure on remit, the CPIO, Supreme Court of India would follow the observations made in the present judgment by keeping in view the objections raised, if any, by the third parties. We have refrained from making specific findings in the absence of third parties, who have rights under Section 11(1) and their views and opinions are unknown.

The reference and the appeals are accordingly disposed of.

N.V. Ramana J.

[A]s this case has large ramification on the rights of an individual in comparison to the rights of the society. The **aspect of transparency and accountability which are required to be balanced with right to privacy, has not been expounded by this Court anytime before**, thereby mandating a separate opinion.

2. This case concerns the **balance which is required between two important fundamental rights i.e. right to information and right to privacy. Often these two rights are seen as conflicting, however, we need to reiterate that both rights are two faces of the same coin. There is no requirement to see the two facets of the right in a manner to further the conflict, what is herein required is to provide balancing formula which can be easily made applicable to individual cases.** Moreover, due to the fact of infancy in privacy jurisprudence has also contributed to the meticulous task we are burdened herein.

…

9 [P]reliminary objections were taken by the appellants that this Bench could not have dealt with this matter considering the fact that this Court's functionality had a direct impact on the same. We do not subscribe to the aforesaid opinion for the reason that this Court while hearing this matter is sitting as a Court of necessity. In the case of *Election Commission of India v. Dr Subramaniam Swamy*, (1996) 4 SCC 104, it was held as under:

> 16. We must have a clear conception of the doctrine. It is well settled that the law permits certain things to be done as a matter of necessity which it would otherwise not countenance on the touchstone of judicial propriety. Stated differently, **the doctrine of necessity makes it imperative for the authority to decide and considerations of judicial propriety must yield.** It is often invoked in cases of bias where there is no other authority or Judge to decide the issue. If the doctrine of necessity is not allowed full play in certain unavoidable situations, it would impede the course of justice itself and the defaulting party would benefit there from. **Take the case of a certain taxing statute which taxes certain perquisites allowed to Judges. If the validity of such a provision is challenged who but the members of the judiciary must decide it. If all the Judges are disqualified on the plea that striking down of such a legislation would benefit them, a stalemate situation may develop. In such cases the doctrine of necessity comes into play.** If the choice is between allowing a biased person to act or to stifle the action altogether, the choice must fall in favour of the former as it is the only way to promote decision-making. In the present case also if the two Election Commissioners are able to reach a unanimous decision, there is no need for the Chief Election Commissioner to participate, if not the doctrine of necessity may have to be invoked.

10. In this light, appellants have to accept the decision of this Court which is the final arbiter of any disputes in India and also the highest court of constitutional matters. In this light, such objections cannot be sustained.

11. [A] brief reference to the scheme of RTI Act [was discussed]. The statement of objects and reasons envisage a noble goal of creating a democracy which is consisting of informed citizens and a transparent government. It also provides for a balance between effective government, efficient operations, expenditure of such transparent systems and requirements of confidentiality for certain sensitive information. It recognises that these principles are inevitable to create friction *inter se* and there needs to be harmonisation …to preserve the supremacy of democratic ideal. The recognition of this normative democratic ideal requires …optimum levels of accountability and transparency of efficient operations of the government. Under Section 2(f), information is defined as '*any material in any form including records, documents, memos, e-mails, opinions, advises, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force*.'

12. The purport of this section was to cover all types of information contained in any format to be available under the ambit of the RTI Act. The aforesaid definition is further broadened by the definition of 'record' provided under Section 2(i) of the RTI Act. Right to Information as defined under Section 2(j) of the RTI Act means the right to information accessible under this Act which is held by or under the control of any public authority.…

14 … For our purposes Section 8[47] deems relevant.…

16. Section 11[48] … is material for the discussion.…

17. The mandate under Section 11 … **enshrines the principles of natural justice**, wherein, the third party is provided with an opportunity to be heard and the **authority needs to consider whether the disclosure in public interest outweighs the possible harm in disclosure** to the third party. It must be noted that the **use of term 'confidential'** as occurring under Section 11, **subsumes commercial confidential information, other types of confidential information and private information**.

…

19. [W]e need to understand that **right to information stems from Article 19(1)(a) of the Constitution which guarantees freedom of expression**. Accordingly, this Court in *State of Uttar Pradesh v. Raj Narain*, (1975) 4 SCC 428 and *S.P. Gupta v. Union of India*, (1981) Supp. (1) SCC 87, held that a **citizen cannot effectively exercise his freedom of speech and expression unless he/she is informed of the governmental activities**. Our country being democratic, **the right to criticise the government**

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[47] "Section 8. Exemption from disclosure of information.— (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen, …

(d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;

(e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;

(j) information which relates to personal information the disclosure of which has not relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:

Provided that the information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person."

[48] "Section 11. Third party information.—

(1) Where a Central Public Information Officer or the State Public Information Officer, as the case may be, intends to disclose any information or record, or part thereof on a request made under this Act, which relates to or has been supplied by a third party and has been treated as confidential by that third party, the Central Public Information Officer or State Public Information Officer, as the case may be, shall, within five days from the receipt of the request, give a written notice to such third party of the request and of the fact that the Central Public Information Officer or State Public Information Officer, as the case may be, intends to disclose the information or record, or part thereof, and invite the third party to make a submission in writing or orally, regarding whether the information should be disclosed, and such submission of the third party shall be kept in view while taking a decision about disclosure of information:

Provided that except in the case of trade or commercial secrets protected by law, disclosure may be allowed if the public interest in disclosure outweighs in importance any possible harm or injury to the interests of such third party.

(2) Where a notice is served by the Central Public Information Officer or State Public Information Officer, as the case may be, under sub-section (1) to a third party in respect of any information or record or part thereof, the third party shall, within ten days from the date of receipt of such notice, be given the opportunity to make representation against the proposed disclosure.

(3) Notwithstanding anything contained in section 7, the Central Public Information Officer or State Public Information Officer, as the case may be, shall, within forty days after receipt of the request under section 6, if the third party has been given an

can only be effectively undertaken if accountability and transparency are maintained at appropriate levels. In view of the same, right to information can squarely said to be a corollary to the right to speech and expression.

20. Firstly, the appellants have contended that the information are not held with the Registry of the Supreme Court, rather the Chief Justice of India is holding the aforesaid information concerning the exchanges between Mr. Justice R. Reghupati and the then Chief Justice of India. In this context, **the term 'held' acquires important position. The term 'held' usually connotes the power, custody, or possession with the person**. However, the mandate of the Act requires this term to be interpreted wherein the association between held and the authority needs to be taken into consideration while providing a meaning for the aforesaid term. At this juncture, we need to observe the case of *University of New Castle upon Tyne v. Information Commissioner and British Union for Abolition of Vivisection*, [2011] UKUT 185 AAC, wherein the upper tribunal has held as under:

> "'Hold' is an ordinary English word. In our judgment it is not used in some technical sense in the Act. We do not consider that it is appropriate to define its meaning by reference to concepts such as legal possession or bailment, or by using phrases taken from court rules concerning the obligation to give disclosure of documents in litigation. Sophisticated legal analysis of its meaning is not required or appropriate. However, it is necessary to observe that 'holding' is not a purely physical concept, and it has to be understood with the purpose of the Act in mind. Section 3(2)(b) illustrates this: an authority cannot evade the requirements of the Act by having its information held on its behalf by some other person who is not a public authority. Conversely, we consider that s.1 would not apply merely because information is contained in a document that happens to be physically on the authority's premises: there must be an appropriate connection between the information and the authority, so that it can be properly said that the information is held by the authority. For example, an employee of the authority may have his own personal information on a document in his pocket while at work, or in the drawer of his office desk; that does not mean that the information is held by the authority."

21. From the aforesaid it can be concluded that a similar interpretation can be provided for term 'held' as occurring under Section 2(j) of the Act. Therefore, in view of the same the term 'held' does not include following information:

> 1. That is, without request or arrangement, sent to or deposited with a public authority which does not hold itself out as willing to receive it and which does not subsequently use it;
>
> 2. That is accidentally left with a public authority;
>
> 3. That just passes through a public authority;
>
> 4. That 'belongs' to an employee or officer of a public authority but which is brought by that employee or officer onto the public authority's premises.[49]

Having clarified the aforesaid aspect **we are of the opinion that the nature of information in relation to the authority concerned requires to be seen**. The fact that the information sought in the instant matter is in custody with the Chief Justice of India as he is the administrative head of the Supreme Court, squarely require us to hold that the concerned authority is holding the information and accordingly the contention of the appellants does not have any merit.

22. The appellants … argued that the information with respect to the assets declared with the Chief Justice of India or Chief Justices of respective High Courts **are held in confidence, fiduciary capacity**; … **is private information of the judges which cannot be revealed** under the RTI Act.

23. The exemptions to right to information as noted above are contained under Section 8 of the RTI Act. Before we analyse the aforesaid provision, we need to observe basic principles, concerning

[49] Phillip Coppel, Information Rights Law and Practice (4th Edn. (2014)), Pg. 362.

interpretation of exemption clauses. **[I]t is now well settled that exemption clauses need to be construed strictly. They need to be given appropriate meaning in terms of the intention of the legislature** [see *Commissioner of Customs (Import) v. Dilip Kumar & Ors*., (2018) 9 SCC 40; *Rechnungshof v. Österreichischer Rundfunk and Ors*., C465/00].

24. At the cost of repetition we note that the exemption of right to information for confidential information is covered under Section 8(1)(d), exemption from right to information under a fiduciary relationship is covered under Section 8(1)(e) and the exemption from private information is contained under Section 8(1)(j) of the RTI Act.

25. The first contention raised … is that the aforesaid information is confidential, therefore the same is covered under the exemption as provided under Section 8(1)(d) of the RTI Act. **The aforesaid exemption originates from a long time of judge made law concerning breach of confidence** (which are recently termed as misuse of private information).

26. **Under the classic breach of confidence action, three requirements were necessary** for bringing an action under this head. These conditions are clearly mentioned in the opinion of *Megarry, J., in Coco vs. Clark,* [1968] FSR 415; wherein, the conditions are **first**, the information itself, i.e. 'information is required to have necessary quality about confidence of the same'; **second**, 'the information must have been imparted in circumstances importing an obligation of confidence'; **third**, 'there must be unauthorized use of information which will be detriment to the party communicating'.

27. **Breach of confidence was not an absolute right and public interest, incorporated from long time under the common law jurisprudence**. This defence of public interest can be traced to initial case of *Gartside v. Outram,* (1856) 26 LJ Ch (NS) 113, wherein it was held that there is no confidence as to disclosure in iniquity. This iniquity was later expanded by Lord Denning in *Fraser v. Evans,* [1969] 1 QB 349, wherein the iniquity was referred as merely as an example of 'justice cause or excuse' for a breach of confidence. This iniquity was widened further in *Initial Service v. Putterill,* [1968] 1 QB 396, wherein it was held that iniquity covers any misconduct of nature that it ought to be disclosed to others in the public interest. In this line of precedents Thomas Ungoed, J., in *Beloff v. Pressdram,* [1973] 1 All ER 24, noted that iniquity would cover 'any matter, carried out or contemplated, in breach of country's security or in breach of law including statutory duty, fraud or otherwise destructive of the country or its people and doubtless other misdeeds of similar gravity.'

28. **Eventually the language of iniquity was shaken and discourse on public interest took over as a defence for breach of confidence** [See *Lion Laboratories v. Evans,* [1985] QB 526]. It would be necessary to quote Lord Goff in *Her Majesty's Attorney General v. The Observer Ltd. & Ors.,* [1991] AC 109, wherein he noted that "it is now clear that the principle [of iniquity] extends to matters of which disclosure is required in public interest".

29. The aforesaid expansion from the rule of iniquity to public interest defence has not caught the attention of Australian courts wherein, Justice Gummow, in *Corrs Pavey Whiting and Byrne v. Collector of Customs,* (1987) 14 FCR 434 and *Smith Kline and French Laboratories [Australia] Ltd. v. Department of Community Services and Health,* (1990) 22 FCR 73, reasoned that public interest was "picturesque if somewhat imprecise" and "not so much a rule of law as an invitation to judicial idiosyncrasy by deciding each case on ad-hoc basis as to whether, on the facts overall, it is better to respect or to override the obligation of confidence".

30. Even in England **there has been a shift of reasoning from an absolute public interest defence to balancing of public interest**. At this point we may observe the case of *Woodward v. Hutchins,*[1977] 1 WLR 760, wherein it was observed "It is a question of balancing the public interest in maintaining the confidence against the public interest in knowing the truth".

31. **Section 8(1)(d) of the RTI Act has limited the action of defence of confidentiality to only commercial information, intellectual property rights and those which are concerned with maintaining the competitive superiority. Therefore, aforesaid section is only relatable to breach**

of confidence of commercial information as classically developed. Although there are examples wherein commercial confidentiality are also expanded to other types of breach of confidential information, however, under Section 8(1)(d) does not take into its fold such breach of confidential information actions.

32. **Coming to other types of confidentiality**, we need to note that the confidentiality cannot be only restricted to commercial confidentiality, rather needs to extend to other types of confidentialities as well. [*Duchess of Argyll v. Duke of Argyll*, 1967 Ch 302] **Under the RTI Scheme such other confidential information are taken care under Section 11 of the RTI Act**. The language and purport under Section 11 extends to all types of confidentialities, inclusive of both commercial and other types of confidentialities. **The purport of this Section is that an opportunity should be provided to third party, who treats the information as confidential. The 'test of balancing public interest' needs to be applied in cases of confidential information other than commercial information as well**, under Section 11 of the RTI Act, as discussed. In this light, the concerned third parties need to be heard and thereafter the authorities are required to pass order as indicated herein.

33. Further, the appellants have **contended that the information sought herein relating to the third party are covered under exemptions as provided in Section 8(1)(j)** of the RTI Act i.e. private information.

34. The development from breach of confidence to misuse of private information/privacy claim was gradual. There was shift from the focus on relationship to whether the information itself had a requisite confidential quality [refer to *Her Majesty's Attorney General case* (supra)]. This shift in focus resulted in the evolution of misuse of private information or privacy claim, from its predecessor of confidentiality. In the case of *Campbell v. M.G.N.*, [2004] UKHL 22, wherein the breach of misuse of private information evolved as cause of action. The modification which happened in the new cause of action is that the initial confidential relationship was not material, which was earlier required under the breach of confidence action. The **use of term confidential information was replaced with more** … **descriptive term information in private**. **The change from breach of confidence which was an action of equity, to misuse of private information, which was a tort provided more structural definitiveness and reduced the discretionary aspect**.

35. The **purport of the Section 8(1)(j) of the RTI Act is to balance privacy with public interest**. Under the provision a **two steps test** could be identified wherein the **first step** was:

> (i) whether there is a reasonable expectation of privacy, and
>
> (ii) whether on an ultimate balancing analysis, does privacy give way to freedom of expression?

We should acknowledge that these two tests are very difficult to be kept separate analytically.

FIRST STEP

36. [T]o ascertain **whether the information is private and whether the information relating the concerned party has a reasonable expectation of privacy**. In *Murray v. Express Newspaper plc*, [2009] Ch 481, it was held as under:

> "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."

37. From the aforesaid discussion we can note that there are certain **factors which needs to be considered before concluding whether there was a reasonable expectation of privacy** of the person concerned. These non-exhaustive factors **are**:

1. The nature of information. **2.** Impact on private life. **3.** Improper conduct. **4.** Criminality **5.** Place where the activity occurred or the information was found. **6.** Attributes of claimants such as being a public figure, a minor etc. and their reputation. **7.** Absence of consent. **8.** Circumstances and purposes for which the information came into the hands of the publishers. **9.** Effect on the claimant. **10.** Intrusion's nature and purpose.

These non-exhaustive factors are to be considered in order to come to a conclusion whether the information sought is private or does the persons has a reasonable expectations of privacy. In certain cases we may conclude that there could be certain information which are inherently private and are presumptively protected under the privacy rights. These information include gender, age and sexual preferences etc. These instances need to be kept in mind while assessing the first requirement under the aforesaid test.

38. **If the information is strictly covered under the aforesaid formulation, then the person is exempted from the right to information unless 'the public interest test' requires to trump the same.**

SECOND STEP

39. Having ascertained whether the information is private or not, **a judge is required to adopt a balancing test to note whether the public interest justifies discloser** of such information under Section 8(1)(j) of the RTI Act. **The term 'larger public interest' needs to be understood in light of** the above discussion which points that a 'balancing test' needs to be incorporated to see the **appropriateness of discloser**. There are certain basic principles which we need to keep in mind while balancing the rights which are relevant herein.

40. That the **right to information and right to privacy are at an equal footing. There is no requirement to take an *a priori* view that one right trumps other**. Although there are American cases, which have taken the view that the freedom of speech and expression trumps all other rights in every case. However, **in India we cannot accord any such priority to the rights.**

41. The contextual balancing involves **'proportionality test'**. [See *K S Puttaswamy v. Union of India*, (2017) 10 SCC 1]. **The test is to see whether the release of information would be necessary, depends on the information seeker showing the 'pressing social need' or 'compelling requirement for upholding the democratic values'**. We can easily conclude that the exemption of public interest as occurring under Section 8(1)(j) requires a balancing test to be adopted. We need to **distinguish two separate concepts i.e. "interest of the public" and "something in the public interest."** Therefore, **the material distinction between the aforesaid concepts concern those matters which affect political, moral and material welfare of the public need to be distinguished from those for public entertainment, curiosity or amusement**. Under Section 8(1)(j) of the RTI Act requires us to hold that only the former is an exception to the exemption. Although we must note that the majority opinion in *K S Puttaswamy (supra)* has held that the **data privacy is part of the right to privacy, however, we need to note that the concept of data protection is still developing** [refer *Google Spain v. AEPD*, C/131/12; *Bavarian Lager v Commission*, [2007] ECR II-4523]. …

42. Coming to **the aspect of transparency, judicial independence and the RTI Act, we need to note that there needs to be a balance between the three equally important concepts.** The whole bulwark of **preserving our Constitution, is trusted upon judiciary, when other branches have not been able to do so. As a shield, the judicial independence is the basis with which judiciary has maintained its trust reposed by the citizens. In light of the same, the judiciary needs to be protected from attempts to breach its independence. Such interference requires calibration of appropriate amount of transparency in consonance with judicial independence**.

43. It must be kept in the mind that the **transparency cannot be allowed to run to its absolute, considering the fact that efficiency is equally important principle** to be taken into fold. We may note that **right to information should not be allowed to be used as a tool of surveillance to scuttle**

effective functioning of judiciary. While applying the second step the concerned authority needs to balance these considerations as well.

44. In line with the aforesaid discussion, we need to note that following non-exhaustive considerations needs to be considered while assessing the 'public interest' under Section 8 of the RTI Act:

a. Nature and content of the information

b. Consequences of non-disclosure; dangers and benefits to public

c. Type of confidential obligation.

d. Beliefs of the confidant; reasonable suspicion

e. Party to whom information is disclosed

f. Manner in which information acquired

g. Public and private interests

h. Freedom of expression and proportionality.

45. Having ascertained the test which is required to be applied while considering the exemption under Section 8(1)(j) of the RTI Act, I may note that there is no requirement to elaborate on the factual nuances of the cases presented before us. Accordingly, I concur with the conclusions reached by the majority.

[*For comprehensive understanding it is requested to peruse the separate judgment given by Dr. Justice D.Y. Chandrachud, provided as a soft copy*].

IN THE SUPREME COURT OF INDIA

Decided on: 28.09.2018

Indian Young Lawyers Association and others
vs
State of Kerala and others

Case No : Writ Petition (Civil) No. 373 of 2006
Bench : Dipak Misra, A.M. Khanwilkar, R.F. Nariman, Dr. D.Y. Chandrachud, Indu Malhotra
Citation : 2018 Indlaw SC 905

The Judgment was delivered by: Dipak Misra, J. (also on behalf of A.M. Khanwilkar, J)

1. The irony that is nurtured by the society is to impose a rule, however unjustified, and proffer explanation or justification to substantiate the substratum of the said rule. Mankind, since time immemorial, has been searching for explanation or justification to substantiate a point of view that hurts humanity. The theoretical human values remain on paper. Historically, women have been treated with inequality and that is why, many have fought for their rights. Susan B. Anthony, known for her feminist activity, succinctly puts, "Men, their rights, and nothing more; women, their rights, and nothing less." It is a clear message.

2. Neither the said message nor any kind of philosophy has opened up the large populace of this country to accept women as partners in their search for divinity and spirituality. In the theatre of life, it seems, man has put the autograph and there is no space for a woman even to put her signature. There is inequality on the path of approach to understand the divinity. The attribute of devotion to divinity cannot be subjected to the rigidity and stereotypes of gender. The dualism that persists in religion by glorifying and venerating women as goddesses on one hand and by imposing rigorous sanctions on the other hand in matters of devotion has to be abandoned. Such a dualistic approach and an entrenched mindset results in indignity to women and degradation of their status. The society has to undergo a perceptual shift from being the propagator of hegemonic patriarchal notions of demanding more exacting standards of purity and chastity solely from women to be the cultivator of equality where the woman is in no way considered frailer, lesser or inferior to man. The law and the society are bestowed with the Herculean task to act as levellers in this regard and for the same, one has to remember the wise saying of Henry Ward Beecher that deals with the changing perceptions of the world in time.

5. Having stated so, we will focus on the factual score. The instant writ petition preferred under Article 32 of the Constitution seeks issuance of directions against the Government of Kerala, Devaswom Board of Travancore, Chief Thanthri of Sabarimala Temple and the District Magistrate of Pathanamthitta to ensure entry of female devotees between the age group of 10 to 50 years to the Lord Ayyappa Temple at Sabarimala (Kerala) which has been denied to them on the basis of certain custom and usage; to declare Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965 (for short, "the 1965 Rules") framed in exercise of the powers conferred by Section 4 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965 (for brevity, "the 1965 Act") as unconstitutional being violative of Articles 14, 15, 25 and 51A(e) of the Constitution of India and further to pass directions for the safety of women pilgrims.

7. After recording the submissions advanced by the learned counsel for the petitioners, the respondents as well as by the learned Amici Curiae, the three-Judge Bench considered the questions formulated by the counsel for the parties and, thereafter, framed the following questions for the purpose of reference to the Constitution Bench:

"1. Whether the exclusionary practice which is based upon a biological factor exclusive to the female gender amounts to "discrimination" and thereby violates the very core of Articles 14, 15 and 17 and not protected by 'morality' as used in Articles 25 and 26 of the Constitution?

2. Whether the practice of excluding such women constitutes an "essential religious practice" under Article

25 and whether a religious institution can assert a claim in that regard under the umbrella of right to manage its own affairs in the matters of religion?

3. Whether Ayyappa Temple has a denominational character and, if so, is it permissible on the part of a 'religious denomination' managed by a statutory board and financed under Article 290-A of the Constitution of India *out of the Consolidated Fund of Kerala and Tamil Nadu to indulge in such practices violating constitutional principles/ morality embedded in Articles 14, 15(3), 39(a) and 51-A(e)?*

4. Whether Rule 3 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules permits 'religious denomination' to ban entry of women between the age of 10 to 50 years? And if so, would it not play foul of Articles 14 and 15(3) of the Constitution *by restricting entry of women on the ground of sex?*

5. Whether Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorization of Entry) Rules, 1965 is ultra vires the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965 and, if treated to be intra vires, whether it will be violative of the provisions of Part III of the Constitution?"

8. Because of the aforesaid reference, the matter has been placed before us.

96. Coming to the first and the most important condition for a religious denomination, i.e., the collection of individuals ought to have a system of beliefs or doctrines which they regard as conducive to their spiritual well-being, there is nothing on record to show that the devotees of Lord Ayyappa have any common religious tenets peculiar to themselves, which they regard as conducive to their spiritual well-being, other than those which are common to the Hindu religion. Therefore, the devotees of Lord Ayyappa are just Hindus and do not constitute a separate religious denomination. For a religious denomination, there must be new methodology provided for a religion. Mere observance of certain practices, even though from a long time, does not make it a distinct religion on that account.

Enforceability of Fundamental Rights under Article 25(1) against the Travancore Devaswom Board

97. Having stated that the devotees of Lord Ayyappa do not constitute a religious denomination within the meaning of Article 26 and that Sabarimala Temple is a public temple by virtue of the fact that Section 15 of the 1950 Act vests all powers of direction, control and supervision over it in the Travancore Devaswom Board which, in our foregoing analysis, has been unveiled as 'other authority' within the meaning of Article 12, resultantly fundamental rights including those guaranteed under Article 25(1) are enforceable against the Travancore Devaswom Board and other incorporated Devaswoms including the Sabarimala Temple. We have also discussed the secular character of the Indian Constitution as well as the broad meaning assigned to the term religion occurring in various Articles of the Constitution including Article 25(1).

98. Now adverting to the rights guaranteed under Article 25(1) of the Constitution, be it clarified that Article 25(1), by employing the expression 'all persons', demonstrates that the freedom of conscience and the right to freely profess, practise and propagate religion is available, though subject to the restrictions delineated in Article 25(1) itself, to every person including women.

99. It needs to be understood that the kernel of Article 26 is 'establishment of a religious institution' so as to acclaim the status of religious denomination. Whereas, Article 25(1) guarantees the right to practise religion to every individual and the act of practice is concerned, primarily, with religious worship, rituals and observations as held in Rev. Stainislaus v. State of Madhya Pradesh and others (1977) 1 SCC 677 1977 Indlaw SC 284. Further, it has been held in Shirur Mutt (supra) that the logic underlying the constitutional guarantee regarding 'practice' of religion is that religious practices are as such a part of religion as religious faith or doctrines.

100. The right guaranteed under Article 25(1) has nothing to do with gender or, for that matter, certain physiological factors, specifically attributable to women. Women of any age group have as much a right as men to visit and enter a temple in order to freely practise a religion as guaranteed under Article 25(1). When we say so, we are absolutely alive to the fact that whether any such proposed exclusion of women from entry into religious places forms an essential part of a religion would be examined at a subsequent stage.

101. We have no hesitation to say that such an exclusionary practice violates the right of women to visit and enter a temple to freely practise Hindu religion and to exhibit her devotion towards Lord Ayyappa. The denial of this right to women significantly denudes them of their right to worship. We concur with the view of the Amicus Curiae, learned senior counsel, Mr. Raju Ramachandran, that the right guaranteed under

Article 25(1) is not only about inter-faith parity but it is also about intra-faith parity. Therefore, the right to practise religion under Article 25(1), in its broad contour, encompasses a non-discriminatory right which is equally available to both men and women of all age groups professing the same religion.

104. Therefore, it can be said without any hesitation or reservation that the impugned Rule 3(b) of the 1965 Rules, framed in pursuance of the 1965 Act, that stipulates exclusion of entry of women of the age group of 10 to 50 years, is a clear violation of the right of such women to practise their religious belief which, in consequence, makes their fundamental right under Article 25(1) a dead letter. It is clear as crystal that as long as the devotees, irrespective of their gender and/or age group, seeking entry to a temple of any caste are Hindus, it is their legal right to enter into a temple and offer prayers. The women, in the case at hand, are also Hindus and so, there is neither any viable nor any legal limitation on their right to enter into the Sabarimala Temple as devotees of Lord Ayyappa and offer their prayers to the deity.

105. When we say so, we may also make it clear that the said rule of exclusion cannot be justified on the ground that allowing entry to women of the said age group would, in any way, be harmful or would play a jeopardizing role to public order, morality, health or, for that matter, any other provision/s of Part III of the Constitution, for it is to these precepts that the right guaranteed under Article 25(1) has been made subject to.

106. The term 'morality' occurring in Article 25(1) of the Constitution cannot be viewed with a narrow lens so as to confine the sphere of definition of morality to what an individual, a section or religious sect may perceive the term to mean. We must remember that when there is a violation of the fundamental rights, the term 'morality' naturally implies constitutional morality and any view that is ultimately taken by the Constitutional Courts must be in conformity with the principles and basic tenets of the concept of this constitutional morality that gets support from the Constitution.

122. In the light of the above authorities, it has to be determined whether the practice of exclusion of women of the age group of 10 to 50 years is equivalent to a doctrine of Hindu religion or a practice that could be regarded as an essential part of the Hindu religion and whether the nature of Hindu religion would be altered without the said exclusionary practice. The answer to these questions, in our considered opinion, is in the firm negative. In no scenario, it can be said that exclusion of women of any age group could be regarded as an essential practice of Hindu religion and on the contrary, it is an essential part of the Hindu religion to allow Hindu women to enter into a temple as devotees and followers of Hindu religion and offer their prayers to the deity. In the absence of any scriptural or textual evidence, we cannot accord to the exclusionary practice followed at the Sabarimala temple the status of an essential practice of Hindu religion.

123. By allowing women to enter into the Sabarimala temple for offering prayers, it cannot be imagined that the nature of Hindu religion would be fundamentally altered or changed in any manner. Therefore, the exclusionary practice, which has been given the backing of a subordinate legislation in the form of Rule 3(b) of the 1965 Rules, framed by the virtue of the 1965 Act, is neither an essential nor an integral part of the Hindu religion without which Hindu religion, of which the devotees of Lord Ayyappa are followers, will not survive.

124. Nobody can say that essential part or practice of one's religion has changed from a particular date or by an event. Such alterable parts or practices are definitely not the 'core' of religion where the belief is based and religion is founded upon. It could only be treated as mere embellishments to the non-essential part or practices.

125. This view of ours is further substantiated by the fact that where a practice changes with the efflux of time, such a practice cannot, in view of the law laid down in Commissioner of Police and others (supra), be regarded as a core upon which a religion is formed. There has to be unhindered continuity in a practice for it to attain the status of essential practice. It is further discernible from the judgment of the High Court in S. Mahendran (supra) that the Devaswom Board had accepted before the High Court that female worshippers of the age group of 10 to 50 years used to visit the temple and conduced poojas in every month for five days for the first rice feeding ceremony of their children. The Devaswom Board also took a stand before the High Court that restriction of entry for women was only during Mandalam, Makaeavilakku and Vishnu days. The same has also been pointed out by learned Senior Counsel, Ms. Indira Jaising, that the impugned

exclusionary practice in question is a 'custom with some aberrations' as prior to the passing of the Notification in 1950, women of all age groups used to visit the Sabarimala temple for the first rice feeding ceremony of their children.

126. Therefore, there seems to be no continuity in the exclusionary practice followed at the Sabarimala temple and in view of this, it cannot be treated as an essential practice.

Analysis of the 1965 Act and Rule 3(b) of the 1965 Rules

127. We may presently deal with the statutory provisions of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965.

130. Section 3 of the Act being a non-obstante clause declares that every place of public worship which is open to Hindus generally or to any section or class thereof shall be open to all sections and classes of Hindus and no Hindu, of whatsoever section or class, shall be prevented, obstructed or discouraged from entering such place of public worship, or from worshipping, offering prayers or performing any religious service at such place of public worship in the like manner and to the like extent as any other Hindu of whatsoever section or class may so be eligible to enter, worship, pray or perform.

131. A careful dissection of Section 3 reveals that places of public worship in the State of Kerala, irrespective of any contrary law, custom, usage or instrument having effect by virtue of any such law or any decree or order of Court, shall be open to all sections and classes of Hindus. The definition of 'section or class' and 'Hindu' has to be imported, for the purposes of Section 3, from the definition clauses 2(a) and 2(c) which, as per our foregoing analysis, includes all the genders, provided they are Hindus. It further needs to be accentuated that the right provided under Section 3 due to its non-obstante nature has to be given effect to regardless of any law, custom or usage to the contrary.

132. The proviso to Section 3 stipulates that in case the place of public worship is a temple founded for the benefit of any religious denomination or section thereof, then the rights warranted under Section 3 becomes subject to the right of that religious denomination or section to manage its own affairs in matters of religion. Having said so, we have, in the earlier part of this judgment, categorically stated that devotees and followers of Lord Ayyappa do not constitute a religious denomination and, therefore, the proviso to Section 3 cannot be resorted to in the case at hand.

143. The language of both the provisions, that is, Section 3 and the proviso to Section 4(1) of the 1965 Act, clearly indicates that custom and usage must make space to the rights of all sections and classes of Hindus to offer prayers at places of public worship. Any interpretation to the contrary would annihilate the purpose of the 1965 Act and the fundamental right to practise religion guaranteed under Article 25(1). It is clear as crystal that the provisions of the 1965 Act are liberal in nature so as to allow entry to all sections and classes of Hindus including Scheduled Castes and Scheduled Tribes. But framing of Rule 3(b) of the 1965 Rules under the garb of Section 4(1) would violate the very purpose of the 1965 Act.

Conclusions

144. In view of our aforesaid analysis, we record our conclusions in seriatim:

(i) In view of the law laid down by this Court in Shirur Mutt (supra) and S.P. Mittal (supra), the devotees of Lord Ayyappa do not constitute a separate religious denomination. They do not have common religious tenets peculiar to themselves, which they regard as conducive to their spiritual well-being, other than those which are common to the Hindu religion. Therefore, the devotees of Lord Ayyappa are exclusively Hindus and do not constitute a separate religious denomination.

(ii) Article 25(1), by employing the expression 'all persons', demonstrates that the freedom of conscience and the right to freely profess, practise and propagate religion is available, though subject to the restrictions delineated in Article 25(1) itself, to every person including women. The right guaranteed under Article 25(1) has nothing to do with gender or, for that matter, certain physiological factors specifically attributable to women.

(iii) The exclusionary practice being followed at the Sabrimala temple by virtue of Rule 3(b) of the 1965 Rules violates the right of Hindu women to freely practise their religion and exhibit their devotion towards Lord Ayyappa. This denial denudes them of their right to worship. The right to practise religion under Article

25(1) is equally available to both men and women of all age groups professing the same religion.
(iv) The impugned Rule 3(b) of the 1965 Rules, framed under the 1965 Act, that stipulates exclusion of entiy of women of the age group of 10 to 50 years, is a clear violation of the right of Hindu women to practise their religious beliefs which, in consequence, makes their fundamental right of religion under Article 25(1) a dead letter.
(v) The term 'morality' occurring in Article 25(1) of the Constitution cannot be viewed with a narrow lens so as to confine the sphere of definition of morality to what an individual, a section or religious sect may perceive the term to mean. Since the Constitution has been adopted and given by the people of this country to themselves, the term public morality in Article 25 has to be appositely understood as being synonymous with constitutional morality.
(vi) The notions of public order, morality and health cannot be used as colourable device to restrict the freedom to freely practise religion and discriminate against women of the age group of 10 to 50 years by denying them their legal right to enter and offer their prayers at the Sabarimala temple.
(vii) The practice of exclusion of women of the age group of 10 to 50 years being followed at the Sabarimala Temple cannot be regarded as an essential part as claimed by the respondent Board.
(viii) In view of the law laid down by this Court in the second Ananda Marga case, the exclusionary practice being followed at the Sabarimala Temple cannot be designated as one, the non-observance of which will change or alter the nature of Hindu religion. Besides, the exclusionary practice has not been observed with unhindered continuity as the Devaswom Board had accepted before the High Court that female worshippers of the age group of 10 to 50 years used to visit the temple and conducted poojas in every month for five days for the first rice feeding ceremony of their children.
(ix) The exclusionary practice, which has been given the backing of a subordinate legislation in the form of Rule 3(b) of the 1965 Rules, framed by the virtue of the 1965 Act, is neither an essential nor an integral part of the religion.
(x) A careful reading of Rule 3(b) of the 1965 Rules makes it luculent that it is ultra vires both Section 3 as well as Section 4 of the 1965 Act, for the simon pure reason that Section 3 being a non-obstante provision clearly stipulates that every place of public worship shall be open to all classes and sections of Hindus, women being one of them, irrespective of any custom or usage to the contrary.
(xi) Rule 3(b) is also ultra vires Section 4 of the 1965 Act as the proviso to Section 4(1) creates an exception to the effect that the regulations/rules made under Section 4(1) shall not discriminate, in any manner whatsoever, against any Hindu on the ground that he/she belongs to a particular section or class.
(xii) The language of both the provisions, that is, Section 3 and the proviso to Section 4(1) of the 1965 Act clearly indicate that custom and usage must make space to the rights of all sections and classes of Hindus to offer prayers at places of public worship. Any interpretation to the contrary would annihilate the purpose of the 1965 Act and incrementally impair the fundamental right to practise religion guaranteed under Article 25(1). Therefore, we hold that Rule 3(b) of the 1965 Rules is ultra vires the 1965 Act.
145. In view of the aforesaid analysis and conclusions, the writ petition is allowed. There shall be no order as to costs.

R.F. Nariman, J. (Concurring)
146. The present writ petition raises far-reaching questions on the ambit of the fundamental rights contained in Articles 25 and 26 of the Constitution of India. These questions arise in the backdrop of an extremely famous temple at Sabarimala in which the idol of Lord Ayyappa is installed. According to the Respondents, the said temple, though open to all members of the public regardless of caste, creed, or religion, is a denominational temple which claims the fundamental right to manage its own affairs in matters relating to religion. The question that arises is whether the complete exclusion of women between the ages of 10 and 50 from entry, and consequently, of worship in this temple, based upon a biological factor which is exclusive to women only, and which is based upon custom allegedly constituting an essential part of religion, can be said to be violative of their rights under Article 25. Consequently, whether such women are covered by Section 3 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965 and whether

Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965 is violative of their fundamental right under Article 25(1) and Article 15(1), and ultra vires the parent Act.

166. A conspectus of these judgments, therefore, leads to the following propositions:

166.1. Article 25 recognises a fundamental right in favour of "all persons" which has reference to natural persons.

166.2. This fundamental right equally entitles all such persons to the said fundamental right. Every member of a religious community has a right to practice the religion so long as he does not, in any way, interfere with the corresponding right of his co-religionists to do the same.

166.3. The content of the fundamental right is the fleshing out of what is stated in the Preamble to the Constitution as "liberty of thought, belief, faith and worship". Thus, all persons are entitled to freedom of conscience and the right to freely profess, practice, and propagate religion.

166.4. The right to profess, practice, and propagate religion will include all acts done in furtherance of thought, belief, faith, and worship.

166.5. The content of the right concerns itself with the word "religion". "Religion" in this Article would mean matters of faith with individuals or communities, based on a system of beliefs or doctrines which conduce to spiritual well-being. The aforesaid does not have to be theistic but can include persons who are agnostics and atheists.

166.6. It is only the essential part of religion, as distinguished from secular activities, that is the subject matter of the fundamental right. Superstitious beliefs which are extraneous, unnecessary accretions to religion cannot be considered as essential parts of religion. Matters that are essential to religious faith and/or belief are to be judged on evidence before a court of law by what the community professing the religion itself has to say as to the essentiality of such belief. One test that has been evolved would be to remove the particular belief stated to be an essential belief from the religion - would the religion remain the same or would it be altered? Equally, if different groups of a religious community speak with different voices on the essentiality aspect presented before the Court, the Court is then to decide as to whether such matter is or is not essential. Religious activities may also be mixed up with secular activities, in which case the dominant nature of the activity test is to be applied. The Court should take a common-sense view and be actuated by considerations of practical necessity.

166.7. The exceptions to this individual right are public order, morality, and health. "Public order" is to be distinguished from "law and order". "Public disorder" must affect the public at large as opposed to certain individuals. A disturbance of public order must cause a general disturbance of public tranquility. The term "morality" is difficult to define. For the present, suffice it to say that it refers to that which is considered abhorrent to civilized society, given the mores of the time, by reason of harm caused by way, inter alia, of exploitation or degradation. We were invited by the learned Amicus Curiae, Shri Raju Ramachandran, to read the word "morality" as being "constitutional morality" as has been explained in some of our recent judgments. If so read, it cannot be forgotten that this would bring in, through the back door, the other provisions of Part III of the Constitution, which Article 26 is not subject to, in contrast with Article 25(1). In any case, the fundamental right under Article 26 will have to be balanced with the rights of others contained in Part III as a matter of harmonious construction of these rights as was held in Sri Venkataramana Devaru (supra). But this would only be on a case to case basis, without necessarily subjecting the fundamental right under Article 26 to other fundamental rights contained in Part III. "Health" would include noise pollution and the control of disease.

166.8. Another exception to the fundamental right conferred by Article 25(1) is the rights that are conferred on others by the other provisions of Part III. This would show that if one were to propagate one's religion in such a manner as to convert a person of another religious faith, such conversion would clash with the other person's right to freedom of conscience and would, therefore, be interdicted. Where the practice of religion is interfered with by the State, Articles 14, 15(1), 19, and 21 would spring into action. Where the practice of religion is interfered with by non-State actors, Article 15(2) and Article 17 We were invited by the learned Amicus Curiae, Shri Raju Ramachandran, to construe Article 17 in wider terms than merely including those who were historically untouchables at the time of framing of the Constitution. We have refrained from doing

so because, given our conclusion, based on Article 25(1), this would not directly arise for decision on the facts of this case. would spring into action.

166.9. Article 25(2) is also an exception to Article 25(1), which speaks of the State making laws which may regulate or restrict secular activity, which includes economic, financial or political activity, which may be associated with religious practice - see Article 25(2)(a).

166.10. Another exception is provided under Article 25(2)(b) which is in two parts. Any law providing for social welfare and reform in a religious community can also affect and/or take away the fundamental right granted under Article 25(1). A further exception is provided only insofar as persons professing the Hindu religion are concerned, which is to throw open all Hindu religious institutions of a public character to all classes and sections of Hindus.

166.11. Contrasted with the fundamental right in Article 25(1) is the fundamental right granted by Article 26. This fundamental right is not granted to individuals but to religious denominations or sections thereof. A religious denomination or section thereof is to be determined on the basis of persons having a common faith, a common organization, and designated by a distinct name as a denomination or section thereof. Believers of a particular religion are to be distinguished from denominational worshippers. Thus, Hindu believers of the Shaivite and Vaishnavite form of worship are not denominational worshippers but part of the general Hindu religious form of worship.

166.13. The fundamental right granted under Article 26 is subject to the exception of public order, morality, and health. However, since the right granted under Article 26 is to be harmoniously construed with Article 25(2)(b), the right to manage its own affairs in matters of religion granted by Article 26(b), in particular, will be subject to laws made under Article 25(2)(b) which throw open religious institutions of a public character to all classes and sections of Hindus.

166.14. Thus, it is clear that even though the entry of persons into a Hindu temple of a public character would pertain to management of its own affairs in matters of religion, yet such temple entry would be subject to a law throwing open a Hindu religious institution of a public character owned and managed by a religious denomination or section thereof to all classes or sections of Hindus. However, religious practices by the religious denomination or section thereof, which do not have the effect of either a complete ban on temple entry of certain persons, or are otherwise not discriminatory, may pass muster under Article 26(b). Examples of such practices are that only certain qualified persons are allowed to enter the sanctum sanctorum of a temple, or time management of a temple in which all persons are shut out for certain periods.

168. In the present writ petition filed before this Court, an affidavit filed by a Thanthri of the Sabarimala temple dated 23.04.2016 makes interesting reading. According to the affidavit, two Brahmin brothers from Andhra Pradesh were tested by Sage Parasuram and were named "Tharanam" and "Thazhamon". The present Thanthri is a descendant of the Thazhamon brother, who is authorized to perform rituals in Sastha temples. The affidavit then refers to the Sabarimala Temple, which is dedicated to Lord Ayyappa, as a prominent temple in Kerala which is visited by over twenty million pilgrims and devotees every year. The temple is only open during the first five days of every Malayalam month, and during the festivals of Mandalam, Makaravilakku, and Vishu. Significantly, no daily poojas are performed in the said temple. It is stated in the affidavit that Lord Ayyappa had himself explained that the pilgrimage to Sabarimala can be undertaken only by the performance of Vratham, which are religious austerities that train man for evolution to spiritual consciousness.

