

A BALANCED APPROACH TO PRIVACY FOR AADHAAR: BETWEEN PRIVACY & CONVENIENCE

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‘The greatest freedom that I have gained is that I do not have to worry about what happens tomorrow, because I am happy with what I have done today.’

– Edward J. Snowden

ABSTRACT: The article legally examines the key privacy concerns pertaining to the Aadhaar, a unique digital identity project of India. The Aadhaar project is stipulated as the core platform for the advent of a digital society and economy as steered by the IndiaStack template that aims to integrate identity data management across different sectors for an efficient and hassle-free transfer of ideas, goods and services across the nation. Although the project has high and defensible ambitions to bring the much-needed ease or convenience along with economic benefits in India, there are genuine data privacy concerns which makes it economically, politically and legally - a highly ambitious and controversial project. The amount of data which is captured in the process of Aadhaar enrolment and authentication given that the core database of Aadhaar remains centralized creates new vulnerabilities making it susceptible to state or private surveillance of citizens. Thus, it becomes necessary to diagnose the data privacy arguments in light of the constitutional right to privacy and analyze whether the Supreme Court’s Aadhaar judgment ‘balances’ citizen’s right to privacy with Aadhaar objectives and whether such ‘balancing’ meets the standard benchmark or lacks in the same.

Key words: Aadhaar; mass surveillance; privacy; metadata; proportionality; Wednesbury unreasonableness; digital identity

1. INTRODUCTION
2. THE AADHAAR PROJECT

Aadhaar is the largest biometric digital identity in the world with the aim to unleash the positive digital potential as well as to re-model public sector governance in India.² It is estimated that Aadhaar will advance the national digital economy with the entrance of public and private

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² OECD, *OCED Case-Study on Aadhaar*, <https://www.oecd.org/gov/innovative-government/India-case-study-UAE-report-2018.pdf> (last visited 10 April 2020).

sectors into the digital era which will help re-imagine public-private interactions at several levels.³

The Indian state since independence was confronted with three special problems: a) reduce mass poverty, b) ensure national security given the apprehensive relations with neighbors and c) regulate terrorism finance.⁴ In order to resolve the triple problems, the solution depended on a unique and functional national identification system.⁵

Firstly, poverty was meant to be tackled through various schemes, subsidies, services and benefits paid through the national exchequer and directed to all the citizens who needed the same.⁶ However, the system was substandard due to middlemen, power brokers, contractors and the other such corrupt middlemen.⁷ In relation, Rajiv Gandhi famously said that – ‘...out of Rs. 100 allocated to an anti-poverty project only Rs. 15 reaches the people’. Years later, Rahul Gandhi expressed the same concerns until the arrival of Aadhaar.⁸ As the Aadhaar project enabled the Government to uniquely target the most vulnerable communities in India to directly transfer government aid to them by uniquely identifying them without the need for any middlemen.

Secondly, following the 9/11 attacks in the United States (US), there were global concerns over terrorism financing that enabled such acts of terrorism.⁹ A global consensus behind a probable legislation through an inter-governmental body known as the Financial Action Task Force (FATF) was revived by the US.¹⁰ India supported the FATF’s initiatives and affirmed to abide by its standards.¹¹ Additionally, India’s financial institutions confronted challenges around the enforcement of customer due diligence, i.e., electronic verification of identity – Electronic Know Your Customer (e-KYC) requirement.¹²

Thirdly, three days after the Kargil War, an armed conflict between India and Pakistan in 1999, a Kargil Review Committee (KRC) was established by the Government of India to examine the sequence of events and make recommendations for the future.¹³ The report stated that: ‘The critical failure in intelligence was related to the absence of any information on the induction and de-induction of battalions and the lack of actual data on the identity of the

³ Nandan Nilekani and Viral Shah, ‘Chapter 16: Rebooting India – Realizing a Billion Aspirations’, NANDAN NILEKANI, REBOOTING INDIA: REALIZING A BILLION ASPIRATIONS (Penguin Random House, India 2015).

⁴ SHANKAR AIYAR, ‘Chapter 1: Who I Am – The Birth of Aadhaar and the Need for it Aadhaar’, in A BIOMETRIC HISTORY OF INDIA’S 12-DIGIT REVOLUTION (Westland Publications Ltd 2017).