Paragraph 10 of the affidavit is important and states as follows:-

"10. I submit that as part of observing "vrutham", the person going on pilgrimage to Sabarimala separates himself from all family ties and becomes a student celibate who is under Shastras banned any contact with females of the fertile age group. Everywhere when somebody takes on the "vrutham", either the women leave the house and take up residence elsewhere or the men separate themselves from the family so that normal Asauchas in the house do not affect his "vrutham". The problem with women is that they cannot complete the 41 days vrutham because the Asaucham of periods will surely fall within the 41 days. It is not a mere physiological phenomenon. It is the custom among all Hindus that women during periods do not go to Temples or participate in religious activity. This is as per the statement of the basic Thantric text of Temple

*worshipping in Kerala Thanthra Samuchayam, Chapter 10, Verse II. A true copy of the relevant page of Thanthra Samuchchaya is attached herewith and marked as Annexure A-1 (Pages 30-31)."*The affidavit then goes on to state that the Shastras forbid religious austerity by menstruating women, which is why women above the age of 10 and below the age of 50 are not allowed entering into the temple. The affidavit then states, in paragraph 15:

*"15. ..... During this period, many women are affected by physical discomforts like headache, body pain, vomiting sensation etc. In such circumstances, intense and chaste spiritual disciplines for forty-one days are not possible. It is for the sake of pilgrims who practiced celibacy that youthful women are not allowed in the Sabarimala pilgrimage. ....."*The other reason given in the affidavit for the usage of non-entry of women between these ages is as follows:

"24. That the deity at Sabarimala is in the form of a 'Naishtik Brahmachari' and that is the reason why young women are not permitted to offer prayers in the temple as the slightest deviation from celibacy and austerity observed by the deity is not caused by the presence of such women. ....."

It will thus be seen that women are barred entry to the temple at Sabarimala because of the biological or physiological phenomenon of menstruation, which forbids their participation in religious activity. The second reason given is that young women should not, in any manner, deflect the deity, who is in the form of a Naisthika Brahmachari, from celibacy and austerity.

170. For the purpose of this case, we have proceeded on the footing that the reasons given for barring the entry of menstruating women to the Sabarimala temple are considered by worshippers and Thanthris alike, to be an essential facet of their belief.

171. The first question that arises is whether the Sabarimala temple can be said to be a religious denomination for the purpose of Article 26 of the Constitution. We have already seen with reference to the case law quoted above, that three things are necessary in order to establish that a particular temple belongs to a religious denomination. The temple must consist of persons who have a common faith, a common organization, and are designated by a distinct name. In answer to the question whether Thanthris and worshippers alike are designated by a distinct name, we were unable to find any answer. When asked whether all persons who visit the Sabarimala temple have a common faith, the answer given was that all persons, regardless of caste or religion, are worshippers at the said temple. From this, it is also clear that Hindus of all kinds, Muslims, Christians etc., all visit the temple as worshippers, without, in any manner, ceasing to be Hindus, Christians or Muslims. They can therefore be regarded, as has been held in Sri Adi Visheshwara (supra), as Hindus who worship the idol of Lord Ayyappa as part of the Hindu religious form of worship but not as denominational worshippers. The same goes for members of other religious communities. We may remember that in Durgah Committee (supra), this Court had held that since persons of all religious faiths visit the Durgah as a place of pilgrimage, it may not be easy to hold that they constitute a religious denomination or a section thereof. However, for the purpose of the appeal, they proposed to deal with the dispute between the parties on the basis that the Chishtia sect, whom the respondents represented, were a separate religious denomination, being a sub-sect of Soofies. We may hasten to add that we find no such thing here. We may also add that in S.P. Mittal (supra), the majority judgment did not hold, and therefore, assumed that "Aurobindoism" was a religious denomination, given the fact that the Auroville Foundation Society claimed exemption from income tax on the footing that it was a charitable, and not a religious organization, and held itself out to be a non-religious organization. Also, the powerful argument addressed, noticed at paragraph 106 of the majority judgment, that persons who joined the Auroville Society did not give up their religion, also added great substance to the fact that the Auroville Society could not be regarded as a religious denomination for the purpose of Article 26. Chinnappa Reddy, J. alone, in dissent, held the Auroville Society to be a religious denomination, without adverting to the fact that persons who are a part of the Society continued to adhere to their religion.

172. In these circumstances, we are clearly of the view that there is no distinctive name given to the worshippers of this particular temple; there is no common faith in the sense of a belief common to a particular religion or section thereof; or common organization of the worshippers of the Sabarimala temple so as to constitute the said temple into a religious denomination. Also, there are over a thousand other Ayyappa

temples in which the deity is worshipped by practicing Hindus of all kinds. It is clear, therefore, that Article 26 does not get attracted to the facts of this case.

174. Even otherwise, the fundamental right of women between the ages of 10 and 50 to enter the Sabarimala temple is undoubtedly recognized by Article 25(1). The fundamental right claimed by the Thanthris and worshippers of the institution, based on custom and usage under the selfsame Article 25(1), must necessarily yield to the fundamental right of such women, as they are equally entitled to the right to practice religion, which would be meaningless unless they were allowed to enter the temple at Sabarimala to worship the idol of Lord Ayyappa. The argument that all women are not prohibited from entering the temple can be of no avail, as women between the age group of 10 to 50 are excluded completely. Also, the argument that such women can worship at the other Ayyappa temples is no answer to the denial of their fundamental right to practice religion as they see it, which includes their right to worship at any temple of their choice. On this ground also, the right to practice religion, as claimed by the Thanthris and worshippers, must be balanced with and must yield to the fundamental right of women between the ages of 10 and 50, who are completely barred from entering the temple at Sabarimala, based on the biological ground of menstruation.

177. The facts, as they emerge from the writ petition and the aforesaid affidavits, are sufficient for us to dispose of this writ petition on the points raised before us. I, therefore, concur in the judgment of the learned Chief Justice of India in allowing the writ petition, and declare that the custom or usage of prohibiting women between the ages of 10 to 50 years from entering the Sabarimala temple is violative of Article 25(1), and violative of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965 made under Article 25(2)(b) of the Constitution. Further, it is also declared that Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965 is unconstitutional being violative of Article 25(1) and Article 15(1) of the Constitution of India.

Dr Dhananjaya Y Chandrachud, J

178. The Preamble to the Constitution portrays the foundational principles: justice, liberty, equality and fraternity. While defining the content of these principles, the draftspersons laid out a broad canvass upon which the diversity of our society would be nurtured. Forty two years ago, the Constitution was amended to accommodate a specific reference to its secular fabric in the Preamble. The Constitution (Forty-second) Amendment, 1976 Arguably, this was only a formal recognition of a concept which found expression in diverse facets, as they were crafted at the birth of the Constitution. Secularism was not a new idea but a formal reiteration of what the Constitution always respected and accepted: the equality of all faiths. Besides incorporating a specific reference to a secular republic, the Preamble divulges the position held by the framers on the interface of religion and the fundamental values of a constitutional order. The Constitution is not - as it could not have been - oblivious to religion. Religiosity has moved hearts and minds in the history of modern India. Hence, in defining the content of liberty, the Preamble has spoken of the liberty of thought, expression, belief, faith and worship. While recognising and protecting individual liberty, the Preamble underscores the importance of equality, both in terms of status and opportunity. Above all, it seeks to promote among all citizens fraternity which would assure the dignity of the individual.

179. The significance of the Preamble lies both in its setting forth the founding principles of the Constitution as well as in the broad sweep of their content. The Constitution was brought into existence to oversee a radical transformation. There would be a transformation of political power from a colonial regime. There was to be a transformation in the structure of governance. Above all the Constitution envisages a transformation in the position of the individual, as a focal point of a just society. The institutions through which the nation would be governed would be subsumed in a democratic polity where real power both in legal and political terms would be entrusted to the people. The purpose of adopting a democratic Constitution was to allow a peaceful transition from a colonial power to home rule. In understanding the fundamental principles of the Constitution which find reflection in the Preamble, it is crucial to notice that the transfer of political power from a colonial regime was but one of the purposes which the framers sought to achieve. The transfer of political power furnished the imperative for drafting a fundamental text of governance. But the task which the framers assumed was infinitely more sensitive. They took upon themselves above all, the task

to transform Indian society by remedying centuries of discrimination against Dalits, women and the marginalised. They sought to provide them a voice by creating a culture of rights and a political environment to assert freedom. Above all, placing those who were denuded of their human rights before the advent of the Constitution - whether in the veneer of caste, patriarchy or otherwise - were to be placed in control of their own destinies by the assurance of the equal protection of law. Fundamental to their vision was the ability of the Constitution to pursue a social transformation. Intrinsic to the social transformation is the role of each individual citizen in securing justice, liberty, equality and fraternity in all its dimensions.

182. Essentially, the significance of this case lies in the issues which it poses to the adjudicatory role of this Court in defining the boundaries of religion in a dialogue about our public spaces. Does the Constitution, in the protection which it grants to religious faith, allow the exclusion of women of a particular age group from a temple dedicated to the public? Will the quest for human dignity be incomplete or remain but a writ in sand if the Constitution accepts the exclusion of women from worship in a public temple? Will the quest for equality and fraternity be denuded of its content where women continue to be treated as children of a lesser god in exercising their liberties in matters of belief, faith and worship? Will the pursuit of individual dignity be capable of being achieved if we deny to women equal rights in matters of faith and worship, on the basis of a physiological aspect of their existence? These questions are central to understanding the purpose of the Constitution, as they are to defining the role which is ascribed to the Constitution in controlling the closed boundaries of organised religion.

184. Yet, the right to the freedom of religion is not absolute. For the Constitution has expressly made it subject to public order, morality and health on one hand and to the other provisions of Part III, on the other. The subjection of the individual right to the freedom of religion to the other provisions of the Part is a nuanced departure from the position occupied by the other rights to freedom recognised in Articles 14, 15, 19 and 21. While guaranteeing equality and the equal protection of laws in Article 14 and its emanation, in Article 15, which prohibits discrimination on grounds of religion, race, caste, sex or place of birth, the Constitution does not condition these basic norms of equality to the other provisions of Part III. Similar is the case with the freedoms guaranteed by Article 19(1) or the right to life under Article 21. The subjection of the individual right to the freedom of religion under Article 25(1) to the other provisions of Part III was not a matter without substantive content. Evidently, in the constitutional order of priorities, the individual right to the freedom of religion was not intended to prevail over but was subject to the overriding constitutional postulates of equality, liberty and personal freedoms recognised in the other provisions of Part III.

185. Clause (2) of Article 25 protects laws which existed at the adoption of the Constitution and the power of the state to enact laws in future, dealing with two categories. The first of those categories consists of laws regulating or restricting economic, financial, political or other secular activities which may be associated with religious practices. Thus, in sub-clause (a) of Article 25 (2), the Constitution has segregated matters of religious practice from secular activities, including those of an economic, financial or political nature. The expression "other secular activity" which follows upon the expression "economic, financial, political" indicates that matters of a secular nature may be regulated or restricted by law. The fact that these secular activities are associated with or, in other words, carried out in conjunction with religious practice, would not put them beyond the pale of legislative regulation. The second category consists of laws providing for (i) social welfare and reform; or (ii) throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. The expression "social welfare and reform" is not confined to matters only of the Hindu religion. However, in matters of temple entry, the Constitution recognised the disabilities which Hindu religion had imposed over the centuries which restricted the rights of access to dalits and to various groups within Hindu society. The effect of clause (2) of Article 25 is to protect the ability of the state to enact laws, and to save existing laws on matters governed by sub-clauses (a) and (b). Clause (2) of Article 25 is clarificatory of the regulatory power of the state over matters of public order, morality and health which already stand recognised in clause (1). Clause 1 makes the right conferred subject to public order, morality and health. Clause 2 does not circumscribe the ambit of the 'subject to public order, morality or health' stipulation in clause 1. What clause 2 indicates is that the authority of the state to enact laws on the categories

is not trammelled by Article 25.

187. Public order, morality and health are grounds which the Constitution contemplates as the basis of restricting both the individual right to freedom of religion in Article 25(1) and the right of religious denominations under Article 26. The vexed issue is about the content of morality in Articles 25 and 26. What meaning should be ascribed to the content of the expression 'morality' is a matter of constitutional moment. In the case of the individual right as well as the right of religious denominations, morality has an overarching position similar to public order and health because the rights recognised by both the Articles are subject to those stipulations. Article 25(2) contemplates that the Article will neither affect the operation of existing law or prevent the state from enacting a law for the purposes stipulated in sub-clauses (a) and (b).

193. Much of our jurisprudence on religion has evolved, as we shall see, around what constitutes an essential religious practice. At a certain level an adjudication of what is a religious practice seems to have emerged from the distinction made in clause 2(a) of Article 25 between a religious practice and economic, financial, political or other secular activities which are associated with religious practices. Where the state has enacted a law by which it claims to have regulated a secular activity associated with a religious practice, but not the religious practice, it becomes necessary to decide the issue, where the validity of the law is challenged. Similarly, Article 26(b) speaks of "matters of religion" when it recognises the right of a religious denomination to manage them. In the context of Article 26(b), this Court has embarked upon a course to decide in individual cases whether, what was said to be regulated by the state was a matter of religion which falls within the freedom guaranteed to the denomination. These compulsions nonetheless have led the court to don a theological mantle. The enquiry has moved from deciding what is essentially religious to what is an essential religious practice. Donning such a role is not an easy task when the Court is called upon to decide whether a practice does nor does not form an essential part of a religious belief. Scriptures and customs merge with bewildering complexity into superstition and dogma. Separating the grain from the chaff involves a complex adjudicatory function. Decisions of the Court have attempted to bring in a measure of objectivity by holding that the Court has been called upon to decide on the basis of the tenets of the religion itself. But even that is not a consistent norm.

234. Human dignity postulates an equality between persons. The equality of all human beings entails being free from the restrictive and dehumanizing effect of stereotypes and being equally entitled to the protection of law. Our Constitution has willed that dignity, liberty and equality serve as a guiding light for individuals, the state and this Court. Though our Constitution protects religious freedom and consequent rights and practices essential to religion, this Court will be guided by the pursuit to uphold the values of the Constitution, based in dignity, liberty and equality. In a constitutional order of priorities, these are values on which the edifice of the Constitution stands. They infuse our constitutional order with a vision for the future - of a just, equal and dignified society. Intrinsic to these values is the anti-exclusion principle. Exclusion is destructive of dignity. To exclude a woman from the might of worship is fundamentally at odds with constitutional values.

249. Article 17 occupies a unique position in our constitutional scheme. The Article, which prohibits a social practice, is located in the chapter on fundamental rights. The framers introduced Article 17, which prohibits a discriminatory and inhuman social practice, in addition to Articles 14 and 15, which provide for equality and non-discrimination. While there has been little discussion about Article 17 in textbooks on constitutional law, it is a provision which has a paramount social significance both in terms of acknowledging the past and in defining the vision of the Constitution for the present and for the future.

257. The Constitution has carefully eschewed a definition of "untouchability". The draftspersons realized that even a broadly couched definition may be restrictive. A definition would become restrictive if the words used or the instances depicted are not adequate to cover the manifold complexities of our social life through which prejudice and discrimination is manifest. Hence, even though the attention of the framers was drawn to the fact that "untouchability" is not a practice referable only to the lowest in the caste ordering but also was practiced against women (and in the absence of a definition, the prohibition would cover all its forms), the expression was designedly left undefined. The Constitution uses the expression "untouchability" in inverted comas. The use of a punctuation mark cannot be construed as intent to circumscribe the

constitutional width of the expression. The historical backdrop to the inclusion of the provision was provided by centuries of subjugation, discrimination and social exclusion. Article 17 is an intrinsic part of the social transformation which the Constitution seeks to achieve. Hence in construing it, the language of the Constitution should not be ascribed a curtailed meaning which will obliterate its true purpose. "Untouchability" in any form is forbidden. The operation of the words used by the Constitution cannot be confined to a particular form or manifestation of "untouchability". The Constitution as a constantly evolving instrument has to be flexible to reach out to injustice based on untouchability, in any of its forms or manifestations. Article 17 is a powerful guarantee against exclusion. As an expression of the anti-exclusion principle, it cannot be read to exclude women against whom social exclusion of the worst kind has been practiced and legitimized on notions of purity and pollution.

263. The use of the term 'includes' in Section 2(c) indicates that the scope of the words 'section or class' cannot be confined only to 'division', 'sub-division', 'caste', 'sub-caste', 'sect' or 'denomination'. 'Section or class', would be susceptible to a broad interpretation that includes 'women' within its ambit. Section 2(b) uses the expression "Hindus or any section or class thereof". Plainly, individuals who profess and practise the faith are Hindus. Moreover, every section or class of Hindus is comprehended within the expression. That must necessarily include women who profess and practise the Hindu religion. The wide ambit of the expression "section or class" emerges from Section 2(c). Apart from the inclusive definition, the expression includes any division, sub-division, caste, sub-caste, sect or denomination whatsoever. Women constitute a section or class. The expression 'section or class' must receive the meaning which is ascribed to it in common parlance. Hence, looked at from any perspective, women would be comprehended within that expression.

The long title of the Act indicates that its object is "to make better provisions for the entry of all classes and sections of Hindus into places of public worship". The long title is a part of the Act and is a permissible aid to construction. Union of India v Elphinstone Spinning and Weaving Co Ltd, (2001) 4 SCC 139 2001 Indlaw SC 19962 The Act was enacted to remedy the restriction on the right of entry of all Hindus in temples and their right to worship in them. The legislation is aimed at bringing about social reform. The legislature endeavoured to strike at the heart of the social evil of exclusion and sought to give another layer of recognition and protection to the fundamental right of every person to freely profess, practice and propagate religion under Article 25. Inclusion of women in the definition of 'section and class' in Section 2(c) furthers the object of the law, and recognizes the right of every Hindu to enter and worship in a temple. It is an attempt to pierce through imaginary social constructs formed around the practice of worship, whose ultimate effect is exclusion. A just and proper construction of Section 2(c) requires that women be included within the definition of 'section or class'.

265. We have held that the devotees of Lord Ayyappa do not constitute a religious denomination and the Sabarimala temple is not a denominational temple. The proviso has no application. The notifications which restrict the entry of women between the ages of ten and fifty in the Sabarimala temple cannot stand scrutiny and plainly infringe Section 3. They prevent any woman between the age of ten and fifty from entering the Sabarimala temple and from offering prayers. Such a restriction would infringe the rights of all Hindu women which are recognized by Section 3. The notifications issued by the Board prohibiting the entry of women between ages ten and fifty-five, are ultra vires Section 3.

266. The next question is whether Rule 3(b) of the 1965 Rules is ultra vires the 1965 Act.

267. When the rule-making power is conferred by legislation on a delegate, the latter cannot make a rule contrary to the provisions of the parent legislation. The rule-making authority does not have the power to make a rule beyond the scope of the enabling law or inconsistent with the law. Additional District Magistrate v Siri Ram, (2000) 5 SCC 451 2000 Indlaw SC 331 Whether delegated legislation is in excess of the power conferred on the delegate is determined with reference to the specific provisions of the statute conferring the power and the object of the Act as gathered from its provisions. Maharashtra State Board of Secondary and Higher Education v Paritosh Bhupeshkumar Sheth, (1984) 4 SCC 27 1984 Indlaw SC 322

268. Hindu women constitute a 'section or class' of Hindus under clauses b and c of Section 2 of the 1965 Act. The proviso to Section 4(1) forbids any regulation which discriminates against any Hindu on the ground of belonging to a particular section or class. Above all, the mandate of Section 3 is that if a place of public

worship is open to Hindus generally or to any section or class of Hindus, it shall be open to all sections or classes of Hindus. The Sabarimala temple is open to Hindus generally and in any case to a section or class of Hindus. Hence it has to be open to all sections or classes of Hindus, including Hindu women. Rule 3(b) gives precedence to customs and usages which allow the exclusion of women "at such time during which they are not... allowed to enter a place of public worship". In laying down such a prescription, Rule 3(b) directly offends the right of temple entry established by Section 3. Section 3 overrides any custom or usage to the contrary. But Rule 3 acknowledges, recognises and enforces a custom or usage to exclude women. This is plainly ultra vires.

The object of the Act is to enable the entry of all sections and classes of Hindus into temples dedicated to, or for the benefit of or used by any section or class of Hindus. The Act recognizes the rights of all sections and classes of Hindus to enter places of public worship and their right to offer prayers. The law was enacted to remedy centuries of discrimination and is an emanation of Article 25(2)(b) of the Constitution. The broad and liberal object of the Act cannot be shackled by the exclusion of women. Rule 3(b) is ultra vires.

278. The Indian Constitution is marked by a transformative vision. Its transformative potential lies in recognizing its supremacy over all bodies of law and practices that claim the continuation of a past which militates against its vision of a just society. At the heart of transformative constitutionalism, is a recognition of change. What transformation in social relations did the Constitution seek to achieve? What vision of society does the Constitution envisage? The answer to these questions lies in the recognition of the individual as the basic unit of the Constitution. This view demands that existing structures and laws be viewed from the prism of individual dignity.

Did the Constitution intend to exclude any practice from its scrutiny? Did it intend that practices that speak against its vision of dignity, equality and liberty of the individual be granted immunity from scrutiny? Was it intended that practices that detract from the transformative vision of the Constitution be granted supremacy over it? To my mind, the answer to all these, is in the negative.

The individual, as the basic unit, is at the heart of the Constitution. All rights and guarantees of the Constitution are operationalized and are aimed towards the self-realization of the individual. This makes the anti-exclusion principle firmly rooted in the transformative vision of the Constitution, and at the heart of judicial enquiry. Irrespective of the source from which a practice claims legitimacy, this principle enjoins the Court to deny protection to practices that detract from the constitutional vision of an equal citizenship.

290. The anti-exclusion principle allows for due-deference to the ability of a religion to determine its own religious tenets and doctrines. At the same time, the anti-exclusion principle postulates that where a religious practice causes the exclusion of individuals in a manner which impairs their dignity or hampers their access to basic goods, the freedom of religion must give way to the over-arching values of a liberal constitution. The essential religious practices test should merit a close look, again for the above reasons, in an appropriate case in the future. For the present, this judgment has decided the issues raised on the law as it stands.

he case at hand asks important questions of our conversation with the Constitution. In a dialogue about our public spaces, it raises the question of the boundaries of religion under the Constitution. The quest for equality is denuded of its content if practices that exclude women are treated to be acceptable. The Constitution cannot allow practices, irrespective of their source, which are derogatory to women. Religion cannot become a cover to exclude and to deny the right of every woman to find fulfillment in worship.

Conclusion

297. I hold and declare that:

(1) The devotees of Lord Ayyappa do not satisfy the judicially enunciated requirements to constitute a religious denomination under Article 26 of the Constitution;

(2) A claim for the exclusion of women from religious worship, even if it be founded in religious text, is subordinate to the constitutional values of liberty, dignity and equality. Exclusionary practices are contrary to constitutional morality;

(3) In any event, the practice of excluding women from the temple at Sabarimala is not an essential religious practice. The Court must decline to grant constitutional legitimacy to practices which derogate from the

dignity of women and to their entitlement to an equal citizenship;
(4) The social exclusion of women, based on menstrual status, is a form of untouchability which is an anathema to constitutional values. Notions of "purity and pollution", which stigmatize individuals, have no place in a constitutional order;
(5) The notifications dated 21 October 1955 and 27 November 1956 issued by the Devaswom Board, prohibiting the entry of women between the ages of ten and fifty, are ultra vires Section 3 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act 1965 and are even otherwise unconstitutional; and
(6) Hindu women constitute a 'section or class' of Hindus under clauses (b) and (c) of Section 2 of the 1965 Act. Rule 3(b) of the 1965 Rules enforces a custom contrary to Section 3 of the 1965 Act. This directly offends the right of temple entry established by Section 3. Rule 3(b) is ultra vires the 1965 Act.

INDU MALHOTRA, J.
298. The present Writ Petition has been filed in public interest by a registered association of Young Lawyers. The Intervenors in the Application for Intervention have averred that they are gender rights activists working in and around the State of Punjab, with a focus on issues of gender equality and justice, sexuality, and menstrual discrimination.
305. APPLICABILITY OF ARTICLE 14 IN MATTERS OF RELIGION AND RELIGIOUS PRACTISES
305.1. Religious customs and practises cannot be solely tested on the touchstone of Article 14 and the principles of rationality embedded therein. Article 25 specifically provides the equal entitlement of every individual to freely practise their religion. Equal treatment under Article 25 is conditioned by the essential beliefs and practises of any religion. Equality in matters of religion must be viewed in the context of the worshippers of the same faith.
305.2. The twin-test for determining the validity of a classification under Article 14 is:
- The classification must be founded on an intelligible differentia; and
- It must have a rational nexus with the object sought to be achieved by the impugned law.
The difficulty lies in applying the tests under Article 14 to religious practises which are also protected as Fundamental Rights under our Constitution. The right to equality claimed by the Petitioners under Article 14 conflicts with the rights of the worshippers of this shrine which is also a Fundamental Right guaranteed by Articles 25, and 26 of the Constitution. It would compel the Court to undertake judicial review under Article 14 to delineate the rationality of the religious beliefs or practises, which would be outside the ken of the Courts. It is not for the courts to determine which of these practises of a faith are to be struck down, except if they are pernicious, oppressive, or a social evil, like Sati.
305.3. The submissions made by the Counsel for the Petitioners is premised on the view that this practise constitutes gender discrimination against women. On the other hand, the Respondents submit that the present case deals with the right of the devotees of this denomination or sect, as the case may be, to practise their religion in accordance with the tenets and beliefs, which are considered to be "essential" religious practises of this shrine.
305.4. The Petitioners and Intervenors have contended that the age group of 10 to 50 years is arbitrary, and cannot stand the rigours of Article 14. This submission cannot be accepted, since the prescription of this age-band is the only practical way of ensuring that the limited restriction on the entry of women is adhered to.
305.5. The right to gender equality to offer worship to Lord Ayyappa is protected by permitting women of all ages, to visit temples where he has not manifested himself in the form of a 'Naishtik Brahamachari', and there is no similar restriction in those temples. It is pertinent to mention that the Respondents, in this context, have submitted that there are over 1000 temples of Lord Ayyappa, where he has manifested in other forms, and this restriction does not apply.
305.6. The prayers of the Petitioners if acceded to, in its true effect, amounts to exercising powers of judicial review in determining the validity of religious beliefs and practises, which would be outside the ken of the courts. The issue of what constitutes an essential religious practise is for the religious community to decide.
306. APPLICABILITY OF ARTICLE 15

306.1. Article 15 of the Constitution prohibits differential treatment of persons on the ground of 'sex' alone. The limited restriction on the entry of women during the notified age-group but in the deep-rooted belief of the worshippers that the deity in the Sabarimala Temple has manifested in the form of a 'Naishtik Brahmachari'.

307.8. The Constitution lays emphasis on social justice and equality. It has specifically provided for social welfare and reform, and throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus through the process of legislation in Article 25(2)(b) of the Constitution. Article 25(2)(b) is an enabling provision which permits the State to redress social inequalities and injustices by framing legislation.

It is therefore difficult to accept the contention that Article 25(2)(b) is capable of application without reference to an actual legislation. What is permitted by Article 25(2) is State made law on the grounds specified therein, and not judicial intervention.

307.13. Judicial review of religious practises ought not to be undertaken, as the Court cannot impose its morality or rationality with respect to the form of worship of a deity. Doing so would negate the freedom to practise one's religion according to one's faith and beliefs. It would amount to rationalising religion, faith and beliefs, which is outside the ken of Courts.

308. CONSTITUTIONAL MORALITY IN MATTERS OF RELIGION IN A SECULAR POLITY

308.3. The Preamble to the Constitution secures to all citizens of this country liberty of thought, expression, belief, faith and worship. Article 25 in Part III of the Constitution make freedom of conscience a Fundamental Right guaranteed to all persons who are equally entitled to the right to freely profess, practise and propagate their respective religion. This freedom is subject to public order, morality and health, and to the other provisions of Part III of the Constitution.

Article 26 guarantees the freedom to every religious denomination, or any sect thereof, the right to establish and maintain institutions for religious purposes, manage its own affairs in matters of religion, own and acquire movable and immovable property, and to administer such property in accordance with law. This right is subject to public order, morality and health. The right under Article 26 is not subject to Part III of the Constitution.

308.4. The framers of the Constitution were aware of the rich history and heritage of this country being a secular polity, with diverse religions and faiths, which were protected within the fold of Articles 25 and 26. State interference was not permissible, except as provided by Article 25(2)(b) of the Constitution, where the State may make law providing for social welfare and reform.

308.5. The concept of Constitutional Morality refers to the moral values underpinning the text of the Constitution, which are instructive in ascertaining the true meaning of the Constitution, and achieve the objects contemplated therein.

308.6. Constitutional Morality in a pluralistic society and secular polity would reflect that the followers of various sects have the freedom to practise their faith in accordance with the tenets of their religion. It is irrelevant whether the practise is rational or logical. Notions of rationality cannot be invoked in matters of religion by courts.

309. RELIGIOUS DENOMINATION

309.1. Article 26 of the Constitution guarantees the freedom to every religious denomination, or sect thereof, the right to establish and maintain institutions for religious or charitable purposes, and to manage their own affairs in matters of religion. The right conferred under Article 26 is subject to public order, morality and health, and not to any other provisions in Part III of the Constitution.

309.2. A religious denomination or organisation enjoys complete autonomy in matters of deciding what rites and ceremonies are essential according to the tenets of that religion. The only restriction imposed is on the exercise of the right being subject to public order, morality and health under Article 26.

309.9. The Respondents have made out a strong and plausible case that the worshippers of the Sabarimala Temple have the attributes of a religious denomination.

309.10. The issue whether the Sabarimala Temple constitutes a 'religious denomination', or a sect thereof, is a mixed question of fact and law. It is trite in law that a question of fact should not be decided in writ

proceedings. The proper forum to ascertain whether a certain sect constitutes a religious denomination or not, would be more appropriately determined by a civil court, where both parties are given the opportunity of leading evidence to establish their case.

310.6. Reference is required to be made to the doctrines and tenets of a religion, its historical background, and the scriptural texts to ascertain the 'essentiality' of religious practises.

The 'essential practises test' in its application would have to be determined by the tenets of the religion itself. The practises and beliefs which are considered to be integral by the religious community are to be regarded as "essential", and afforded protection under Article 25.

The only way to determine the essential practises test would be with reference to the practises followed since time immemorial, which may have been scripted in the religious texts of this temple. If any practise in a particular temple can be traced to antiquity, and is integral to the temple, it must be taken to be an essential religious practise of that temple.

310.9. The practise of celibacy and austerity is the unique characteristic of the deity in the Sabarimala Temple.

Hindu deities have both physical/temporal and philosophical form. The same deity is capable of having different physical and spiritual forms or manifestations. Worship of each of these forms is unique, and not all forms are worshipped by all persons.

Worship has two elements - the worshipper, and the worshipped. The right to worship under Article 25 cannot be claimed in the absence of the deity in the particular form in which he has manifested himself.

310.11. In the case of the Sabarimala Temple, the manifestation is in the form of a 'Naishtik Brahmachari'. The belief in a deity, and the form in which he has manifested himself is a fundamental right protected by Article 25(1) of the Constitution.

The phrase "equally entitled to", as it occurs in Article 25(1), must mean that each devotee is equally entitled to profess, practise and propagate his religion, as per the tenets of that religion.

310.12. In the present case, the celibate nature of the deity at the Sabarimala Temple has been traced by the Respondents to the Sthal Purana of this Temple chronicled in the 'Bhuthanatha Geetha'. Evidence of these practises are also documented in the Memoir of the Survey of the Travancore and Cochin States Supra note 9 written by Lieutenants Ward and Conner published in two parts in 1893 and 1901.

13.14. In the present case, the character of the temple at Sabarimala is unique on the basis of centuries old religious practises followed to preserve the manifestation of the deity, and the worship associated with it. Any interference with the mode and manner of worship of this religious denomination, or sect, would impact the character of the Temple, and affect the beliefs and practises of the worshippers of this Temple.

311. ARTICLE 17

311.1. The contention of the Petitioners that the restriction imposed on the entry of women during the notified age group, tantamounts to a form of 'Untouchability' under Article 17 of the Constitution, is liable to be rejected for the reasons stated hereinafter.

311.2. All forms of exclusion would not tantamount to untouchability. Article 17 pertains to untouchability based on caste prejudice. Literally or historically, untouchability was never understood to apply to women as a class. The right asserted by the Petitioners is different from the right asserted by Dalits in the temple entry movement. The restriction on women within a certain age-band, is based upon the historical origin and the beliefs and practises of the Sabarimala Temple.

311.3. In the present case, women of the notified age group are allowed entry into all other temples of Lord Ayyappa. The restriction on the entry of women during the notified age group in this Temple is based on the unique characteristic of the deity, and not founded on any social exclusion. The analogy sought to be drawn by comparing the rights of Dalits with reference to entry to temples and women is wholly misconceived and unsustainable.

The right asserted by Dalits was in pursuance of right against systematic social exclusion and for social acceptance per se.

In the case of temple entry, social reform preceded the statutory reform, and not the other way about. The social reform was spearheaded by great religious as well as national leaders like Swami Vivekananda and

Mahatma Gandhi. The reforms were based upon societal morality, much before Constitutional Morality came into place.

312. RULE 3(B) OF THE 1965 RULES IS NOT ULTRA VIRES THE ACT

312.3. Rule 3(b) is a statutory recognition of a pre-existing custom and usage being followed by this Temple. Rule 3(b) is within the ambit of the proviso to Section 3 of the 1965 Act, as it recognises pre-existing customs and usages including past traditions which have been practised since time immemorial qua the Temple. The Travancore Devaswom Board submits that these practises are integral and essential to the Temple.

312.4. The Petitioners have not challenged the proviso to Section 3 as being unconstitutional on any ground. The proviso to Section 3 makes an exception in cases of religious denominations, or sects thereof to manage their affairs in matters of religion.

312.5. The Notification dated November 27, 1956 issued by the Travancore Devaswom Board restricts the entry of women between the ages of 10 to 55 years as a custom and practise integral to the sanctity of the Temple, and having the force of law under Article 13(3)(a) of the Constitution. The High Court in S. Mahendran v. The Secretary, Travancore Devaswom Board, Thiruvananthapuram & Ors. (supra) noted that this practise of restricting the entry of women is admitted to have been prevalent since the past several centuries. These practises are protected by the proviso to Section 3 of the 1965 Act which is given effect to by Rule 3(b) of the 1965 Rules.

Conclusion

313. The summary of the aforesaid analysis is as follows:

(i) The Writ Petition does not deserve to be entertained for want of standing. The grievances raised are non-justiciable at the behest of the Petitioners and Intervenors involved herein.

(ii) The equality doctrine enshrined under Article 14 does not override the Fundamental Right guaranteed by Article 25 to every individual to freely profess, practise and propagate their faith, in accordance with the tenets of their religion.

(iii) Constitutional Morality in a secular polity would imply the harmonisation of the Fundamental Rights, which include the right of every individual, religious denomination, or sect, to practise their faith and belief in accordance with the tenets of their religion, irrespective of whether the practise is rational or logical.

(iv) The Respondents and the Intervenors have made out a plausible case that the Ayyappans or worshippers of the Sabarimala Temple satisfy the requirements of being a religious denomination, or sect thereof, which is entitled to the protection provided by Article 26. This is a mixed question of fact and law which ought to be decided before a competent court of civil jurisdiction.

(v) The limited restriction on the entry of women during the notified age-group does not fall within the purview of Article 17 of the Constitution.

(vi) Rule 3(b) of the 1965 Rules is not ultra vires Section 3 of the 1965 Act, since the proviso carves out an exception in the case of public worship in a temple for the benefit of any religious denomination or sect thereof, to manage their affairs in matters of religion.

314. In light of the aforesaid discussion and analysis, the Writ Petition cannot be entertained on the grounds enumerated hereinabove.

It is ordered accordingly.

Order accordingly

IN THE SUPREME COURT OF INDIA

Decided on: 27.09.2018

Joseph Shine

v

Union of India

Case No : Writ Petition (Criminal) No. 194 of 2017
Bench : Dipak Misra, A.M. Khanwilkar, R.F. Nariman, Dr. D.Y. Chandrachud, Indu Malhotra
Citation : 2018 Indlaw SC 899

The Judgment was delivered by: Dipak Misra, J. (also on behalf of A.M. Khanwilkar, J)

1. The beauty of the Indian Constitution is that it includes 'I' 'you' and 'we'. Such a magnificent, compassionate and monumental document embodies emphatic inclusiveness which has been further nurtured by judicial sensitivity when it has developed the concept of golden triangle of fundamental rights. If we have to apply the parameters of a fundamental right, it is an expression of judicial sensibility which further enhances the beauty of the Constitution as conceived of. In such a situation, the essentiality of the rights of women gets the real requisite space in the living room of individual dignity rather than the space in an annexe to the main building. That is the manifestation of concerned sensitivity. Individual dignity has a sanctified realm in a civilized society. The civility of a civilization earns warmth and respect when it respects more the individuality of a woman. The said concept gets a further accent when a woman is treated with the real spirit of equality with a man. Any system treating a woman with indignity, inequity and inequality or discrimination invites the wrath of the Constitution. Any provision that might have, few decades back, got the stamp of serene approval may have to meet its epitaph with the efflux of time and growing constitutional precepts and progressive perception. A woman cannot be asked to think as a man or as how the society desires. Such a thought is abominable, for it slaughters her core identity. And, it is time to say that a husband is not the master. Equality is the governing parameter. All historical perceptions should evaporate and their obituaries be written.

2. At this juncture, it is necessary to state that though there is necessity of certainty of law, yet with the societal changes and more so, when the rights are expanded by the Court in respect of certain aspects having regard to the reflective perception of the organic and living Constitution, it is not apposite to have an inflexible stand on the foundation that the concept of certainty of law should be allowed to prevail and govern. The progression in law and the perceptual shift compels the present to have a penetrating look to the past.

5. The instant writ petition has been filed under Article 32 of the Constitution of India challenging the validity of Section 497 IPC. A three-Judge Bench, on the first occasion, taking note of the authorities in Yusuf Abdul Aziz v. State of Bombay 1954 SCR 930 : AIR 1954 SC 321 1954 Indlaw SC 54, Sowmithri Vishnu v. Union of India and another (1985)Supp SCC 137 : AIR 1985 SC 1618 1985 Indlaw SC 50, V. Revathi v. Union of India and others (1988)2 SCC 72 1988 Indlaw SC 384 and W. Kalyani v. State through Inspector of Police and another (2012) 1 SCC 358 2011 Indlaw SC 778 and appreciating the submissions advanced by the learned counsel for the petitioner, felt the necessity to have a re-look at the constitutionality of the provision.

6. At this stage, one aspect needs to be noted. At the time of initial hearing before the three-Judge Bench, the decision in Yusuf Abdul Aziz (supra) was cited and the cited Law Report reflected that the judgment was delivered by four learned Judges and later on, it was noticed, as is reflectible from the Supreme Court Reports, that the decision was rendered by a Constitution Bench comprising of five Judges of this Court.

7. The said factual discovery will not detain us any further. In Yusuf Abdul Aziz (supra), the Court was dealing with the controversy that had travelled to this Court while dealing with a different fact situation. In the said case, the question arose whether Section 497 contravened Articles 14 and 15 of the Constitution of India. In the said case, the appellant was being prosecuted for adultery under Section 497 IPC. As soon as the complaint was filed, the husband applied to the High Court of Bombay to determine the constitutional question under Article 228 of the Constitution. The Constitution Bench referring to Section 497 held thus:-

"3. Under Section 497 the offence of adultery can only be committed by a man but in the absence of any provision to the contrary the woman would be punishable as an abettor. The last sentence in Section 497 prohibits this. It runs-

"In such case the wife shall not be punishable as an abettor." It is said that this offends Articles 14 and 15. The portion of Article 15 on which the appellant relies is this:

"The State shall not discriminate against any citizen on grounds only of ... sex."
But what he overlooks is that that is subject to clause (3) which runs-
"Nothing in this article shall prevent the State from making any special provision for women ...."
The provision complained of is a special provision and it is made for women, therefore it is saved by clause (3).
4. It was argued that clause (3) should be confined to provisions which are beneficial to women and cannot be used to give them a licence to commit and abet crimes. We are unable to read any such restriction into the clause; nor are we able to agree that a provision which prohibits punishment is tantamount to a licence to commit the offence of which punishment has been prohibited.
5. Article 14 is general and must be read with the other provisions which set out the ambit of fundamental rights. Sex is a sound classification and although there can be no discrimination in general on that ground, the Constitution *itself provides for special provisions in the case of women and children. The two articles read together validate the impugned clause in Section 497 of the* Indian Penal Code.
6. The appellant is not a citizen of India. It was argued that he could not invoke Articles 14 and 15 for that reason. The High Court held otherwise. It is not necessary for us to decide this question in view of our decision on the other issue."
On a reading of the aforesaid passages, it is manifest that the Court treated the provision to be a special provision made for women and, therefore, saved by clause (3) of Article 15. Thus, the Court proceeded on the foundation of affirmative action.
9. Sections 497 and 498 of IPC read thus:-
"Section 497 : Adultery
Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.
Section 498 : Enticing or taking away or detaining with criminal intent a married woman
Whoever takes or entices away any woman who is and whom he knows or has reason to believe to be the wife of any other man, from that man, or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person, or conceals or detains with that intent any such woman, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."
11. On a perusal of the aforesaid provision, it is clear that the husband of the woman has been treated to be a person aggrieved for the offences punishable under Sections 497 and 498 of the IPC. The rest of the proviso carves out an exception as to who is entitled to file a complaint when the husband is absent. It may be noted that the offence is non-cognizable.
12. The three-Judge Bench, while referring the matter, had briefly dwelled upon the impact of the provision. To appreciate the constitutional validity, first, we shall deal with the earlier pronouncements and the principles enunciated therein and how we can have a different perspective of such provisions. We have already referred to what has been stated in Yusuf Abdul Aziz (supra).
18. At this juncture, we think it seemly to state that we are only going to deal with the constitutional validity of Section 497 IPC and Section 198 CrPC. The learned counsel for the petitioner submits that the provision by its very nature is arbitrary and invites the frown of Article 14 of the Constitution.
21. In Yusuf Abdul Aziz (supra), the Court understood the protection of women as not discriminatory but as being an affirmative provision under clause (3) of Article 15 of the Constitution. We intend to take the path of expanded horizon as gender justice has been expanded by this Court.
22. We may now proceed to test the provision on the touchstone of the aforesaid principles. On a reading of the provision, it is demonstrable that women are treated as subordinate to men inasmuch as it lays down that when there is connivance or consent of the man, there is no offence. This treats the woman as a chattel. It treats her as the property of man and totally subservient to the will of the master. It is a reflection of the

social dominance that was prevalent when the penal provision was drafted.

23. As we notice, the provision treats a married woman as a property of the husband. It is interesting to note that Section 497 IPC does not bring within its purview an extra marital relationship with an unmarried woman or a widow. The dictionary meaning of "adultery" is that a married person commits adultery if he has sex with a woman with whom he has not entered into wedlock. As per Black's Law Dictionary, 'adultery' is the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife. However, the provision has made it a restricted one as a consequence of which a man, in certain situations, becomes criminally liable for having committed adultery while, in other situations, he cannot be branded as a person who has committed adultery so as to invite the culpability of Section 497 IPC. Section 198 CrPC deals with a "person aggrieved". Sub-section (2) of Section 198 treats the husband of the woman as deemed to be aggrieved by an offence committed under Section 497 IPC and in the absence of husband, some person who had care of the woman on his behalf at the time when such offence was committed with the leave of the court. It does not consider the wife of the adulterer as an aggrieved person. The offence and the deeming definition of an aggrieved person, as we find, is absolutely and manifestly arbitrary as it does not even appear to be rational and it can be stated with emphasis that it confers a licence on the husband to deal with the wife as he likes which is extremely excessive and disproportionate. We are constrained to think so, as it does not treat a woman as an abettor but protects a woman and simultaneously, it does not enable the wife to file any criminal prosecution against the husband. Indubitably, she can take civil action but the husband is also entitled to take civil action. However, that does not save the provision as being manifestly arbitrary. That is one aspect of the matter. If the entire provision is scanned being Argus-eyed, we notice that on the one hand, it protects a woman and on the other, it does not protect the other woman. The rationale of the provision suffers from the absence of logicality of approach and, therefore, we have no hesitation in saying that it suffers from the vice of Article 14 of the Constitution being manifestly arbitrary.