⁵ *id.*

⁶ *id.*

⁷ *id.*

⁸ *id.*

⁹ *id.*

¹⁰ *id.*

¹¹ *id.*

¹² *id.*

¹³ *id.*

battalions in the area opposite Kargil during 1998.’¹⁴ In February 2001, a group of ministers recommended on the basis of the report a comprehensive and systematic overhaul of the country’s security and intelligence apparatus keeping with the technological revolution. One of the ambitions provided by the ministers was to ensure a multi-purpose National Identity Card. In 2003, the BJP government amended the Citizenship Act, 1955 to add a new section¹⁵ for the issuance of National Identity Cards which was tasked to the Ministry of Home Affairs under the National Population Register.¹⁶

Critically, these three factors shaped the future of the national digital identification system in India. The main architect behind the Aadhaar project – Nandan Nilekani in his book titled ‘Imagining India – Idea for the New Century’ provided that a unique national ID built on an intelligent infrastructure with a secure and scalable backend, single record keeper for the whole country would be nothing less than revolutionary in how the state ensures welfare and it would dramatically change India’s governance model.¹⁷ Nandan Nilekani got involved into the Aadhaar project when he was invited in New Delhi to potentially join the Congress Party by Rahul Gandhi.¹⁸ The then former Prime Minister of India, Dr. Manmohan Singh saw the suitable opportunity for bringing Nilekani into the government as the chief of the Aadhaar project, the post which was vacant at the time.¹⁹

According to the World Bank, inclusive and trusted - i.e., good ID systems are important for achieving sustainable development goals, especially for ending extreme poverty and improving shared prosperity.²⁰ It achieves the United Nations’ Sustainable Development Goal (SDG) Target 16.9 – ‘to provide legal identity for all, including birth registration by 2030’.²¹

¹⁴ Kargil Review Committee Report (15 December 1999) <https://nuclearweaponarchive.org/India/KargilRCB.html> (last visited 10 April 2020).

¹⁵ Citizenship Act, 1955 – Section 14A. Issue of national identity cards.—(1) The Central Government may compulsorily register every citizen of India and issue national identity card to him. (2) The Central Government may maintain a National Register of Indian Citizens and for that purpose establish a National Registration Authority. (3) On and from the date of commencement of the Citizenship (Amendment) Act, 2003 (6 of 2004), the Registrar General, India, appointed under sub-section (1) of section 3 of the Registration of Births and Deaths Act, 1969 (18 of 1969) shall act as the National Registration Authority and he shall function as the Registrar General of Citizen Registration. (4) The Central Government may appoint such other officers and staff as may be required to assist the Registrar General of Citizen Registration in discharging his functions and responsibilities. (5) The procedure to be followed in compulsory registration of the citizens of India shall be such as may be prescribed.

¹⁶ Stevens, *supra* note 3.

¹⁷ NANDAN NILEKANI, ‘ICT in India - From Subsidies to Direct Benefits’ IN IMAGINING INDIA: IDEAS FOR THE NEW CENTURY, (Penguin Random Book House 2009) ISBN: 978-0-143-06707-8.

¹⁸ *id.*

¹⁹ *id.*

²⁰ World Bank Group, ‘Version 1.0 Practitioner’s Guide – Identification for Development (ID4D) Report’ (October 2019) <<http://documents.worldbank.org/curated/en/248371559325561562/pdf/ID4D-Practitioner-s-Guide.pdf>> (last visited 9 March 2020).

²¹ YouTube ‘Presentation by Nandan Nilekani on IndiaStack 2016’, <https://drive.google.com/file/d/0B8eAaE2o9UUh8d3JsX3pNeVNCsVVoRU45VTJLTiFfZlBweHRN/view> (last visited 10 April 2020). See ‘YouTube video of Nandan Nilekani’s presentation’, <https://www.youtube.com/watch?v=zAMGrYs-fKM> (last visited 10 April 2020).

3. THE AADHAAR FRAMEWORK

The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016²² legally implements the Aadhaar project. The preamble of the Aadhaar Act, 2016 states:

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

The main institutional body regulating the Aadhaar project is called the Unique Identification Authority of India (UIDAI) as mentioned in the Aadhaar Act, 2016 based in New Delhi, India.²³ Whereas the other eight regional offices are located in other various parts of India.²⁴ The UIDAI as an institution comes under the Ministry of Electronics and Information Technology (MeitY), Government of India.²⁵ The UIDAI controls all the enrolment, authentication and the central database processes relating to the Aadhaar project.²⁶ The UIDAI specifies the manner in which the Aadhaar can be used as a digital identity both for public as well as private services and it has the authority to share information of Aadhaar number holders, specify data management, security and other technology safeguards for Aadhaar.²⁷

There are essentially two main processes in Aadhaar which operates at a mass-scale for digital identification in India – enrolment and authentication.²⁸ Aadhaar enrolment is undertaken by local enrolment agencies appointed by the registrars who in turn are appointed by the UIDAI itself.²⁹ The enrolment process utilizes multiple-fingerprint scanners, iris scanners and cameras as certified by the Standardization, Testing and Quality Certification (STQC) and UIDAI which are then connected to the UIDAI's Standard Application Programming Interface (API).³⁰ The enrolment process captures two kinds of personal data: (a) demographic information and (b) biometric information.³¹ The enrolment data packet gets encrypted after the enrolment and uploaded on the central ID repository (CIDR) safely using

²² UIDAI, 'Legal Framework: Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016', <https://uidai.gov.in/about-uidai/legal-framework/2033-aadhaar-targeted-delivery-of-financial-and-other-subsidies.-benefits-and-services-act.-2016.html> (last visited 30 January 2021).

²³ UIDAI, 'About UIDAI', < <https://uidai.gov.in/about-uidai/unique-identification-authority-of-india.html> > (last visited 30 January 2021).

²⁴ *id.*

²⁵ *id.*

²⁶ *id.*

²⁷ *id.*

²⁸ UIDAI, 'Enrolment Ecosystem', <https://uidai.gov.in/ecosystem/enrolment-ecosystem.html> (last visited 30 January 2021).

²⁹ *id.*

³⁰ *id.*

³¹ *id.*

secured file transfer protocol.³² The data packets are checked against duplication, quality checks, bio-metric de-duplication and performance to ensure that they improve the performance of the systems.³³ The Aadhaar number is allotted as the uniqueness of the applicant-resident is determined.³⁴

Aadhaar authentication services encompasses the use of Aadhaar as a digital ID for various public and private services within India.³⁵ The UIDAI selects the authentication service agencies who direct the authentication requests from the requesting agencies.³⁶ Requesting agencies are any public or private entities who accept Aadhaar IDs as authentication to supply their services to the Indian citizens.³⁷ The authentication requests travels from the requesting agencies to the authentication agencies and finally to the Central Identities Data Repository (CIDR) for the formal approval via a digitally signed response Yes or No or a digitally signed e-KYC authentication response with encrypted e-KYC data along with technical details related to the authentication transaction.³⁸ In all modes of authentication, the Aadhaar number is mandatory along with certain input parameters specified by the UIDAI so that the authentication is always reduced to 1:1 match.³⁹ Lastly, the REs could receive Aadhaar authentication services through multiple ASAs, a RE can apply to the UIDAI to become its own ASA.⁴⁰ The REs can send authentication requests for its own service needs as well as on behalf of multiple-REs.⁴¹

In order to achieve the benefits of a unique digital identity at scale, the Indian state by utilizing Aadhaar as the backbone has ventured and built a technology stack, known as 'IndiaStack' as an interconnected but independent single-purpose layer of technologies called platforms (for data sharing, digital payments and identity verification) which work together towards general purpose tasks.⁴² The IndiaStack is based on two principles: (i) building digital platforms as public goods so both public and private sector participants are able to develop technological innovations; and (ii) incorporating data privacy and security in the design of digital public goods.⁴³ These platforms include – verification, digital signature and payments which uses Aadhaar as the identification basis to serve as a public digital infrastructure for the ease of supplying various public or private services.⁴⁴ All of these platforms when connected allow for different and competing solutions which are capable of scaling-up swiftly.⁴⁵ They

³² *id.*

³³ *id.*

³⁴ *id.*

³⁵ UIDAI, 'About Authentication', <https://uidai.gov.in/ecosystem/authentication-ecosystem.html> (last visited 30 January 2021).

³⁶ *id.*

³⁷ *id.*

³⁸ *id.*

³⁹ *id.*

⁴⁰ *id.*

⁴¹ *id.*

⁴² YouTube 'Presentation by Nandan Nilekani on IndiaStack 2016' *supra* note 20.