24. Presently, we shall address the issue against the backdrop of Article 21 of the Constitution. For the said purpose, it is necessary to devote some space with regard to the dignity of women and the concept of gender equality.

42. Another aspect needs to be addressed. The question we intend to pose is whether adultery should be treated as a criminal offence. Even assuming that the new definition of adultery encapsules within its scope sexual intercourse with an unmarried woman or a widow, adultery is basically associated with the institution of marriage. There is no denial of the fact that marriage is treated as a social institution and regard being had to various aspects that social history has witnessed in this country, the Parliament has always made efforts to maintain the rights of women. For instance, Section 498-A IPC deals with husband or relative of husband of a woman subjecting her to cruelty. The Parliament has also brought in the Protection of Women from Domestic Violence Act, 2005. This enactment protects women. It also enters into the matrimonial sphere. The offences under the provisions of the said enactment are different from the provision that has been conceived of under Section 497 IPC or, for that matter, concerning bringing of adultery within the net of a criminal offence. There can be no shadow of doubt that adultery can be a ground for any kind of civil wrong including dissolution of marriage. But the pivotal question is whether it should be treated as a criminal offence. When we say so, it is not to be understood that there can be any kind of social licence that destroys the matrimonial home. It is an ideal condition when the wife and husband maintain their loyalty. We are not commenting on any kind of ideal situation but, in fact, focusing on whether the act of adultery should be treated as a criminal offence. In this context, we are reminded of what Edmund Burke, a famous thinker, had said, "a good legislation should be fit and equitable so that it can have a right to command obedience". Burke would like to put it in two compartments, namely, 'equity' and 'utility'. If the principle of Burke is properly understood, it conveys that laws and legislations are necessary to serve and promote a good life.

53. In case of adultery, the law expects the parties to remain loyal and maintain fidelity throughout and also makes the adulterer the culprit. This expectation by law is a command which gets into the core of privacy. That apart, it is a discriminatory command and also a socio-moral one. Two individuals may part on the said ground but to attach criminality to the same is inapposite.

56. As we have held that Section 497 IPC is unconstitutional and adultery should not be treated as an offence,

it is appropriate to declare Section 198 CrPC which deals with the procedure for filing a complaint in relation to the offence of adultery as unconstitutional. When the substantive provision goes, the procedural provision has to pave the same path.

57. In view of the foregoing analysis, the decisions in Sowmithri Vishnu (supra) and V. Revathi (supra) stand overruled and any other judgment following precedents also stands overruled.

58. Consequently, the writ petition is allowed to the extent indicated hereinbefore.

R.F. Nariman, J. (Concurring)

59. What is before us in this writ petition is the constitutional validity of an archaic provision of the Indian Penal Code ("IPC.), namely, Section 497, which makes adultery a crime. Section 497 appears in Chapter XX of the IPC, which deals with offences relating to marriage. Section 497 reads as follows:-

"497. Adultery.-Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor."

It will be noticed that the crime of adultery punishes only a third-party male offender as against the crime of bigamy, which punishes the bigamist, be it a man or a woman. What is therefore punished as 'adultery' is not 'adultery' per se but the proprietary interest of a married man in his wife.

Almost all ancient religions/civilizations punished the sin of adultery. In one of the oldest, namely, in Hammurabi's Code, death by drowning was prescribed for the sin of adultery, be it either by the husband or the wife. In Roman law, it was not a crime against the wife for a husband to have sex with a slave or an unmarried woman. The Roman lex Iulia de adulteriis coercendis of 17 B.C., properly so named after Emperor Augustus' daughter, Julia, punished Julia for adultery with banishment. Consequently, in the case of adulterers generally, both guilty parties were sent to be punished on different islands, and part of their property was confiscated.

82. It is clear, therefore, that the ostensible object of Section 497, as pleaded by the State, being to protect and preserve the sanctity of marriage, is not in fact the object of Section 497 at all, as has been seen hereinabove. The sanctity of marriage can be utterly destroyed by a married man having sexual intercourse with an unmarried woman or a widow, as has been seen hereinabove. Also, if the husband consents or connives at such sexual intercourse, the offence is not committed, thereby showing that it is not sanctity of marriage which is sought to be protected and preserved, but a proprietary right of a husband. Secondly, no deterrent effect has been shown to exist, or ever to have existed, which may be a legitimate consideration for a State enacting criminal law. Also, manifest arbitrariness is writ large even in cases where the offender happens to be a married woman whose marriage has broken down, as a result of which she no longer cohabits with her husband, and may in fact, have obtained a decree for judicial separation against her husband, preparatory to a divorce being granted. If, during this period, she has sex with another man, the other man is immediately guilty of the offence.

83. The aforesaid provision is also discriminatory and therefore, violative of Article 14 and Article 15(1). As has been held by us hereinabove, in treating a woman as chattel for the purposes of this provision, it is clear that such provision discriminates against women on grounds of sex only, and must be struck down on this ground as well. Section 198, CrPC is also a blatantly discriminatory provision, in that it is the husband alone or somebody on his behalf who can file a complaint against another man for this offence. Consequently, Section 198 has also to be held constitutionally infirm.

85. When we come to the decision of this Court in Yusuf Abdul Aziz (supra), it is clear that this judgment also does not, in any manner, commend itself or keep in tune with modern constitutional doctrine. In any case, as has been held above, its ratio is an extremely limited one as it upheld a wife not being punishable as an abettor which is contained in Section 497, IPC. The focus on whether the provision as a whole would be constitutionally infirm was not there in the aforesaid judgment.

At this stage, it is necessary to advert to Chief Justice Chagla's foresight in the Bombay High Court judgment

which landed up in appeal before this Court in Yusuf Abdul Aziz's (supra). Chief Justice Chagla had stated that since the underlying idea of Section 497 is that wives are properties of their husbands, Section 497 should not find a place in any modern Code of law, and is an argument in favour of doing away with Section 497 altogether. The day has long since arrived when the Section does, in fact, need to be done away with altogether, and is being done away with altogether.

86. In Sowmithri Vishnu (supra), this Court upheld Section 497 while repelling three arguments against its continuance, as has been noticed hereinabove. This judgment also must be said to be swept away by the tidal wave of recent judgments expanding the scope of the fundamental rights contained in Articles 14, 15, and 21. Ancient notions of the man being the seducer and the woman being the victim permeate the judgment, which is no longer the case today. The moving times have not left the law behind as we have just seen, and so far as engaging the attention of law makers when reform of penal law is undertaken, we may only hasten to add that even when the CrPC was fully replaced in 1973, Section 198 continued to be on the statute book. Even as of today, Section 497 IPC continues to be on the statute book. When these sections are wholly outdated and have outlived their purpose, not only does the maxim of Roman law, cessante ratione legis, cessat ipsa lex, apply to interdict such law, but when such law falls foul of constitutional guarantees, it is this Court's solemn duty not to wait for legislation but to strike down such law. As recently as in Shayara Bano (supra), it is only the minority view of Khehar, C.J.I. and S. Abdul Nazeer, J., that one must wait for the law to change legislatively by way of social reform. The majority view was the exact opposite, which is why Triple Talaq was found constitutionally infirm and struck down by the majority. Also, we are of the view that the statement in this judgment that stability of marriages is not an ideal to be scorned, can scarcely be applied to this provision, as we have seen that marital stability is not the object for which this provision was enacted. On all these counts, therefore, we overrule the judgment in Sowmithri Vishnu (supra). Equally, the judgment in V. Revathi (supra), which upheld the constitutional validity of Section 198 must, for similar reasons, be held to be no longer good law. We, therefore, declare that Section 497 of the Indian Penal Code, 1860 and Section 198 of the Code of Criminal Procedure, 1973 are violative of Articles 14, 15(1), and 21 of the Constitution of India and are, therefore, struck down as being invalid.

Dr Dhananjaya Y Chandrachud, J

87. Our Constitution is a repository of rights, a celebration of myriad freedoms and liberties. It envisages the creation of a society where the ideals of equality, dignity and freedom triumph over entrenched prejudices and injustices. The creation of a just, egalitarian society is a process. It often involves the questioning and obliteration of parochial social mores which are antithetical to constitutional morality. The case at hand enjoins this constitutional court to make an enquiry into the insidious permeation of patriarchal values into the legal order and its role in perpetuating gender injustices.

88. Law and society are intrinsically connected and oppressive social values often find expression in legal structures. The law influences society as well but societal values are slow to adapt to leads shown by the law. The law on adultery cannot be construed in isolation. To fully comprehend its nature and impact, every legislative provision must be understood as a 'discourse' about social structuring. Ratna Kapur and Brenda Cossman, Subversive Sites: Feminist Engagements with Law in India, Sage Publications (1996) at page 40 However, the discourse of law is not homogenous. Ibid at page 41 In the context particularly of Section 497, it regards individuals as 'gendered citizens'. Ibid In doing so, the law creates and ascribes gender roles based on existing societal stereotypes. An understanding of law as a 'discourse' would lead to the recognition of the role of law in creating 'gendered identities'. Ibid

97. The decision in Sowmithri Vishnu has left unanswered the fundamental challenge which was urged before the Court. Under Article 14, the challenge was that the statutory provision treats a woman purely as the property of her husband. That a woman is regarded no more than as a possession of her husband is evidenced in Section 497, in more than one context. The provision stipulates that a man who has sexual intercourse with the wife of another will not be guilty of offence if the husband of the woman were to consent or, (worse still, to connive. In this, it is evident that the legislature attributes no agency to the woman. Whether or not a man with whom she has engaged in sexual intercourse is guilty of an offence depends

exclusively on whether or not her husband is a consenting individual. No offence exists if her husband were to consent. Even if her husband were to connive at the act, no offence would be made out. The mirror image of this constitutional infirmity is that the wife of the man who has engaged in the act has no voice or agency under the statute. Again, the law does not make it an offence for a married man to engage in an act of sexual intercourse with a single woman. His wife is not regarded by the law as a person whose agency and dignity is affected. The underlying basis of not penalising a sexual act by a married man with a single woman is that she (unlike a married woman) is not the property of a man (as the law would treat her to be if she is married). Arbitrariness is writ large on the provision. The problem with Section 497 is not just a matter of under inclusion.

109. In its 156th Report, the Law Commission made a proposal which it believed reflected the "'transformation' which the society has undergone," by suggesting removing the exemption from liability for women under Section 497. Law Commission of India, 156th Report: Indian Penal Code (1997) at page 172 In 2003, the Justice Malimath Committee recommended that Section 497 be made gender-neutral, by substituting the words of the provision with "whosoever has sexual intercourse with the spouse of any other person is guilty of adultery."

117. The essence of the offence is that a man has engaged in an act of sexual intercourse with the wife of another man. But if the man to whom she is married were to consent or even to connive at the sexual relationship, the offence of adultery would not be established. For, in the eyes of law, in such a case it is for the man in the marital relationship to decide whether to agree to his spouse engaging in a sexual act with another. Indeed, even if the two men (the spouse of the woman and the man with whom she engages in a sexual act) were to connive, the offence of adultery would not be made out.

118. Section 497 is destructive of and deprives a woman of her agency, autonomy and dignity. If the ostensible object of the law is to protect the 'institution of marriage', it provides no justification for not recognising the agency of a woman whose spouse is engaged in a sexual relationship outside of marriage. She can neither complain nor is the fact that she is in a marital relationship with a man of any significance to the ingredients of the offence. The law also deprives the married woman who has engaged in a sexual act with another man, of her agency. She is treated as the property of her husband. That is why no offence of adultery would be made out if her husband were to consent to her sexual relationship outside marriage. Worse still, if the spouse of the woman were to connive with the person with whom she has engaged in sexual intercourse, the law would blink. Section 497 is thus founded on the notion that a woman by entering upon marriage loses, so to speak, her voice, autonomy and agency. Manifest arbitrariness is writ large on the provision.

121. The hypothesis which forms the basis of the law on adultery is the subsistence of a patriarchal order. Section 497 is based on a notion of morality which fails to accord with the values on which the Constitution is founded. The freedoms which the Constitution guarantees inhere in men and women alike. In enacting Section 497, the legislature made an ostensible effort to protect the institution of marriage. 'Ostensible' it is, because the provision postulates a notion of marriage which subverts the equality of spouses. Marriage in a constitutional regime is founded on the equality of and between spouses. Each of them is entitled to the same liberty which Part III guarantees. Each of them is entitled to take decisions in accordance with his and her conscience and each must have the ability to pursue the human desire for fulfilment. Section 497 is based on the understanding that marriage submerges the identity of the woman. It is based on a notion of marital subordination. In recognising, accepting and enforcing these notions, Section 497 is inconsistent with the ethos of the Constitution. Section 497 treats a woman as but a possession of her spouse. The essential values on which the Constitution is founded - liberty, dignity and equality - cannot allow such a view of marriage. Section 497 suffers from manifest arbitrariness.

123. The procedural law which has been enacted in Section 198 of the Code of Criminal Procedure 1973 re-enforces the stereotypes implicit in Section 497. Cognizance of an offence under Chapter XX of the Penal Code can be taken by a Court only upon a complaint of a person aggrieved. In the case of an offence punishable under Section 497, only the husband of the woman is deemed to be aggrieved by the offence. In any event, once the provisions of Section 497 are held to offend the fundamental rights, the procedure

engrafted in Section 198 will cease to have any practical relevance.

124. Section 497 amounts to a denial of substantive equality. The decisions in Sowmithri and Revathi espoused a formal notion of equality, which is contrary to the constitutional vision of a just social order. Justness postulates equality. In consonance with constitutional morality, substantive equality is "directed at eliminating individual, institutional and systemic discrimination against disadvantaged groups which effectively undermines their full and equal social, economic, political and cultural participation in society." Kathy Lahey, Feminist Theories of (In)equality, in Equality and Judicial Nuetrality (S.Martin and K.Mahoney (eds.) (1987) To move away from a formalistic notion of equality which disregards social realities, the Court must take into account the impact of the rule or provision in the lives of citizens.

Catherine Mackinnon implores us to look more critically at the reality of this family sphere, termed "personal," and view the family as a "crucible of women's unequal status and subordinate treatment sexually, physically, economically, and civilly." Catherine A Mackinnon, Sex equality under the Constitution of India: Problems, prospects, and 'personal laws',Oxford University Press and New York University School of Law (2006) In a social order which has enforced patriarchal notions of sexuality upon women and which treats them as subordinate to their spouses in heterosexual marriages, Section 497 perpetuates an already existing inequality.

126. Article 15 prohibits the State from discriminating on grounds only of sex. The Petitioners contend that (i) Section 497, in so far as it places a husband and wife on a different footing in a marriage perpetuates sex discrimination; (ii) Section 497 is based on the patriarchal conception of the woman as property, entrenches gender stereotypes, and is consequently hit by Article 15.

From a joint reading of Section 497 of the Indian Penal Code and Section 198(2) of the Code of Criminal Procedure, the following propositions emerge:

i. Sexual relations by a married woman with another man outside her marriage without the consent of her husband is criminalized;

ii. In an 'adulterous relationship', the man is punished for adultery, while the woman is not (even as an abettor);

iii. Sexual relations by a married man with an unmarried woman are not criminalized;

iv. Section 497 accords primacy to the consent of the husband to determine whether criminality is attached to the man who has consensual sexual relations with the spouse of the former. Consent or willingness of the woman is irrelevant to the offence;

v. A man who has sexual relations with the spouse of another man is relieved of the offence only if her spouse has consented or, even connived; and

vi. Section 497, IPC, read with Section 198, Cr.PC, gives the man the sole right to lodge a complaint and precludes a woman from initiating criminal proceedings.

127. The operation of Section 497, by definition, is confined to the sexual relations of a woman outside her marriage. A man who has sexual intercourse with a married woman without the consent or connivance of her husband, is liable to be prosecuted under the Section. However, a married man may engage in sexual relations outside marriage with a single woman without any repercussion in criminal law. Though granted immunity from prosecution, a woman is forced to consider the prospect of the penal action that will attach upon the individual with whom she engages in a sexual act. To ensure the fidelity of his spouse, the man is given the power to invoke the criminal sanction of the State. In effect, her spouse is empowered to curtail her sexual agency. The consent of the husband serves as the key to the exercise of the sexual agency of his spouse. That the married woman is in a consensual relationship, is of no consequence to the possible prosecution.

A married man may engage in sexual relations with an unmarried woman who is not his wife without the fear of opening his partner to prosecution and without the consent of his spouse. No recourse is provided to a woman against her husband who engages in sexual relations outside marriage. The effect of Section 497 is to allow the sexual agency of a married woman to be wholly dependent on the consent or connivance of her husband. Though Section 497 does not punish a woman engaging in adultery as an abettor, a married man and a married woman are placed on different pedestals in respect to their actions. The effect of Section

497, despite granting immunity from prosecution to the married woman, is to attach a notion of wrongdoing to the exercise of her sexual agency. Despite exempting her from prosecution, the exercise of her sexual agency is contingent on the consent or connivance of the husband. A husband is considered an aggrieved party by the law if his wife engages in sexual intercourse with another man, but the wife is not, if her husband does the same. Viewed from this angle, Section 497 discriminates between a married man and a married woman to her detriment on the ground of sex. This kind of discrimination is prohibited by the non-discrimination guarantee in Article 15 of the Constitution. Section 497 also places a woman within marriage and the man with whom she shares a sexual relationship outside marriage on a different footing.

128. Section 497 criminalizes the conduct of the man who has sexual intercourse with the wife of another without his consent. It exempts women from criminal liability. Underlying this exemption is the notion that women, being denuded of sexual agency, should be afforded the 'protection' of the law. In criminalizing the accused who engages in the sexual relationship, the law perpetuates a gender stereotype that men, possessing sexual agency are the seducers, and that women, as passive beings devoid of sexual agency, are the seduced. The notion that a woman is 'submissive', or worse still 'naive' has no legitimacy in the discourse of a liberal constitution. It is deeply offensive to equality and destructive of the dignity of the woman. On this stereotype, Section 497 criminalizes only the accused man.

130. Underlying Section 497 is a gender stereotype that the infidelity of men is normal, but that of a woman is impermissible. In condemning the sexual agency of the woman, only the husband, as the 'aggrieved' party is given the right to initiate prosecution. The proceedings once initiated, would be geared against the person who committed an act of 'theft' or 'trespass' upon his spouse. Sexual relations by a man with another man's wife is therefore considered as theft of the husband's property. Ensuring a man's control over the sexuality of his wife was the true purpose of Section 497.

134. Article 15(3) encapsulates the notion of 'protective discrimination'. The constitutional guarantee in Article 15(3) cannot be employed in a manner that entrenches paternalistic notions of 'protection'. This latter view of protection only serves to place women in a cage. Article 15(3) does not exist in isolation. Articles 14 to 18, being constituents of a single code on equality, supplement each other and incorporate a non-discrimination principle. Neither Article 15(1), nor Article 15(3) allow discrimination against women. Discrimination which is grounded in paternalistic and patriarchal notions cannot claim the protection of Article 15(3). In exempting women from criminal prosecution, Section 497 implies that a woman has no sexual agency and that she was 'seduced' into a sexual relationship. Given the presumed lack of sexual agency, criminal exemption is then granted to the woman in order to 'protect' her. The 'protection' afforded to women under Section 497 highlights the lack of sexual agency that the section imputes to a woman. Article 15(3) when read with the other Articles in Part III, serves as a powerful remedy to remedy the discrimination and prejudice faced by women for centuries. Article 15(3) as an enabling provision is intended to bring out substantive equality in the fullest sense. Dignity and autonomy are crucial to substantive equality. Hence, Article 15(3) does not protect a statutory provision that entrenches patriarchal notions in the garb of protecting women.

145. In criminalizing adultery, the legislature has imposed its imprimatur on the control by a man over the sexuality of his spouse. In doing that, the statutory provision fails to meet the touchstone of Article 21. Section 497 deprives a woman of her autonomy, dignity and privacy. It compounds the encroachment on her right to life and personal liberty by adopting a notion of marriage which subverts true equality. Equality is subverted by lending the sanctions of the penal law to a gender biased approach to the relationship of a man and a woman. The statute confounds paternalism as an instrument for protecting marital stability. It defines the sanctity of marriage in terms of a hierarchical ordering which is skewed against the woman. The law gives unequal voices to partners in a relationship.

148. The hallmark of a truly transformative Constitution is that it promotes and engenders societal change. To consider a free citizen as the property of another is an anathema to the ideal of dignity. Section 497 denies the individual identity of a married woman, based on age-old societal stereotypes which characterised women as the property of their spouse. It is the duty of this Court to break these stereotypes and promote a society which regards women as equal citizens in all spheres of life-irrespective of whether these spheres

may be regarded as 'public' or 'private'.

149. Constitutional values infuse the letter of the law with meaning. True to its transformative vision, the text of the Constitution has, time and again, been interpreted to challenge hegemonic structures of power and secure the values of dignity and equality for its citizens. One of the most significant of the battles for equal citizenship in the country has been fought by women. Feminists have overcome seemingly insurmountable barriers to ensure a more egalitarian existence for future generations. However, the quest for equality continues. While there has been a considerable degree of reform in the formal legal system, there is an aspect of women's lives where their subordination has historically been considered beyond reproach or remedy. That aspect is the family. Marriage is a significant social institution where this subordination is pronounced, with entrenched structures of patriarchy and romantic paternalism shackling women into a less than equal existence.

150. The law on adultery, conceived in Victorian morality, considers a married woman the possession of her husband: a passive entity, bereft of agency to determine her course of life. The provision seeks to only redress perceived harm caused to the husband. This notion is grounded in stereotypes about permissible actions in a marriage and the passivity of women. Fidelity is only expected of the female spouse. This anachronistic conception of both, a woman who has entered into marriage as well as the institution of marriage itself, is antithetical to constitutional values of equality, dignity and autonomy.

In enforcing the fundamental right to equality, this Court has evolved a test of manifest arbitrariness to be employed as a check against state action or legislation which has elements of caprice, irrationality or lacks an adequate determining principle. The principle on which Section 497 rests is the preservation of the sexual exclusivity of a married woman - for the benefit of her husband, the owner of her sexuality. Significantly, the criminal provision exempts from sanction if the sexual act was with the consent and connivance of the husband. The patriarchal underpinnings of Section 497 render the provision manifestly arbitrary.

151. The constitutional guarantee of equality rings hollow when eviscerated of its substantive content. To construe Section 497 in a vacuum (as did Sowmithri Vishnu) or in formalistic terms (as did Revathi) is a refusal to recognise and address the subjugation that women have suffered as a consequence of the patriarchal order. Section 497 is a denial of substantive equality in that it re-inforces the notion that women are unequal participants in a marriage; incapable of freely consenting to a sexual act in a legal order which regards them as the sexual property of their spouse.

Conclusion

153. Criminal law must be in consonance with constitutional morality. The law on adultery enforces a construct of marriage where one partner is to cede her sexual autonomy to the other. Being antithetical to the constitutional guarantees of liberty, dignity and equality, Section 497 does not pass constitutional muster. We hold and declare that:

(1) Section 497 lacks an adequately determining principle to criminalize consensual sexual activity and is manifestly arbitrary. Section 497 is a denial of substantive equality as it perpetuates the subordinate status ascribed to women in marriage and society. Section 497 violates Article 14 of the Constitution;

(2) Section 497 is based on gender stereotypes about the role of women and violates the non-discrimination principle embodied in Article 15 of the Constitution;

(3) Section 497 is a denial of the constitutional guarantees of dignity, liberty, privacy and sexual autonomy which are intrinsic to Article 21 of the Constitution; and

(4) Section 497 is unconstitutional.

The decisions in Sowmithri Vishnu and Revathi are overruled.

INDU MALHOTRA, J.

154. The present Writ Petition has been filed to challenge the constitutional validity of Section 497 of the Indian Penal Code (hereinafter referred to as I.P.C.) which makes 'adultery' a criminal offence, and prescribes a punishment of imprisonment upto five years and fine.

156. The word 'adultery' The New international Webster's Comprehensive Dictionary of the English

Language, Deluxe Encyclopedic Edition, Trident Press International (1996 Edn.) at page 21. derives its origin from the French word 'avoutre', which has evolved from the Latin verb 'adulterium' which means "to corrupt." The concept of a wife corrupting the marital bond with her husband by having a relationship outside the marriage, was termed as 'adultery'.

This definition of adultery emanated from the historical context of Victorian morality, where a woman considered to be the 'property' of her husband; and the offence was committed only by the adulterous man. The adulterous woman could not be proceeded against as an 'abettor', even though the relationship was consensual.

157. Adultery, as an offence, was not a crime under Common Law, in England. It was punishable by the ecclesiastical courts which exercised jurisdiction over sacramental matters that included marriage, separation, legitimacy, succession to personal property, etc. Outhwaite, R.B. (2007). The Rise and Fall of the English Ecclesiastical Courts, 1500-1860. Cambridge, UK: Cambridge University Press

In England, coverture determined the rights of married women, under Common Law. A 'feme sole' transformed into a 'feme covert' after marriage. 'Feme covert' was based on the doctrine of 'Unity of Persons' - i.e. the husband and wife were a single legal identity. This was based on notions of biblical morality that a husband and wife were 'one in flesh and blood'. The effect of 'coverture' was that a married woman's legal rights were subsumed by that of her husband. A married woman could not own property, execute legal documents, enter into a contract, or obtain an education against her husband's wishes, or retain a salary for herself. Fernandez, Angela "Tapping Reeve, Nathan Dane, and James Kent: Three Fading Federalists on Marital Unity." Married Women and the Law: Coverture in England and the Common Law World, edited by Tim Stretton and Krista J. Kesselring, McGill-Queen's University Press, 2013, pp. 192-216.

163. Section 497 is a pre-constitutional law which was enacted in 1860. There would be no presumption of constitutionality in a pre-constitutional law (like Section 497) framed by a foreign legislature. The provision would have to be tested on the anvil of Part III of the Constitution.

164. Section 497 of the I.P.C. it is placed under Chapter XX of "Offences Relating to Marriage".

The provision of Section 497 is replete with anomalies and incongruities, such as:

i. Under Section 497, it is only the male-paramour who is punishable for the offence of adultery. The woman who is pari delicto with the adulterous male, is not punishable, even as an 'abettor'.

The adulterous woman is excluded solely on the basis of gender, and cannot be prosecuted for adultery W Kalyani v. State, (2012) 1 SCC 358 2011 Indlaw SC 778; at para 10..

ii. The Section only gives the right to prosecute to the husband of the adulterous wife. On the other hand, the wife of the adulterous man, has no similar right to prosecute her husband or his paramour.

iii. Section 497 I.P.C. read with Section 198(2) of the Cr.P.C. only empowers the aggrieved husband, of a married wife who has entered into the adulterous relationship to initiate proceedings for the offence of adultery.

iv. The act of a married man engaging in sexual intercourse with an unmarried or divorced woman, does not constitute 'adultery' under Section 497.

v. If the adulterous relationship between a man and a married woman, takes place with the consent and connivance of her husband, it would not constitute the offence of adultery.

The anomalies and inconsistencies in Section 497 as stated above, would render the provision liable to be struck down on the ground of it being arbitrary and discriminatory.

165. The constitutional validity of section 497 has to be tested on the anvil of Article 14 of the Constitution.

165.1. Any legislation which treats similarly situated persons unequally, or discriminates between persons on the basis of sex alone, is liable to be struck down as being violative of Articles 14 and 15 of the Constitution, which form the pillars against the vice of arbitrariness and discrimination.

165.2. Article 14 forbids class legislation;

Section 497 of the I.P.C., makes two classifications:

i. The first classification is based on who has the right to prosecute:

It is only the husband of the married woman who indulges in adultery, is considered to be an aggrieved person given the right to prosecute for the offence of adultery.

Conversely, a married woman who is the wife of the adulterous man, has no right to prosecute either her husband, or his paramour.

ii. The second classification is based on who can be prosecuted.

It is only the adulterous man who can be prosecuted for committing adultery, and not the adulterous woman, even though the relationship is consensual; the adulterous woman is not even considered to be an "abettor" to the offence.

The aforesaid classifications were based on the historical context in 1860 when the I.P.C. was enacted. At that point of time, women had no rights independent of their husbands, and were treated as chattel or 'property' of their husbands.

Hence, the offence of adultery was treated as an injury to the husband, since it was considered to be a 'theft' of his property, for which he could proceed to prosecute the offender.

The said classification is no longer relevant or valid, and cannot withstand the test of Article 14, and hence is liable to be struck down on this ground alone.

165.3. A law which deprives women of the right to prosecute, is not gender-neutral. Under Section 497, the wife of the adulterous male, cannot prosecute her husband for marital infidelity. This provision is therefore ex facie discriminatory against women, and violative of Article 14.

Section 497 as it stands today, cannot hide in the shadows against the discerning light of Article 14 which irradiates anything which is unreasonable, discriminatory, and arbitrary.

166. A law which could have been justified at the time of its enactment with the passage of time may become out-dated and discriminatory with the evolution of society and changed circumstances. Motor General Traders v. State of Andhra Pradesh, (1984) 1 SCC 222 1983 Indlaw SC 256; See also Ratan Arya v. State of Tamil Nadu, (1986) 3 SCC 385 1986 Indlaw SC 417 What may have once been a perfectly valid legislation meant to protect women in the historical background in which it was framed, with the passage of time of over a century and a half, may become obsolete and archaic.

A provision previously not held to be unconstitutional, can be rendered so by later developments in society, including gender equality. John Vallamattom v. Union of India, (2003) 6 SCC 611 2003 Indlaw SC 538

Section 497 of the I.P.C. was framed in the historical context that the infidelity of the wife should not be punished because of the plight of women in this country during the 1860's. Women were married while they were still children, and often neglected while still young, sharing the attention of a husband with several rivals. 'A Penal Code prepared by The Indian Law Commissioners, (1838), Notes of Lord Thomas Babington Macaulay, Note Q This situation is not true 155 years after the provision was framed. With the passage of time, education, development in civil-political rights and socio-economic conditions, the situation has undergone a sea change. The historical background in which Section 497 was framed, is no longer relevant in contemporary society.

It would be unrealistic to proceed on the basis that even in a consensual sexual relationship, a married woman, who knowingly and voluntarily enters into a sexual relationship with another married man, is a 'victim', and the male offender is the 'seducer'.

Section 497 fails to consider both men and women as equally autonomous individuals in society.

167. Article 15(3) of the Constitution is an enabling provision which permits the State to frame beneficial legislation in favour of women and children, to protect and uplift this class of citizens.

Section 497 is a penal provision for the offence of adultery, an act which is committed consensually between two adults who have strayed out of the marital bond. Such a provision cannot be considered to be a beneficial legislation covered by Article 15(3) of the Constitution.

The true purpose of affirmative action is to uplift women and empower them in socio-economic spheres. A legislation which takes away the rights of women to prosecute cannot be termed as 'beneficial legislation'.

A Section which perpetuates oppression of women is unsustainable in law, and cannot take cover under the guise of protective discrimination.

168. The Petitioners have contended that the right to privacy under Article 21 would include the right of two adults to enter into a sexual relationship outside marriage.

The right to privacy and personal liberty is, however, not an absolute one; it is subject to reasonable

restrictions when legitimate public interest is involved.
It is true that the boundaries of personal liberty are difficult to be identified in black and white; however, such liberty must accommodate public interest. The freedom to have a consensual sexual relationship outside marriage by a married person, does not warrant protection under Article 21.

Conclusion

171. In view of the aforesaid discussion, and the anomalies in Section 497, as enumerated in para 11 above, it is declared that :
(i) Section 497 is struck down as unconstitutional being violative of Articles 14, 15 and 21 of the Constitution.
(ii) Section 198(2) of the Cr.P.C. which contains the procedure for prosecution under Chapter XX of the I.P.C. shall be unconstitutional only to the extent that it is applicable to the offence of Adultery under Section 497.
(iii) The decisions in Sowmithri Vishnu (supra), V. Rewathi (supra) and W. Kalyani (supra) hereby stand overruled.
Order accordingly

IN THE SUPREME COURT OF INDIA

Decided on: 26.09.2018

Justice K. S. Puttaswamy (Retired) and another

v

Union of India and others

Bench : A.K. Sikri, Dr. D.Y. Chandrachud, Ashok Bhushan
The Judgment was delivered by : A.K. Sikri, J.

1. Introduction and Preliminaries:

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

2. 'Unique makes you the only one' is the central message of Aadhaar, which is on the altar facing constitutional challenge in these petitions. 'Aadhaar' which means, in English, 'foundation' or 'base', has become the most talked about expression in recent years, not only in India but in many other countries and international bodies. A word from Hindi dictionary has assumed secondary significance. Today, mention of the word 'Aadhaar' would not lead a listener to the dictionary meaning of this word. Instead, every person on the very mentioning of this word 'Aadhaar' would associate it with the card that is issued to a person from where he/she can be identified. It is described as an 'Unique Identity' and the authority which enrols a person and at whose behest the Aadhaar Card is issued is known as Unique Identification Authority of India (hereinafter referred to as 'UIDAI' or 'Authority'). It is described as unique for various reasons. UIDAI claims that not only it is a fool proof method of identifying a person, it is also an instrument whereby a person can enter into any transaction without needing any other document in support. It has become a symbol of digital economy and has enabled multiple avenues for a common man. Aadhaar scheme, which was conceptualised in the year 2006 and launched in the year 2009 with the creation of UIDAI, has secured the enrolment of almost 1.1 billion people in this country. Its use is spreading like wildfire, which is the result of robust and aggressive campaigning done by the Government, governmental agencies and other such bodies. In this way it has virtually become a household symbol. The Government boasts of multiple benefits of Aadhaar.

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

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

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

45. Piercing into the aforesaid Aadhaar programme and its formation/structure under the Aadhaar Act, foundational arguments are that it is a grave risk to the rights and liberties of the citizens of this country which are secured by the Constitution of India. It militates against the constitutional abiding values and its foundational morality and has the potential to enable an intrusive state to become a surveillance state on the basis of information that is collected in respect of each individual by creation of a joint electronic mesh. In this manner, the Act strikes at the very privacy of each individual thereby offending the right to privacy which is elevated and given the status of fundamental right by tracing it to Articles 14, 19 and 21 of the Constitution of India by a nine Judge Bench judgment of this Court in K.S. Puttaswamy & Anr. v. Union of

India & Ors.(2017) 10 SCC 1. Most of the counsel appearing for different petitioners (though not all) conceded that there cannot be a serious dispute insofar as allotment of Aadhaar number, for the purpose of unique identification of the residents, is concerned. However, apprehensions have been expressed about the manner in which the Scheme has been rolled out and implemented. The entire edifice of the aforesaid projection is based on the premise that it forces a person, who intends to enrol for Aadhaar, to part with his core information namely biometric information in the form of fingerprints and iris scan. These are to be given to the enrolment agency in the first instance which is a private body and, thus, there is risk of misuse of this vital information pertaining to an individual. Further, it is argued that the most delicate and fragile part, susceptible to misuse, is the authentication process which is to be carried out each time the holder of Aadhaar number wants to establish her identity. At that stage, not only the individual parts with the biometric information again with the RE (which may again be a private agency as well), the purpose for which such a person approaches the RE would also be known i.e. the nature of transaction which is supposed to be undertaken by the said person at that time. Such information relating to different transactions of a person across the life of the citizen is connected to a central database. This record may enable the State to profile citizens, track their movements, assess their habits and silently influence their behaviour. Over a period of time, the profiling would enable the State to stifle dissent and influence political decision making. It may also enable the State to act as a surveillant state and there is a propensity for it to become a totalitarian state. It is stressed that at its core, Aadhaar alters the relationship between the citizen and the State. It diminishes the status of the citizen. Rights freely exercised, liberties freely enjoyed, entitlements granted by the Constitution and laws are all made conditional, on a compulsory barter. The barter compels the citizen to give up her biometrics 'voluntarily', allow her biometrics and demographic information to be stored by the State and private operators and then used for a process termed 'authentication'.

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

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

53. Questions and Answers to the queries raised by the petitioners in W.P. (C) No. 1056 of 2017 entitled 'Nachiket Udupa & Anr. v. Union of India [discussed]…

Summing up the Scheme:

55. The whole architecture of Aadhaar is devised to give unique identity to the citizens of this country. No doubt, a person can have various documents on the basis of which that individual can establish her identify.

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

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

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

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

58. The petitioners accept that the case at hand is unique, simply because of the reason that the programme challenged here is itself without precedent. According to them, no democratic society has adopted a programme that is similar in its command and sweep. The case is about a new technology that the Government seeks to deploy and a new architecture of governance that it seeks to build on this technology. The petitioners are discrediting the Government's claim that biometric technology employed and the Aadhaar Act is greatly beneficial. As per the petitioners, this is an inroad into the rights and liberties of the citizens which the Constitution of India guarantees. It is intrusive in nature. At its core, Aadhaar alters the relationship between the citizen and the State. It diminishes the status of the citizens. Rights freely exercised, liberties freely enjoyed, entitlements granted by the Constitution and laws are all made conditional, on a compulsory barter. The barter compels the citizens to give up their biometrics 'voluntarily', allow their biometrics and demographic information to be stored by the State and private operators and then used for a process termed 'authentication'. According to them, by the very scheme of the Act and the way it operates, it has propensity to cause 'civil death' of an individual by simply switching of Aadhaar of that person. It is the submission of the petitioners that the Constitution balances rights of individuals against State interest. The Aadhaar completely upsets this balance and skews the relationship between the citizen and the State enabling the State to totally dominate the individual.

…

Contours of Right to Privacy:

81. It stands established, with conclusive determination of the nine Judge Bench judgment of this Court in K.S. Puttaswamy that right to privacy is a fundamental right. The majority judgment authored by Dr. D.Y. Chandrachud, J. (on behalf of three other Judges) and five concurring judgments of other five Judges have declared, in no uncertain terms and most authoritatively, right to privacy to be a fundamental right. This judgment also discusses in detail the scope and ambit of right to privacy. The relevant passages in this behalf have been reproduced above while taking note of the submissions of the learned counsel for the petitioners

as well as respondents. One interesting phenomenon that is discerned from the respective submissions on either side is that both sides have placed strong reliance on different passages from this very judgment to support their respective stances. A close reading of this judgment brings about the following features:
(i) Privacy has always been a natural right: The correct position in this behalf has been established by a number of judgments starting from Gobind v. State of M.P. (1975) 2 SCC 148 1975 Indlaw SC 629 *Various opinions conclude that:*
(a) privacy is a concomitant of the right of the individual to exercise control over his or her personality.
(b) Privacy is the necessary condition precedent to the enjoyment of any of the guarantees in Part III.
(c) The fundamental right to privacy would cover at least three aspects - (i) intrusion with an individual's physical body, (ii) informational privacy, and (iii) privacy of choice.
(d) One aspect of privacy is the right to control the dissemination of personal information. And that every individual should have a right to be able to control exercise over his/her own life and image as portrayed in the world and to control commercial use of his/her identity.
...
Principles of Human Dignity:
94. While undertaking the analysis of the judgment in K.S. Puttaswamy, we have mentioned that one of the attributes laid down therein is that the sanctity of privacy lies in its functional relationship with dignity. Privacy is the constitutional core of human dignity. In the context of Aadhaar scheme how the concept of human dignity is to be applied assumes significance.
…
105. From the aforesaid discussion, it follows that dignity as a jurisprudential concept has now been well defined by this Court. Its essential ingredients can be summarised as under:
The basic principle of dignity and freedom of the individual is an attribute of natural law which becomes the right of all individuals in a constitutional democracy. Dignity has a central normative role as well as constitutional value. This normative role is performed in three ways:
First, it becomes basis for constitutional rights;
Second, it serves as an interpretative principle for determining the scope of constitutional rights; and,
Third, it determines the proportionality of a statute limiting a constitutional right. Thus, if an enactment puts limitation on a constitutional right and such limitation is disproportionate, such a statute can be held to be unconstitutional by applying the doctrine of proportionality.
109. The aforesaid discourse on the concept of human dignity is from an individual point of view. That is the emphasis of the petitioners as well. That would be one side of the coin. A very important feature which the present case has brought into focus is another dimension of human dignity, namely, in the form of 'common good' or 'public good'. Thus, our endeavour here is to give richer and more nuanced understanding to the concept of human dignity. Here, dignity is not limited to an individual and is to be seen in an individualistic way. …
116. When we read socio-economic rights into human dignity, the community approach also assumes importance along with individualistic approach to human dignity. It has now been well recognised that at its core, human dignity contains three elements, namely, intrinsic value, autonomy and community value. These are known as core values of human dignity. These three elements can assist in structuring legal reasoning and justifying judicial choices in 'hard cases'. It has to be borne in mind that human dignity is a constitutional principle, rather than free standing fundamental rights. Insofar as intrinsic value is concerned, here human dignity is linked to the nature of being. We may give brief description of these three contents of the idea of human dignity as below:
(I) Intrinsic Value:
The uniqueness of human kind is the product of a combination of inherent traits and features - including intelligence, sensibility, and the ability to communicate - that give humans a special status in the world, distinct from other species. See George Kateb, Human Dignity 5 (2011) ("[W]e can distinguish between the dignity of every human individual and the dignity of the human species as a whole."). The intrinsic value of all individuals results in two basic postulates: anti-utilitarian and anti-authoritarian. The former consists of

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

(II) Autonomy:

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

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

(III) Community Value:

This element of human dignity as community value relates to the social dimension of dignity. The contours of human dignity are shaped by the relationship of the individual with others, as well as with the world around him. English poet John Donne expresses the same sentiments when he says 'no man is an island, entire of itself' See John Donne, XVII. Mediation, in Devotions upon Emergent Occasions 107, 108-09 (Uyniv. Of Mich. Press 1959) (1624). The individual, thus, lives within himself, within a community, and within a state. His personal autonomy is constrained by the values, rights, and morals of people who are just as free and equal as him, as well as by coercive regulation. Robert Post identified three distinct forms of social order: community (a "shared world of common faith and fate"), management (the instrumental

organization of social life through law to achieve specific objectives), and democracy (an arrangement that embodies the purpose of individual and collective self-determination. These three forms of social order presuppose and depend on each other, but are also in constant tension.

We would like to highlight one more significant feature which the issues involved in the present case bring about. It is the balancing of two facets of dignity of the same individual. Whereas, on the one hand, right of personal autonomy is a part of dignity (and right to privacy), another part of dignity of the same individual is to lead a dignified life as well (which is again a facet of Article 21 of the Constitution). Therefore, in a scenario where the State is coming out with welfare schemes, which strive at giving dignified life in harmony with human dignity and in the process some aspect of autonomy is sacrificed, the balancing of the two becomes an important task which is to be achieved by the Courts. For, there cannot be undue intrusion into the autonomy on the pretext of conferment of economic benefits. Precisely, this very exercise of balancing is undertaken by the Court in resolving the complex issues raised in the petitions.

Doctrine of Proportionality:

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

(a) the action must be sanctioned by law;

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

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

118. Doctrine of proportionality was explained by the Constitution Bench judgment of this Court in Modern Dental College and Research Centre & Ors. v. State of Madhya Pradesh & Ors. (2016) 7 SCC 353 2016 Indlaw SC 389. …

Issues:

127. After setting the tone of the case, it is now time to specify the precise issues which are involved that need to be decided in these matters:

(1) Whether the Aadhaar Project creates or has tendency to create surveillance state and is, thus, unconstitutional on this ground?

(a) What is the magnitude of protection that needs to be accorded to collection, storage and usage of biometric data?

(b) Whether the Aadhaar Act and Rules provide such protection, including in respect of data minimisation, purpose limitation, time period for data retention and data protection and security?

(2) Whether the Aadhaar Act violates right to privacy and is unconstitutional on this ground?

{This issue is considered in the context of Sections 7 and 8 of the Aadhaar Act. Incidental issue of 'Exclusion' is also considered here}

(3) Whether children can be brought within the sweep of Sections 7 and 8 of the Aadhaar Act?

(4) Whether the following provisions of the Aadhaar Act and Regulations suffer from the vice of unconstitutionality:

(i) Sections 2(c) and 2(d) read with Section 32

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

(iii) Section 2(l) read with Regulation 23

(iv) Section 2(v)

(v) Section 3

(vi) Section 5

(vii) Section 6

(viii) Section 8

(ix) Section 9

(x) Sections 11 to 23

(xi) Sections 23 and 54

(xii) Section 23(2)(g) read with Chapter VI & VII-Regulations 27 to 32

(xiii) Section 29

(xiv) Section 33

(xv) Section 47
(xvi) Section 48
(xvii) Section 57
(xviii) Section 59
(5) Whether the Aadhaar Act defies the concept of Limited Government, Good Governance and Constitutional Trust?
(6) Whether the Aadhaar Act could be passed as 'Money Bill' within the meaning of Article 110 of the Constitution?
(7) Whether Section 139AA of the Income Tax Act, 1961 is violative of right to privacy and is, therefore, unconstitutional?
(8) Whether Rule 9(a)(17) of the Prevention of Money Laundering (Maintenance of Records) Rules, 2005 and the notifications issued thereunder, which mandate linking of Aadhaar with bank accounts, are unconstitutional?
(9) Whether Circular dated March 23, 2017 issued by the Department of Telecommunications mandating linking of mobile number with Aadhaar is illegal and unconstitutional?
(10) Whether certain actions of the respondents are in contravention of the interim orders passed by the Court, if so, the effect thereof?
…
Summary and Conclusions:
446. (a) The architecture and structure of the Aadhaar Act reveals that the UIDAI is established as a statutory body which is given the task of developing the policy, procedure and system for issuing Aadhaar numbers to individuals and also to perform authentication thereof as per the provisions of the Act. For the purpose of enrolment and assigning Aadhaar numbers, enrolling agencies are recruited by the Authority. All the residents in India are eligible to obtain an Aadhaar number. To enable a resident to get Aadhaar number, he is required to submit demographic as well as biometric information i.e., apart from giving information relating to name, date of birth and address, biometric information in the form of photograph, fingerprint, iris scan is also to be provided. Aadhaar number given to a particular person is treated as unique number as it cannot be reassigned to any other individual.
(b) Insofar as subsidies, benefits or services to be given by the Central Government or the State Government, as the case may be, is concerned, these Governments can mandate that receipt of these subsidies, benefits and services would be given only on furnishing proof of possession of Aadhaar number (or proof of making an application for enrolment, where Aadhaar number is not assigned). An added requirement is that such individual would undergo authentication at the time of receiving such benefits etc. A particular institution/body from which the aforesaid subsidy, benefit or service is to be claimed by such an individual, the intended recipient would submit his Aadhaar number and is also required to give her biometric information to that agency. On receiving this information and for the purpose of its authentication, the said agency, known as Requesting Entity (RE), would send the request to the Authority which shall perform the job of authentication of Aadhaar number. On confirming the identity of a person, the individual is entitled to receive subsidy, benefit or service. Aadhaar number is permitted to be used by the holder for other purposes as well.
(c) In this whole process, any resident seeking to obtain an Aadhaar number is, in the first instance, required to submit her demographic information and biometric information at the time of enrolment. She, thus, parts with her photograph, fingerprint and iris scan at that stage by giving the same to the enrolling agency, which may be a private body/person. Likewise, every time when such Aadhaar holder intends to receive a subsidy, benefit or service and goes to specified/designated agency or person for that purpose, she would be giving her biometric information to that RE, which, in turn, shall get the same authenticated from the Authority before providing a subsidy, benefit or service.
(d) Attack of the petitioners to the Aadhaar programme and its formation/structure under the Aadhaar Act is founded on the arguments that it is a grave risk to the rights and liberties of the citizens of this country which are secured by the Constitution of India. It militates against the constitutional abiding values and its

foundational morality and has the potential to enable an intrusive state to become a surveillance state on the basis of information that is collected in respect of each individual by creation of a joint electronic mesh. In this manner, the Act strikes at the very privacy of each individual thereby offending the right to privacy which is elevated and given the status of fundamental right by tracing it to Articles 14, 19 and 21 of the Constitution of India by a nine Judge Bench judgment of this Court in K.S. Puttaswamy.

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

(f) In the aforesaid scenario, it is necessary, in the first instance, to find out the extent of core information, biometric as well as demographic, that is collected and stored by the Authority at the time of enrolment as well as at the time of authentication. This exercise becomes necessary in order to consider the argument of the petitioners about the profiling of the Aadhaar holders. On going through this aspect, on the basis of the powerpoint presentation given by Dr. Ajay Bhushan Pandey, CEO of UIDAI, and the arguments of both the sides, including the questions which were put by the petitioners to Dr. Pandey and the answers thereupon, the Court has come to the conclusion that minimal possible data, demographic and biometric, is obtained from the Aadhaar holders.

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

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

(i) Identity of a person has a significance for every individual in his/her life. In a civilised society every individual, on taking birth, is given a name. Her place of birth and parentage also becomes important as she

is known in the society and these demographic particulars also become important attribute of her personality. Throughout their lives, individuals are supposed to provide such information: be it admission in a school or college or at the time of taking job or engaging in any profession or business activity, etc. When all this information is available in one place, in the form of Aadhaar card, it not only becomes unique, it would also qualify as a document of empowerment. Added with this feature, when an individual knows that no other person can clone her, it assumes greater significance.

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

(k) The Court has taken note of the heads of challenge of the Act, Scheme and certain Rules etc. and clarified that the matter is examined with objective examination of the issues on the touchstone of the constitutional provisions, keeping in mind the ethos of constitutional democracy, rule of law, human rights and other basic features of the Constitution.

Discussing the scope of judicial review, the Court has accepted that apart from two grounds noticed in Binoy Viswam, on which legislative Act can be invalidated [(a) the Legislature does not have competence to make the law; and b) law made is in violation of fundamental rights or any other constitutional provision], another ground, namely, manifest arbitrariness, can also be the basis on which an Act can be invalidated. The issues are examined having regard to the aforesaid scope of judicial review.

(l) From the arguments raised by the petitioners and the grounds of challenge, it becomes clear that the main plank of challenge is that the Aadhaar project and the Aadhaar Act infringes right to privacy. Inbuilt in this right to privacy is the right to live with dignity, which is a postulate of right to privacy. In the process, discussion leads to the issue of proportionality, viz. whether measures taken under the Aadhaar Act satisfy the doctrine of proportionality.

(m) In view of the above, the Court discussed the contours of right to privacy, as laid down in K.S. Puttaswamy, principle of human dignity and doctrine of proportionality. After taking note of the discussion contained in different opinions of six Hon'ble Judges, it stands established, without any pale of doubt, that privacy has now been treated as part of fundamental right. The Court has held that, in no uncertain terms, that privacy has always been a natural right which given an individual freedom to exercise control over his or her personality. The judgment further affirms three aspects of the fundamental right to privacy, namely:

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

(ii) informational privacy and

(iii) privacy of choice.

(p) We have also remarked above, the taxonomy of privacy, namely, on the basis of 'harms', 'interest' and 'aggregation of rights'. We have also discussed the scope of right to privacy with reference to the cases at hand and the circumstances in which such a right can be limited. In the process, we have also taken note of the passage from the judgment rendered by Nariman, J. in K.S. Puttaswamy stating the manner in which law has to be tested when it is challenged on the ground that it violates the fundamental right to privacy.

(q) One important comment which needs to be made at this stage relates to the standard of judicial review while examining the validity of a particular law that allegedly infringes right to privacy. The question is as to whether the Court is to apply 'strict scrutiny' standard or the 'just, fair and reasonableness' standard. In the privacy judgment, different observations are made by the different Hon'ble Judges and the aforesaid aspect is not determined authoritatively, may be for the reason that the Bench was deciding the reference on the issue as to whether right to privacy is a fundamental right or not and, in the process, it was called upon to decide the specific questions referred to it. This Court preferred to adopt a 'just, fair and reasonableness' standard which is in tune with the view expressed by majority of Judges in their opinion. Even otherwise, this is in consonance with the judicial approach adopted by this Court while construing 'reasonable restrictions' that the State can impose in public interest, as provided in Article 19 of the Constitution. Insofar as principles of human dignity are concerned, the Court, after taking note of various judgments where this principle is adopted and elaborated, summed up the essential ingredients of dignity jurisprudence by noticing

that the basic principle of dignity and freedom of the individual is an attribute of natural law which becomes the right of all individuals in a constitutional democracy.

We would like to highlight one more significant feature which the issues involved in the present case bring about. It is the balancing of two facets of dignity of the same individual. Whereas, on the one hand, right of personal autonomy is a part of dignity (and right to privacy), another part of dignity of the same individual is to lead a dignified life as well (which is again a facet of Article 21 of the Constitution). Therefore, in a scenario where the State is coming out with welfare schemes, which strive at giving dignified life in harmony with human dignity and in the process some aspect of autonomy is sacrificed, the balancing of the two becomes an important task which is to be achieved by the Courts. For, there cannot be undue intrusion into the autonomy on the pretext of conferment of economic benefits.

447. After stating the aforesaid manner in which different issues that arose are specified and discussed, these questions and conclusions thereupon are summarised below:

(1) Whether the Aadhaar Project creates or has tendency to create surveillance state and is, thus, unconstitutional on this ground?

Incidental Issues:

(a) What is the magnitude of protection that need to be accorded to collection, storage and usage of biometric data?

(b) Whether the Aadhaar Act and Rules provide such protection, including in respect of data minimisation, purpose limitation, time period for data retention and data protection and security?

Answer:

(a) The architecture of Aadhaar as well as the provisions of the Aadhaar Act do not tend to create a surveillance state. This is ensured by the manner in which the Aadhaar project operates.

(b) We have recorded in detail the powerpoint presentation that was given by Dr. Ajay Bhushan Pandey, CEO of the Authority, which brings out the following salient features:

(i) During the enrolment process, minimal biometric data in the form of iris and fingerprints is collected. The Authority does not collect purpose, location or details of transaction. Thus, it is purpose blind. The information collected, as aforesaid, remains in silos. Merging of silos is prohibited. The requesting agency is provided answer only in 'Yes' or 'No' about the authentication of the person concerned. The authentication process is not exposed to the Internet world. Security measures, as per the provisions of Section 29(3) read with Section 38(g) as well as Regulation 17(1)(d) of the Authentication Regulations, are strictly followed and adhered to.

(ii) There are sufficient authentication security measures taken as well, as demonstrated in Slides 14, 28 and 29 of the presentation.

(iii) The Authority has sufficient defence mechanism, as explained in Slide 30. It has even taken appropriate protection measures as demonstrated in Slide 31.

(iv) There is an oversight by Technology and Architecture Review Board (TARB) and Security Review Committee.

(v) During authentication no information about the nature of transaction etc. is obtained.

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

(vii) The Authority gets the AUA code, ASA code, unique device code, registered device code used for authentication. It does not get any information related to the IP address or the GPS location from where authentication is performed as these parameters are not part of authentication (v2.0) and e-KYC (v2.1) API. The Authority would only know from which device the authentication has happened, through which AUA/ASA etc. It does not receive any information about at what location the authentication device is

deployed, its IP address and its operator and the purpose of authentication. Further, the authority or any entity under its control is statutorily barred from collecting, keeping or maintaining any information about the purpose of authentication under Section 32(3) of the Aadhaar Act.

(c) After going through the Aadhaar structure, as demonstrated by the respondents in the powerpoint presentation from the provisions of the Aadhaar Act and the machinery which the Authority has created for data protection, we are of the view that it is very difficult to create profile of a person simply on the basis of biometric and demographic information stored in CIDR. Insofar as authentication is concerned, the respondents rightly pointed out that there are sufficient safeguard mechanisms. To recapitulate, it was specifically submitted that there was security technologies in place (slide 28 of Dr. Pandey's presentation), 24/7 security monitoring, data leak prevention, vulnerability management programme and independent audits (slide 29) as well as the Authority's defence mechanism (slide 30). It was further pointed out that the Authority has taken appropriate pro-active protection measures, which included disaster recovery plan, data backup and availability and media response plan (slide 31). The respondents also pointed out that all security principles are followed inasmuch as: (a) there is PKI-2048 encryption from the time of capture, meaning thereby, as soon as data is given at the time of enrolment, there is an end to end encryption thereof and it is transmitted to the Authority in encrypted form. The said encryption is almost foolproof and it is virtually impossible to decipher the same; (b) adoption of best-in-class security standards and practices; and (c) strong audit and traceability as well as fraud detection. Above all, there is an oversight of Technology and Architecture Review Board (TARB) and Security Review Committee. This Board and Committee consists of very high profiled officers. Therefore, the Act has endeavoured to provide safeguards.

(d) Insofar as use and protection of data is concerned, having regard to the principles enshrined in various cases, Indian and foreign, the matter is examined from the stand point of data minimisation, purpose limitation, time period for data retention, data protection and security (qua CIDR, requisite entities, enrolment agencies and Registrars, authentication service agency, hacking, biometric solution providers, substantive procedural or judicial safeguards). After discussing the aforesaid aspect with reference to certain provisions of the Aadhaar Act, we are of the view that apprehensions of the petitioners stand assuaged with the striking down or reading down or clarification of some of the provisions, namely:

(i) Authentication records are not to be kept beyond a period of six months, as stipulated in Regulation 27(1) of the Authentication Regulations. This provision which permits records to be archived for a period of five years is held to be bad in law.

(ii) Metabase relating to transaction, as provided in Regulation 26 of the aforesaid Regulations in the present form, is held to be impermissible, which needs suitable amendment.

(iii) Section 33(1) of the Aadhaar Act is read down by clarifying that an individual, whose information is sought to be released, shall be afforded an opportunity of hearing.

(iv) Insofar as Section 33(2) of the Act in the present form is concerned, the same is struck down.

(v) That portion of Section 57 of the Aadhaar Act which enables body corporate and individual to seek authentication is held to be unconstitutional.

(vi) We have also impressed upon the respondents, to bring out a robust data protection regime in the form of an enactment on the basis of Justice B.N. Srikrishna (Retd.) Committee Report with necessary modifications thereto as may be deemed appropriate.

(2) Whether the Aadhaar Act violates right to privacy and is unconstitutional on this ground?

Answer:

(a) After detailed discussion, it is held that all matters pertaining to an individual do not qualify as being an inherent part of right to privacy. Only those matters over which there would be a reasonable expectation of privacy are protected by Article 21. This can be discerned from the reading of Paras 297 to 307 of the judgment.

(b) The Court is also of the opinion that the triple test laid down in order to adjudge the reasonableness of the invasion to privacy has been made. The Aadhaar scheme is backed by the statute, i.e. the Aadhaar Act. It also serves legitimate State aim, which can be discerned from the Introduction to the Act as well as the Statement of Objects and Reasons which reflect that the aim in passing the Act was to ensure that social

benefit schemes reach the deserving community. The Court noted that the failure to establish identity of an individual has proved to be a major hindrance for successful implementation of those programmes as it was becoming difficult to ensure that subsidies, benefits and services reach the unintended beneficiaries in the absence of a credible system to authenticate identity of beneficiaries. The Statement of Objects and Reasons also discloses that over a period of time, the use of Aadhaar number has been increased manifold and, therefore, it is also necessary to take measures relating to ensuring security of the information provided by the individuals while enrolling for Aadhaar card.

(c) It may be highlighted that the petitioners are making their claim on the basis of dignity as a facet of right to privacy. On the other hand, Section 7 of the Aadhaar Act is aimed at offering subsidies, benefits or services to the marginalised section of the society for whom such welfare schemes have been formulated from time to time. That also becomes an aspect of social justice, which is the obligation of the State stipulated in Para IV of the Constitution. The rationale behind Section 7 lies in ensuring targeted delivery of services, benefits and subsidies which are funded from the Consolidated Fund of India. In discharge of its solemn Constitutional obligation to enliven the Fundamental Rights of life and personal liberty (Article 21) to ensure Justice, Social, Political and Economic and to eliminate inequality (Article 14) with a view to ameliorate the lot of the poor and the Dalits, the Central Government has launched several welfare schemes. Some such schemes are PDS, scholarships, mid day meals, LPG subsidies, etc. These schemes involve 3% percentage of the GDP and involve a huge amount of public money. Right to receive these benefits, from the point of view of those who deserve the same, has now attained the status of fundamental right based on the same concept of human dignity, which the petitioners seek to bank upon. The Constitution does not exist for a few or minority of the people of India, but "We the people". The goals set out in the Preamble of the Constitution do not contemplate statism and do not seek to preserve justice, liberty, equality an fraternity for those who have the means and opportunity to ensure the exercise of inalienable rights for themselves. These goals are predominantly or at least equally geared to "secure to all its citizens", especially, to the downtrodden, poor and exploited, justice, liberty, equality and "to promote" fraternity assuring dignity. Interestingly, the State has come forward in recognising the rights of deprived section of the society to receive such benefits on the premise that it is their fundamental right to claim such benefits. It is acknowledged by the respondents that there is a paradigm shift in addressing the problem of security and eradicating extreme poverty and hunger. The shift is from the welfare approach to a right based approach. As a consequence, right of everyone to adequate food no more remains based on Directive Principles of State Policy (Art 47), though the said principles remain a source of inspiration. This entitlement has turned into a Constitutional fundamental right. This Constitutional obligation is reinforced by obligations under International Convention.

(d) Even the petitioners did not seriously question the purpose and bona fides of the Legislature enacting the law.

(e) The Court also finds that the Aadhaar Act meets the test of proportionality as the following components of proportionality stand satisfied:

(i) A measure restricting a right must have a legitimate goal (legitimate goal stage).

(ii) It must be a suitable means of furthering this goal (suitability or rationale connection stage).

(iii) There must not be any less restrictive but equally effective alternative (necessity stage).

(iv) The measure must not have a disproportionate impact on the right holder (balancing stage).

(f) In the process, the Court has taken note of various judgments pronounced by this Court pertaining to right to food, issuance of BPL Cards, LPG connections and LPG cylinders at minimal cost, old age and other kind of pensions to deserving persons, scholarships and implementation of MGNREGA scheme.

(g) The purpose behind these orders was to ensure that the deserving beneficiaries of the scheme are correctly identified and are able to receive the benefits under the said scheme, which is their entitlement. The orders also aimed at ensuring 'good governance' by bringing accountability and transparency in the distribution system with the pious aim in mind, namely, benefits actually reached those who are rural, poor and starving.

(h) All this satisfies the necessity stage test, particularly in the absence of any less restrictive but equally effective alternative.

(i) Insofar as balancing is concerned, the matter is examined at two levels:

(i) Whether, 'legitimate state interest' ensures 'reasonable tailoring'? There is a minimal intrusion into the privacy and the law is narrowly framed to achieve the objective. Here the Act is to be tested on the ground that whether it is found on a balancing test that the social or public interest and the reasonableness of the restrictions outweigh the particular aspect of privacy, as claimed by the petitioners. This is the test we have applied in the instant case.

(ii) There needs to be balancing of two competing fundamental rights, right to privacy on the one hand and right to food, shelter and employment on the other hand. Axiomatically both the rights are founded on human dignity. At the same time, in the given context, two facets are in conflict with each other. The question here would be, when a person seeks to get the benefits of welfare schemes to which she is entitled to as a part of right to live life with dignity, whether her sacrifice to the right to privacy, is so invasive that it creates imbalance?

(j) In the process, sanctity of privacy in its functional relationship with dignity is kept in mind where it says that legitimate expectation of privacy may vary from intimate zone to the private zone and from the private to public arena. Reasonable expectation of privacy is also taken into consideration. The Court finds that as the information collected at the time of enrolment as well as authentication is minimal, balancing at the first level is met. Insofar as second level, namely, balancing of two competing fundamental rights is concerned, namely, dignity in the form of autonomy (informational privacy) and dignity in the form of assuring better living standards of the same individual, the Court has arrived at the conclusion that balancing at the second level is also met. The detailed discussion in this behalf amply demonstrates that enrolment in Aadhaar of the unprivileged and marginalised section of the society, in order to avail the fruits of welfare schemes of the Government, actually amounts to empowering these persons. On the one hand, it gives such individuals their unique identity and, on the other hand, it also enables such individuals to avail the fruits of welfare schemes of the Government which are floated as socio-economic welfare measures to uplift such classes. In that sense, the scheme ensures dignity to such individuals. This facet of dignity cannot be lost sight of and needs to be acknowledged. We are, by no means, accepting that when dignity in the form of economic welfare is given, the State is entitled to rob that person of his liberty. That can never be allowed. We are concerned with the balancing of the two facets of dignity. Here we find that the inroads into the privacy rights where these individuals are made to part with their biometric information, is minimal. It is coupled with the fact that there is no data collection on the movements of such individuals, when they avail benefits under Section 7 of the Act thereby ruling out the possibility of creating their profiles. In fact, this technology becomes a vital tool of ensuring good governance in a social welfare state. We, therefore, are of the opinion that the Aadhaar Act meets the test of balancing as well.

(k) Insofar as the argument based on probabilistic system of Aadhaar, leading to 'exclusion' is concerned, the Authority has claimed that biometric accuracy is 99.76% and the petitioners have also proceeded on that basis. In this scenario, if the Aadhaar project is shelved, 99.76% beneficiaries are going to suffer. Would it not lead to their exclusion? It will amount to throwing the baby out of hot water along with the water. In the name of 0.232% failure (which can in any case be remedied) should be revert to the pre-Aadhaar stage with a system of leakages, pilferages and corruption in the implementation of welfare schemes meant for marginalised section of the society, the full fruits thereof were not reaching to such people?

(l) The entire aim behind launching this programme is the 'inclusion' of the deserving persons who need to get such benefits. When it is serving much larger purpose by reaching hundreds of millions of deserving persons, it cannot be crucified on the unproven plea of exclusion of some. It is clarified that the Court is not trivialising the problem of exclusion if it is there. However, what we are emphasising is that remedy is to plug the loopholes rather than axe a project, aimed for the welfare of large section of the society. Obviously, in order to address the failures of authentication, the remedy is to adopt alternate methods for identifying such persons, after finding the causes of failure in their cases. We have chosen this path which leads to better equilibrium and have given necessary directions also in this behalf, viz:

(i) We have taken on record the statement of the learned Attorney General that no deserving person would be denied the benefit of a scheme on the failure of authentication.

(ii) We are also conscious of the situation where the formation of fingerprints may undergo change for

various reasons. It may happen in the case of a child after she grows up; it may happen in the case of an individual who gets old; it may also happen because of damage to the fingers as a result of accident or some disease etc. or because of suffering of some kind of disability for whatever reason. Even iris test can fail due to certain reasons including blindness of a person. We again emphasise that no person rightfully entitled to the benefits shall be denied the same on such grounds. It would be appropriate if a suitable provision be made in the concerned regulations for establishing an identity by alternate means, in such situations.

(m) As far as subsidies, services and benefits are concerned, their scope is not to be unduly expanded thereby widening the net of Aadhaar, where it is not permitted otherwise. In this respect, it is held as under:

(i) 'Benefits' and 'services' as mentioned in Section 7 should be those which have the colour of some kind of subsidies etc., namely, welfare schemes of the Government whereby Government is doling out such benefits which are targeted at a particular deprived class.

(ii) It would cover only those 'benefits' etc. the expenditure thereof has to be drawn from the Consolidated Fund of India.

(iii) On that basis, CBSE, NEET, JEE, UGC etc. cannot make the requirement of Aadhaar mandatory as they are outside the purview of Section 7 and are not backed by any law.

(3) Whether children can be brought within the sweep of Sections 7 and 8 of the Aadhaar Act?

Answer:

(a) For the enrolment of children under the Aadhaar Act, it would be essential to have the consent of their parents/guardian.

(b) On attaining the age of majority, such children who are enrolled under Aadhaar with the consent of their parents, shall be given the option to exit from the Aadhaar project if they so choose in case they do not intend to avail the benefits of the scheme.

(c) Insofar as the school admission of children is concerned, requirement of Aadhaar would not be compulsory as it is neither a service nor subsidy. Further, having regard to the fact that a child between the age of 6 to 14 years has the fundamental right to education under Article 21A of the Constitution, school admission cannot be treated as 'benefit' as well.

(d) Benefits to children between 6 to 14 years under Sarv Shiksha Abhiyan, likewise, shall not require mandatory Aadhaar enrolment.

(e) For availing the benefits of other welfare schemes which are covered by Section 7 of the Aadhaar Act, though enrolment number can be insisted, it would be subject to the consent of the parents, as mentioned in (a) above.

(f) We also clarify that no child shall be denied benefit of any of these schemes if, for some reasons, she is not able to produce the Aadhaar number and the benefit shall be given by verifying the identity on the basis of any other documents. This we say having regard to the statement which was made by Mr. K.K. Venugopal, learned Attorney General for India, at the Bar.

(4) Whether the following provisions of the Aadhaar Act and Regulations suffer from the vice of unconstitutionality:

(i) Sections 2(c) and 2(d) read with Section 32

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

(iii) Section 2(l) read with Regulation 23

(iv) Section 2(v)

(v) Section 3

(vi) Section 5

(vii) Section 6

(viii) Section 8

(ix) Section 9

(x) Sections 11 to 23

(xi) Sections 23 and 54

(xii) Section 23(2)(g) read with Chapter VI & VII - Regulations 27 to 32

(xiii) Section 29

(xiv) Section 33
(xv) Section 47
(xvi) Section 48
(xvii) Section 57
(xviii) Section 59
Answer:
(a) Section 2(d) which pertains to authentication records, such records would not include metadata as mentioned in Regulation 26(c) of the Aadhaar (Authentication) Regulations, 2016. Therefore, this provision in the present form is struck down. Liberty, however, is given to reframe the regulation, keeping in view the parameters stated by the Court.
(b) Insofar as Section 2(b) is concerned, which defines 'resident', the apprehension expressed by the petitioners was that it should not lead to giving Aadhaar card to illegal immigrants. We direct the respondent to take suitable measures to ensure that illegal immigrants are not able to take such benefits.
(c) Retention of data beyond the period of six months is impermissible. Therefore, Regulation 27 of Aadhaar (Authentication) Regulations, 2016 which provides archiving a data for a period of five years is struck down.
(d) Section 29 in fact imposes a restriction on sharing information and is, therefore, valid as it protects the interests of Aadhaar number holders. However, apprehension of the petitioners is that this provision entitles Government to share the information 'for the purposes of as may be specified by regulations'. The Aadhaar (Sharing of Information) Regulations, 2016, as of now, do not contain any such provision. If a provision is made in the regulations which impinges upon the privacy rights of the Aadhaar card holders that can always be challenged.
(e) Section 33(1) of the Act prohibits disclosure of information, including identity information or authentication records, except when it is by an order of a court not inferior to that of a District Judge. We have held that this provision is to be read down with the clarification that an individual, whose information is sought to be released, shall be afforded an opportunity of hearing. If such an order is passed, in that eventuality, he shall also have right to challenge such an order passed by approaching the higher court. During the hearing before the concerned court, the said individual can always object to the disclosure of information on accepted grounds in law, including Article 20(3) of the Constitution or the privacy rights etc.
(f) Insofar as Section 33(2) is concerned, it is held that disclosure of information in the interest of national security cannot be faulted with. However, for determination of such an eventuality, an officer higher than the rank of a Joint Secretary should be given such a power. Further, in order to avoid any possible misuse, a Judicial Officer (preferably a sitting High Court Judge) should also be associated with. We may point out that such provisions of application of judicial mind for arriving at the conclusion that disclosure of information is in the interest of national security, are prevalent in some jurisdictions. In view thereof, Section 33(2) of the Act in the present form is struck down with liberty to enact a suitable provision on the lines suggested above.
(g) Insofar as Section 47 of the Act which provides for the cognizance of offence only on a complaint made by the Authority or any officer or person authorised by it is concerned, it needs a suitable amendment to include the provision for filing of such a complaint by an individual/victim as well whose right is violated.
(h) Insofar as Section 57 in the present form is concerned, it is susceptible to misuse inasmuch as: (a) It can be used for establishing the identity of an individual 'for any purpose'. We read down this provision to mean that such a purpose has to be backed by law. Further, whenever any such "law" is made, it would be subject to judicial scrutiny. (b) Such purpose is not limited pursuant to any law alone but can be done pursuant to 'any contract to this effect' as well. This is clearly impermissible as a contractual provision is not backed by a law and, therefore, first requirement of proportionality test is not met. (c) Apart from authorising the State, even 'any body corporate or person' is authorised to avail authentication services which can be on the basis of purported agreement between an individual and such body corporate or person. Even if we presume that legislature did not intend so, the impact of the aforesaid features would be to enable commercial exploitation of an individual biometric and demographic information by the private entities. Thus, this part of the provision which enables body corporate and individuals also to seek authentication, that too on the basis of

a contract between the individual and such body corporate or person, would impinge upon the right to privacy of such individuals. This part of the section, thus, is declared unconstitutional.

(i) Other provisions of Aadhaar Act are held to be valid, including Section 59 of the Act which, according to us, saves the pre-enactment period of Aadhaar project, i.e. from 2009-2016.

(5) Whether the Aadhaar Act defies the concept of Limited Government, Good Governance and Constitutional Trust?

Answer:

Aadhaar Act meets the concept of Limited Government, Good Governance and Constitutional Trust.

(6) Whether the Aadhaar Act could be passed as 'Money Bill' within the meaning of Article 110 of the Constitution?

Answer:

(a) We do recognise the importance of Rajya Sabha (Upper House) in a bicameral system of the Parliament. The significance and relevance of the Upper House has been succinctly exemplified by this Court in Kuldip Nayar's case. The Rajya Sabha, therefore, becomes an important institution signifying constitutional fedaralism. It is precisely for this reason that to enact any statute, the Bill has to be passed by both the Houses, namely, Lok Sabha as well as Rajya Sabha. It is the constitutional mandate. The only exception to the aforesaid Parliamentary norm is Article 110 of the Constitution of India. Having regard to this overall scheme of bicameralism enshrined in our Constitution, strict interpretation has to be accorded to Article 110. Keeping in view these principles, we have considered the arguments advanced by both the sides.

(b) The petitioners accept that Section 7 of the Aadhaar Act has the elements of 'Money Bill'. The attack is on the premise that some other provisions, namely, clauses 23(2)(h), 54(2)(m) and 57 of the Bill (which corresponds to Sections 23(2)(h), 54(2)(m) and 57 of the Aadhaar Act) do not fall under any of the clauses of Article 110 of the Constitution and, therefore, Bill was not limited to only those subjects mentioned in Article 110. Insofar as Section 7 is concerned, it makes receipt of subsidy, benefit or service subject to establishing identity by the process of authentication under Aadhaar or furnish proof of Aadhaar etc. It is also very clearly declared in this provision that the expenditure incurred in respect of such a subsidy, benefit or service would be from the Consolidated Fund of India. It is also accepted by the petitioners that Section 7 is the main provision of the Act. In fact, introduction to the Act as well as Statement of Objects and Reasons very categorically record that the main purpose of Aadhaar Act is to ensure that such subsidies, benefits and services reach those categories of persons, for whom they are actually meant.

(c) As all these three kinds of welfare measures are sought to be extended to the marginalised section of society, a collective reading thereof would show that the purpose is to expand the coverage of all kinds of aid, support, grant, advantage, relief provisions, facility, utility or assistance which may be extended with the support of the Consolidated Fund of India with the objective of targeted delivery. It is also clear that various schemes which can be contemplated by the aforesaid provisions, relate to vulnerable and weaker section of the society. Whether the social justice scheme would involve a subsidy or a benefit or a service is merely a matter of the nature and extent of assistance and would depend upon the economic capacity of the State. Even where the state subsidizes in part, whether in cash or kind, the objective of emancipation of the poor remains the goal.

(d) The respondents are right in their submission that the expression subsidy, benefit or service ought to be understood in the context of targeted delivery to poorer and weaker sections of society. Its connotation ought not to be determined in the abstract. For as an abstraction one can visualize a subsidy being extended by Parliament to the King; by Government to the Corporations or Banks; etc. The nature of subsidy or benefit would not be the same when extended to the poor and downtrodden for producing those conditions without which they cannot live a life with dignity. That is the main function behind the Aadhaar Act and for this purpose, enrolment for Aadhaar number is prescribed in Chapter II which covers Sections 3 to 6. Residents are, thus, held entitled to obtain Aadhaar number. We may record here that such an enrolment is of voluntary nature. However, it becomes compulsory for those who seeks to receive any subsidy, benefit or service under the welfare scheme of the Government expenditure whereof is to be met from the Consolidated Fund of India. It follows that authentication under Section 7 would be required as a condition for receipt of a subsidy,

benefit or service only when such a subsidy, benefit or service is taken care of by Consolidated Fund of India. Therefore, Section 7 is the core provision of the Aadhaar Act and this provision satisfies the conditions of Article 110 of the Constitution. Upto this stage, there is no quarrel between the parties.

(e) On examining of the other provisions pointed out by the petitioners in an attempt to take it out of the purview of Money Bill, we are of the view that those provisions are incidental in nature which have been made in the proper working of the Act. In any case, a part of Section 57 has already been declared unconstitutional. We, thus, hold that the Aadhaar Act is validly passed as a 'Money Bill'.

(7) Whether Section 139AA of the Income Tax Act, 1961 is violative of right to privacy and is, therefore, unconstitutional?

Answer:

Validity of this provision was upheld in the case of Binoy Viswam by repelling the contentions based on Articles 14 and 19 of the Constitution. The question of privacy which, at that time, was traced to Article 21, was left open. The matter is reexamined on the touchstone of principles laid down in K.S. Puttaswamy. The matter has also been examined keeping in view that manifest arbitrariness is also a ground of challenge to the legislative enactment. Even after judging the matter in the context of permissible limits for invasion of privacy, namely: (i) the existence of a law; (ii) a 'legitimate State interest'; and (iii) such law should pass the 'test of proportionality', we come to the conclusion that all these tests are satisfied. In fact, there is specific discussion on these aspects in Binoy Viswam's case as well.

(8) Whether Rule 9 of the Prevention of Money Laundering (Maintenance of Records) Rules, 2005 and the notifications issued thereunder which mandates linking of Aadhaar with bank accounts is unconstitutional?

Answer:

(a) We hold that the provision in the present form does not meet the test of proportionality and, therefore, violates the right to privacy of a person which extends to banking details.

(b) This linking is made compulsory not only for opening a new bank account but even for existing bank accounts with a stipulation that if the same is not done then the account would be deactivated, with the result that the holder of the account would not be entitled to operate the bank account till the time seeding of the bank account with Aadhaar is done. This amounts to depriving a person of his property. We find that this move of mandatory linking of Aadhaar with bank account does not satisfy the test of proportionality. To recapitulate, the test of proportionality requires that a limitation of the fundamental rights must satisfy the following to be proportionate: (i) it is designated for a proper purpose; (ii) measures are undertaken to effectuate the limitation are rationally connected to the fulfilment of the purpose; (iii) there are no alternative less invasive measures; and

(iv) there is a proper relation between the importance of achieving the aim and the importance of limiting the right.

(c) The Rules are held to be disproportionate for the reasons stated in the main body of this Judgment.

(9) Whether Circular dated March 23, 2017 issued by the Department of Telecommunications mandating linking of mobile number with Aadhaar is illegal and unconstitutional?

Answer:

Circular dated March 23, 2017 mandating linking of mobile number with Aadhaar is held to be illegal and unconstitutional as it is not backed by any law and is hereby quashed.

(10) Whether certain actions of the respondents are in contravention of the interim orders passed by the Court, if so, the effect thereof?

Answer:

This question is answered in the negative.

448. In view of the aforesaid discussion and observations, the writ petitions, transferred cases, special leave petition, contempt petitions and all the pending applications stand disposed of.

Dr Dhananjaya Y Chandrachud, J

A Introduction: technology, governance and freedom

449. Technology and biometrics are recent entrants to litigation. Individually, each presents specific claims:

of technology as the great enabler; and of biometrics as the unique identifier. As recombinant elements, they create as it were, new genetic material. Combined together, they present unforeseen challenges for governance in a digital age. Part of the reason for these challenges is that our law evolved in a radically different age and time. The law evolved instruments of governance in incremental stages. They were suited to the social, political and economic context of the time. The forms of expression which the law codified were developed when paper was ubiquitous. The limits of paper allowed for a certain freedom: the freedom of individuality and the liberty of being obscure. Governance with paper could lapse into governance on paper. Technology has become a universal language which straddles culture and language. It confronts institutions of governance with new problems. Many of them have no ready answers.

450. Technology questions the assumptions which underlie our processes of reasoning. It reshapes the dialogue between citizens and the state. Above all, it tests the limits of the doctrines which democracies have evolved as a shield which preserves the sanctity of the individual.

451. In understanding the interface between governance, technology and freedom, this case will set the course for the future. Our decision must address the dialogue between technology and power. The decision will analyse the extent to which technology has reconfigured the role of the state and has the potential to reset the lines which mark off no-fly zones: areas where the sanctity of the individual is inviolable. Our path will define our commitment to limited government. Technology confronts the future of freedom itself.

…

886. 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.

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

(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?

…

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.

…

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?

…

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?

…

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

Issue No.9	Whether Section 33 is Constitutional ?

…

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?

…

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?

…

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?

…

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?

…

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?

…

Ans.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.

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

…

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?

…

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?

…

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?

…

Ans.18:- The Aadhaar Act does not violate the interim orders passed in Writ Petition (C) No. 494 of 2012 and other Writ Petitions.

1172. 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:-

1173. 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.

IN THE SUPREME COURT OF INDIA

Decided on: 06.09.2018

Navtej Singh Johar and others
v
Union of India, through Secretary Ministry of Law and Justice and others

Case No : Writ Petition (Criminal) No. 76 of 2016 with Writ Petition (Civil) No. 572 of 2016, Writ Petition (Criminal) No. 88 of 2018, Writ Petition (Criminal) No. 100 of 2018, Writ Petition (Criminal) No. 101 of 2018, Writ Petition (Criminal) No. 121 of 2018
Bench : Dipak Misra, A.M. Khanwilkar, R.F. Nariman, Dr. Dhananjaya Y. Chandrachud, Indu Malhotra
Citation : 2018 Indlaw SC 786

The Judgment was delivered by: Dipak Misra, J. (also on behalf of A.M. Khanwilkar, J)
3. The overarching ideals of individual autonomy and liberty, equality for all sans discrimination of any kind, recognition of identity with dignity and privacy of human beings constitute the cardinal four corners of our monumental Constitution forming the concrete substratum of our fundamental rights that has eluded certain sections of our society who are still living in the bondage of dogmatic social norms, prejudiced notions, rigid stereotypes, parochial mindset and bigoted perceptions. Social exclusion, identity seclusion and isolation from the social mainstream are still the stark realities faced by individuals today and it is only when each and every individual is liberated from the shackles of such bondage and is able to work towards full development of his/her personality that we can call ourselves a truly free society. The first step on the long path to acceptance of the diversity and variegated hues that nature has created has to be taken now by vanquishing the enemies of prejudice and injustice and undoing the wrongs done so as to make way for a progressive and inclusive realisation of social and economic rights embracing all and to begin a dialogue for ensuring equal rights and opportunities for the "less than equal" sections of the society. We have to bid adieu to the perceptions, stereotypes and prejudices deeply ingrained in the societal mindset so as to usher in inclusivity in all spheres and empower all citizens alike without any kind of alienation and discrimination.
4. The natural identity of an individual should be treated to be absolutely essential to his being. What nature gives is natural. That is called nature within. Thus, that part of the personality of a person has to be respected and not despised or looked down upon. The said inherent nature and the associated natural impulses in that regard are to be accepted. Non-acceptance of it by any societal norm or notion and punishment by law on some obsolete idea and idealism affects the kernel of the identity of an individual. Destruction of individual identity would tantamount to crushing of intrinsic dignity that cumulatively encapsulates the values of privacy, choice, freedom of speech and other expressions. It can be viewed from another angle. An individual in exercise of his choice may feel that he/she should be left alone but no one, and we mean, no one, should impose solitude on him/her.
5. The eminence of identity has been luculently stated in National Legal Services Authority v. Union of India and others (2014) 5 SCC 438 2014 Indlaw SC 250, popularly known as NALSA case, wherein the Court was dwelling upon the status of identity of the transgenders. Radhakrishnan, J., after referring to catena of judgments and certain International Covenants, opined that gender identity is one of the most fundamental aspects of life which refers to a person's intrinsic sense of being male, female or transgender or transsexual

person. A person's sex is usually assigned at birth, but a relatively small group of persons may be born with bodies which incorporate both or certain aspects of both male and female physiology. The learned Judge further observed that at times, genital anatomy problems may arise in certain persons in the sense that their innate perception of themselves is not in conformity with the sex assigned to them at birth and may include pre-and post-operative transsexual persons and also persons who do not choose to undergo or do not have access to operation and also include persons who cannot undergo successful operation.

9. It has to be borne in mind that search for identity as a basic human ideal has reigned the mind of every individual in many a sphere like success, fame, economic prowess, political assertion, celebrity status and social superiority, etc. But search for identity, in order to have apposite space in law, sans stigmas and sans fear has to have the freedom of expression about his/her being which is keenly associated with the constitutional concept of "identity with dignity". When we talk about identity from the constitutional spectrum, it cannot be pigeon-holed singularly to one's orientation that may be associated with his/her birth and the feelings he/she develops when he/she grows up. Such a narrow perception may initially sound to subserve the purpose of justice but on a studied scrutiny, it is soon realized that the limited recognition keeps the individual choice at bay. The question that is required to be posed here is whether sexual orientation alone is to be protected or both orientation and choice are to be accepted as long as the exercise of these rights by an individual do not affect another's choice or, to put it succinctly, has the consent of the other where dignity of both is maintained and privacy, as a seminal facet of Article 21, is not dented. At the core of the concept of identity lies self-determination, realization of one's own abilities visualizing the opportunities and rejection of external views with a clear conscience that is in accord with constitutional norms and values or principles that are, to put in a capsule, "constitutionally permissible". As long as it is lawful, one is entitled to determine and follow his/her pattern of life. And that is where the distinction between constitutional morality and social morality or ethicality assumes a distinguished podium, a different objective. Non-recognition in the fullest sense and denial of expression of choice by a statutory penal provision and giving of stamp of approval by a two-Judge Bench of this Court to the said penal provision, that is, Section 377 of the Indian Penal Code, in Suresh Kumar Koushal and another v. Naz Foundation and others (2014) 1 SCC 1 2013 Indlaw SC 816 overturning the judgment of the Delhi High Court in Naz Foundation v. Government of NCT of Delhi and others (2009) 111 DRJ 1, is the central issue involved in the present controversy.

E. Decisions in Naz Foundation and Suresh Koushal

66. We shall now advert to what had been stated by the Delhi High Court in Naz Foundation and thereafter advert to the legal base of the decision in Suresh Koushal's case. The Delhi High Court had taken the view that Article 15 of the Constitution prohibits discrimination on several enumerated grounds including sex. The High Court preferred an expansive interpretation of 'sex' so as to include prohibition of discrimination on the ground of 'sexual orientation' and that sex-discrimination cannot be read as applying to gender simpliciter. Discrimination, as per the High Court's view, on the basis of sexual orientation is grounded in stereotypical judgments and generalization about the conduct of either sex.

67. Another facet of the Indian Constitution that the High Court delineated was that of inclusiveness as the Indian Constitution reflects this value of inclusiveness deeply ingrained in the Indian society and nurtured over several generations. The High Court categorically said that those who are perceived by the majority as deviants or different are not to be, on that score, excluded or ostracised. In the High Court's view, where a society displays inclusiveness and understanding, the LGBT persons can be assured of a life of dignity and non-discrimination.

68. It has been further opined by the High Court that the Constitution does not permit any statutory criminal law to be held captive of the popular misconceptions of who the LGBTs are, as it cannot be forgotten that discrimination is the antithesis of equality and recognition of equality in its truest sense will foster the dignity of every individual. That apart, the High Court had taken the view that social morality has to succumb to the concept of constitutional morality.

69. On the basis of the aforesaid reasons, the High Court declared Section 377 IPC.violative of Articles 14, 15 and 21 of the Constitution in so far as it criminalises consensual sexual acts of adults in private, whereas

for non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors, the High Court ruled that Section 377 IPC.was valid.

70. The Delhi High Court judgment was challenged in Suresh Koushal (supra) wherein this Court opined that acts which fall within the ambit of Section 377 IPC.can only be determined with reference to the act itself and to the circumstances in which it is executed. While so opining, the Court held that Section 377 IPC.would apply irrespective of age and consent, for Section 377 IPC.does not criminalize a particular people or identity or orientation and only identifies certain acts which, when committed, would constitute an offence. Such a prohibition, in the Court's view in Suresh Koushal (supra), regulates sexual conduct regardless of gender identity and orientation.

86. Our Constitution fosters and strengthens the spirit of equality and envisions a society where every person enjoys equal rights which enable him/her to grow and realize his/her potential as an individual. This guarantee of recognition of individuality runs through the entire length and breadth of this dynamic instrument. The Constitution has been conceived of and designed in a manner which acknowledges the fact that 'change is inevitable'. It is the duty of the courts to realize the constitutional vision of equal rights in consonance with the current demands and situations and not to read and interpret the same as per the standards of equality that existed decades ago. The judiciary cannot remain oblivious to the fact that the society is constantly evolving and many a variation may emerge with the changing times. There is a constant need to transform the constitutional idealism into reality by fostering respect for human rights, promoting inclusion of pluralism, bringing harmony, that is, unity amongst diversity, abandoning the idea of alienation or some unacceptable social notions built on medieval egos and establishing the cult of egalitarian liberalism founded on reasonable principles that can withstand scrutiny.

122. In the garb of social morality, the members of the LGBT community must not be outlawed or given a step-motherly treatment of malefactor by the society. If this happens or if such a treatment to the LGBT community is allowed to persist, then the constitutional courts, which are under the obligation to protect the fundamental rights, would be failing in the discharge of their duty. A failure to do so would reduce the citizenry rights to a cipher.

126. The Universal Declaration of Human Rights, 1948 became the Magna Carta of people all over the world. The first Article of the UDHR was uncompromising in its generality of application: All human beings are born free and equal in dignity and rights. Justice Kirby succinctly observed:-

"This language embraced every individual in our world. It did not apply only to citizens. It did not apply only to 'white' people. It did not apply only to good people. Prisoners, murderers and even traitors were to be entitled to the freedoms that were declared. There were no exceptions to the principles of equality."Human Rights Gay Rights by Michael Kirby, Published in 'Humane Rights' in 2016 by Future Leaders

127. The fundamental idea of dignity is regarded as an inseparable facet of human personality. Dignity has been duly recognized as an important aspect of the right to life under Article 21 of the Constitution. In the international sphere, the right to live with dignity had been identified as a human right way back in 1948 with the introduction of the Universal Declaration of Human Rights. The constitutional courts of our country have solemnly dealt with the task of assuring and preserving the right to dignity of each and every individual whenever the occasion arises, for without the right to live with dignity, all other fundamental rights may not realise their complete meaning.

160. At home, the view as to the right to privacy underwent a sea-change when a nine-Judge Bench of this Court in Puttaswamy (supra) elevated the right to privacy to the stature of fundamental right under Article 21 of the Constitution. One of us, Chandrachud, J., speaking for the majority, regarded the judgment in Suresh Koushal as a discordant note and opined that the reasons stated therein cannot be regarded as a valid constitutional basis for disregarding a claim based on privacy under Article 21 of the Constitution. Further, he observed that the reasoning in Suresh Koushal's decision to the effect that "a minuscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders" is not a sustainable basis to deny the right to privacy.

161. It was further observed that the purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular,

and the guarantee of constitutional rights does not depend upon their exercise being favourably regarded by majoritarian opinion.

163. As far as the aspect of sexual orientation is concerned, the Court opined that it is an essential attribute of privacy and discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. The Court was of the view that equality demands that the sexual orientation of each individual in the society must be protected on an even platform, for the right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution.

164. Regarding the view in Suresh Koushal's case to the effect that the Delhi High Court in Naz Foundation case had erroneously relied upon international precedents in its anxiety to protect the so-called rights of LGBT persons, the nine-Judge Bench was of the opinion that the aforesaid view in Suresh Koushal (supra) was unsustainable. The rights of the lesbian, gay, bisexual and transgender population, as per the decision in Puttaswamy (supra), cannot be construed to be "so-called rights" as the expression "so-called" seems to suggest the exercise of liberty in the garb of a right which is illusory.

165. The Court regarded such a construction in Suresh Koushal's case as inappropriate of the privacy based claims of the LGBT population, for their rights are not at all "so-called" but are real rights founded on sound constitutional doctrine. The Court went on to observe that the rights of the LGBT community inhere in the right to life, dwell in privacy and dignity and they constitute the essence of liberty and freedom. Further, the Court observed that sexual orientation being an essential component of identity, equal protection demands equal protection of the identity of every individual without discrimination.

183. We have discussed, in brief, the dynamic and progressive nature of the Constitution to accentuate that rights under the Constitution are also dynamic and progressive, for they evolve with the evolution of a society and with the passage of time. The rationale behind the doctrine of progressive realization of rights is the dynamic and ever growing nature of the Constitution under which the rights have been conferred to the citizenry.

184. The constitutional courts have to recognize that the constitutional rights would become a dead letter without their dynamic, vibrant and pragmatic interpretation. Therefore, it is necessary for the constitutional courts to inculcate in their judicial interpretation and decision making a sense of engagement and a sense of constitutional morality so that they, with the aid of judicial creativity, are able to fulfill their foremost constitutional obligation, that is, to protect the rights bestowed upon the citizens of our country by the Constitution.

187. This also gives birth to an equally important role of the State to implement the constitutional rights effectively. And of course, when we say State, it includes all the three organs, that is, the legislature, the executive as well as the judiciary. The State has to show concerned commitment which would result in concrete action. The State has an obligation to take appropriate measures for the progressive realization of economic, social and cultural rights.

188. The doctrine of progressive realization of rights, as a natural corollary, gives birth to the doctrine of non-retrogression. As per this doctrine, there must not be any regression of rights. In a progressive and an ever-improving society, there is no place for retreat. The society has to march ahead.

189. The doctrine of non-retrogression sets forth that the State should not take measures or steps that deliberately lead to retrogression on the enjoyment of rights either under the Constitution or otherwise.

220. Despite the Criminal Law (Amendment) Act, 2013 coming into force, by virtue of which Section 375 was amended, whereby the words 'sexual intercourse' in Section 375 were replaced by four elaborate clauses from (a) to (d) giving a wide definition to the offence of rape, Section 377 IPC.still remains in the statute book in the same form. Such an anomaly, if allowed to persist, may result in a situation wherein a heterosexual couple who indulges in carnal intercourse with the willful and informed consent of each other may be held liable for the offence of unnatural sex under Section 377 IPC, despite the fact that such an act would not be rape within the definition as provided under Section 375 IPC.

225. It is axiomatic that the expression 'life or personal liberty' in Article 21 embodies within itself a variety of rights. In Maneka Gandhi (supra), Bhagwati, J. (as he then was) observed:-

"The expression 'personal liberty' in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19..."

230. The sexual autonomy of an individual to choose his/her sexual partner is an important pillar and an insegregable facet of individual liberty. When the liberty of even a single person of the society is smothered under some vague and archival stipulation that it is against the order of nature or under the perception that the majority population is peeved when such an individual exercises his/her liberty despite the fact that the exercise of such liberty is within the confines of his/her private space, then the signature of life melts and living becomes a bare subsistence and resultantly, the fundamental right of liberty of such an individual is abridged.

231. While saying so, we are absolutely conscious of the fact that the citizenry may be deprived of their right to life and personal liberty if the conditions laid down in Article 21 are fulfilled and if, at the same time, the procedure established by law as laid down in Maneka Gandhi (supra) is satisfied. Article 21 requires that for depriving a person of his right to life and personal liberty, there has to be a law and the said law must prescribe a fair procedure. The seminal point is to see whether Section 377 withstands the sanctity of dignity of an individual, expression of choice, paramount concept of life and whether it allows an individual to lead to a life that one's natural orientation commands. That apart, more importantly, the question is whether such a gender-neutral offence, with the efflux of time, should be allowed to remain in the statute book especially when there is consent and such consent elevates the status of bodily autonomy. Hence, the provision has to be tested on the principles evolved under Articles 14, 19 and 21 of the Constitution.

237. A perusal of Section 377 IPC.reveals that it classifies and penalizes persons who indulge in carnal intercourse with the object to protect women and children from being subjected to carnal intercourse. That being so, now it is to be ascertained whether this classification has a reasonable nexus with the object sought to be achieved. The answer is in the negative as the non-consensual acts which have been criminalized by virtue of Section 377 IPC.have already been designated as penal offences under Section 375 IPC.and under the POCSO Act. Per contra, the presence of this Section in its present form has resulted in a distasteful and objectionable collateral effect whereby even 'consensual acts', which are neither harmful to children nor women and are performed by a certain class of people (LGBTs) owning to some inherent characteristics defined by their identity and individuality, have been woefully targeted. This discrimination and unequal treatment meted out to the LGBT community as a separate class of citizens is unconstitutional for being violative of Article 14 of the Constitution.

238. In Shayara Bano (supra), the Court observed that manifest arbitrariness of a provision of law can also be a ground for declaring a law as unconstitutional. Opining so, the Court observed thus:-

"The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14."

240. The LGBT community possess the same human, fundamental and constitutional rights as other citizens do since these rights inhere in individuals as natural and human rights. We must remember that equality is the edifice on which the entire non-discrimination jurisprudence rests. Respect for individual choice is the very essence of liberty under law and, thus, criminalizing carnal intercourse under Section 377 IPC.is irrational, indefensible and manifestly arbitrary.

247. In view of the test laid down in the aforesaid authorities, Section 377 IPC.does not meet the criteria of proportionality and is violative of the fundamental right of freedom of expression including the right to choose a sexual partner. Section 377 IPC.also assumes the characteristic of unreasonableness, for it becomes a weapon in the hands of the majority to seclude, exploit and harass the LGBT community. It shrouds the lives of the LGBT community in criminality and constant fear mars their joy of life. They constantly face social prejudice, disdain and are subjected to the shame of being their very natural selves. Thus, an archaic

law which is incompatible with constitutional values cannot be allowed to be preserved.

249. The very existence of Section 377 IPC.criminalising transgenders casts a great stigma on an already oppressed and discriminated class of people. This stigma, oppression and prejudice has to be eradicated and the transgenders have to progress from their narrow claustrophobic spaces of mere survival in hiding with their isolation and fears to enjoying the richness of living out of the shadows with full realization of their potential and equal opportunities in all walks of life. The ideals and objectives enshrined in our benevolent Constitution can be achieved only when each and every individual is empowered and enabled to participate in the social mainstream and in the journey towards achieving equality in all spheres, equality of opportunities in all walks of life, equal freedoms and rights and, above all, equitable justice. This can be achieved only by inclusion of all and exclusion of none from the mainstream.

252. Thus analysed, Section 377 IPC, so far as it penalizes any consensual sexual activity between two adults, be it homosexuals (man and a man), heterosexuals (man and a woman) and lesbians (woman and a woman), cannot be regarded as constitutional. However, if anyone, by which we mean both a man and a woman, engages in any kind of sexual activity with an animal, the said aspect of Section 377 IPC.is constitutional and it shall remain a penal offence under Section 377 IPC. Any act of the description covered under Section 377 IPC.done between the individuals without the consent of any one of them would invite penal liability under Section 377 IPC.

Conclusions

253. In view of the aforesaid analysis, we record our conclusions in seriatim:-

(i) The eminence of identity which has been luculently stated in the NALSA case very aptly connects human rights and the constitutional guarantee of right to life and liberty with dignity. With the same spirit, we must recognize that the concept of identity which has a constitutional tenability cannot be pigeon-holed singularly to one's orientation as it may keep the individual choice at bay. At the core of the concept of identity lies self-determination, realization of one's own abilities visualizing the opportunities and rejection of external views with a clear conscience that is in accord with constitutional norms and values or principles that are, to put in a capsule, "constitutionally permissible".

(ii) In Suresh Koushal (supra), this Court overturned the decision of the Delhi High Court in Naz Foundation (supra) thereby upholding the constitutionality of Section 377 IPC.and stating a ground that the LGBT community comprised only a minuscule fraction of the total population and that the mere fact that the said Section was being misused is not a reflection of the vires of the Section. Such a view is constitutionally impermissible.

(iii) Our Constitution is a living and organic document capable of expansion with the changing needs and demands of the society. The Courts must commemorate that it is the Constitution and its golden principles to which they bear their foremost allegiance and they must robe themselves with the armoury of progressive and pragmatic interpretation to combat the evils of inequality and injustice that try to creep into the society. The role of the Courts gains more importance when the rights which are affected belong to a class of persons or a minority group who have been deprived of even their basic rights since time immemorial.

(iv) The primary objective of having a constitutional democracy is to transform the society progressively and inclusively. Our Constitution has been perceived to be transformative in the sense that the interpretation of its provisions should not be limited to the mere literal meaning of its words; instead they ought to be given a meaningful construction which is reflective of their intent and purpose in consonance with the changing times. Transformative constitutionalism not only includes within its wide periphery the recognition of the rights and dignity of individuals but also propagates the fostering and development of an atmosphere wherein every individual is bestowed with adequate opportunities to develop socially, economically and politically. Discrimination of any kind strikes at the very core of any democratic society. When guided by transformative constitutionalism, the society is dissuaded from indulging in any form of discrimination so that the nation is guided towards a resplendent future.

(v) Constitutional morality embraces within its sphere several virtues, foremost of them being the espousal of a pluralistic and inclusive society. The concept of constitutional morality urges the organs of the State,

including the Judiciary, to preserve the heterogeneous nature of the society and to curb any attempt by the majority to usurp the rights and freedoms of a smaller or minuscule section of the populace. Constitutional morality cannot be martyred at the altar of social morality and it is only constitutional morality that can be allowed to permeate into the Rule of Law. The veil of social morality cannot be used to violate fundamental rights of even a single individual, for the foundation of constitutional morality rests upon the recognition of diversity that pervades the society.

(vi) The right to live with dignity has been recognized as a human right on the international front and by number of precedents of this Court and, therefore, the constitutional courts must strive to protect the dignity of every individual, for without the right to dignity, every other right would be rendered meaningless. Dignity is an inseparable facet of every individual that invites reciprocative respect from others to every aspect of an individual which he/she perceives as an essential attribute of his/her individuality, be it an orientation or an optional expression of choice. The Constitution has ladened the judiciary with the very important duty to protect and ensure the right of every individual including the right to express and choose without any impediments so as to enable an individual to fully realize his/her fundamental right to live with dignity.

(vii) Sexual orientation is one of the many biological phenomena which is natural and inherent in an individual and is controlled by neurological and biological factors. The science of sexuality has theorized that an individual exerts little or no control over who he/she gets attracted to. Any discrimination on the basis of one's sexual orientation would entail a violation of the fundamental right of freedom of expression.

(viii) After the privacy judgment in Puttaswamy (supra), the right to privacy has been raised to the pedestal of a fundamental right. The reasoning in Suresh Koushal (supra), that only a minuscule fraction of the total population comprises of LGBT community and that the existence of Section 377 IPC.abridges the fundamental rights of a very minuscule percentage of the total populace, is found to be a discordant note. The said reasoning in Suresh Koushal (supra), in our opinion, is fallacious, for the framers of our Constitution could have never intended that the fundamental rights shall be extended for the benefit of the majority only and that the Courts ought to interfere only when the fundamental rights of a large percentage of the total populace is affected. In fact, the said view would be completely against the constitutional ethos, for the language employed in Part III of the Constitution as well as the intention of the framers of our Constitution mandates that the Courts must step in whenever there is a violation of the fundamental rights, even if the right/s of a single individual is/are in peril.

(ix) There is a manifest ascendance of rights under the Constitution which paves the way for the doctrine of progressive realization of rights as such rights evolve with the evolution of the society. This doctrine, as a natural corollary, gives birth to the doctrine of non-retrogression, as per which there must not be atavism of constitutional rights. In the light of the same, if we were to accept the view in Suresh Koushal (supra), it would tantamount to a retrograde step in the direction of the progressive interpretation of the Constitution and denial of progressive realization of rights.

(x) Autonomy is individualistic. Under the autonomy principle, the individual has sovereignty over his/her body. He/she can surrender his/her autonomy wilfully to another individual and their intimacy in privacy is a matter of their choice. Such concept of identity is not only sacred but is also in recognition of the quintessential facet of humanity in a person's nature. The autonomy establishes identity and the said identity, in the ultimate eventuate, becomes a part of dignity in an individual.

(xi) A cursory reading of both Sections 375 IPC.and 377 IPC.reveals that although the former Section gives due recognition to the absence of 'wilful and informed consent' for an act to be termed as rape, per contra, Section 377 does not contain any such qualification embodying in itself the absence of 'wilful and informed consent' to criminalize carnal intercourse which consequently results in criminalizing even voluntary carnal intercourse between homosexuals, heterosexuals, bisexuals and transgenders. Section 375 IPC, after the coming into force of the Criminal Law (Amendment) Act, 2013, has not used the words 'subject to any other provision of the IPC.. This indicates that Section 375 IPC.is not subject to Section 377 IPC.

(xii) The expression 'against the order of nature' has neither been defined in Section 377 IPC.nor in any other provision of the IPC. The connotation given to the expression by various judicial pronouncements includes all sexual acts which are not intended for the purpose of procreation. Therefore, if coitus is not performed

for procreation only, it does not per se make it 'against the order of nature'.
(xiii) Section 377 IPC, in its present form, being violative of the right to dignity and the right to privacy, has to be tested, both, on the pedestal of Articles 14 and 19 of the Constitution as per the law laid down in Maneka Gandhi (supra) and other later authorities.
(xiv) An examination of Section 377 IPC.on the anvil of Article 14 of the Constitution reveals that the classification adopted under the said Section has no reasonable nexus with its object as other penal provisions such as Section 375 IPC.and the POCSO Act already penalize non-consensual carnal intercourse. Per contra, Section 377 IPC.in its present form has resulted in an unwanted collateral effect whereby even'consensual sexual acts', which are neither harmful to children nor women, by the LGBTs have been woefully targeted thereby resulting in discrimination and unequal treatment to the LGBT community and is, thus, violative of Article 14 of the Constitution.
(xv) Section 377 IPC, so far as it criminalises even consensual sexual acts between competent adults, fails to make a distinction between non-consensual and consensual sexual acts of competent adults in private space which are neither harmful nor contagious to the society. Section 377 IPC.subjects the LGBT community to societal pariah and dereliction and is, therefore, manifestly arbitrary, for it has become an odious weapon for the harassment of the LGBT community by subjecting them to discrimination and unequal treatment. Therefore, in view of the law laid down in Shayara Bano (supra), Section 377 IPC.is liable to be partially struck down for being violative of Article 14 of the Constitution.
(xvi) An examination of Section 377 IPC.on the anvil of Article 19(1)(a) reveals that it amounts to an unreasonable restriction, for public decency and morality cannot be amplified beyond a rational or logical limit and cannot be accepted as reasonable grounds for curbing the fundamental rights of freedom of expression and choice of the LGBT community. Consensual carnal intercourse among adults, be it homosexual or heterosexual, in private space, does not in any way harm the public decency or morality. Therefore, Section 377 IPC.in its present form violates Article 19(1)(a) of the Constitution.
(xvii) Ergo, Section 377 IPC, so far as it penalizes any consensual sexual relationship between two adults, be it homosexuals (man and a man), heterosexuals (man and a woman) or lesbians (woman and a woman), cannot be regarded as constitutional. However, if anyone, by which we mean both a man and a woman, engages in any kind of sexual activity with an animal, the said aspect of Section 377 is constitutional and it shall remain a penal offence under Section 377 IPC. Any act of the description covered under Section 377 IPC.done between two individuals without the consent of any one of them would invite penal liability under Section 377 IPC.
(xviii) The decision in Suresh Koushal (supra), not being in consonance with what we have stated hereinabove, is overruled.
254. The Writ Petitions are, accordingly, disposed of. There shall be no order as to costs.

R.F. Nariman, J.
256. The word "homosexual" is not derived from "homo" meaning man, but from "homo" meaning same. Homo in Greek means 'same' - the Nicene creed that was accepted by the Catholic Church after the Council at Nicaea, held by Emperor Constantine in 325 AD, was formulated with the word 'homo' at the forefront. When coupled with 'sios' it means same substance, meaning thereby that Jesus Christ was divine as he was of the same substance as God. The word "lesbian" is derived from the name of the Greek island of Lesbos, where it was rumored that female same-sex couples proliferated. What we have before us is a relook at the constitutional validity of Section 377 of the Indian Penal Code which was enacted in the year 1860 (over 150 years ago) insofar as it criminalises consensual sex between adult same-sex couples.
260. The impetus of this decision is what led to a three-Judge Bench order of 08.01.2018, which referred to the judgment of Puttaswamy (supra) and other arguments made by Shri Datar, to refer the correctness of Suresh Kumar Koushal's case (supra) to a larger Bench. This is how the matter has come to us.
302. The Section which had been struck down by the High Court was held to be arbitrary and unreasonable by this Court as well.
303. Close on the heels of this Court's judgment in Suresh Kumar Koushal (supra) is this Court's judgment

in NALSA (supra). In this case, the Court had to grapple with the trauma, agony and pain of the members of the transgender community.

332. The Latin maxim cessant ratione legis, cessat ipsa lex, meaning when the reason for a law ceases, the law itself ceases, is a rule of law which has been recognized by this Court in H.H. Shri Swamiji of Shri Amar Mutt v. Commissioner, Hindu Religious and Charitable Endowments Dept, 1979 4 SCC 642 at paragraph 29, and State of Punjab v. Devans Modern Breweries Ltd., (2004) 11 SCC 26 2003 Indlaw SC 1507 at paragraph 335. It must not be forgotten that Section 377 was the product of the Victorian era, with its attendant puritanical moral values. Victorian morality must give way to constitutional morality as has been recognized in many of our judgments. Constitutional morality is the soul of the Constitution, which is to be found in the Preamble of the Constitution, which declares its ideals and aspirations, and is also to be found in Part III of the Constitution, particularly with respect to those provisions which assure the dignity of the individual. The rationale for Section 377, namely Victorian morality, has long gone and there is no reason to continue with - as Justice Holmes said in the lines quoted above in this judgment - a law merely for the sake of continuing with the law when the rationale of such law has long since disappeared.

333. Given our judgment in Puttaswamy (supra), in particular, the right of every citizen of India to live with dignity and the right to privacy including the right to make intimate choices regarding the manner in which such individual wishes to live being protected by Articles 14, 19 and 21, it is clear that Section 377, insofar as it applies to same-sex consenting adults, demeans them by having them prosecuted instead of understanding their sexual orientation and attempting to correct centuries of the stigma associated with such persons.

343. Given the aforesaid, it has now to be decided as to whether the judgment in Suresh Kumar Koushal (supra) is correct. Suresh Kumar Koushal's judgment (supra) first begins with the presumption of constitutionality attaching to pre-constitutional laws, such as the Indian Penal Code. The judgment goes on to state that pre-constitutional laws, which have been adopted by Parliament and used with or without amendment, being manifestations of the will of the people of India through Parliament, are presumed to be constitutional. We are afraid that we cannot agree.

345. It is a little difficult to subscribe to the view of the Division Bench that the presumption of constitutionality of Section 377 would therefore attach.

346. The fact that the legislature has chosen not to amend the law, despite the 172nd Law Commission Report specifically recommending deletion of Section 377, may indicate that Parliament has not thought it proper to delete the aforesaid provision, is one more reason for not invalidating Section 377, according to Suresh Kumar Koushal (supra). This is a little difficult to appreciate when the Union of India admittedly did not challenge the Delhi High Court judgment striking down the provision in part. Secondly, the fact that Parliament may or may not have chosen to follow a Law Commission Report does not guide the Court's understanding of its character, scope, ambit and import as has been stated in Suresh Kumar Koushal (supra). It is a neutral fact which need not be taken into account at all. All that the Court has to see is whether constitutional provisions have been transgressed and if so, as a natural corollary, the death knell of the challenged provision must follow.

347. It is a little difficult to appreciate the Court stating that the ambit of Section 377 IPC.is only determined with reference to the sexual act itself and the circumstances in which it is executed. It is also a little difficult to appreciate that Section 377 regulates sexual conduct regardless of gender identity and orientation.

349. The fact that only a minuscule fraction of the country's population constitutes lesbians and gays or transgenders, and that in the last 150 years less than 200 persons have been prosecuted for committing the offence under Section 377, is neither here nor there. When it is found that privacy interests come in and the State has no compelling reason to continue an existing law which penalizes same-sex couples who cause no harm to others, on an application of the recent judgments delivered by this Court after Suresh Kumar Koushal (supra), it is clear that Articles 14, 15, 19 and 21 have all been transgressed without any legitimate state rationale to uphold such provision.

350. For all these reasons therefore, we are of the view that, Suresh Kumar Koushal (supra) needs to be, and is hereby, overruled.

351. We may conclude by stating that persons who are homosexual have a fundamental right to live with dignity, which, in the larger framework of the Preamble of India, will assure the cardinal constitutional value of fraternity that has been discussed in some of our judgments (See (1) Nandini Sundar v. State of Chhattisgarh, (2011) 7 SCC 547 2011 Indlaw SCO 445 at paragraphs 16, 25 and 52; and (2) Subramaniam Swamy v. Union of India (2016) 7 SCC 221 at paragraphs 153 to 156). We further declare that such groups are entitled to the protection of equal laws, and are entitled to be treated in society as human beings without any stigma being attached to any of them. We further declare that Section 377 insofar as it criminalises homosexual sex and transgender sex between consenting adults is unconstitutional.

352. We are also of the view that the Union of India shall take all measures to ensure that this judgment is given wide publicity through the public media, which includes television, radio, print and online media at regular intervals, and initiate programs to reduce and finally eliminate the stigma associated with such persons. Above all, all government officials, including and in particular police officials, and other officers of the Union of India and the States, be given periodic sensitization and awareness training of the plight of such persons in the light of the observations contained in this judgment.

Dr. Dhananjaya Y. Chandrachud, J.

354. A hundred and fifty eight years ago, a colonial legislature made it criminal, even for consenting adults of the same gender, to find fulfillment in love. The law deprived them of the simple right as human beings to live, love and partner as nature made them. The human instinct to love was caged by constraining the physical manifestation of their sexuality. Gays and lesbians These terms as well as terms such as "LGBT" and "LGBTIQ" used in the judgement are to be construed in an inclusive sense to include members of all gender and sexual minorities, whose sexual activity is criminalized by the application of Section 377 of the Indian Penal Code, 1860. were made subordinate to the authority of a coercive state. A charter of morality made their relationships hateful. The criminal law became a willing instrument of repression. To engage in 'carnal intercourse' against 'the order of nature' risked being tucked away for ten years in a jail. The offence would be investigated by searching the most intimate of spaces to find tell-tale signs of intercourse. Civilisation has been brutal.

355. Eighty seven years after the law was made, India gained her liberation from a colonial past. But Macaulay's legacy - the offence under Section 377 of the Penal Code - has continued to exist for nearly sixty eight years after we gave ourselves a liberal Constitution. Gays and lesbians, transgenders and bisexuals continue to be denied a truly equal citizenship seven decades after Independence. The law has imposed upon them a morality which is an anachronism. Their entitlement should be as equal participants in a society governed by the morality of the Constitution. That in essence is what Section 377 denies to them. The shadows of a receding past confront their quest for fulfillment.

356. Section 377 exacts conformity backed by the fear of penal reprisal. There is an unbridgeable divide between the moral values on which it is based and the values of the Constitution. What separates them is liberty and dignity. We must, as a society, ask searching questions to the forms and symbols of injustice. Unless we do that, we risk becoming the cause and not just the inheritors of an unjust society. Does the Constitution allow a quiver of fear to become the quilt around the bodies of her citizens, in the intimacies which define their identities? If there is only one answer to this question, as I believe there is, the tragedy and anguish which Section 377 inflicts must be remedied.

357. The Constitution brought about a transfer of political power. But it reflects above all, a vision of a society governed by justice. Individual liberty is its soul. The constitutional vision of justice accommodates differences of culture, ideology and orientation. The stability of its foundation lies in its effort to protect diversity in all its facets: in the beliefs, ideas and ways of living of her citizens. Democratic as it is, our Constitution does not demand conformity. Nor does it contemplate the mainstreaming of culture. It nurtures dissent as the safety valve for societal conflict. Our ability to recognise others who are different is a sign of our own evolution. We miss the symbols of a compassionate and humane society only at our peril.

Section 377 provides for rule by the law instead of the rule of law. The rule of law requires a just law which facilitates equality, liberty and dignity in all its facets. Rule by the law provides legitimacy to arbitrary state

behaviour.

358. Section 377 has consigned a group of citizens to the margins. It has been destructive of their identities. By imposing the sanctions of the law on consenting adults involved in a sexual relationship, it has lent the authority of the state to perpetuate social stereotypes and encourage discrimination. Gays, lesbians, bisexuals and transgenders have been relegated to the anguish of closeted identities. Sexual orientation has become a target for exploitation, if not blackmail, in a networked and digital age. The impact of Section 377 has travelled far beyond the punishment of an offence. It has been destructive of an identity which is crucial to a dignified existence.

E Beyond physicality: sex, identity and stereotypes

"Only in the most technical sense is this a case about who may penetrate whom where. At a practical and symbolical level it is about the status, moral citizenship and sense of self-worth of a significant section of the community. At a more general and conceptual level, it concerns the nature of the open, democratic and pluralistic society contemplated by the Constitution." The National Coalition for Gay and Lesbian Equality v. The Minister of Justice, 1999 (1) SA 6 (CC), Sachs J., concurring.

385. The Petitioners contend that (i) Section 377 discriminates on the basis of sex and violates Articles 15 and 16; and (ii) Discrimination on the ground of sexual orientation is in fact, discrimination on the ground of sex. The intervenors argue that (i) Section 377 criminalizes acts and not people; (ii) It is not discriminatory because the prohibition on anal and oral sex applies equally to both heterosexual and homosexual couples; and (iii) Article 15 prohibits discrimination on the ground of 'sex' which cannot be interpreted so broadly as to include 'sexual orientation'.

386. When the constitutionality of a law is challenged on the ground that it violates the guarantees in Part III of the Constitution, what is determinative is its effect on the infringement of fundamental rights. Re. the Kerala Education Bill, AIR 1958 SC 956 1958 Indlaw SC 182 at para 26; Sakal Papers v Union of India, AIR 1962 SC 305 1961 Indlaw SC 429 at para 42; R.C. Cooper v Union of India, (1970) 1 SCC 248 1970 Indlaw SC 575 at paras 43, 49; Bennett Coleman v. Union of India, AIR (1972) 2 SCC 788 1972 Indlaw SC 337 at para 39; Maneka Gandhi v Union of India, (1978) 1 SCC 248 1978 Indlaw SC 212 at para 19. This affords the guaranteed freedoms their true potential against a claim by the state that the infringement of the right was not the object of the provision. It is not the object of the law which impairs the rights of the citizens. Nor is the form of the action taken determinative of the protection that can be claimed. It is the effect of the law upon the fundamental right which calls the courts to step in and remedy the violation. The individual is aggrieved because the law hurts. The hurt to the individual is measured by the violation of a protected right. Hence, while assessing whether a law infringes a fundamental right, it is not the intention of the lawmaker that is determinative, but whether the effect or operation of the law infringes fundamental rights.

Article 15 of the Constitution reads thus:

"15. (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them." (Emphasis supplied)

Article 15 prohibits the State from discriminating on grounds only of sex. Early judicial pronouncements adjudged whether discrimination aimed only at sex is covered by Article 15 or whether the guarantee is attracted even to a discrimination on the basis of sex and some other grounds ('Sex plus'). The argument was that since Article 15 prohibited discrimination on only specified grounds, discrimination resulting from a specified ground coupled with other considerations is not prohibited. The view was that if the discrimination is justified on the grounds of sex and another factor, it would not be covered by the prohibition in Article 15. In National Legal Services Authority v. Union of India ("NALSA") 433 U.S. 321 (1977).The case concerned an effective bar on females for the position of guards or correctional counsellors in the Alabama State Penitentiary system. Justice Marshall's dissent held that prohibition of women in 'contact positions' violated the Title VII guarantee., while dealing with the rights of transgender persons under the Constitution, this Court opined:

"66. Articles 15 and 16 sought to prohibit discrimination on the basis of sex, recognizing that sex discrimination is a historical fact and needs to be addressed. Constitution *makers, it can be gathered, gave emphasis to the fundamental right against sex discrimination so as to prevent the direct or indirect attitude*

to treat people differently, for the reason of not being in conformity with stereotypical generalizations of binary genders. Both gender and biological attributes constitute distinct components of sex. Biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes include one's self image, the deep psychological or emotional sense of sexual identity and character. The discrimination on the ground of 'sex' Under Articles 15 and 16, therefore, includes discrimination on the ground of gender identity." (Emphasis supplied)

This approach, in my view, is correct.

393. A discriminatory act will be tested against constitutional values. A discrimination will not survive constitutional scrutiny when it is grounded in and perpetuates stereotypes about a class constituted by the grounds prohibited in Article 15(1). If any ground of discrimination, whether direct or indirect is founded on a stereotypical understanding of the role of the sex, it would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex. If certain characteristics grounded in stereotypes, are to be associated with entire classes of people constituted as groups by any of the grounds prohibited in Article 15(1), that cannot establish a permissible reason to discriminate. Such a discrimination will be in violation of the constitutional guarantee against discrimination in Article 15(1). That such a discrimination is a result of grounds rooted in sex and other considerations, can no longer be held to be a position supported by the intersectional understanding of how discrimination operates. This infuses Article 15 with true rigour to give it a complete constitutional dimension in prohibiting discrimination.

The approach adopted the Court in Nergesh Meerza, is incorrect.

404. The Constitution envisaged a transformation in the order of relations not just between the state and the individual, but also between individuals: in a constitutional order characterized by the Rule of Law, the constitutional commitment to egalitarianism and an anti-discriminatory ethos permeates and infuses these relations. In K S Puttaswamy v. Union of India ("Puttaswamy") (2017) 10 SCC 1, this Court affirmed the individual as the bearer of the constitutional guarantee of rights. Such rights are devoid of their guarantee when despite legal recognition, the social, economic and political context enables an atmosphere of continued discrimination. The Constitution enjoins upon every individual a commitment to a constitutional democracy characterized by the principles of equality and inclusion. In a constitutional democracy committed to the protection of individual dignity and autonomy, the state and every individual has a duty to act in a manner that advances and promotes the constitutional order of values.

By criminalizing consensual sexual conduct between two homosexual adults, Section 377 has become the basis not just of prosecutions but of the persecution of members of the affected community. Section 377 leads to the perpetuation of a culture of silence and stigmatization. Section 377 perpetuates notions of morality which prohibit certain relationships as being against the 'order of nature.' A criminal provision has sanctioned discrimination grounded on stereotypes imposed on an entire class of persons on grounds prohibited by Article 15(1). This constitutes discrimination on the grounds only of sex and violates the guarantee of non-discrimination in Article 15(1)

406. The right to privacy is intrinsic to liberty, central to human dignity and the core of autonomy. These values are integral to the right to life under Article 21 of the Constitution. A meaningful life is a life of freedom and self-respect and nurtured in the ability to decide the course of living. In the nine judge Bench decision in Puttaswamy, this Court conceived of the right to privacy as natural and inalienable. The judgment delivered on behalf of four judges holds:

"Privacy is a concomitant of the right of the individual to exercise control over his or her personality. It finds an origin in the notion that there are certain rights which are natural to or inherent in a human being. Natural rights are inalienable because they are inseparable from the human personality. The human element in life is impossible to conceive without the existence of natural rights..." Puttaswamy, at para 42.

498. LGBT individuals living under the threats of conformity grounded in cultural morality have been denied a basic human existence. They have been stereotyped and prejudiced. Constitutional morality requires this Court not to turn a blind eye to their right to an equal participation of citizenship and an equal enjoyment of living. Constitutional morality requires that this Court must act as a counter majoritarian institution which discharges the responsibility of protecting constitutionally entrenched rights, regardless of what the majority

may believe. Constitutional morality must turn into a habit of citizens. By respecting the dignity of LGBT individuals, this Court is only fulfilling the foundational promises of our Constitution.

M In summation : transformative constitutionalism

499. This case has required a decision on whether Section 377 of the Penal Code fulfills constitutional standards in penalising consensual sexual conduct between adults of the same sex. We hold and declare that in penalising such sexual conduct, the statutory provision violates the constitutional guarantees of liberty and equality. It denudes members of the LGBT communities of their constitutional right to lead fulfilling lives. In its application to adults of the same sex engaged in consensual sexual behaviour, it violates the constitutional guarantee of the right to life and to the equal protection of law.

500. Sexual orientation is integral to the identity of the members of the LGBT communities. It is intrinsic to their dignity, inseparable from their autonomy and at the heart of their privacy. Section 377 is founded on moral notions which are an anathema to a constitutional order in which liberty must trump over stereotypes and prevail over the mainstreaming of culture. Our Constitution, above all, is an essay in the acceptance of diversity. It is founded on a vision of an inclusive society which accommodates plural ways of life.

501. The impact of Section 377 has travelled far beyond criminalising certain acts. The presence of the provision on the statute book has reinforced stereotypes about sexual orientation. It has lent the authority of the state to the suppression of identities. The fear of persecution has led to the closeting of same sex relationships. A penal provision has reinforced societal disdain.

502. Sexual and gender based minorities cannot live in fear, if the Constitution has to have meaning for them on even terms. In its quest for equality and the equal protection of the law, the Constitution guarantees to them an equal citizenship. In de-criminalising such conduct, the values of the Constitution assure to the LGBT community the ability to lead a life of freedom from fear and to find fulfilment in intimate choices.

503. The choice of a partner, the desire for personal intimacy and the yearning to find love and fulfilment in human relationships have a universal appeal, straddling age and time. In protecting consensual intimacies, the Constitution adopts a simple principle: the state has no business to intrude into these personal matters. Nor can societal notions of heteronormativity regulate constitutional liberties based on sexual orientation.

504. This reference to the Constitution Bench is about the validity of Section 377 in its application to consensual sexual conduct between adults of the same sex. The constitutional principles which we have invoked to determine the outcome address the origins of the rights claimed and the source of their protection. In their range and content, those principles address issues broader than the acts which the statute penalises. Resilient and universal as they are, these constitutional values must enure with a mark of permanence.

505. Above all, this case has had great deal to say on the dialogue about the transformative power of the Constitution. In addressing LGBT rights, the Constitution speaks - as well - to the rest of society. In recognising the rights of the LGBT community, the Constitution asserts itself as a text for governance which promotes true equality. It does so by questioning prevailing notions about the dominance of sexes and genders. In its transformational role, the Constitution directs our attention to resolving the polarities of sex and binarities of gender. In dealing with these issues we confront much that polarises our society. Our ability to survive as a free society will depend upon whether constitutional values can prevail over the impulses of the time.

506. A hundred and fifty eight years is too long a period for the LGBT community to suffer the indignities of denial. That it has taken sixty eight years even after the advent of the Constitution is a sobering reminder of the unfinished task which lies ahead. It is also a time to invoke the transformative power of the Constitution.

507. The ability of a society to acknowledge the injustices which it has perpetuated is a mark of its evolution. In the process of remedying wrongs under a regime of constitutional remedies, recrimination gives way to restitution, diatribes pave the way for dialogue and healing replaces the hate of a community. For those who have been oppressed, justice under a regime committed to human freedom, has the power to transform lives. In addressing the causes of oppression and injustice, society transforms itself. The Constitution has within it the ability to produce a social catharsis. The importance of this case lies in telling us that reverberations of how we address social conflict in our times will travel far beyond the narrow alleys in which they are

explored.

Conclusion

508. We hold and declare that:

(i) Section 377 of the Penal Code, in so far as it criminalises consensual sexual conduct between adults of the same sex, is unconstitutional;

(ii) Members of the LGBT community are entitled, as all other citizens, to the full range of constitutional rights including the liberties protected by the Constitution;

(iii) The choice of whom to partner, the ability to find fulfilment in sexual intimacies and the right not to be subjected to discriminatory behaviour are intrinsic to the constitutional protection of sexual orientation;

(iv) Members of the LGBT community are entitled to the benefit of an equal citizenship, without discrimination, and to the equal protection of law; and

(v) The decision in Koushal stands overruled.

Indu Malhotra, J.

512. The Petitioners have inter alia submitted that sexual expression and intimacy between consenting adults of the same sex in private ought to receive protection under Part III of the Constitution, as sexuality lies at the core of a human being's innate identity. Section 377 inasmuch as it criminalises consensual relationships between same sex couples is violative of the fundamental rights guaranteed by Articles 21, 19 and 14, in Part III of the Constitution.

The principal contentions raised by the Petitioners during the course of hearing are:

i. Fundamental rights are available to LGBT persons regardless of the fact that they constitute a minority.

ii. Section 377 is violative of Article 14 being wholly arbitrary, vague, and has an unlawful objective.

iii. Section 377 penalises a person on the basis of their sexual orientation, and is hence discriminatory under Article 15.

iv. Section 377 violates the right to life and liberty guaranteed by Article 21 which encompasses all aspects of the right to live with dignity, the right to privacy, and the right to autonomy and self-determination with respect to the most intimate decisions of a human being.

518. The trend of decriminalizing anti-sodomy laws world over has gained currency during the past few decades since such laws have been recognised to be violative of human rights. In 2017, the International Lesbian, Gay, Bisexual, Trans and Intersex Association noted in its Annual State Sponsored Homophobia Report Aengus Carroll And Lucas Ramon Mendos, Ilga Annual State Sponsored Homophobia Report 2017: A World Survey Of Sexual Orientation Laws: Criminalisation, Protection And Recognition (12th Edition, 2017), at pp. 26-36 that 124 countries no longer penalise homosexuality. The change in laws in these countries was given effect to, either through legislative amendments to the statutory enactments, or by way of court judgments.

Relationships between same-sex couples have been increasingly accorded protection by States across the world. As per the aforesaid Report, a total of 24 countries now allow same-sex couples to marry, while 28 countries legally recognise partnerships between same-sex couples. Several countries have enacted enabling legislations which protect LGBT persons from discrimination, and allow them to adopt children. Id For instance, the United Kingdom now outlaws discrimination in employment, education, social protection and housing on the ground of sexual orientation. Marriage between same-sex couples have been recognised in England and Wales.

520. JUDICIAL INTERPRETATION

520.1. The essential ingredient required to constitute an offence under Section 377 is "carnal intercourse against the order of nature", which is punishable with life imprisonment, or imprisonment of either description up to ten years. Section 377 applies irrespective of gender, age, or consent.

520.2. The expression 'carnal intercourse' used in Section 377 is distinct from 'sexual intercourse' which appears in Sections 375 and 497 of the IPC. The phrase "carnal intercourse against the order of nature" is not defined by Section 377, or in the Code.

520.3. The term 'carnal' has been the subject matter of judicial interpretation in various decisions. According to the New International Webster's Comprehensive Dictionary of the English Language The New International Webster's Comprehensive Dictionary of the English Language (Deluxe Encyclopedic Edition, 1996), 'carnal' means:

"1. Pertaining to the fleshly nature or to bodily appetites.

2. Sensual; sexual.

3. Pertaining to the flesh or to the body; not spiritual; hence worldly."

520.4. The courts had earlier interpreted the term "carnal" to refer to acts which fall outside penile-vaginal intercourse, and were not for the purposes of procreation.

In Khanu v. Emperor AIR 1925 Sind 286, the Sindh High Court was dealing with a case where the accused was found guilty of having committed Gomorrah coitus per os with a little child, and was convicted under Section 377. The Court held that the act of carnal intercourse was clearly against the order of nature, because the natural object of carnal intercourse is that there should be the possibility of conception of human beings, which in the case of coitus per os is impossible.

Section 377 insofar as it criminalises consensual sexual acts between adults in private, is not based on any sound or rational principle, since the basis of criminalisation is the "sexual orientation" of a person, over which one has "little or no choice".

Further, the phrase "carnal intercourse against the order of nature" in Section 377 as a determining principle in a penal provision, is too open-ended, giving way to the scope for misuse against members of the LGBT community.

Thus, apart from not satisfying the twin-test under Article 14, Section 377 is also manifestly arbitrary, and hence violative of Article 14 of the Constitution.

523. SECTION 377 IS VIOLATIVE OF ARTICLE 15

Article 15 prohibits the State from discrimination against any citizen on the grounds of religion, race, caste, sex, or place of birth. The object of this provision was to guarantee protection to those citizens who had suffered historical disadvantage, whether it be of a political, social, or economic nature.

Race, caste, sex, and place of birth are aspects over which a person has no control, ergo they are immutable. On the other hand, religion is a fundamental choice of a person. Supra note 25 Discrimination based on any of these grounds would undermine an individual's personal autonomy.

The Supreme Court of Canada in its decisions in the cases of Egan v. Canada [1995] SCC 98, and Vriend v. Alberta [1998] SCC 816, interpreted Section 15(1) "15. Equality before and under law and equal protection and benefit of law

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability..."

Article 15(1), Canadian Charter of Rights and Freedoms. of the Canadian Charter of Rights and Freedoms which is pari materia to Article 15 of the Indian Constitution.

Section 15(1), of the Canadian Charter like Article 15 of our Constitution, does not include "sexual orientation" as a prohibited ground of discrimination. Notwithstanding that, the Canadian Supreme Court in the aforesaid decisions has held that sexual orientation is a "ground analogous" to the other grounds specified under Section 15(1). Discrimination based on any of these grounds has adverse impact on an individual's personal autonomy, and is undermining of his personality.

A similar conclusion can be reached in the Indian context as well in light of the underlying aspects of immutability and fundamental choice.

The LGBT community is a sexual minority which has suffered from unjustified and unwarranted hostile discrimination, and is equally entitled to the protection afforded by Article 15.

524. SECTION 377 VIOLATES THE RIGHT TO LIFE AND LIBERTY GUARANTEED BY ARTICLE 21

Article 21 provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Such procedure established by law must be fair, just and reasonable. Maneka

Gandhi v. Union of India & Anr., (1978) 1 SCC 248 1978 Indlaw SC 212, at paragraph 48

The right to life and liberty affords protection to every citizen or non-citizen, irrespective of their identity or orientation, without discrimination.

525. SECTION 377 VIOLATES THE RIGHT TO FREEDOM OF EXPRESSION OF LGBT PERSONS

525.1. Article 19(1)(a) guarantees freedom of expression to all citizens. However, reasonable restrictions can be imposed on the exercise of this right on the grounds specified in Article 19(2).

LGBT persons express their sexual orientation in myriad ways. One such way is engagement in intimate sexual acts like those proscribed under Section 377. Lawrence et al. v. Texas, 539 U.S. 558 (2003); and, National Coalition for Gay and Lesbian Equality & Anr. v. Minister of Justice & Ors., [1998] ZACC 15 Owing to the fear of harassment from law enforcement agencies and prosecution, LGBT persons tend to stay 'in the closet'. They are forced not to disclose a central aspect of their personal identity i.e. their sexual orientation, both in their personal and professional spheres to avoid persecution in society and the opprobrium attached to homosexuality. Unlike heterosexual persons, they are inhibited from openly forming and nurturing fulfilling relationships, thereby restricting rights of full personhood and a dignified existence. It also has an impact on their mental well-being.

526. SURESH KUMAR KOUSHAL OVERRULED

The two-Judge bench of this Court in Suresh Kumar Koushal & Anr. v. Naz Foundation & Ors. (supra) over-ruled the decision of the Delhi High Court in Naz Foundation v. Government of NCT of Delhi & Ors. (2009) 111 DRJ 1 (DB) which had declared Section 377 insofar as it criminalised consensual sexual acts of adults in private to be violative of Articles 14, 15 and 21 of the Constitution.

The grounds on which the two-judge bench of this Court over-ruled the judgment in Naz Foundation v. Government of NCT of Delhi & Ors. (supra) were that:

i. Section 377 does not criminalise particular people or identity or orientation. It merely identifies certain acts which if committed would constitute an offence. Such a prohibition regulates sexual conduct, regardless of gender identity and orientation.

Those who indulge in carnal intercourse in the ordinary course, and those who indulge in carnal intercourse against the order of nature, constitute different classes. Persons falling in the latter category cannot claim that Section 377 suffers from the vice of arbitrariness and irrational classification. Section 377 merely defines a particular offence, and prescribes a punishment for the same.

ii. LGBT persons constitute a "miniscule fraction" of the country's population, and there have been very few prosecutions under this Section. Hence, it could not have been made a sound basis for declaring Section 377 to be ultra-vires Articles 14, 15, and 21.

iii. It was held that merely because Section 377, IPC.has been used to perpetrate harassment, blackmail and torture to persons belonging to the LGBT community, cannot be a ground for challenging the vires of the Section.

iv. After noting that Section 377 was intra vires, this Court observed that the legislature was free to repeal or amend Section 377.

527. The fallacy in the Judgment of Suresh Kumar Koushal & Anr. v. Naz Foundation & Ors. (supra) is that:

i. The offence of "carnal intercourse against the order of nature" has not been defined in Section 377. It is too wide, and open-ended, and would take within its sweep, and criminalise even sexual acts of consenting adults in private.

Furthermore, consensual relationships between adults cannot be classified along with offences of bestiality, sodomy and non-consensual relationships.

Sexual orientation is immutable, since it is an innate feature of one's identity, and cannot be changed at will. The choice of LGBT persons to enter into intimate sexual relations with persons of the same sex is an exercise of their personal choice, and an expression of their autonomy and self-determination.

Section 377 insofar as it criminalises voluntary sexual relations between LGBT persons of the same sex in private, discriminates against them on the basis of their "sexual orientation" which is violative of their fundamental rights guaranteed by Articles 14, 19, and 21 of the Constitution.

ii. The mere fact that the LGBT persons constitute a "miniscule fraction" of the country's population cannot

be a ground to deprive them of their Fundamental Rights guaranteed by Part III of the Constitution. Even though the LGBT constitute a sexual minority, members of the LGBT community are citizens of this country who are equally entitled to the enforcement of their Fundamental Rights guaranteed by Articles 14, 15, 19, and 21.

Fundamental Rights are guaranteed to all citizens alike, irrespective of whether they are a numerical minority. Modern democracies are based on the twin principles of majority rule, and protection of fundamental rights guaranteed under Part III of the Constitution. Under the Constitutional scheme, while the majority is entitled to govern; the minorities like all other citizens are protected by the solemn guarantees of rights and freedoms under Part III.

iii. Even though Section 377 is facially neutral, it has been misused by subjecting members of the LGBT community to hostile discrimination, making them vulnerable and living in fear of the ever-present threat of prosecution on account of their sexual orientation.

The criminalisation of "carnal intercourse against the order of nature" has the effect of criminalising the entire class of LGBT persons since any kind of sexual intercourse in the case of such persons would be considered to be against the "order of nature", as per the existing interpretation.

iv. The conclusion in case of Suresh Kumar Koushal & Anr. v. Naz Foundation & Ors. (supra) to await legislative amendments to this provision may not be necessary. Once it is brought to the notice of the Court of any violation of the Fundamental Rights of a citizen, or a group of citizens the Court will not remain a mute spectator, and wait for a majoritarian government to bring about such a change.

Given the role of this Court as the sentinel on the qui vive, it is the Constitutional duty of this Court to review the provisions of the impugned Section, and read it down to the extent of its inconsistency with the Constitution.

In the present case, reading down Section 377 is necessary to exclude consensual sexual relationships between adults, whether of the same sex or otherwise, in private, so as to remove the vagueness of the provision to the extent it is inconsistent with Part III of the Constitution.

528. History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries. The members of this community were compelled to live a life full of fear of reprisal and persecution. This was on account of the ignorance of the majority to recognise that homosexuality is a completely natural condition, part of a range of human sexuality. The mis-application of this provision denied them the Fundamental Right to equality guaranteed by Article 14. It infringed the Fundamental Right to non-discrimination under Article 15, and the Fundamental Right to live a life of dignity and privacy guaranteed by Article 21. The LGBT persons deserve to live a life unshackled from the shadow of being 'unapprehended felons'.

Conclusion

i. In view of the aforesaid findings, it is declared that insofar as Section 377 criminalises consensual sexual acts of adults (i.e. persons above the age of 18 years who are competent to consent) in private, is violative of Articles 14, 15, 19, and 21 of the Constitution.

It is, however, clarified that such consent must be free consent, which is completely voluntary in nature, and devoid of any duress or coercion.

ii. The declaration of the aforesaid reading down of Section 377 shall not, however, lead to the re-opening of any concluded prosecutions, but can certainly be relied upon in all pending matters whether they are at the trial, appellate, or revisional stages.

iii. The provisions of Section 377 will continue to govern non-consensual sexual acts against adults, all acts of carnal intercouse against minors, and acts of beastiality.

iv. The judgment in Suresh Kumar Koushal & Anr. v. Naz Foundation & Ors. (2014) 1 SCC 1 2013 Indlaw SC 816 is hereby overruled for the reasons stated in paragraph 19.

The Reference is answered accordingly.

In view of the above findings, the Writ Petitions are allowed.

Reference answered

IN THE SUPREME COURT OF INDIA

Decided On: 24.08.2017

2017(5)ALLMR686, (2017)6MLJ267, 2017(10)SCALE1

Justice K S Puttaswamy (Retd.) & Anr.

vs

Union of India & Ors.

Judges/Coram:
J.S. Khehar, C.J.I., Jasti Chelameswar, S.A. Bobde, R.K. Agrawal, Rohinton Fali Nariman, Abhay Manohar Sapre. Dr. D.Y. Chandrachud, Sanjay Kishan Kaul and S. Abdul Nazeer, JJ.

A Bench of three judges of this Court, while considering the constitutional challenge to the Aadhaar card scheme of the Union government noted in its order dated 11 August 2015 that the norms for and compilation of demographic biometric data by government was questioned on the ground that it violates the right to privacy. The Attorney General for India urged that the existence of a fundamental right of privacy is in doubt in view of two decisions : the first – M P Sharma v. Satish Chandra, District Magistrate, Delhi ("M P Sharma") [*(1954) SCR 1077]* was rendered by a Bench of eight judges and the second, in Kharak Singh v. State of Uttar Pradesh ("Kharak Singh") [(1964) 1 SCR 332] was rendered by a Bench of six judges. Each of these decisions, in the submission of the Attorney General, contained observations that the Indian Constitution does not specifically protect the right to privacy. On the other hand, the submission of the petitioners was that M P Sharma and Kharak Singh were founded on principles expounded in A K Gopalan v. State of Madras ("Gopalan") [AIR 1950 SC 27]. Gopalan, which construed each provision contained in the Chapter on fundamental rights as embodying a distinct protection, was held not to be good law by an eleven-judge Bench in Rustom Cavasji Cooper v. Union of India ("Cooper") [(1970) 1 SCC 248]. Hence the petitioners submitted that the basis of the two earlier decisions is not valid. Moreover, it was also urged that in the seven-judge Bench decision in Maneka Gandhi v. Union of India ("Maneka")[(1978) 1 SCC 248], the minority judgment of Justice Subba Rao in Kharak Singh was specifically approved of and the decision of the majority was overruled. While addressing these challenges, the Bench of three judges of this Court took note of several decisions of this Court in which the right to privacy has been held to be a constitutionally protected fundamental right. Those decisions include : Gobind v. State of Madhya Pradesh ("Gobind") [(1975) 2 SCC 148], R Rajagopal v. State of Tamil Nadu ("Rajagopal") [(1994) 6 SCC 632] and People's Union for Civil Liberties v. Union of India ("PUCL") [(1997) 1 SCC 301]. These subsequent decisions which affirmed the existence of a constitutionally protected right of privacy, were rendered by Benches of a strength smaller than those in M P Sharma and Kharak Singh. Faced with this predicament and having due

regard to the far-reaching questions of importance involving interpretation of the Constitution, it was felt that institutional integrity and judicial discipline would require a reference to a larger Bench. Hence the Bench of three learned judges observed in its order dated 11 August 2015 :

"12. We are of the opinion that the cases on hand raise far reaching questions of importance involving interpretation of the Constitution. What is at stake is the amplitude of the fundamental rights including that precious and inalienable right under Article 21. If the observations made in M.P. Sharma (supra) and Kharak Singh (supra) 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. At the same time, we are also of the opinion that the institutional integrity and judicial discipline require that pronouncement made by larger Benches of this Court cannot be ignored by the smaller Benches without appropriately explaining the reasons for not following the pronouncements made by such larger Benches. With due respect to all the learned Judges who rendered the subsequent judgments - where right to privacy is asserted or referred to their Lordships concern for the liberty of human beings, we are of the humble opinion that there appears to be certain amount of apparent unresolved contradiction in the law declared by this Court.

13. Therefore, in our opinion to give a 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."

On 18 July 2017, a Constitution Bench presided over by the learned Chief Justice considered it appropriate that the issue be resolved by a Bench of nine judges. The order of the Constitution Bench reads thus:

"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."

Held –

(Per J. S. Khehar, CJI., R K Agrawal, J., D Y Chandrachud, J., S Abdul Nazir, J)

1. The judgment in M P Sharma holds essentially that in the absence of a provision similar to the Fourth Amendment to the US Constitution, the right to privacy cannot be read into the provisions

of Article 20 (3) of the Indian Constitution. The judgment does not specifically adjudicate on whether a right to privacy would arise from any of the other provisions of the rights guaranteed by Part III including Article 21 and Article 19. The observation that privacy is not a right guaranteed by the Indian Constitution is not reflective of the correct position.

M P Sharma is overruled to the extent to which it indicates to the contrary.

2. Kharak Singh has correctly held that the content of the expression 'life' under Article 21 means not merely the right to a person's "animal existence" and that the expression 'personal liberty' is a guarantee against invasion into the sanctity of a person's home or an intrusion into personal security. Kharak Singh also correctly laid down that the dignity of the individual must lend content to the meaning of 'personal liberty'. The first part of the decision in Kharak Singh which invalidated domiciliary visits at night on the ground that they violated ordered liberty is an implicit recognition of the right to privacy. The second part of the decision, however, which holds that the right to privacy is not a guaranteed right under our Constitution, is not reflective of the correct position. Similarly, Kharak Singh's reliance upon the decision of the majority in Gopalan is not reflective of the correct position in view of the decisions in Cooper and in Maneka. Kharak Singh to the extent that it holds that the right to privacy is not protected under the Indian Constitution is overruled.

3.

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

(B) Life and personal liberty are not creations of the Constitution. These rights are recognised by the Constitution as inhering in each individual as an intrinsic and inseparable part of the human element which dwells within;

(C) Privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in Article 21 of the Constitution. Elements of privacy also arise in varying contexts from the other facets of freedom and dignity recognised and guaranteed by the fundamental rights contained in Part III;

(D) Judicial recognition of the existence of a constitutional right of privacy is not an exercise in the nature of amending the Constitution nor is the Court embarking on a constitutional function of that nature which is entrusted to Parliament;

(E) Privacy is the constitutional core of human dignity. Privacy has both a normative and descriptive function. At a normative level privacy sub-serves 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;

(F) 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;

G) This Court has not embarked upon an exhaustive enumeration or a catalogue of entitlements or interests comprised in the right to privacy. The Constitution must evolve with the felt necessities of time to meet the challenges thrown up in a democratic order governed by the rule of law. The meaning of the Constitution cannot be frozen on the perspectives present when it was adopted. Technological change has given rise to concerns which were not present seven decades ago and the rapid growth of technology may render obsolescent many notions of the present. Hence the interpretation of the Constitution must be resilient and flexible

to allow future generations to adapt its content bearing in mind its basic or essential features;

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

(I) 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.

4. Decisions rendered by this Court subsequent to Kharak Singh, upholding the right to privacy would be read subject to the above principles.

5. Informational privacy is a facet of the right to privacy. The dangers to privacy in an age of information can originate not only from the state but from non-state actors as well. We commend to the Union Government the need to examine and put into place a robust regime for data protection. The creation of such a regime requires a careful and sensitive balance between individual interests and legitimate concerns of the state. The legitimate aims of the state would include for instance protecting national security, preventing and investigating crime, encouraging innovation and the spread of knowledge, and preventing the dissipation of social

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

6. The reference is answered in the above terms.

(Per Chelameswar, J.)

I do not think that anybody in this country would like to have the officers of the State intruding into their homes or private property at will or soldiers quartered in their houses without their consent. I do not think that anybody would like to be told by the State as to what they should eat or how they should dress or whom they should be associated with either in their personal, social or political life. Freedom of social and political association is guaranteed to citizens under Article 19(1)(c). Personal association is still a doubtful area. The decision making process regarding the freedom of association, freedoms of travel and residence are purely private and fall within the realm of the right of privacy. It is one of the most intimate decisions. All liberal democracies believe that the State should not have unqualified authority to intrude into certain aspects of human life and that the authority should be limited by parameters constitutionally fixed. Fundamental rights are the only constitutional firewall to prevent State's interference with those core freedoms constituting liberty of a human being. The right to privacy is certainly one of the core freedoms which is to be defended. It is part of liberty within the meaning of that expression in Article 21.

I am in complete agreement with the conclusions recorded by my learned brothers in this regard.

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

To begin with, the options canvassed for limiting the right to privacy include an Article 14 type reasonableness enquiry; limitation as per the express provisions of Article 19; a just, fair and reasonable basis (that is, substantive due process) for limitation per Article 21; and finally, a just, fair and reasonable standard per Article 21 plus the amorphous standard of 'compelling state interest'. The last of these four options is the highest standard of scrutiny that a court can

adopt. It is from this menu that a standard of review for limiting the right of privacy needs to be chosen.

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

The just, fair and reasonable standard of review under Article 21 needs no elaboration. It has also most commonly been used in cases dealing with a privacy claim hitherto. Gobind resorted to the compelling state interest standard in addition to the Article 21 reasonableness enquiry. From the United States where the terminology of 'compelling state interest' originated, a strict standard of scrutiny comprises two things- a 'compelling state interest' and a requirement of 'narrow tailoring' (narrow tailoring means that the law must be narrowly framed to achieve the objective). As a term, compelling state interest does not have definite contours in the US. Hence, it is critical that this standard be adopted with some clarity as to when and in what types of privacy claims it is to be used. Only in privacy claims which deserve the strictest scrutiny is the standard of compelling State interest to be used. As for others, the just, fair and reasonable standard under Article 21 will apply. When the compelling State interest standard is to be employed must depend upon the context of concrete cases. However, this discussion sets the ground rules within which a limitation for the right of privacy is to be found.

(Per S A Bobde, J.)

In view of the foregoing, I answer the reference before us in the following terms:

a) The ineluctable conclusion must be that an inalienable constitutional right to privacy inheres in Part III of the Constitution. M.P. Sharma and the majority opinion in Kharak Singh must stand overruled to the extent that they indicate to the contrary.

b) The right to privacy is inextricably bound up with all exercises of human liberty – both as it is specifically enumerated across Part III, and as it is guaranteed in the residue under Article 21. It is distributed across the various articles in Part III and, mutatis mutandis, takes the form of whichever of their enjoyment its violation curtails.

c) Any interference with privacy by an entity covered by Article 12's description of the 'state' must satisfy the tests applicable to whichever one or more of the Part III freedoms the interference affects.

(Per R F Nariman, J.)

This reference is answered by stating that the inalienable fundamental right to privacy resides in Article 21 and other fundamental freedoms contained in Part III of the Constitution of India. M.P. Sharma (supra) and the majority in Kharak Singh (supra), to the extent that they indicate to the contrary, stand overruled. The later judgments of this Court recognizing privacy as a fundamental right do not need to be revisited. These cases are, therefore, sent back for adjudication on merits to the original Bench of 3 honourable Judges of this Court in light of the judgment just delivered by us.

(Per A M Sapre, J.)

In my considered opinion, "right to privacy of any individual" is essentially a natural right, which inheres in every human being by birth. Such right remains with the human being till he/she breathes last. It is indeed inseparable and inalienable from human being. In other words, it is born with the human being and extinguish with human being.

One cannot conceive an individual enjoying meaningful life with dignity without such right. Indeed, it is one of those cherished rights, which every civilized society governed by rule of law always recognizes in every human being and is under obligation to recognize such rights in order to maintain and preserve the dignity of an individual regardless of gender, race, religion, caste and creed. It is, of course, subject to imposing certain reasonable restrictions keeping in view the social, moral and compelling public interest, which the State is entitled to impose by law.

"Right to privacy" is not defined in law except in the dictionaries. The Courts, however, by process of judicial interpretation, has assigned meaning to this right in the context of specific issues involved on case-to-case basis.

The most popular meaning of "right to privacy" is - "the right to be let alone". In Gobind vs. State of Madhya Pradesh & Anr., (1975) 2 SCC 148, K.K.Mathew, J. noticed multiple facets of this right (Para 21-25) and then gave a rule of caution while examining the contours of such right on case-to-case basis.

In my considered view, the answer to the questions can be found in the law laid down by this Court in the cases beginning from Rustom Cavasjee Cooper (supra) followed by Maneka Gandhi vs. Union of India & Anr. (1978) 1 SCC 248, People's Union for Civil Liberties (PUCL) vs. Union of India & Anr., (1997) 1 SCC 301, Gobind's case (supra), Mr. "X" vs. Hospital 'Z' (1998) 8 SCC 296, District Registrar & Collector, Hyderabad & Anr. vs. Canara Bank & Ors., (2005) 1 SCC 496 and lastly in Thalappalam Service Coop. Bank Ltd. & Ors. vs. State of Kerala & Ors. (2013) 16 SCC 82.

I, therefore, do not find any difficulty in tracing the "right to privacy" emanating from the two expressions of the Preamble namely, "liberty of thought, expression, belief, faith and worship" and "Fraternity assuring the dignity of the individual" and also emanating from Article

19 (1)(a) which gives to every citizen "a freedom of speech and expression" and further emanating from Article 19(1)(d) which gives to every citizen "a right to move freely throughout the territory of India" and lastly, emanating from the expression "personal liberty" under Article 21. Indeed, the right to privacy is inbuilt in these expressions and flows from each of them and in juxtaposition.

In view of foregoing discussion, my answer to question No. 2 is that "right to privacy" is a part of fundamental right of a citizen guaranteed under Part III of the Constitution. However, it is not an absolute right but is subject to certain reasonable restrictions, which the State is entitled to impose on the basis of social, moral and compelling public interest in accordance with law.

Similarly, I also hold that the "right to privacy" has multiple facets, and, therefore, the same has to go through a process of case-to-case development as and when any citizen raises his grievance complaining of infringement of his alleged right in accordance with law.

My esteemed learned brothers, Justice J. Chelameswar, Justice S.A. Bobde, Justice Rohinton Fali Nariman and Dr. Justice D.Y. Chandrachud have extensively dealt with question No. 1 in the context of Indian and American Case law on the subject succinctly. They have also dealt with in detail the various submissions of the learned senior counsel appearing for all the parties.

I entirely agree with their reasoning and the conclusion on question No. 1 and hence do not wish to add anything to what they have said in their respective scholarly opinions.

(Per S K Kaul, J.)

The right of privacy is a fundamental right. It is a right which protects the inner sphere of the individual from interference from both State, and non-State actors and allows the individuals to make autonomous life choices.

It was rightly expressed on behalf of the petitioners that the technology has made it possible to enter a citizen's house without knocking at his/her door and this is equally possible both by the State and non-State actors. It is an individual's choice as to who enters his house, how he lives and in what relationship. The privacy of the home must protect the family, marriage, procreation and sexual orientation which are all important aspects of dignity.

If the individual permits someone to enter the house it does not mean that others can enter the house. The only check and balance is that it should not harm the other individual or affect his or her rights. This applies both to the physical form and to technology. In an era where there are wide, varied, social and cultural norms and more so in a country like ours which prides itself on its diversity, privacy is one of the most important rights to be protected both against State and non-State actors and be recognized as a fundamental right. How it thereafter works out in its inter-play with other fundamental rights and when such restrictions would become necessary would depend on the factual matrix of each case. That it may give rise to more

litigation can hardly be the reason not to recognize this important, natural, primordial right as a fundamental right.

There are two aspects of the opinion of Dr. D.Y. Chandrachud,J., one of which is common to the opinion of Rohinton F. Nariman,J., needing specific mention. While considering the evolution of Constitutional jurisprudence on the right of privacy he has referred to the judgment in Suresh Kumar Koushal Vs. Naz Foundation. In the challenge laid to Section 377 of the Indian Penal Code before the Delhi High Court, one of the grounds of challenge was that the said provision amounted to an infringement of the right to dignity and privacy. The Delhi High Court,inter alia, observed that, *"the right to live with dignity and the right of privacy both are recognized as dimensions of Article 21 of the Constitution of India. The view of the High Court, however did not find favour with the Supreme Court and it was observed that only a miniscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders and thus, there cannot be any basis for declaring the Section ultra virus of provisions of Articles 14, 15 and 21 of the Constitution. The matter did not rest at this, as the issue of privacy and dignity discussed by the High Court was also observed upon. The sexual orientation even within the four walls of the house thus became an aspect of debate. I am in agreement with the view of Dr. D. Y. Chandrachud, J., who in paragraphs 123 & 124 of his judgment, states that the right of privacy cannot be denied, even if there is a miniscule fraction of the population which is affected. The majoritarian concept does not apply to Constitutional rights and the Courts are often called up on to take what may be categorized as a non-majoritarian view, in the check and balance of power envisaged under the Constitution of India. Ones sexual orientation is undoubtedly an attribute of privacy. The observations made in Mosley vs. News Group Papers Ltd., in a broader concept may be usefully referred to: ".. It is not simply a matter of personal privacy versus the public interest. The modern perception is that there is a public interest in respecting personal privacy. It is thus a question of taking account of conflicting public interest considerations and evaluating them according to increasingly well recognized criteria. When the courts identify an infringement of a person's Article 8 rights, and in particular in the context of his freedom to conduct his sex life and personal relationships as he wishes, it is right to afford a remedy and to vindicate that right. The only permitted exception is where there is a countervailing public interest which in the particular circumstances is strong enough to outweigh it; that is to say, because one at least of the established "limiting principles" comes into play. Was it necessary and proportionate for the intrusion to take place, for example, in order to expose illegal activity or to prevent the public from being significantly misled by public claims hitherto made by the individual concerned (as with Naomi Campbell's public denials of drug-taking)? Or was it necessary because the information, in the words of the Strasbourg court in Von Hannover at (60) and (76), would make a contribution to "a debate of general interest"? That is, of course, a very high test, it is yet to be determined how far that doctrine will be taken in the courts of this jurisdiction in relation to photography in public places. If taken literally, it would mean a very significant change in what is permitted. It would have a profound effect on the tabloid and celebrity culture to which we have become accustomed in recent years."*

It is not necessary to delve into this issue further, other than in the context of privacy as that would be an issue to be debated before the appropriate Bench, the matter having been referred to a larger Bench.

The second aspect is the discussion in respect of the majority judgment in the case of ADM Jabalpur vs. Shivkant Shukla in both the opinions. In I.R. Coelho Vs. The State of Tamil Nadu it was observed that the ADM Jabalpur case has been impliedly overruled and that the supervening event was the 44th Amendment to the Constitution, amending Article 359 of the Constitution.

I fully agree with the view expressly overruling the ADM Jabalpur case which was an aberration in the constitutional jurisprudence of our country and the desirability of burying the majority opinion ten fathom deep, with no chance of resurrection.

Let the right of privacy, an inherent right, be un equivocally a fundamental right embedded in part-III of the Constitution of India, but subject to the restrictions specified, relatable to that part. This is the call of today. The old order change the yielding place to new.

Operative order of the Supreme Court –

ORDER OF THE COURT

1. The judgment on behalf of the Hon'ble Chief Justice Shri Justice Jagdish Singh Khehar, Shri Justice R K Agrawal, Shri Justice S Abdul Nazeer and Dr. Justice D Y Chandrachud was delivered by Dr. Justice D Y Chandrachud. Shri Justice J Chelameswar, Shri Justice S A Bobde, Shri Justice Abhay Manohar Sapre, Shri Justice Rohinton Fali Nariman and Shri Justice Sanjay Kishan Kaul delivered separate judgments.

2. The reference is disposed of in the following terms:

(i) The decision in M P Sharma which holds that the right to privacy is not protected by the Constitution stands over-ruled;

(ii) The decision in Kharak Singh to the extent that it holds that the right to privacy is not protected by the Constitution stands over-ruled;

(iii) The right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution.

(iv) Decisions subsequent to Kharak Singh which have enunciated the position in (iii) above lay down the correct position in law.

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The Petitioner/Wife had approached present Court, for assailing the divorce pronounced by her Husband in the presence of witnesses saying that I gave 'talak, talak, talak'. The Petitioner had sought a declaration, that the talaq-e-biddat pronounced by her husband be declared as void ab initio

IN THE SUPREME COURT OF INDIA

Decided On: 22.08.2017

2017(5)BomCR481, III(2017)DMC1SC, (2017)6MLJ378, 2017(9)SCALE178

Shayara Bano and Ors.
Vs.
Union of India (UOI) and Ors.

Judges/Coram:
J.S. Khehar, C.J.I., Kurian Joseph, Rohinton Fali Nariman, U.U. Lalit and S. Abdul Nazeer, JJ.

The petitioner-Shayara Bano, has approached Supreme Court, for assailing the divorce pronounced by her husband – Rizwan Ahmad on 10.10.2015, wherein he affirmed "...in the presence of witnesses saying that I gave 'talak, talak, talak', hence like this I divorce from you from my wife. From this date there is no relation of husband and wife. From today I am 'haraam', and I have become 'naamharram'. In future you are free for using your life ...". The aforesaid divorce was pronounced before Mohammed Yaseen (son of Abdul Majeed) and Ayaaz Ahmad (son of Ityaz Hussain) – the two witnesses. The petitioner has sought a declaration, that the 'talaq-e-biddat' pronounced by her husband on 10.10.2015 be declared as void ab initio. It is also her contention, that such a divorce which abruptly, unilaterally and irrevocably terminates the ties of matrimony, purportedly under Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 (hereinafter referred to as, the Shariat Act), be declared unconstitutional. During the course of hearing, it was submitted, that the 'talaq-e-biddat' (-triple talaq), pronounced by her husband is not valid, as it is not a part of 'Shariat' (Muslim 'personal law'). It is also the petitioner's case, that divorce of the instant nature, cannot be treated as "rule of decision" under the Shariat Act. It was also submitted, that the practice of 'talaq-e-biddat' is violative of the fundamental rights guaranteed to citizens in India, under Articles 14, 15 and 21 of the Constitution. It is also the petitioner's case, that the practice of 'talaq-e-biddat' cannot be protected under the rights granted to religious denominations (-or any sections thereof) under Articles 25(1), 26(b) and 29 of the Constitution.

Held, while allowing the petition:

J.S. Khehar, C.J.I. and S. Abdul Nazeer, J.:Dissenting view

(i) Practice of 'talaq-e-biddat', has had the sanction and approval of the religious denomination which practiced it, and as such, there could be no doubt that the practice, was a part of their personal law.

(ii) After examined Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937, the limited purpose of the aforesaid provision was to negate the overriding effect of usages and customs over the Muslim 'personal law'-'Shariat'. The debates reveal that customs and usages by tribals were being given overriding effect by courts while determining issues between Muslims. The Shariat Act, neither lays down nor declares the Muslim 'personal law'-'Shariat'. Not even, on the questions/subjects covered by the legislation. There was no room for any doubt, that there was substantial divergence of norms regulating Shias and Sunnis. There was further divergence of norms, in their respective schools. The Shariat Act did not crystallise the norms as were to be applicable to Shias and Sunnis, or their respective schools. What was sought to be done through the Shariat Act, was to preserve Muslim 'personal law'-'Shariat', as it existed from time immemorial. The Shariat Act recognizes the Muslim 'personal law' as the 'rule of decision' in the same manner as Article 25 recognises the supremacy and enforceability of 'personal law' of all religions. Muslim 'personal law'-'Shariat' as body of law, was perpetuated by the Shariat Act, and what had become ambiguous (due to inundations through customs and usages), was clarified and crystalised. Muslim 'personal law'-'Shariat' could not be considered as a State enactment.

(iii) The fundamental rights enshrined in Articles 14, 15 and 21 are as against State actions. A challenge under these provisions Articles 14, 15 and 21 could be invoked only against the State. It was essential to keep in mind, that Article 14 forbids the State from acting arbitrarily. Article 14 requires the State to ensure equality before the law and equal protection of the laws, within the territory of Country. Likewise, Article 15 prohibits the State from taking discriminatory action on the grounds of religion, race, caste, sex or place of birth, or any of them. The mandate of Article 15 requires, the State to treat everyone equally. Even Article 21 is a protection from State action, inasmuch as, it prohibits the State from depriving anyone of the rights ensuring to them, as a matter of life and liberty (-except, by procedure established by law). Muslim 'personal law'-'Shariat', could not be tested on the touchstone of being a State action. Muslim 'personal law'-'Shariat', is a matter of 'personal law' of Muslims, to be traced from four sources, namely, the Quran, the 'hadith', the 'ijma' and the 'qiyas'. None of these could be attributed to any State action. Talaq-e-biddat is a practice amongst Sunni Muslims of the Hanafi school. A practice which was a component of the faith of those belonging to that school. Personal law, being a matter of religious faith, and not being State action, there was no question of its being violative of the provisions of the Constitution, more particularly, the provisions relied upon by the Petitioners, to assail the practice of talaq-e-biddat, namely, Articles 14, 15 and 21 of the Constitution.

(iv) This was a case which presents a situation where present Court should exercise its discretion to issue appropriate directions under Article 142 of the Constitution. Direction granted to Union of India to consider appropriate legislation, particularly with reference to 'talaq-e-biddat'. The contemplated legislation would also take into consideration advances in Muslim 'personal law'-'Shariat', as have been corrected by legislation the world over, even by theocratic Islamic States.

(v) Till such time as legislation in the matter is considered, Muslim husbands are injuncted from pronouncing 'talaq-e-biddat' as a means for severing their matrimonial relationship. The instant injunction, shall in the first instance, be operative for a period of six months. If the legislative process commences before the expiry of the period of six months, and a positive decision emerges towards redefining 'talaq-e-biddat' (three pronouncements of 'talaq', at one and the same time)-as one, or alternatively, if it was decided that the practice of 'talaq-e-biddat' be done away with altogether, the injunction would continue, till legislation is finally enacted. Failing which, the injunction shall cease to operate.

Kurian Joseph, J. and U.U. Lalit J.:Concurring view

(vi) To freely profess, practice and propagate religion of one's choice is a Fundamental Right guaranteed under the Constitution. Under Article 25 (2) of the Constitution, the State is also granted power to make law in two contingencies notwithstanding the freedom granted under Article 25(1). Article 25 (2) states that "nothing in this Article shall affect the operation of any existing law or prevent the State from making any law-(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and Sections of Hindus. Except to the above extent, the freedom of religion under the Constitution is absolute. On the statement that triple talaq was an integral part of the religious practice, could not be agreed. Merely because a practice had continued for long, that by itself could not make it valid if it had been expressly declared to be impermissible. The whole purpose of the 1937 Act was to declare Shariat as the Rule of decision and to discontinue anti-Shariat practices with respect to subjects enumerated in Section 2 which include talaq. Therefore, in any case, after the introduction of the 1937 Act, no practice against the tenets of Quran was permissible. Hence, there could not be any Constitutional protection to such a practice and thus, disagreement with the Chief Justice for the constitutional protection given to triple talaq.

Rohinton Fali Nariman, J.:Concurring view

(vii) Marriage in Islam is a contract, and like other contracts, may under certain circumstances, be terminated. There was something astonishingly modern about this-no public declaration was a condition precedent to the validity of a Muslim marriage nor was any religious ceremony deemed absolutely essential, though they were usually carried out. Apparently, before the time of Prophet,

the pagan Arab was absolutely free to repudiate his wife on a mere whim, but after the advent of Islam, divorce was permitted to a man if his wife by her indocility or bad character renders marital life impossible. In the absence of good reason, no man could justify a divorce for he then draws upon himself the curse of God. Indeed, Prophet had declared divorce to be the most disliked of lawful things in the sight of God. The reason for this was not far to seek. Divorce breaks the marital tie which is fundamental to family life in Islam. Not only does it disrupt the marital tie between man and woman, but it has severe psychological and other repercussions on the children from such marriage.

(viii) Given the fact that Triple Talaq is instant and irrevocable, it was obvious that any attempt at reconciliation between the husband and wife by two arbiters from their families, which was essential to save the marital tie, could not ever take place. Also, as understood by the Privy Council in Rashid Ahmad, such Triple Talaq was valid even if it was not for any reasonable cause, which view of the law no longer holds good after Shamim Ara. This being the case, it was clear that this form of Talaq was manifestly arbitrary in the sense that the marital tie could be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it. This form of Talaq must, therefore, be held to be violative of the fundamental right contained Under Article 14 of the Constitution. The 1937 Act, insofar as it seeks to recognize and enforce Triple Talaq, was within the meaning of the expression laws in force in Article 13(1) and must be struck down as being void to the extent that it recognizes and enforces Triple Talaq. The practice of talaq-e-biddat-triple talaq was set aside.

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Writ Petitions preferred Under Article 32 - Constitution of India - Challenged constitutional validity of Sections 499 and 500 of Indian Penal Code - Sections 199(1) of Code of Criminal Procedure - Assertion of Petitioners - Freedom of thought and expression cannot be scuttled or abridged - Threat of criminal prosecution - Individual grievances pertaining to reputation - Can be agitated in civil courts - There is a remedy - No justification to keep the provision of defamation in criminal law alive - Creates concavity and unreasonable restriction in individual freedom - Assertion by Union of India - Reasonable restrictions are based on paradigms and parameters of the Constitution - Structured and pedestalled on doctrine of absoluteness of any fundamental right, cultural and social ethos - Need and feel of time for every right engulfs and incorporates duty to respect other's right - Whether criminal prosecution for defamation Under Section 499 and Section 500 Indian Penal Code acts as a "chilling effect" on the freedom of speech and expression or a potential for harassment, particularly, of the press and media - Whether the word "defamation" includes both civil and criminal defamation - Whether criminalization of defamation in the manner as it has been done Under Section 499 Indian Penal Code withstands the test of reasonableness - Whether right to freedom of speech and expression can be allowed so much room that even reputation of an individual which is a constituent of Article 21 would have no entry into that area - Whether Section 499 of Indian Penal Code either in substantive sense or procedurally violates the concept of reasonable restriction - Whether Section 499 is arbitrary, vague or

disproportionate

Whether the doctrine of noscitur a soccis be applied to the expression "incitement of an offence" used in Article 19(2) of the Constitution so that it gets associated with the term "defamation"

IN THE SUPREME COURT OF INDIA

Decided On: 13.05.2016

(2016)7SCC 221; AIR2016SC2728, 2016 (2) ALT (Crl.) 170 (A.P.),

Subramanian Swamy
Vs.
Union of India (UOI), Ministry of Law and Ors.

Judges/Coram:
Dipak Misra and Prafulla C. Pant, JJ.

The present batch of writ petitions have been preferred Under Article 32 of the Constitution of India challenging the constitutional validity of Sections 499 and 500 of the Indian Penal Code, 1860 (Indian Penal Code) and Sections 199(1) to 199(4) of the Code of Criminal Procedure, 1973 (Code of Criminal Procedure).

The assertion by the Union of India and the complainants is that the reasonable restrictions are based on the paradigms and parameters of the Constitution that are structured and pedestalled on the doctrine of non-absoluteness of any fundamental right, cultural and social ethos, need and feel of the time, for every right engulfs and incorporates duty to respect other's right and ensure mutual compatibility and conviviality of the individuals based on collective harmony and conceptual grace of eventual social order; and the asseveration on the part of the Petitioners is that freedom of thought and expression cannot be scuttled or abridged on the threat of criminal prosecution and made paraplegic on the mercurial stance of individual reputation and of societal harmony, for the said aspects are to be treated as things of the past, a symbol of colonial era where the ruler ruled over the subjects and vanquished concepts of resistance; and, in any case, the individual grievances pertaining to reputation can be agitated in civil courts and thus, there is a remedy and viewed from a prismatic perspective, there is no justification to keep the provision of defamation in criminal law alive as it creates a concavity and unreasonable restriction in individual freedom and further progressively mars voice of criticism and dissent which are necessitous for the growth of genuine advancement and a matured democracy.

Held, while disposing of the petitions

Learned Counsel appearing for some of the Petitioners, apart from addressing at length on the concept of reasonable restriction have also made an effort, albeit an Everestian one, pertaining to the meaning of the term "defamation" as used in Article 19(2). In this regard, four aspects, namely, (i) defamation, however extensively stretched, can only include a civil action but not a criminal proceeding, (ii) even if defamation is conceived of to include a criminal offence, regard being had to its placement in Article 19(2), it has to be understood in association of the words, "incitement to an offence", for the principle of noscitur a sociis has to be made applicable, then only the cherished and natural right of freedom of speech and expression which has been recognized Under Article 19(1)(a) would be saved from peril, (iii) the intention of Clause (2) of Article 19 is to include a public law remedy in respect of a grievance that has a collective impact but not to take in its ambit an actionable claim under the common law by an individual and (iv) defamation of a person is mostly relatable to assault on reputation by another individual and such an individual cavil cannot be thought of being pedestalled as fundamental right and, therefore, the criminal defamation cannot claim to have its source in the word "defamation" used in Article 19(2) of the Constitution.

To appreciate the said facets of the submission, it is necessary to appreciate ambit and purport of the word "defamation". To elaborate, whether the word "defamation" includes both civil and criminal defamation. Only after the Court answered the said question, it proceeded to advert to the aspect of reasonable restriction on the right of freedom of speech and expression as engrafted Under Article 19(1)(a). Mr. Rohtagi, learned Attorney General for India has canvassed that to understand the ambit of the word "defamation" in the context of the language employed in Article 19(2), it is necessary to refer to the Constituent Assembly debates. He has referred to certain aspects of the debates. Relying on the said debates, it is urged by Mr. Rohatgi that the founding fathers had no intention to confer a restricted meaning on the term "defamation".

The Court stated with profit that the debates of the Constituent Assembly can be taken aid of for the purpose of understanding the intention of the framers of the Constitution. In S.R. Chaudhuri v. State of Punjab and Ors., a three-Judge Bench has observed that Constitutional provisions are required to be understood and interpreted with an object-oriented approach. A Constitution must not be construed in a narrow and pedantic sense. The words used may be general in terms but, their full import and true meaning, has to be appreciated considering the true context in which the same are used and the purpose which they seek to achieve. While so observing, the Court proceeded to state that it is a settled position that debates in the Constituent Assembly may be relied upon as an aid to interpret a constitutional provision because it is the function of the court to find out the intention of the framers of the Constitution. It was also highlighted that the Constitution is not just a document in solemn form, but a living framework for the Government of the people exhibiting

a sufficient degree of cohesion and its successful working depends upon the democratic spirit underlying it being respected in letter and in spirit.

The Court has referred to the aforesaid aspect only to highlight the intention of the founding fathers and also how contextually the word "defamation" should be understood. At this stage, the Court stated that in the course of hearing, an endeavour was made even to the extent of stating that the word "defamation" may not even call for a civil action in the absence of a codified law. The Court has referred to this aspect only to clarify the position that it is beyond any trace of doubt that civil action for which there is no codified law in India, a common law right can be taken recourse to Under Section 9 of the Code of Civil Procedure, 1908, unless there is specific statutory bar in that regard.

The other aspect that is being highlighted in the context of Article 19(2)(a) is that defamation even is conceived of to include a criminal offence, it must have the potentiality to "incite to cause an offence". To elaborate, the submission is the words "incite to cause an offence" should be read to give attributes and characteristics of criminality to the word "defamation". It must have the potentiality to lead to breach of peace and public order. It has been urged that the intention of Clause (2) of Article 19 is to include a public law remedy in respect of a grievance that has a collective impact but not as an actionable claim under the common law by an individual and, therefore, the word "defamation" has to be understood in that context, as the associate words are "incitement to an offence" would so warrant. Mr. Rao, learned senior counsel, astutely canvassed that unless the word "defamation" is understood in this manner applying the principle of noscitur a sociis, the cherished and natural right of freedom of speech and expression which has been recognized Under Article 19(1)(a) would be absolutely at peril. Mr. Narsimha, learned ASG would contend that the said Rule of construction would not be applicable to understand the meaning of the term "defamation".

Be it noted, while construing the provision of Article 19(2), it is the duty of the Court to keep in view the exalted spirit, essential aspects, the value and philosophy of the Constitution. There is no doubt that the principle of noscitur a sociis can be taken recourse to in order to understand and interpret the Constitution but while applying the principle, one has to keep in mind the contours and scope of applicability of the said principle.

Learned author on further discussion has expressed the view that meaning of a word is to be judged from the company it keeps, i.e., reference to words found in immediate connection with them. It applies when two or more words are susceptible of analogous meanings are coupled together, to be read and understood in their cognate sense. Noscitur a soccis is merely a Rule of construction and cannot prevail where it is clear that wider and diverse etymology is intentionally and deliberately used in the provision. It is only when and where the intention of the legislature in associating wider words with words of narrowest significance is doubtful or otherwise not clear, that the Rule of noscitur a soccis is useful.

The core issue is whether the said doctrine of noscitur a soccis should be applied to the expression "incitement of an offence" used in Article 19(2) of the Constitution so that it gets associated with the term "defamation". The term "defamation" as used is absolutely clear and unambiguous. The meaning is beyond doubt. The said term was there at the time of commencement of the Constitution. If the word "defamation" is associated or is interpreted to take colour from the terms "incitement to an offence", it would unnecessarily make it a restricted one which even the founding fathers did not intend to do. Keeping in view the aid that one may take from the Constituent Assembly Debates and regard being had to the clarity of expression, the Court was of the considered opinion that there is no warrant to apply the principle of noscitur a sociis to give a restricted meaning to the term "defamation" that it only includes a criminal action if it gives rise to incitement to constitute an offence. The word "incitement" has to be understood in the context of freedom of speech and expression and reasonable restriction. The word "incitement" in criminal jurisprudence has a different meaning. It is difficult to accede to the submission that defamation can only get criminality if it incites to make an offence. The word "defamation" has its own independent identity and it stands alone and the law relating to defamation has to be understood as it stood at the time when the Constitution came into force.

The term "defamation" as used in Article 19(2) should not be narrowly construed. The conferment of a narrow meaning on the word would defeat the very purpose that the founding fathers intended to convey and further the Court did not find any justifiable reason to constrict the application. The word "defamation" as used in Article 19(2) has to be conferred an independent meaning, for it is incomprehensible to reason that it should be read with the other words and expressions, namely, "security of the State", "friendly relations with foreign States", "public order, decency or morality". The submission is based on the premise that "defamation" is meant to serve private interest of an individual and not the larger public interest. Both the aspects of the said submission are interconnected and interrelated. Defamation has been regarded as a crime in the Indian Penal Code which is a pre-constitutional law.

It is urged that such kind of legal right is unconnected with the fundamental right conceived of Under Article 19(1)(a) of the Constitution. Additionally, it is canvassed that reputation which has been held to be a facet of Article 21 in Board of Trustees of the Port of Bombay v. Dilipkumar Raghavendranath Nadkarni and Ors., Mehmood Nayyar Azam v. State of Chhatisgarh and Ors., and Umesh Kumar v. State of Andhra Pradesh and Anr., is against the backdrop where the State has affected the dignity and reputation of an individual. This aspect of the submission needs apposite understanding. Individuals constitute the collective. Law is enacted to protect the societal interest. The law relating to defamation protects the reputation of each individual in the perception of the public at large. It matters to an individual in the eyes of the society. Protection of individual right is imperative for social stability in a body polity and that is why the State makes laws relating to crimes. A crime affects the society. It causes harm and creates a dent in social harmony. When we talk of society, it is not an abstract idea or a thought in abstraction. There is a link and connect

between individual rights and the society; and this connection gives rise to community interest at large. It is a concrete and visible phenomenon. Therefore, when harm is caused to an individual, the society as a whole is affected and the danger is perceived.

The distinction of public wrongs from private, of crimes and misdemeanours from civil injuries, seems principally to consist in this: that private wrongs or civil injuries are an infringement or privation of the civil rights which belongs to individuals, considered merely as individuals; public wrongs or crimes and misdemeanours are a breach and violation of the public rights and duties due to the whole community in its social aggregate capacity. In all cases the crime includes injury; every public offence is also a private wrong, and somewhat more. It affects the individual, and it likewise affects the community.

The constituents of crime in general has been enumerated in Halsbury's Laws of England as "a person is not to be convicted of a crime unless he has, by voluntary conduct, brought about those elements which by common law or statute constitute that crime. In general a person does not incur criminal liability unless he intended to bring about, or recklessly brought about, those elements which constitute the crime. The foregoing concepts are traditionally expressed in maxim "actus non facit reum nisi mens sit rea". Enforcement of a right and seeking remedy are two distinct facets. It should not be confused.

The concept of crime is essentially concerned with social order. It is well known that man's interests are best protected as a member of the community. Everyone owes certain duties to his fellow-men and at the same time has certain rights and privileges which he expects others to ensure for him. This sense of mutual respect and trust for the rights of others regulates the conduct of the members of society inter-se. Although most people believe in the principle of 'live and let live', yet there are a few who, for some reason or the other, deviate from this normal behavioral pattern and associate themselves with anti-social elements. This obviously imposes an obligation on the State to maintain normalcy in the society. This arduous task of protecting the law abiding citizens and punishing the law breakers vests with the State which performs it through the instrumentality of law. It is for this reason that Salmond has defined law as a 'rule of action' regulating the conduct of individuals in society. The conducts which are prohibited by the law in force at a given time and place are known as wrongful acts or crimes, whereas those which are permissible under the law are treated as lawful. The wrongdoer committing crime is punished for his guilt under the law of crime.

From the aforesaid discussion, it is plain as day that the contention that the criminal offence meant to subserve the right of inter se private individuals but not any public or collective interest in totality is sans substance. In this regard, the Court took note of the submission put forth by Mr. Narsimha, learned Additional Solicitor General, that Articles 17, 23 and 24 which deal with abolition of untouchability and prohibit trafficking in human beings and forced labour and child

labour respectively are rights conferred on the citizens and they can be regarded as recognition of horizontal rights under the Constitution. He has referred to certain legislations to highlight that they regulate rights of individuals inter se.

The Court referred to this facet only to show that the submission so astutely canvassed by the learned Counsel for the Petitioners that treating defamation as a criminal offence can have no public interest and thereby it does not serve any social interest or collective value is sans substratum. The Court hastened to clarify that creation of an offence may be for some different reason declared unconstitutional but it cannot be stated that the legislature cannot have a law to constitute an act or omission done by a person against the other as a crime. It depends on the legislative wisdom. Needless to say, such wisdom has to be in accord with constitutional wisdom and pass the test of constitutional challenge. If the law enacted is inconsistent with the constitutional provisions, it is the duty of the Court to test the law on the touchstone of Constitution.

Freedom of speech and expression in a spirited democracy is a highly treasured value. Authors, philosophers and thinkers have considered it as a prized asset to the individuality and overall progression of a thinking society, as it permits argument, allows dissent to have a respectable place, and honours contrary stances. There are proponents who have set it on a higher pedestal than life and not hesitated to barter death for it. Some have condemned compelled silence to ruthless treatment. William Dougles has denounced Regulation of free speech like regulating diseased cattle and impure butter. The Court has in many an authority having realized its precious nature and seemly glorified sanctity has put it in a meticulously structured pyramid. Freedom of speech is treated as the thought of the freest who has not mortgaged his ideas, may be wild, to the artificially cultivated social norms; and transgression thereof is not perceived as a folly.

Needless to emphasise, freedom of speech has to be allowed specious castle, but the question is should it be so specious or regarded as so righteous that it would make reputation of another individual or a group or a collection of persons absolutely ephemeral, so as to hold that criminal prosecution on account of defamation negates and violates right to free speech and expression of opinion. Keeping in view what it had stated hereinabove, the Court was required to see how the constitutional conception has been understood by the Court where democracy and Rule of law prevail.

The Court has referred to a series of judgments on freedom of speech and then referred to Devidas Ramachandra Tuljapurkar v. State of Maharashtra and Ors. which dealt with Section 292 Indian Penal Code solely for the purpose that test in respect of that offence is different. That apart, constitutional validity of Section 292 has been upheld in Ranjit D. Udeshi v. State of Maharashtra. It is to be noted that all the cases, barring Odyssey Communications Pvt. Ltd. v. Lokvidayan Sanghatana and Ors. and Bobby Art International v. Om Pal Singh Hoon [Bandit Queen case], all others are in the fictional realm. The Court was disposed to think that the right of expression with

regard to fictional characters through any medium relating to creation of a fiction would be somewhat dissimilar for it may not have reference to an individual or a personality. Right of expression in such cases is different, and be guided by provisions of any enactment subject to constitutional scrutiny.

The right of freedom of expression in a poem, play or a novel pertaining to fictional characters stand on a different footing than defamation as the latter directly concerns the living or the legal heirs of the dead and most importantly, having a known identity. A person in reality is defamed contrary to a "fictional character" being spoken of by another character or through any other mode of narrative. Liberty of freedom in that sphere is fundamentally different than the arena of defamation. Therefore, the decisions rendered in the said context are to be guardedly studied, appreciated and applied. It may be immediately added here that the freedom in the said sphere is not totally without any limit or boundary. The Court not only adverted to the said aspect to note that what could legally be permissible in the arena of fiction may not have that allowance in reality. Also, the Court stated in quite promptitude that it has adverted to this concept only to have the completeness with regard to precious value of freedom of speech and expression and the limitations perceived and stipulated thereon.

Be that as it may, the aforesaid authorities clearly lay down that freedom of speech and expression is a highly treasured value under the Constitution and voice of dissent or disagreement has to be respected and regarded and not to be scuttled as unpalatable criticism. Emphasis has been laid on the fact that dissonant and discordant expressions are to be treated as view-points with objectivity and such expression of views and ideas being necessary for growth of democracy are to be zealously protected. Notwithstanding, the expansive and sweeping ambit of freedom of speech, as all rights, right to freedom of speech and expression is not absolute. It is subject to imposition of reasonable restrictions.

To appreciate the compass and content of reasonable restriction, the Court had to analyse nature of reasonable restrictions. Article 19(2) envisages "reasonable restriction". The said issue many a time has been deliberated by this Court. The concept of reasonable restriction has been weighed in numerous scales keeping in view the strength of the right and the effort to scuttle such a right.

The principles as regards reasonable restriction as has been stated by this Court from time to time are that the restriction should not be excessive and in public interest. The legislation should not invade the rights and should not smack of arbitrariness. The test of reasonableness cannot be determined by laying down any abstract standard or general pattern. It would depend upon the nature of the right which has been infringed or sought to be infringed. The ultimate "impact", that is, effect on the right has to be determined. The "impact doctrine" or the principle of "inevitable effect" or "inevitable consequence" stands in contradistinction to abuse or misuse of a legislation or a statutory provision depending upon the circumstances of the case. The prevailing conditions of the time and the principles of proportionality of restraint are to be kept in mind by the court

while adjudging the constitutionality of a provision regard being had to the nature of the right. The nature of social control which includes public interest has a role. The conception of social interest has to be borne in mind while considering reasonableness of the restriction imposed on a right. The social interest principle would include the felt needs of the society.

As the submissions would show, the stress is given on the right to freedom of speech and expression in the context of individual growth, progress of democracy, conceptual respect for a voice of dissent, tolerance for discordant note and acceptance of different voices. Right to say what may displease or annoy others cannot be throttled or garroted. There can never be any cavil over the fact that the right to freedom of speech and expression is a right that has to get ascendance in a democratic body polity, but at the same time the limit has to be proportionate and not unlimited. It is urged that the defamation has been described as an offence Under Section 499 Indian Penal Code that protects individual's perception of his own reputation which cannot be elevated to have the status of public interest. The argument is that to give a remedy by taking recourse to criminal jurisprudence to curb the constitutional right, that is, right to freedom of speech and expression, is neither permissible nor justified. The provision possibly could have met the constitutional requirement has it been associated with law and order or breach of peace but the same is not the position. It is also canvassed that in the colonial era the defamation was conceived of to keep social peace and social order but with the changing climate of growing democracy, it is not permissible to keep alive such a restriction.

The principles being stated, the attempt at present is to scrutinize whether criminalization of defamation in the manner as it has been done Under Section 499 Indian Penal Code withstands the said test.

The thoughts of the aforesaid two thinkers, namely Patrick Henry and Edmund Burke, as the Court understood, are not contrary to each other. They relate to different situations and conceptually two different ideas; one speaks of an attitude of compromising liberty by accepting chains and slavery to save life and remain in peace than to death, and the other view relates to "qualified civil liberty" and needed control for existence of the society. Contexts are not different and reflect one idea. Rhetorics may have its own place when there is disproportionate restriction but acceptable restraint subserves the social interest. In the case at hand, it is to be seen whether right to freedom and speech and expression can be allowed so much room that even reputation of an individual which is a constituent of Article 21 would have no entry into that area. To put differently, in the name of freedom of speech and expression, should one be allowed to mar the other's reputation as is understood within the ambit of defamation as defined in criminal law.

The aforementioned authorities clearly state that balancing of fundamental rights is a constitutional necessity. It is the duty of the Court to strike a balance so that the values are sustained. The submission is that continuance of criminal defamation Under Section 499 Indian Penal Code is

constitutionally inconceivable as it creates a serious dent in the right to freedom of speech and expression. It is urged that to have defamation as a component of criminal law is an anathema to the idea of free speech which is recognized under the Constitution and, therefore, criminalization of defamation in any form is an unreasonable restriction. We have already held that reputation is an inextricable aspect of right to life Under Article 21 of the Constitution and the State in order to sustain and protect the said reputation of an individual has kept the provision Under Section 499 Indian Penal Code alive as a part of law. The seminal point is permissibility of criminal defamation as a reasonable restriction as understood Under Article 19(2) of the Constitution. To elucidate, the submission is that criminal defamation, a pre-Constitution law is totally alien to the concept of free speech. As stated earlier, the right to reputation is a constituent of Article 21 of the Constitution. It is an individual's fundamental right and, therefore, balancing of fundamental right is imperative. The Court has spoken about synthesis and overlapping of fundamental rights, and thus, sometimes conflicts between two rights and competing values. In the name of freedom of speech and expression, the right of another cannot be jeopardized.

In this regard, reproduction of a passage from Noise Pollution (V), In re would be apposite. It reads as follows: "... Undoubtedly, the freedom of speech and right to expression are fundamental rights but the rights are not absolute. Nobody can claim a fundamental right to create noise by amplifying the sound of his speech with the help of loudspeakers. While one has a right to speech, others have a right to listen or decline to listen. Nobody can be compelled to listen and nobody can claim that he has a right to make his voice trespass into the ears or mind of others. Nobody can indulge in aural aggression. If anyone increases his volume of speech and that too with the assistance of artificial devices so as to compulsorily expose unwilling persons to hear a noise raised to unpleasant or obnoxious levels, then the person speaking is violating the right of others to a peaceful, comfortable and pollution-free life guaranteed by Article 21. Article 19(1)(a) cannot be pressed into service for defeating the fundamental right guaranteed by Article 21. We need not further dwell on this aspect. Two decisions in this regard delivered by the High Courts have been brought to our notice wherein the right to live in an atmosphere free from noise pollution has been upheld as the one guaranteed by Article 21 of the Constitution."

The Court was in respectful agreement with the aforesaid enunciation of law. Reputation being an inherent component of Article 21, the Court did not think it should be allowed to be sullied solely because another individual can have its freedom. It is not a restriction that has an inevitable consequence which impairs circulation of thought and ideas. In fact, it is control regard being had to another person's right to go to Court and state that he has been wronged and abused. He can take recourse to a procedure recognized and accepted in law to retrieve and redeem his reputation. Therefore, the balance between the two rights needs to be struck. "Reputation" of one cannot be allowed to be crucified at the altar of the other's right of free speech. The legislature in its wisdom has not thought it appropriate to abolish criminality of defamation in the obtaining social climate.

The Court has referred to Shreya Singhal v. Union of India in extenso as it has been commended to it to pyramid the submission that it lays the foundation stone for striking down Sections 499 and 500 Indian Penal Code because existence of defamation as a criminal offence has a chilling effect on the right to freedom of speech and expression. As the Court understood the decision, the two-Judge Bench has neither directly nor indirectly laid down such a foundation. The analysis throughout the judgment clearly pertains to the vagueness and to an act which would make an offence dependent on uncertain factors billowed in inexcactitude and wide amplitude. The Court has ruled that Section 66-A also suffers from vice of procedural unreasonableness. The judgment drew distinction and observed defamation was different. Thus, the canvas is different. Once the Court has held that reputation of an individual is a basic element of Article 21 of the Constitution and balancing of fundamental rights is a constitutional necessity and further the legislature in its wisdom has kept the penal provision alive, it is extremely difficult to subscribe to the view that criminal defamation has a chilling effect on the freedom of speech and expression.

The analysis therein would show that tendency to create public disorder is not evincible in the language employed in Section 66A. Section 66A dealt with punishment for certain obscene messages through communication service, etc. A new offence had been created and the boundary of the forbidding area was not clearly marked as has been held in Kedar Nath Singh v. State of Bihar. The Court also opined that the expression used in Section 66-A having not been defined and further the provision having not used the expression that definitions in Indian Penal Code will apply to the Information Technology Act, 2000, it was vague. The decision in Shreya Singhal v. Union of India is placed reliance upon to highlight that a restriction has to be narrowly tailored but criminal defamation is not a narrowly tailored concept. The Court has early opined that the word "defamation" is in existence from the very beginning of the Constitution. Defamation as an offence is admittedly a pre-constitutional law which was in existence when the Constitution came into force. To interpret that the word "defamation" occurring in Article 19(2) would not include "criminal defamation" or it should have a tendency to cause public disorder or incite for an offence, would not be in consonance with the principle of interpretation pertaining to the Constitution.

It may be noted here that the decisions rendered in Ramji Lal Modi v. State of U.P. and Kedar Nath Singh v. State of Bihar where constitutional validity of Sections 124A and 295A Indian Penal Code had been upheld subject to certain limitations. But inspiration cannot be drawn from the said authorities that to argue that they convey that defamation which would include criminal defamation must incorporate public order or intention of creating public disorder. The said decisions relate to a different sphere. The concept of defamation remains in a different area regard being had to the nature of the offence and also the safeguards provided therein which we shall advert to at a later stage. The passage which the Court has reproduced from S. Rangarajan v. P. Jagjivan Ram and Ors., which has also been referred to in Shreya Singhal v. Union of India, has to be understood in the context in which it is stated having regard to the facts of the case... Therefore, in the ultimate conclusion, the Court came to hold that applying the doctrine of balancing of fundamental rights,

existence of defamation as a criminal offence is not beyond the boundary of Article 19(2) of the Constitution, especially when the word "defamation" has been used in the Constitution.

Permissibility of criminal defamation can be tested on the touchstone of constitutional fraternity and fundamental duty. It is submitted by Mr. Narsimha, learned Additional Solicitor General that right to reputation being an inseparable component of Article 21 deserves to be protected in view of Preambular concept. Learned Additional Solicitor General has referred to the Preamble to the Constitution which provides for "... to promote among them all Fraternity assuring the dignity of the individual..."

The term "fraternity" has a significant place in the history of constitutional law. It has, in fact, come into prominence after French Revolution. The motto of Republican France echoes:'Liberte, egalite, fraternite', or 'Liberty, equality, fraternity'. The term "fraternity" has an animating effect in the constitutional spectrum. The Preamble states that it is a constitutional duty to promote fraternity assuring the dignity of the individual. Be it stated that fraternity is a per-ambulatory promise. In the Preamble to the Constitution of India, fraternity has been laid down as one of the objectives. Dr. B.R. Ambedkar inserted the same in the Draft Constitution stating "the need for fraternal concord and goodwill in India was never greater than now, and that this particular aim of the new Constitution should be emphasized by special mention in the Preamble." Fraternity, as a constitutional concept, is umbilically connected with justice, equality and liberty.

Fraternity as a concept is characteristically different from the other constitutional goals. It, as a constitutional concept, has a keen bond of sorority with other concepts. And hence, it must be understood in the breed of homogeneity in a positive sense and not to trample dissent and diversity. It is neither isolated nor lonely. The idea of fraternity is recognised as a constitutional norm and a precept. It is a constitutional virtue that is required to be sustained and nourished.

It is a constitutional value which is to be cultivated by the people themselves as a part of their social behavior. There are two schools of thought; one canvassing individual liberalization and the other advocating for protection of an individual as a member of the collective. The individual should have all the rights under the Constitution but simultaneously he has the responsibility to live upto the constitutional values like essential brotherhood-the fraternity-that strengthens the societal interest. Fraternity means brotherhood and common interest. Right to censure and criticize does not conflict with the constitutional objective to promote fraternity. Brotherliness does not abrogate and rescind the concept of criticism. In fact, brothers can and should be critical. Fault finding and disagreement is required even when it leads to an individual disquiet or group disquietude. Enemies Enigmas Oneginese on the part of some does not create a dent in the idea of fraternity but, a significant one, liberty to have a discordant note does not confer a right to defame the others. The dignity of an individual is extremely important.

The concept of fraternity under the Constitution expects every citizen to respect the dignity of the other. Mutual respect is the fulcrum of fraternity that assures dignity. It does not mean that there cannot be dissent or difference or discordance or a different voice. It does not convey that all should join the chorus or sing the same song. Indubitably not. One has a right to freedom of speech and expression. One is also required to maintain the constitutional value which is embedded in the idea of fraternity that assures the dignity of the individual. One is obliged under the Constitution to promote the idea of fraternity. It is a constitutional obligation.

The Court has referred to two concepts, namely, constitutional fraternity and the fundamental duty, as they constitute core constitutional values. Respect for the dignity of another is a constitutional norm. It would not amount to an overstatement if it is said that constitutional fraternity and the intrinsic value inhered in fundamental duty proclaim the constitutional assurance of mutual respect and concern for each other's dignity. The individual interest of each individual serves the collective interest and correspondingly the collective interest enhances the individual excellence. Action against the State is different than an action taken by one citizen against the other. The constitutional value helps in structuring the individual as well as the community interest. Individual interest is strongly established when constitutional values are respected. The Preamble balances different and divergent rights. Keeping in view the constitutional value, the legislature has not repealed Section 499 and kept the same alive as a criminal offence. The studied analysis from various spectrums, it is difficult to come to a conclusion that the existence of criminal defamation is absolutely obnoxious to freedom of speech and expression. As a prescription, it neither invites the frown of any of the Articles of the Constitution nor its very existence can be regarded as an unreasonable restriction.

To constitute the offence of "defamation", there has to be imputation and it must have made in the manner as provided in the provision with the intention of causing harm or having reason to believe that such imputation will harm the reputation of the person about whom it is made. Causing harm to the reputation of a person is the basis on which the offence is founded and mens rea is a condition precedent to constitute the said offence. The complainant has to show that the accused had intended or known or had reason to believe that the imputation made by him would harm the reputation of the complainant. The criminal offence emphasizes on the intention or harm. Section 44 of Indian Penal Code defines "injury". It denotes any harm whatever illegally caused to any person, in body, mind, reputation or property. Thus, the word "injury" encapsulates harm caused to the reputation of any person. It also takes into account the harm caused to a person's body and mind. Section 499 provides for harm caused to the reputation of a person, that is, the complainant.

Having dwelt upon the ingredients, it is necessary to appreciate the Explanations appropriately. There are four Explanations to the main provision and an Explanation has been appended to the Fourth Exception. Explanation 4 needs to be explained first. It is because the said Explanation provides the expanse and the inherent control wherein what imputation has been regarded as harm to a person's reputation and that an imputation can only be treated as harm of a person's reputation

if it directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful. The Court was conscious that it was dealing with the constitutional validity of the provision and the decisions relate to interpretation. But the purpose is to appreciate how the Explanations have been understood by this Court.

Explanation 1 stipulates that an imputation would amount to defamation if it is done to a deceased person if the imputation would harm the reputation of that person if he is living and is intended to be harmful to the feelings of his family or other near relatives. It is submitted by the learned Counsel for the Petitioners that the width of the Explanation is absolutely excessive as it enables the family members to prosecute a criminal action whereas they are debarred to initiate civil action for damages. According to the learned Counsel for the Petitioners, Explanation 1 is anomalous and creates a piquant situation which can effortlessly be called unreasonable, for when a civil suit cannot be entertained or allowed to be prosecuted by the legal heirs or the legal representatives, how could they prosecute criminal offence by filing a complaint. On a first blush, the aforesaid submission looks quite attractive, but on a keener scrutiny, it loses its significance.

The enunciation of law makes it clear how and when the civil action is not maintainable by the legal heirs. The prosecution, as envisaged in Explanation 1, lays two postulates, that is, (i) the imputation to a deceased person is of such a nature that would have harmed the reputation of that person if he was living and (ii) the said imputation must be intended to be hurtful to the feelings of the family or other near relatives. Unless the twin tests are satisfied, the complaint would not be entertained Under Section 199 of Code of Criminal Procedure. The said Explanation protects the reputation of the family or relatives. The entitlement to damages for personal injury is in a different sphere whereas a criminal complaint to be filed by the family members or other relatives under twin tests being satisfied is in a distinct compartment. It is more rigorous. The principle of grant of compensation and the principle of protection of reputation of family or near relative cannot be equated. Therefore, the Court did not find any extra mileage is given to the legal heirs of a deceased person when they have been made eligible to initiate a criminal action by taking recourse to file a criminal complaint.

Explanation 2 deals with imputation concerning a company or an association or collection of persons as such. Explanation 3 says that an imputation in the form of an alternative or expressed ironically may amount to defamation. Section 11 of Indian Penal Code defines "person" to mean a company or an association or collection of persons as such or body of persons, whether incorporated or not. The inclusive nature of the definition indicates that juridical persons can come within its ambit. The submission advanced on behalf of the Petitioners is that collection of persons or, for that matter, association, is absolutely vague. More than five decades back, the Court, in Sahib Singh Mehra v. State of Uttar Pradesh while being called upon to decide whether public prosecutor would constitute a class or come within the definition of "collection of persons" referred

to Explanation 2 to Section 499 of Indian Penal Code, and held that collection of persons must be identifiable in the sense that one could, with certainty, say that this group of particular people has been defamed, as distinguished from the rest of the community. The Court, in the facts of the case, held that the prosecuting staff of Aligarh or, as a matter of fact, the prosecuting staff in the State of Uttar Pradesh, was certainly such an identifiable group or collection of persons, and there was nothing indefinite about it. Thus, in the said authority, emphasis is laid on the concept of identifiability and definitiveness as regards collection of persons.

The enunciation of law clearly lays stress on determinate and definite body. It also lays accent on identifiable body and identity of the collection of persons. It also significantly states about the test of precision so that the collection of persons have a distinction. Thus, it is fallacious to contend that it is totally vague and can, by its inclusiveness, cover an indefinite multitude. The Court has to understand the concept and appositely apply the same. There is no ambiguity. Be it noted that a three-Judge Bench, though in a different context, in Aneeta Hada v. Godfather Travels and Tours (P) Ltd. has ruled that a company has its own reputation. Be that as it may, it cannot be said that the persons covered under the Explanation are gloriously vague.

Having dealt with the four Explanations, presently, the Court analysed the Exceptions and noted certain authorities with regard to the Exceptions. It is solely for the purpose of appreciating how the Court has appreciated and applied them. The First Exception stipulates that it is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. "Public good" has to be treated to be a fact. In Chaman Lal v. State of Punjab, the Court has held that in order to come within the First Exception to Section 499 of the Indian Penal Code it has to be established that what has been imputed concerning the Respondent is true and the publication of the imputation is for the public good. The onus of proving these two ingredients, namely, truth of the imputation and the publication of the imputation for the public good, is on the accused.

It is submitted by Dr. Dhawan, learned senior Counsel for the Petitioners that if the imputation is not true, the matter would be different. But as the Exception postulates that imputation even if true, if it is not to further public good then it will not be defamation, is absolutely irrational and does not stand to reason. It is urged that truth is the basic foundation of justice, but this Exception does not recognize truth as a defence and, therefore, it deserves to be struck down. It has been canvassed by Mr. Rao, learned senior counsel, that the term "public good" is a vague concept and to bolster the said submission, he has placed reliance upon Harakchand Ratanchand Banthia and Ors. v. Union of India and Ors. to highlight that in the said case, it has been held that "public interest" do not provide any objective standard or norm.

The context in which the said decision was rendered has to be appreciated. As the Court perceived, the factual score and the provision under challenge was totally different. It has been stated in the backdrop of the power conferred on an administrative authority for the purpose of renewal of

licence, and in that context, the Court opined that the criterion of "public interest" did not provide objective standard. The Court, on analysis of the provision from a manifold angle, opined that the provision proposed unreasonable restriction. The context and the conferment of power makes a gulf of difference and, therefore, the said authority has to be considered on its own facts. It cannot be ruled that it lays down as a principle that "public interest" is always without any norm or guidance or has no objective interest. Ergo, the said decision is distinguishable.

In Arundhati Roy, In re, this Court, referring to Second Exception, observed that even a person claiming the benefit of Second Exception to Section 499 of the Indian Penal Code, is required to show that the opinion expressed by him was in good faith which related to the conduct of a public servant in the discharge of his public functions or respecting his character so far as his character appears in that conduct. Third Exception states about conduct of any person touching any public question and stipulates that it is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question and respecting his character, so far as his character appears in that conduct. The said Exception uses the words "good faith" and particularizes conduct of any person relating to any public question and the Exception, as is perceptible, gives stress on good faith. Third Exception comes into play when some defamatory remark is made in good faith as held in Sahib Singh Mehra v. State of Uttar Pradesh. The Court has clarified that if defamatory remarks are made after due care and attention, it will be regarded as made in good faith. In the said case, the Court also adverted to Ninth Exception which gives protection to imputation made in good faith for the protection of the interest of the person making it or of any other person or for the public good.

A three-Judge Bench in Harbhajan Singh v. State of Punjab and Anr. has opined that where the accused invokes Ninth Exception to Section 499 Indian Penal Code, good faith and public good are both to be satisfied and the failure of the Appellant to prove good faith would exclude the application of Ninth Exception in favour of the accused even if requirement of public good is satisfied. The Court has referred to Section 52 Indian Penal Code which defines "good faith" that requires the element of honesty. It is necessary to note here that the three-Judge Bench has drawn a distinction between the First Exception and the Ninth Exception to opine that the proof of truth which is one of the ingredients of the First Exception is not an ingredient of the Ninth Exception and what the Ninth Exception requires an accused person to prove is that he made the statement in good faith. Proceeding further, the Court has stated that in dealing with the claim of the accused under the Ninth Exception, it is not necessary and, in a way, immaterial, to consider whether he has strictly proved the truth of the allegations made by him.

Fifth Exception stipulates that it is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness or agent. The further stipulation is that the said opinion must relate to the character of said person, as far as his character appears in that conduct.

Again in M.C. Verghese v. T.J. Poonan, it has been ruled that a person making libellous statements in his complaint filed in Court is not absolutely protected in a criminal proceeding for defamation, for under the Eighth Exception and the illustration to Section 499 the statements are privileged only when they are made in good faith. There is, therefore, authority for the proposition that in determining the criminality of an act under the Indian Penal Code the Courts will not extend the scope of special exceptions by resorting to the Rule peculiar to English common law that the husband and wife are regarded as one. In Chaman Lal v. State of Punjab this Court has opined that the Eighth Exception to Section 499 of the Indian Penal Code indicates that accusation in good faith against the person to any of those who have lawful authority over that person is not defamation. In Rajendra Kumar Sitaram Pande v. Uttam, it has been observed that Exception 8 to Section 499 Indian Penal Code clearly indicates that it is not a defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with regard to the subject-matter of accusation.

The detailed discussion made hereinabove do clearly reveal that neither the main provision nor the Explanation nor the Exceptions remotely indicate any vagueness. It is submitted that the Exceptions make the offence more rigorous and thereby making the concept of criminal defamation extremely unreasonable. The criticism advanced pertain to truth being not a defence, and unnecessary stress on 'public good'. The counter argument is that if a truthful statement is not made for any kind of public good but only to malign a person, it is a correct principle in law that the statement or writing can amount to defamation. Dr. Singhvi, learned senior Counsel for some of the Respondents has given certain examples. The examples pertain to an imputation that a person is an alcoholic; an imputation that two family members are involved in consensual incest; an imputation that a person is impotent; a statement is made in public that a particular person suffers from AIDS; an imputation that a person is a victim of rape; and an imputation that the child of a married couple is not fathered by the husband but born out of an affair with another man. The Court has set out the examples cited by the learned senior Counsel only to show that there can be occasions or situations where truth may not be sole defence. And that is why the provision has given emphasis on public good. Needless to say, what is public good is a question of fact depending on the facts and circumstances of the case.

From the analysis, the Court has made, it is clear as day that the provision along with Explanations and Exceptions cannot be called unreasonable, for they are neither vague nor excessive nor arbitrary. There can be no doubt that Court can strike down a provision, if it is excessive, unreasonable or disproportionate, but the Court cannot strike down if it thinks that the provision is unnecessary or unwarranted. Be it noted that it has also been argued that the provision is defeated by doctrine of proportionality. It has been argued that existence of criminal defamation on the statute book and the manner in which the provision is engrafted suffers from disproportionality because it has room for such restriction which is disproportionate.

Needless to emphasise that when a law limits a constitutional right which many laws do, such limitation is constitutional if it is proportional. The law imposing restriction is proportional if it is meant to achieve a proper purpose, and if the measures taken to achieve such a purpose are rationally connected to the purpose, and such measures are necessary. Such limitations should not be arbitrary or of an excessive nature beyond what is required in the interest of the public. Reasonableness is judged with reference to the objective which the legislation seeks to achieve, and must not be in excess of that objective. Further, the reasonableness is examined in an objective manner form the stand point of the interest of the general public and not from the point of view of the person upon whom the restrictions are imposed or abstract considerations.

One cannot be unmindful that right to freedom of speech and expression is a highly valued and cherished right but the Constitution conceives of reasonable restriction. In that context criminal defamation which is in existence in the form of Sections 499 and 500 Indian Penal Code is not a restriction on free speech that can be characterized as disproportionate. Right to free speech cannot mean that a citizen can defame the other. Protection of reputation is a fundamental right. It is also a human right. Cumulatively it serves the social interest. Thus, we are unable to accept that provisions relating to criminal defamation are not saved by doctrine of proportionality because it determines a limit which is not impermissible within the criterion of reasonable restriction.

It has been held in D.C. Saxena (Dr.) v. Hon'ble The Chief Justice of India, though in a different context, that if maintenance of democracy is the foundation for free speech, society equally is entitled to regulate freedom of speech or expression by democratic action. The reason is obvious, viz., that society accepts free speech and expression and also puts limits on the right of the majority. Interest of the people involved in the acts of expression should be looked at not only from the perspective of the speaker but also the place at which he speaks, the scenario, the audience, the reaction of the publication, the purpose of the speech and the place and the forum in which the citizen exercises his freedom of speech and expression. The Court had further observed that the State has legitimate interest, therefore, to regulate the freedom of speech and expression which liberty represents the limits of the duty of restraint on speech or expression not to utter defamatory or libellous speech or expression. There is a correlative duty not to interfere with the liberty of others. Each is entitled to dignity of person and of reputation. Nobody has a right to denigrate others' right to person or reputation.

The submission of Mr. Datar, learned senior Counsel is that defamation is fundamentally a notion of the majority meant to cripple the freedom of speech and expression. It is too broad a proposition to be treated as a guiding principle to adjudge reasonable restriction. There is a distinction between social interest and a notion of the majority. The legislature has exercised its legislative wisdom and it is inappropriate to say that it expresses the notion of the majority. It has kept the criminal defamation on the statute book as in the existing social climate it subserves the collective interest because reputation of each is ultimately inhered in the reputation of all. The submission that imposition of silence will Rule over eloquence of free speech is a stretched concept inasmuch as

the said proposition is basically founded on the theory of absoluteness of the fundamental right of freedom of speech and expression which the Constitution does not countenance.

The Court then adverted to Section 199 of Code of Criminal Procedure, which provides for prosecution for defamation. The said provision is criticized on the ground that "some person aggrieved" is on a broader spectrum and that is why, it allows all kinds of persons to take recourse to defamation. As far as the concept of "some person aggrieved" is concerned, the Court referred to plethora of decisions in course of its deliberations to show how this Court has determined the concept of "some person aggrieved". While dealing with various Explanations, it has been clarified about definite identity of the body of persons or collection of persons. In fact, it can be stated that the "person aggrieved" is to be determined by the courts in each case according to the fact situation. It will require ascertainment on due deliberation of the facts.

It has also been commented upon that by giving a benefit to public servant employed in connection with the affairs of the Union or of a State in respect of his conduct in the discharge of public functions to file the case through public prosecutor, apart from saving his right Under Sub-section (6) of Section 199 Code of Criminal Procedure, the provision becomes discriminatory. In this regard, it is urged that a public servant is treated differently than the other persons and the classification invites the frown of Article 14 of the Constitution and there is no base for such classification. Thus, the attack is on the base of Article 14 of the Constitution.

Be it stated that learned Counsel for the Petitioners stated that there can be no cavil about the President of India, the Vice-President of India, the Governor of a State, the Administrator of a Union territory but about others whose names find mention in the provision there is no justification to put them in a different class to enable them to file a case through the public prosecutor in the Court of Session. A studied scrutiny of the provision makes it clear that a public servant is entitled to file a complaint through public prosecutor in respect of his conduct in discharge of public functions. Public function stands on a different footing than the private activities of a public servant. The provision gives them protection for their official acts. There cannot be defamatory attacks on them because of discharge of their due functions. In that sense, they constitute a different class. Be it clarified here that criticism is different than defamation. One is bound to tolerate criticism, dissent and discordance but not expected to tolerate defamatory attack.

Sub-section (6) gives to a public servant what every citizen has as he cannot be deprived of a right of a citizen. There can be cases where sanction may not be given by the State Government in favour of a public servant to protect his right and, in that event, he can file a case before the Magistrate. The provision relating to engagement of public prosecutor in defamation cases in respect of the said authorities is seriously criticized on the ground that it allows unnecessary room to the authorities mentioned therein and the public servants to utilize the Public Prosecutor to espouse their cause for vengeance. Once it is held that the public servants constitute a different class in respect of the conduct pertaining to their discharge of duties and functions, the engagement

of Public Prosecutor cannot be found fault with. It is ordinarily expected that the Public Prosecutor has a duty to scan the materials on the basis of which a complaint for defamation is to be filed. He has a duty towards the Court.

The other ground of attack is that when a complaint is filed in a Court of Session, right or appeal is curtailed. The said submission suffers from a basic fallacy. Filing of a complaint before the Court of Session has three safeguards, namely, (i), it is filed by the public prosecutor; (ii) obtaining of sanction from the appropriate Government is necessary, and (iii) the Court of Session is a superior court than the Magistrate to deal with a case where a public servant is defamed. In Court's considered opinion, when sufficient protection is given and the right to appeal to the High Court is not curtailed as the Code of Criminal Procedure protects it, the submission does not really commend acceptation. In view of the aforesaid, the Court did not perceive any justification to declare the provisions ultra vires.

On behalf of Petitioner-Foundation of Media Professionals, Mr. Bhambhani, learned senior Counsel has submitted that the operation of the Press and Registration of Books Act, 1867 (1867 Act) must necessitate a Magistrate to accord due consideration of the provision of the 1867 Act before summoning the accused. Attention has been drawn to the Sections 3, 5, 6 and 8 of the 1867 Act and it is submitted that only person recognized under the said Act as editor, publisher, printer and owner could be summoned in the proceeding Under Section 499 Indian Penal Code (Indian Penal Code), apart from the author or person who has made the offending statements. The submission of the Petitioner, Mr. Bhambhani, learned senior Counsel is that in all the proceedings Under Section 499 of Indian Penal Code against a newspaper the accused must be confined to those who are identifiable to be responsible Under Section 5 of the 1867 Act. In Court's considered opinion that the said aspects can be highlighted by an aggrieved person either in a challenge for quashing of the complaint or during the trial. There is no necessity to deal with the said facet while deliberating upon the constitutional validity of the provisions.

In the course of hearing, it has been argued that the multiple complaints are filed at multiple places and there is abuse of the process of the court. In the absence of any specific provisions to determine the place of proceedings in a case of defamation, it shall be governed by the provisions of Chapter XIII of the Code of Criminal Procedure-Jurisdiction of the Criminal Courts in Inquiries and Trials. A case is ordinarily tried where the Offence is committed (Section 177). The expression used in Section 177 is "shall ordinarily be inquired and tried" by a court within whose jurisdiction it was committed. Whereas "shall" brings a mandatory requirement, the word "ordinarily" brings a situational variation which results in an interpretation that the case may be tried as per the further provisions of the Chapter. In case the place of committing the offence is uncertain, the case may also be tried where the offence was partly committed or continues to be committed (Section 178). The case may also be tried where the consequence of the act ensues (Section 179).

The other provisions in the chapter also deal with regard to certain specific circumstances. Section 186 Code of Criminal Procedure gives the High Court powers to determine the issue if two or more courts take cognizance of the same offence. If cases are filed in two or more courts in different jurisdictions, then the Jurisdiction to determine the case lies with the High Court under whose jurisdiction the first complaint was filed. Upon the decision of the High Court regarding the place of trial, the proceedings in all other places shall be discontinued. Thus, it is again left to the facts and circumstances of each case to determine the right forum for the trial of case of defamation. Thus, Code of Criminal Procedure governs the territorial jurisdiction and needless to say, if there is abuse of the said jurisdiction, the person grieved by the issue of summons can take appropriate steps in accordance with law. But that cannot be a reason for declaring the provision unconstitutional.

Another aspect requires to be addressed pertains to issue of summons. Section 199 Code of Criminal Procedure envisages filing of a complaint in court. In case of criminal defamation neither any FIR can be filed nor can any direction be issued Under Section 156(3) Code of Criminal Procedure. The offence has its own gravity and hence, the responsibility of the Magistrate is more. In a way, it is immense at the time of issue of process. Issue of process, as has been held in Rajindra Nath Mahato v. T. Ganguly, Dy. Superintendent and Anr., is a matter of judicial determination and before issuing a process, the Magistrate has to examine the complainant.

In Punjab National Bank and Ors. v. Surendra Prasad Sinha, it has been held that judicial process should not be an instrument of oppression or needless harassment. The Court, though in a different context, has observed that there lies responsibility and duty on the Magistracy to find whether the concerned accused should be legally responsible for the offence charged for. Only on satisfying that the law casts liability or creates offence against the juristic person or the persons impleaded then only process would be issued. At that stage the court would be circumspect and judicious in exercising discretion and should take all the relevant facts and circumstances into consideration before issuing process lest it would be an instrument in the hands of the private complaint as vendetta to harass the persons needlessly. Vindication of majesty of justice and maintenance of law and order in the society are the prime objects of criminal justice but it would not be the means to wreak personal vengeance. In Pepsi Foods Ltd. and Anr. v. Special Judicial Magistrate and Ors., a two-Judge Bench has held that summoning of an accused in a criminal case is a serious matter and criminal law cannot be set into motion as a matter of course.

The Court referred to the authorities to highlight that in matters of criminal defamation the heavy burden is on the Magistracy to scrutinise the complaint from all aspects. The Magistrate has also to keep in view the language employed in Section 202 Code of Criminal Procedure which stipulates about the resident of the accused at a place beyond the area in which the Magistrate exercises his jurisdiction. He must be satisfied that ingredients of Section 499 Code of Criminal Procedure are satisfied. Application of mind in the case of complaint is imperative.

The Court felt that it will be failing in its duty if it did not take note of submission of Mr. Bhambhani, learned senior counsel. It is submitted by the learned senior Counsel that Exception to Section 499 are required to be considered at the time of summoning of the accused but as the same is not conceived in the provision, it is unconstitutional. It is settled position of law that those who plead Exception must prove it. It has been laid down in M.A. Rumugam v. Kittu that for the purpose of bringing any case within the purview of the Eighth and the Ninth Exceptions appended to Section 499 Indian Penal Code, it would be necessary for the person who pleads the Exception to prove it. He has to prove good faith for the purpose of protection of the interests of the person making it or any other person or for the public good. The said proposition would definitely apply to any Exception who wants to have the benefit of the same. Therefore, the argument that if the said Exception should be taken into consideration at the time of the issuing summons it would be contrary to established criminal jurisprudence and, therefore, the stand that it cannot be taken into consideration makes the provision unreasonable, is absolutely an unsustainable one and in a way, a mercurial one. And the Court unhesitatingly repelled the same.

In view of the aforesaid analysis, the Court upheld the constitutional validity of Sections 499 and 500 of the Indian Penal Code and Section 199 of the Code of Criminal Procedure. During the pendency of the Writ Petitions, this Court had directed stay of further proceedings before the trial court. As the Court declared the provisions to be constitutional, it observed that it will be open to the Petitioners to challenge the issue of summons before the High Court either Under Article 226 of the Constitution of India or Section 482 Code of Criminal Procedure, as advised and seek appropriate relief and for the said purpose, Court granted eight weeks time to the Petitioners. The interim protection granted by this Court shall remain in force for a period of eight weeks. However, it is made clear that, if any of the Petitioners has already approached the High Court and also become unsuccessful before this Court, he shall face trial and put forth his defence in accordance with law.

The Writ Petitions and the Transfer Petitions are disposed of accordingly. All pending criminal miscellaneous petitions also stand disposed of.

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Constitution - Sitting of Assembly - Power of Governor - Interpretation of Article - Articles 163 and 174 of Constitution of India - Present appeal filed against order of High Court on discretionary powers of Governor to summon or advance sitting of State Assembly - Whether message addressed by Governor, could extend to subjects on which message was addressed - Whether Governor could address message to Assembly in his own discretion, without seeking aid and advice of Chief Minister and his Council of Ministers - Whether, after having notified dates of sitting of Legislative Assembly in consultation with Chief Minister and Speaker of House, Governor could cancel those dates in exercise of power and discretion under Articles 174(1) and Article 163 of Constitution respectively - Whether Governor could

unilaterally alter and reschedule those notified dates in exercise of power under Article 174(1) of Constitution read with Article 163 of Constitution by issuing fresh notification - Whether generally, in exercise of discretion under Article 163(1) of Constitution read with Article 174(1) of Constitution and notwithstanding relevant Rules framed by Legislative Assembly, Governor could summon Legislative Assembly without consulting Chief Minister and Speaker - Whether message sent by Governor was constitutionally valid message that ought to have been acted upon by Legislative Assembly

IN THE SUPREME COURT OF INDIA

Civil Appeal Nos. 6203-6204 of 2016 (Arising out of SLP (C) Nos. 1259-1260 of 2016)

Decided On: 13.07.2016

(2016)8SCC 1, 2016(5)GLT1, 2016(6)SCALE506, (2016)8SCC1, 2016 (7) SCJ 1

Nabam Rebia and Ors.
Vs.
Deputy Speaker and Ors.

Judges/Coram:
J.S. Khehar, Pinaki Chandra Ghose, N.V. Ramana, Dipak Misra and Madan B. Lokur, JJ.

The 5th session of the State Legislative Assembly was concluded on 21.10.2015. On 3.11.2015, the Governor issued an order summoning the 6th session of the Assembly, to meet on 14.1.2016 in the Legislative Assembly Chamber. The instant order was passed by the Governor, on the aid and advice of the Chief Minister, and in consultation with the Speaker of the House. The 6th session of the House was preponed by the Governor from 14.1.2016 to 16.12.2015, by an order dated 9.12.2015 indicating inter alia the manner in which the proceedings of the House should be conducted. In its support, the Governor issued a message on 9.12.2015. These actions of the Governor, according to the Appellants, demonstrate an extraneous and inappropriate exercise of constitutional authority. That order and message of the Governor, without the aid and advice of the Council of Ministers and the Chief Minister, constitute the foundation of the challenge raised by the Appellants. Hence, the present appeal.

Held, while allowing the appeal:

(i) The measure of discretionary power of the Governor, is limited to the scope postulated therefor, under Article 163(1). Secondly, under Article 163(1) the discretionary power of the Governor extends to situations, wherein a constitutional provision expressly requires the Governor to act in his own discretion. Thirdly, the Governor can additionally discharge functions in his own discretion, where such intent emerges from a legitimate interpretation of the concerned provision,

and the same cannot be construed otherwise. Fourthly, in situations where this Court has declared, that the Governor should exercise the particular function at his own and without any aid or advice, because of the impermissibility of the other alternative, by reason of conflict of interest. Fifthly, the submission advanced on behalf of the Respondents, that the exercise of discretion under Article 163(2) is final and beyond the scope of judicial review cannot be accepted. Firstly, because we have rejected the submission advanced by the Respondents, that the scope and extent of discretion vested with the Governor has to be ascertained from Article 163(2), on the basis whereof the submission was canvassed. And secondly, any discretion exercised beyond the Governor's jurisdictional authority, would certainly be subject to judicial review.

(ii) A Governor under the Constitution, is not an elected representative. A Governor is appointed by a warrant issued under the hand and seal of the President under Article 155, and his term of office enures under Article 156, during the pleasure of the President. A Governor is an executive nominee, and his appointment flows from the aid and advice tendered by the Council of Ministers with the Prime Minister as the head, to the President. The President, on receipt of the above advice, appoints the Governor. Likewise, the tenure of the Governor rightfully subsists, till it is acceptable to the Council of Ministers with the Prime Minister as its head, as the Governor under Article 156 holds office, during the pleasure of the President. Such a nominee, cannot have an overriding authority, over the representatives of the people, who constitute the House or Houses of the State Legislature (on being duly elected from their respective constituencies) and/or even the executive Government functioning under the Council of Ministers with the Chief Minister as the head. Allowing the Governor to overrule the resolve and determination of the State legislature or the State executive, would not harmoniously augur with the strong democratic principles enshrined in the provisions of the Constitution. Specially so, because the Constitution is founded on the principle of ministerial responsibility. The acceptance of the submission advanced on behalf of the Respondents, would obviously negate the concept of responsible Government. Summoning of the Legislature, initiates the commencement of the legislative process; prorogation of the Legislature temporarily defers the legislative process; and the dissolution of the Legislature brings to an end, the legislative process. In the absence of any legislative responsibility, acceptance of the contention advanced on behalf of the Respondents, would seriously interfere with the responsibility entrusted to the popular Government, which operates through the Council of Ministers with the Chief Minister as the head. It is for the instant reasons also, that the submission advanced on behalf of the Respondents, with reference to the interpretation of Article 174, does not merit acceptance.
(iii) As long as the Council of Ministers enjoys the confidence of the House, the aid and advice of the Council of Ministers headed by the Chief Minister is binding on the Governor, on the subject of summoning, proroguing or dissolving the House or Houses of the State Legislature. The above position would stand altered, if the Government in power has lost the confidence of the House. As and when the Chief Minister does not enjoy the support from the majority of the House, it is open to the Governor to act at his own, without any aid and advice. Aid and advice sustains and subsists, till the Government enjoys the confidence of the Legislature. No justification in taking a different view, than the one expressed by the Justice Sarkaria Commission report, conclusions whereof were reiterated by the Justice M.M. Punchhi Commission report. Present Court endorsed and adopted the same, as a correct expression of the constitutional interpretation, insofar as the present issue was concerned.

(iv) In ordinary circumstances during the period when the Chief Minister and his Council of Ministers enjoy the confidence of the majority of the House, the power vested with the Governor Under Article 174, to summon, prorogue and dissolve the House(s) must be exercised in consonance with the aid and advice of the Chief Minister and his Council of Ministers. In the above situation, he is precluded to take an individual call on the issue at his own will, or in his own discretion. In a situation where the Governor has reasons to believe, that the Chief Minister and his Council of Ministers have lost the confidence of the House, it is open to the Governor, to require the Chief Minister and his Council of Ministers to prove their majority in the House, by a floor test. Only in a situation, where the Government in power on the holding of such floor test is seen to have lost the confidence of the majority, it would be open to the Governor to exercise the powers vested with him Under Article 174 at his own, and without any aid and advice.

(v) Section 63 of the Government of India Act, 1935 was a precursor to Article 175. A perusal of Section 63 of the Government of India Act, 1935, reveals that Sub-section (2) thereof had the words "in his discretion", incorporated therein, with reference to the scope and ambit of the Governor's messages, to the Legislature. It is therefore apparent, that under the Government of India Act, 1935, the discretion to send messages to the Legislature, was clearly and precisely bestowed on the Governor, as he may consider appropriate, in his own wisdom. Article 175 has no such or similar expression. It is apparent therefore, that the framers of the Constitution did not intend to follow the regimen, which was prevalent Under Section 63 of the Government of India Act, 1935. It must have been for the above reason, that the Constituent Assembly framed Article 175, by excluding and omitting the discretion which was vested with the Governor, in the matter of sending messages, under the Government of India Act, 1935. Had it been otherwise, the phrase "in his discretion" would have been retained by the Constituent Assembly in Article 175. It was also the contention on behalf of the Appellants, that the messages addressed by the Governor should be construed by accepting, that the Governor is in no manner associated with the legislative process, except under Article 200. A detailed consideration in this behalf has already been recorded hereinabove. In our considered view, the Governor's connectivity to the House in the matter of sending messages, must be deemed to be limited to the extent considered appropriate by the Council of Ministers headed by the Chief Minister. In fact, it is not possible for us to conclude otherwise, because Article 175 does not expressly provide, in consonance with Article 163(1), that the Governor would exercise his above functions "in his discretion". Thus viewed, messages addressed by the Governor to the House(s) have to be in consonance with the aid and advice tendered to him.

(vi) The messages addressed by the Governor to the Assembly, must abide by the mandate contained in Article 163(1), namely, that the same can only be addressed to the State Legislature, on the aid and advice of the Council of Ministers with the Chief Minister as the head. The message of the Governor dated 9.12.2015, was therefore beyond the constitutional authority vested with the Governor. The impugned message of the Governor was liable to be set aside.

(vii) The Governor had a limited scope of authority, relating to the exercise of executive functions, in his own discretion, i.e., without any aid and advice. The limited power of the Governor is

exercisable in situations, expressly provided for "by or under" the provisions of the Constitution.

(viii) The Governor in his alleged bona fide determination issued the impugned message dated 9.12.2015, statedly to advise and guide the State Legislature, to carry out its functions in consonance with the provisions of the Constitution, and the Rules framed under Articles 166 and 208. The Governor has no direct or indirect constitutionally assigned role, in the matter of removal of the Speaker (or the Deputy Speaker). The Governor is not the conscience keeper of the Legislative Assembly, in the matter of removal of the Speaker. He does not participate in any executive or legislative responsibility, as a marshal. He has no such role assigned to him, whereby he can assume the position of advising and guiding the Legislative Assembly, on the question of removal of the Speaker (or Deputy Speaker). Or to require the Legislative Assembly to follow a particular course. The Governor can only perform such functions, in his own discretion, as are specifically assigned to him "by or under this Constitution", within the framework of Article 163(1), and nothing more. The interjects at the hands of the Governor, in the functioning of the State Legislature, not expressly assigned to him, however bona fide, would be extraneous and without any constitutional sanction. A challenge to an action beyond the authority of the Governor, would fall within the scope of the judicial review, and would be liable to be set aside.

(ix) When the position of a Speaker is under challenge, through a notice of resolution for his removal, it would "seem" just and appropriate, that the Speaker first demonstrates his right to continue as such, by winning support of the majority in the State Legislature. The action of the Speaker in continuing, with one or more disqualification petitions under the Tenth Schedule, whilst a notice of resolution for his own removal, from the office of Speaker is pending, would "appear" to be unfair. If a Speaker truly and rightfully enjoys support of the majority of the MLAs, there would be no difficulty whatsoever, to demonstrate the confidence which the members of the State Legislature, repose in him. The office of Speaker, with which the Constitution vests the authority to deal with disqualification petitions against MLAs, must surely be a Speaker who enjoys confidence of the Assembly. After all, disposal of the motion under Article 179(c), would take no time at all. As soon as the motion is moved, on the floor of the House, the decision thereon will emerge, forthwith. The manner in which the matter had been examined, was on ethical considerations. A constitutional issue, however, must have a constitutional answer.

(x) It would be constitutionally impermissible for a Speaker to adjudicate upon disqualification petitions under the Tenth Schedule, while a notice of resolution for his own removal from the office of Speaker, is pending.

xi) A Governor of a State, has clearly defined duties, functions and responsibilities. The Governor must remain aloof from any disagreement, discord, disharmony, discontent or dissension, within individual political parties. The activities within a political party, confirming turbulence, or unrest within its ranks, are beyond the concern of the Governor. The Governor must keep clear of any political horse-trading, and even unsavory political manipulations, irrespective of the degree of their ethical repulsiveness. Who should or should not be a leader of a political party, is a political question, to be dealt with and resolved privately by the political party itself. The Governor cannot, make such issues, a matter of his concern. The provisions of the Constitution do not enjoin upon the Governor, the authority to resolve disputes within a political party, or between rival political parties. The action of the Governor, in bringing the aforesaid factual position to the notice of the

President, in his monthly communications, may well have been justified for drawing the President's attention to the political scenario of the State. But, it is clearly beyond the scope of the Governor's authority, to engage through his constitutional position, and exercise his constitutional authority, to resolve the same.

(xii) The order of the Governor preponing the 6th session of the Arunachal Pradesh Legislative Assembly, was violative of Article 163 read with Article 174 of the Constitution of India, and as such, was liable to be quashed. The same is accordingly hereby quashed. The message of the Governor dated 9.12.2015, directing the manner of conducting proceedings during the 6th session of the Arunachal Pradesh Legislative Assembly, from 16.12.2015 to 18.12.2015, was violative of Article 163 read with Article 175 of the Constitution of India, and as such, was liable to be quashed. The same was accordingly hereby quashed. All steps and decisions taken by the Arunachal Pradesh Legislative Assembly, pursuant to the Governor's order and message dated 9.12.2015, were unsustainable. The status quo ante as it prevailed on 15.12.2015, was ordered to be restored.

(xiii) Article 179(a) postulates that a Speaker or a Deputy Speaker of the Assembly shall vacate his office if he ceases to be a member of the Assembly. Article 179(b) deals with resignation from the office. In the case at hand, neither Clause (a) nor Clause (b) of Article 179 is attracted. In the obtaining fact situation, the controversy pertains singularly to the understanding of Clause (c).

(xiv) Appreciating the scheme of the Constitution and especially keeping in view the language employed in the first proviso to Article 179(c) it was quite clear that it is the constitutional design that the Speaker should not do any act in furtherance of his interest till the resolution is moved.

(xv) In view of the conclusions arrived at with regard to the interpretation of Article 163 and Article 174 of the Constitution, the interpretation of Article 175 of the Constitution and the actions of the Governor of Arunachal Pradesh in this regard are rendered academic. It was therefore not necessary or advisable to comment, one way or the other, on the interpretation of Article 175 of the Constitution and the actions of the Governor of Arunachal Pradesh in this regard. The interpretation of Article 179 of the Constitution also does not arise in view of the conclusions arrived at on the interpretation of Article 163 and Article 174 of the Constitution and the consequence thereof. With regard to the interpretation of the Tenth Schedule of the Constitution and the decision of the Speaker of the Legislative Assembly of Arunachal Pradesh, that too is unnecessary in view of the decision rendered by the High Court in Pema Khandu v. The Speaker, Arunachal Pradesh Legislative Assembly the decision having been delivered after judgment was reserved in these appeals.

(xvi) Two important expressions find mention in Section 50 of the Government of India Act, 1935 namely, "in his discretion" and "his individual judgment". These expressions are noticed in several Sections of the Government of India Act, 1935 and came up for discussion when Section 9 of the Government of India Act, 1935 (relating to the Council of Ministers) was discussed in the House of Commons. In the debate, the view expressed by one of the Members of Parliament was that the

Governor-General acts "in his discretion" when he is not obliged to consult the Council of Ministers. On the other hand, he acts in "his individual judgment" when he consults the Council of Ministers but does not necessarily accept its advice.

(xvii) The framers of Constitution did not intend that the Governor could disregard the aid and advice of the Council of Ministers. The absence of the expression "his individual judgment" makes it apparent that the Constitution framers were clear that the Governor would always be bound by the aid and advice of the Council of Ministers. Limited elbow room was, however, given to the Governor to act "in his discretion" in matters permitted by or under the Constitution.

(xviii) The Council of Ministers will aid and advise the Governor in the exercise of his functions. This is the first part of Article 163(1) of the Constitution. The Governor then has two options-(a) To reject the aid and advice of the Council of Ministers and act in "his individual judgment". This is an illusory and non-existent option since the Constitution does not permit it. (b) To act on the aid and advice of the Council of Ministers. By default this is the only real option available to him. (ii) If the exercise of function is beyond the purview of the aid and advice of the Council of Ministers but is by or under the Constitution, the Governor can act "in his discretion". Article 163(2) of the Constitution will have reference only to the last part of Article 163(1) of the Constitution and is not all-pervasive. If there is a break-down in communications between the Council of Ministers and the Governor, then the Governor will not have the benefit of the aid and advice of the Council of Ministers. In that event, the Governor may "take the matter into his own hands and act freely." The break-down of communications was a possibility under the Government of India Act, 1935 since it was "in the main undemocratic" and there could be a break-down of communications between the representative of His Majesty and the Council of Ministers. However, if such a situation were to arise today in independent India, namely, a break-down of communications between the Governor of a State and the Council of Ministers, it would be most unfortunate and detrimental to our democracy. In the unlikely event of a complete break-down of communications, the President can and must intervene to bring in constitutional order.

(xix) In the Government of India Act, 1935 the Governor of a Province had vast powers, including for example, the power to preside over a meeting of the Council of Ministers.13 However, for the present purposes it is not necessary to research into that issue since it is quite clear that with Independence, the executive and other powers, functions and responsibilities of the Governor earlier appointed by His Majesty needed an overhaul. This is what Article 153 of the draft Constitution sought to achieve.

(xx) The President and the Governor can act under Article 85 of the Constitution and Article 174 of the Constitution respectively only on the aid and advise of the Council of Ministers. No independent authority is given either to the President or the Governor in this regard.

(xxi) It is only the Governor who may summon the Legislative Assembly, but only on the advice of the Council of Ministers and not suo moto. In other words, the Governor cannot summon the

Legislative Assembly "in his discretion". If the Governor does so, there would be no business to transact and summoning the House in such a situation would be a futile operation. The Governor cannot manufacture any business for the House to transact, through a so-called message or otherwise. If the Governor disregards the advice of the Council of Ministers for summoning the House, necessary consequences would follow. In this regard, it may be mentioned that if the President disregards the advice of the Council of Ministers he can impeached. As far as the Governor is concerned, if he disregards the advice of the Council of Ministers the pleasure of the President can be withdrawn since the Governor holds office during his pleasure. On a different note, if the Legislative Assembly does not meet once in six months, there would be a breach of the Constitution requiring severe sanction.

(xxii) As per Rules, the Governor can summon the Assembly only if the Chief Minister (in consultation with the Speaker) so advises him. There is no exception to this. However, Article 174 of the Constitution would be violated if the Chief Minister does not so advise the Governor to summon the Assembly for a period of six months, or if the Governor does not summon the Assembly despite the advice of the Chief Minister.

(xxiii) in case the Chief Minister fails in his duty to put forward a proposal before the Governor for summoning the Legislative Assembly or if the Governor does not accept the proposal of the Chief Minister of Arunachal Pradesh for summoning the Legislative Assembly, necessary consequences will follow as mentioned in the debates in Parliament when the first amendment to the Constitution was considered.

(xxiv) Under Article 163(1) of the Constitution, the Governor is bound by the advice of his Council of Ministers. There are only three exceptions, "except in so far as", to this: (i) The Governor may, in the exercise of his functions, act in his discretion as conferred by the Constitution; (ii) The Governor may, in the exercise of his functions, act in his discretion as conferred under the Constitution; and (iii) The Governor may, in the exercise of his functions, act in his individual judgment in instances specified by the Constitution. The development of constitutional law in India and some rather peculiar and extraordinary situations have led to the evolution of a distinct category of functions, in addition to those postulated or imagined by the Constitution and identified above. These are functions in which the Governor acts by the Constitution and of constitutional necessity in view of the peculiar and extraordinary situation such as that which arose in M.P. Special Police Establishment and as arise in situations relating to Article 356 of the Constitution or in choosing a person to be the leader of the Legislative Assembly and the Chief Minister of the State by proving his majority in the Legislative Assembly. However, these limitations do not preclude the Legislative Assembly from framing its Rules of Legislative Business Under Article 208 of the Constitution with reference to the functions of the Governor, nor do they preclude the Governor from framing Rules of Executive Business Under Article 166 of the Constitution for the smooth functioning of the government, as long as the Rules are framed in consonance with the constitutional requirements and within constitutional boundaries.

(xxv) The Governor not only modified the dates of the session of the Assembly but also cancelled or revoked the dates of the session of the Assembly earlier decided upon in consultation with the Speaker of the Assembly and the Chief Minister of Arunachal Pradesh.

(xxvi) Constitution expects all constitutional authorities to act in harmony and there must be comity between them to further the constitutional vision of democracy in the larger interests of the nation. In other words, conflicts between them should be completely avoided but if there are any differences of opinion or perception, they should be narrowed to the maximum extent possible and ironed out through dialogue and discussion. It must be appreciated that no one is above the law and equally, no one is not answerable to the law and the debate on the First Amendment to the Constitution clearly indicates so.

(xxvii) Impugned judgment and order of 13th January, 2016 passed by the Gauhati High Court was set aside. The modification Order of 9th December, 2015 passed by the Governor of Arunachal Pradesh was unconstitutional and was set aside and the order of the Deputy Speaker dated 15th December, 2015 setting aside the order of the Speaker of the same date is also set aside.

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IN THE SUPREME COURT OF INDIA

Decided On: 16.10.2015

2015(5)GLT(SC)12, 2015(11)SCALE1, (2016)5SCC1, (2016)2SCC(LS)253

Supreme Court Advocates-on-Record-Association and Ors.
Vs.
Union of India (UOI)

Judges/Coram:
J.S. Khehar, Jasti Chelameswar, Madan B. Lokur, Kurian Joseph and A.K. Goel, JJ.

Facts:

Two acts, the Constitution (Ninety-ninth Amendment) Act, 2014 and National Judicial Appointments Commission Act, 2014 were enacted by Parliament to set up a National Judicial Appointments Commission (NJAC) for selection, appointment and transfer of Judges to the Higher judiciary. The Commission would replace the prevailing procedure under Articles 124(2) and 217(1) of the Constitution, otherwise known as the Collegium. The Commission was purported to introduce transparency in the selection process.

Articles 124 and 217 of the Constitution were accordingly amended by the Constitution (Ninety-ninth Amendment) Act, 2014, which received Presidential assent on 31.12.2014. The National Judicial Appointments Commission Act, 2014 was simultaneously assented to. The proposed NJAC would be comprised of the Chief Justice of India, next two senior most judges in the Supreme Court, the Union Minister for Law and Justice and two eminent persons nominated by a separate committee. The committee to nominate the eminent persons would include the Chief Justice of India, the Prime Minister and Leader of the Opposition. Hence, the present petition questioning the constitutional validity of the two acts.

Hearings at the Supreme Court of India on the NJAC were initiated before a three-Judge Bench, which referred it to a five-Judge Bench, which included Justice Anil R. Dave. On 13.4.2015 the Constitution (Ninety-ninth Amendment) Act, 2014, and the National Judicial Appointments Commission Act, 2014, were notified, making Justice Anil R. Dave, J. an ex-officio Member of the National Judicial Appointments Commission, for being the second senior-most Judge after the Chief Justice of India, under Article 124A(1)(b) of the Constitution. The Bench was reconstituted with Justice J.S. Khehar replacing Justice Dave. Submissions were made for Justice Khehar to recuse himself from the matter as he was a member of the Collegium of five Judges of the Supreme Court which recommended judicial appointments to the Higher judiciary, which was directly affected by the creation of the NJAC and the validity of which was under challenge.

In their submissions bolstering the validity of the NJAC, Respondents relied on the decision in S.P. Gupta v. Union of India (First Judges case), which was overruled by Supreme Court Advocates-on-Record Association v. Union of India (Second Judges case), affirmed in Re: Special Reference No. 1 of 1998 (Third Judges case). Respondents sought to prove correct the interpretation in the First Judges case and challenged the correctness of precedent laid down in Second and Third Judges case.

From the opinion in the First Judges case emerged: Chief Justice of India, Chief Justice of the High Court, and other Judges of the High Court and Supreme Court were constitutional functionaries, having a consultative role, and the power of appointments rested solely and exclusively in the decision of the Central Government. This power was not unfettered in that the Central Government could not act arbitrarily, without consulting fully and effectively the constitutional functionaries specified in Articles 124 and 217 of the Constitution. With reference to appointment of Judges of the Supreme Court, it was held, that the Chief Justice of India was required to be consulted, but the Central Government was not bound to act in accordance with the opinion of the Chief Justice of India even though his opinion was to be considered with due importance. Consultation with the Chief Justice of India was a mandatory requirement. But while making an appointment, consultation could extend to other Judges of the Supreme Court and High Courts, as deemed necessary by the Central Government. Moreover, Article 222 of the Constitution conferred expressly a power on the President to transfer a judge from one State to another to have 1/3rd of Judges in the High Court from outside the State. The President possessed an implied power to lay

down the norms, the principles, the conditions and the circumstances, under which such power was to be exercised. With regards to the "independence of the judiciary", it was observed that while the administration of justice drew its legal sanction from the Constitution, its credibility rested in the faith of the people. Thus, it was held that the ultimate power of appointment rested with the Central Government.

The Second Judges case decided: The process of appointment of Judges to the Supreme Court and the High Courts was an integrated 'participatory consultative process' for selecting the best and most suitable persons available for appointment. Initiation of the proposal for appointment in the case of the Supreme Court must be by the Chief Justice of India; and in the instance of High Court, by the Chief Justice of the High Court. In the event of conflicting opinions by constitutional functionaries, the opinion of the judiciary, the Chief Justice of India, has primacy. No appointment, to the Supreme Court or a High Court, could be made unless conforming with the opinion of the Chief Justice of India. Only in exceptional cases, stated with strong cogent reasons, should the appointment recommended by the Chief Justice not be made. Provisions of the Constitution, and its scheme, should be construed and implemented in a manner conducive to such an interpretation.

Finally, in the Third Judges case it was held: "consultation with the Chief justice of India" in Articles 217(1) of the Constitution of India required consultation with a plurality of Judges in the formation of the opinion of the Chief Justice of India. The sole, individual opinion of the Chief Justice of India did not constitute "consultation". The Chief Justice of India was not entitled to act solely in his individual capacity, without consultation with other Judges of the Supreme Court, in respect of materials and information conveyed by the Government of India for non-appointment of a judge recommended for appointment. "Strong cogent reasons" did not have to be recorded as justification for a departure from the order of seniority in respect of each senior Judge who has been passed over. What has to be recorded is the positive reason for the recommendation. The views of the Judges consulted should be in writing and should be conveyed to the Government of India by the Chief Justice of India along with his views to the extent set out in the body of this opinion.

Attention was also drawn to several speeches, debates and deliberations of the Constituent Assembly. Dr. Ambedkar had in the course of the Assembly observed: "there is no doubt that the House in general, has agreed that the independence of the Judiciary from the Executive should be made as clear and definite as we could make it by law. At the same time, there is the fear that in the name of the independence of the Judiciary, we might be creatingWe do not want to create an *Imperium in Imperio*, and at the same time we want to give the Judiciary ample independence so that it can act without fear or favour of the Executive."

In asserting the validity of the Constitution (Ninety-ninth Amendment) Act, 2014, Respondents submitted that Parliament's power to amend the Constitution was plenary, subject only to it not altering the "basic structure" of the Constitution. As such, a constitutional amendment must be

presumed to be constitutionally valid unless shown otherwise. The Constitution (Ninety-ninth Amendment) Act, 2014 only introduced checks and balances, which were inherent components of an effective constitutional arrangement. Further, it was not within the ambit of this Court to suggest an alternative combination of Members for the NJAC or an alternative procedure to regulate its functioning. In conjunction with the issue of "independence of the judiciary", which emanated from the concept of "separation of powers", the Respondents submitted that the scheme of the Constitution envisaged a system of checks and balances. With each organ of governance while being allowed the freedom to discharge the duties assigned to it, was subject to controls in the hands of one or both of the other organs. In the matter of appointment of judges, whereas Articles 124 and 217 provided executive control under the scheme of checks and balances, the Second and Third Judges case had done away with the same.

Held, allowing the petition

1. Justice Khehar noted that besides him, three other judges on the instant Bench would over time be a part of the Collegium or would be a part of the NJAC. As such, the averment of conflict of interest should have been raised against them all. Though a Judge may recuse of his own volition from a case entrusted to him by the Chief Justice, such would be a matter of his own choosing. A judge before he assumes his office takes an oath to discharge his duties without fear or favour. He would be in breach of his oath of office if he accepted a prayer for recusal, unless justified. Justice Chelameswar opined the following: (1) if a Judge has a financial interest in the outcome of a case, he is automatically disqualified from hearing the case; (2) in cases where the interest of the Judge in the case is other than financial, then the disqualification is not automatic but an enquiry is required whether the existence of such an interest disqualifies the Judge tested in the light of either on the principle of "real danger" or "reasonable apprehension" of bias; and (3) the Judge is automatically disqualified from hearing a case where the Judge is interested in a cause which is being promoted by one of the parties to the case.

2.In UOI v. Sankalchand Himatlal Sheth the court had held that "consultation" could not be deemed to be "concurrence" with reference to Article 222 of the Constitution. Determining whether the President was to act in its individual capacity, at his own discretion, Court determined that President means the Minister or the Council of Ministers and his opinion, satisfaction or decision is constitutionally secured when Ministers arrive at such opinion satisfaction or decision. The independence of the Judiciary, which is a cardinal principle of the Constitution and has been relied on to justify the deviation, is guarded by the relevant article making consultation with the Chief Justice of India obligatory. Consultation with that highest dignitary of Indian justice will and should be accepted by the government of India and the court will have an opportunity to examine if any other extraneous circumstances have entered into the verdict of the Minister, if he departs from the counsel given by the Chief Justice of India. In practice, the last word in such a sensitive subject must belong to the Chief Justice of India, the rejection of his advice being ordinarily regarded as prompted by oblique considerations vitiating the order. It is immaterial whether the President or the Prime Minister or the Minister for Justice formally decides the issue.

3.The position having been conceded by the Respondents in the Third Judges case, accepting the decision in the Second Judges case, they cannot seek reconsideration of the judicial declaration in the Second and Third Judges cases. Consequent to pronouncement of judgments in the Second and Third Judges cases, a Memorandum of Procedure for Appointment of Judges and Chief Justices to the Higher judiciary was drawn by the Ministry of Law, Justice and Company Affairs on 30.6.1999. The Memorandum of Procedure provides for a participatory role, to the judiciary as well as the political-executive. While the judicial contribution is responsible for evaluating the individual's professional ability, the political-executive is tasked with the obligation to provide details about the individual's character and antecedents.

4.In the Collegium system of appointment, it is open to the Executive to return the file to the Chief Justice of India, for a reconsideration of the proposal, by enclosing material which may have escaped the notice of the Chief Justice of India and his collegium of Judges. There is a complete comity of purpose between the judiciary and the political-executive in the matter of selection and appointment of High Court Judges, and there is clear transparency as views and counter-views are exchanged in writing.

5.When the Constituent Assembly used the term "consultation" its intent was to limit the participatory role of the political-executive in the matter of appointments of Judges to the higher judiciary. It was the view of Dr. B.R. Ambedkar, that the draft article had adopted a middle course, by not making the President-the executive "the supreme and absolute authority in the matter of making appointments" of Judges. The judgments in the Second and Third Judges cases cannot be blamed, for not assigning a dictionary meaning to the term "consultation". If the real purpose sought to be achieved by the term "consultation" was to shield the selection and appointment of Judges to the higher judiciary, from executive and political involvement, certainly the term "consultation" was meant to be understood as something more than a mere "consultation". Thus, Article 124 was clearly meant to propound that the matter of "appointments of Judges was an integral part of the "independence of the judiciary". The process contemplated for appointment of Judges would therefore have to be understood to be shielded from political pressure and political considerations. Thus, the court on a harmonious construction of the provisions of the Constitution in the Second and Third Judges cases rightly held that primacy in appointments vested with the judiciary; leading to the inference that the term "consultation" should be understood as giving primacy to the view expressed by the judiciary through the Chief Justice of India.

6.From Article 74 of the Constitution it cannot be concluded that "aid and advice" can be treated synonymous with a binding "direction", an irrevocable "command" or a conclusive "mandate". The phrase "aid and advice" cannot be individually construed as an imperative diktat, which had to be obeyed under all circumstances. In common parlance, a process of "consultation" is really the process of "aid and advice". The only distinction being, that "consultation" is obtained, whereas "aid and advice" may be tendered. On a plain reading therefore, neither can be understood to convey that they can be of a binding nature. Through the Constitution (Forty-second Amendment)

Act, 1976, Article 74 came to be amended, and with the insertion of the words "shall ... act in accordance with such advice", the President came to be bound, to exercise his functions, in consonance with the "aid and advice" tendered to him, by the Council of Ministers headed by the Prime Minister. The instant seen as clarificatory in character, merely reiterates the manner in which the original provision ought to have been understood.

7.For the nomination of the two "eminent persons", the Selection Committee comprises of one member of the executive, one member of the legislature, and one member of the judiciary. For the two "eminent persons", purported to not be identified with either the executive or legislature, there were no guidelines, for appointment. The sensitivity of selecting Judges is so enormous, and the consequences of making inappropriate appointments so dangerous, that if those involved in the process of selection and appointment of Judges to the higher judiciary, make wrongful selections, it may lead to chaos. The two "eminent persons" would also have the absolute authority to reject all names unanimously approved by the remaining four Members of the NJAC. That would include the power to reject the unanimous recommendation of the entire judicial component of the NJAC. Vesting of such authority on persons who have no nexus to the system of administration of justice is arbitrary. The inclusion of "eminent persons", would adversely impact primacy of the judiciary, in the matter of selection and appointment of Judges to the higher judiciary. Article 124A(1)(d) is liable to be set aside and struck down as being violative of the "basic structure" of the Constitution.

8.The contention of Respondents that an amendment to the Constitution, passed by following the procedure expressed in the proviso to Article 368(2), constituted the will of the people, and the same was not subject to judicial review was rejected. Article 368 postulates only a "procedure" for amendment of the Constitution, and that, the same could not be treated as a "power" vested in the Parliament to amend the Constitution, so as to alter, the "core" of the Constitution, which has also been described as, the "basic features/basic structure" of the Constitution.

9.Since the executive has a major stake, in a majority of cases, which arise for consideration before the higher judiciary, the participation of the Union Minister in charge of Law and Justice, as an ex officio Member of the NJAC, would be questionable. One of the rules of natural justice is that the adjudicator should not be biased. In the NJAC, the Union Minister in charge of Law and Justice would be a party to all final selections and appointments of Judges to the higher judiciary. It may be difficult for Judges approved by the NJAC, to resist a plea of conflict of interest where the political-executive is a party to the lis. It would have the inevitable effect of undermining the "independence of the judiciary". Therefore, the role assigned to the political-executive, can at best be limited to a collaborative participation, excluding any role in the final determination. Merely the participation of the Union Minister in charge of Law and Justice, in the final process of selection, as an ex officio Member of the NJAC, would render the amended provision of Article 124A(1)(c) as ultra vires the Constitution, as it impinges on the principles of "independence of the judiciary" and "separation of powers".

10.It is evident from the conclusions returned in the State of Maharashtra v. Central Provinces Manganese Ore Co. Ltd., that in the facts and circumstances of the instant the construction suggested by Respondents would result in the creation of a void if neither the original nor amended constitutional provision of the Constitution would survive. The clear intent of the Parliament while enacting the Constitution (Ninety-ninth Amendment) Act, 2014 was to provide for a new process of selection and appointment of Judges to the higher judiciary by amending the existing provisions. Therefore, when the amended provision postulating a different procedure is set aside, the original process of selection and appointment under the unamended provisions would revive. The above position also emerges from the legal position declared in Koteswar Vittal Kamath v. K. Rangappa Baliga and Co. Plea for reference to a larger Bench, and for reconsideration of the Second and Third Judges cases is rejected.

11.This Court can reconsider an earlier decision rendered by it. The broad principles that can be culled out from the various decisions suggest that: (1) If the decision concerns an interpretation of the Constitution, perhaps the bar for reconsideration might be lowered a bit; where a constitutional issue is involved, the necessity of reconsideration should be shown beyond all reasonable doubt, the remedy of amending the Constitution always being available to Parliament. (2) If the decision concerns the imposition of a tax, then too the bar might be lowered since the tax burden would affect a large section of the public. (3) If the decision concerns the fundamental rights of the people. (4) In other cases, the Court must be convinced that the earlier decision is plainly erroneous and has a baneful effect on the public; that it is vague or inconsistent or manifestly wrong. (5) If the decision only concerns two contending private parties or individuals, then perhaps it might not be advisable to reconsider it. (6) The power to reconsider is not unrestricted or unlimited, but is confined within narrow limits and must be exercised sparingly and under exceptional circumstances for clear and compelling reasons. Therefore, merely because a view different from or contrary to what has been expressed earlier is preferable is no reason to reconsider an earlier decision.

12.There are two crucial factors to be carefully considered before a person is appointed as a judge of the Supreme Court or a High Court. These are: (1) The professional skills, judicial potential, suitability and temperament of a person to be a good judge, and (2) The personal strengths, weaknesses, habits and traits of that person. As far as the professional skills, judicial potential, suitability and temperament of a person being a good judge is concerned, the most appropriate person to make that assessment would be the Chief Justice of India (in consultation with the other judges) and not somebody from outside the legal fraternity. On the other hand, as far as the personal strengths, weaknesses, habits and traits of a person are concerned, appropriate inputs can come only from the executive, since the Chief Justice of India and other judges may not be aware of them. Since these two facets of the personality of a would-be judge are undoubtedly distinct, there cannot be a difference of opinion between the judiciary and the executive in this regard since they both express an opinion on different facets of a person's life. The Chief Justice of India cannot

comment upon the 'expert opinion' of the executive nor can the executive comment upon the 'expert opinion' of the Chief Justice of India.

13.The 'collegium system' postulated by the Second Judges case and the Third Judges case gets revived. A 'consequence hearing' is required to assist in the matter for steps to be taken in the future to streamline the process and procedure of appointment of judges, to make it more responsive to the needs of the people, to make it more transparent and in tune with societal needs.

14.The word amendment literally means betterment or improvement and sponsor of amendment may always claim improvement. Such claim has to be tested by applying the 'identity test' and the 'impact test'. The amendment should not affect the identity of an essential feature of the Constitution. The impact of the amendment on the working of the scheme of the Constitution has to be taken into account. The criticism against perceived short comings in the working of the collegium also does not justify the impugned provisions.

15. Justice Chelameswar dissented. "(Judicial independence) connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guaranteesIt is generally agreed that judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of Government.

16. Further, in M. Nagaraj and Ors. v. Union of India and Ors. it was held: "The point which is important to be noted is that principles of federalism, secularism, reasonableness and socialism, etc. are beyond the words of a particular provision. They are systematic and structural principles underlying and connecting various provisions of the Constitution. They give coherence to the Constitution. They make the Constitution an organic whole. They are part of constitutional law even if they are not expressly stated in the form of rules."

17. In Minerva Mills Ltd. and Ors. v. Union of India and Ors. it was held the amendment of a single article may result in the destruction of the basic structure of the Constitution depending upon the nature of the basic feature and the context of the abrogation of that article if the purpose sought to be achieved by the Article constitutes the quintessential to the basic structure of the Constitution. The case, and similar, do not help determine the instant case as they do not lay down any general principle by which it can be determined as to when can a constitutional amendment be said to destroy the basic structure of the Constitution. In the present case the identity of the basic feature is not in dispute, rather the question is whether the amendment is abrogative of the independence of judiciary (the basic feature) resulting in the destruction of the basic structure of the Constitution. This basic feature with does not confer any fundamental or constitutional right in favour of individuals. It is only a means for securing to the people of India, justice, liberty and

equality. It creates a collective right in favour of the polity to have a judiciary which is free from the control of the Executive or the Legislature in its essential function of decision making.

18. By Articles 124, 217 and 124-A and 124-B of the Constitution it leads to the position that the Executive Branch of Government cannot push through an 'undeserving candidate' so long as at least two members representing the Judicial Branch are united in their view as to unsuitability of that candidate. Even one eminent person and a single judicial member of NJAC could effectively stall entry of an unworthy appointment. Similarly, the judicial members also cannot push through persons of their choice unless at least one other member belonging to the non-judicial block supports the candidate proposed by them. An identical inference is that in difficult times when political branches cannot be counted upon, neither can the Judiciary: the judiciary is not the only constitutional organ which protects liberties of the people. Accordingly, primacy to the opinion of the judiciary in the matter of judicial appointments is not the only mode of securing independence of judiciary for protection of liberties. Consequently, the assumption that primacy of the Judicial Branch in the appointments process is an essential element and thus a basic feature is empirically flawed without any basis either in the constitutional history of the Nation or any other and normatively fallacious apart from being contrary to political theory.

19. To wholly eliminate the Executive from the process of selection would be inconsistent with the foundational premise that government in a democracy is by chosen representatives of the people. To hold that it should be totally excluded from the process of appointing judges would be wholly illogical and inconsistent with the foundations of the theory of democracy and a doctrinal heresy. Such exclusion has no parallel in any other democracy whose models were examined by the Constituent Assembly and none other were brought to our notice either. Established principles of constitutional government, practices in other democratic constitutional arrangements and the fact that the Constituent Assembly provided a role for the Executive clearly prohibit the inference that Executive participation in the selection process abrogates a basic feature. Submissions that exclusion of the Executive Branch is destructive of the basic feature of checks and balances-a fundamental principle in constitutional theory- are correct.

20. In I.R. Coelho v. State of Tamil Nadu it was opined, "Further, mere possibility of abuse is not a relevant test to determine the validity of a provision. The people, through the Constitution, have vested the power to make laws in their representatives through Parliament in the same manner in which they have entrusted the responsibility to adjudge, interpret and construe law and the Constitution including its limitation in the judiciary. We, therefore, cannot make any assumption about the alleged abuse of the power." Such a test is relevant only for bodies created by statutes and subordinate legislation. The functioning of any constitutional body is only disciplined by appropriate legislation. Constitution does not lay down any guidelines for the functioning of the President and Prime Minister nor the Governors or the Chief Ministers. Performance of constitutional duties entrusted to them is structured by legislation and constitutional culture. To contend that the amendment is destructive of the basic structure since it

does not lay down any guidelines is tantamount to holding that the design of the Constitution as originally enacted is defective. For the abovementioned reasons, amendment should be upheld.

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