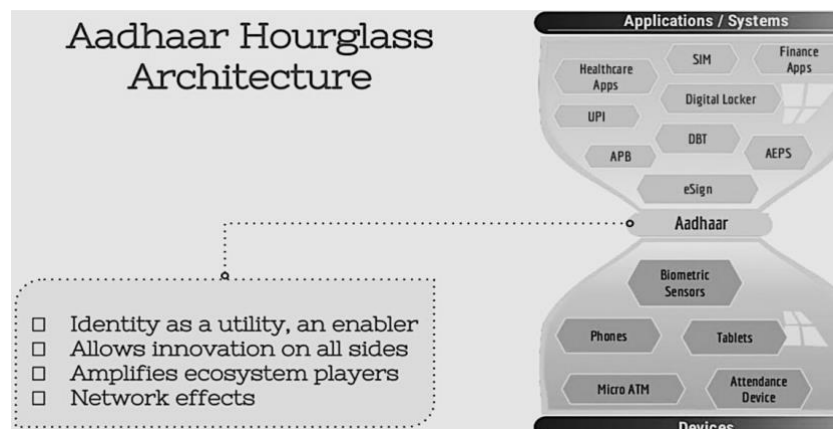
⁴³ *id.*

⁴⁴ *id.*

⁴⁵ *id.*

have an important combinatorial effect on financial inclusion, social protection and access to governmental programmes.⁴⁶

Figure 1: Aadhaar as the backbone of IndiaStack (Digital India)



Source: IndiaStack Official Portal, Presentation, Slide 15 of 29, <<https://www.slideshare.net/indiastack/architecting-platforms-for-innovation>> accessed on 13 April 2020.

Along with the IndiaStack initiative for a digital society and economy, various public and private services are connecting to Aadhaar for voluntary identification beyond those services where mandatory linkage with Aadhaar is required. The Government had already made health care, national subsidies, services, benefits, pan card, income tax, property registrations, passports and ration card linkage to Aadhaar compulsory.⁴⁷ However, indirectly many other service providers are gradually demanding the Aadhaar verification to ensure quick and convenient authentication and delivery of services - for bank accounts, car numbers and registration, LPG gas connection, electricity bills, railway travels, pension cards, marriage proof, mobile numbers, school enrolments as well as central or state examination.⁴⁸

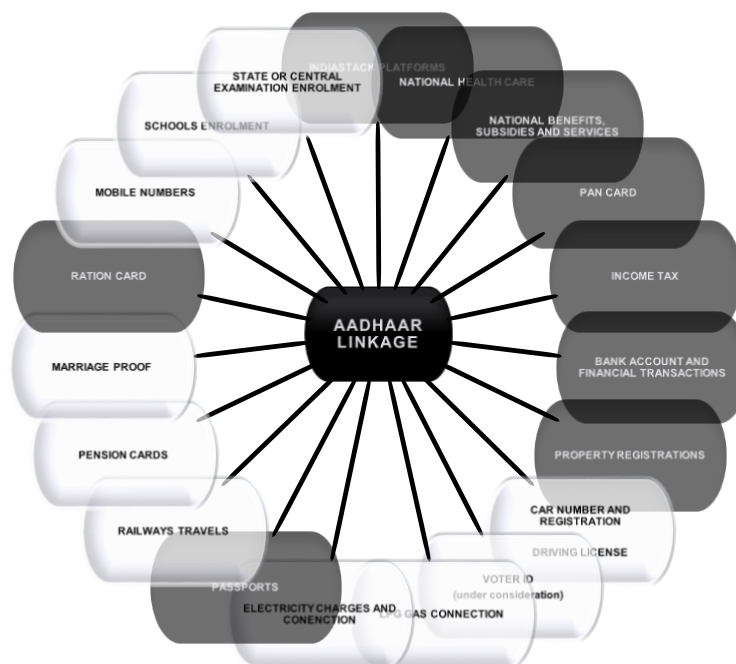
Aadhaar has become the gateway to access, build and expand the Digital India vision. Nandan Nilekani notably said that: 'Indians will be data-rich before they become economically rich'. 'Data Democracy' a term stated by Nilekani in relation to IndiaStack aims to provide that the idea of Digital India means that Data will be in the hands of the people to utilize, share and build to enable people's ease of access and development in the Digital India. Data will be used for the development of Indians through democratic means by ensuring 'consent' of the people.

⁴⁶ *id.*

⁴⁷ Unique Identification Authority of India, 'Annual Report – 2017-18', <https://uidai.gov.in/images/Annual-Report-ENG-2017-18-Final-18072019.pdf> (last visited 11 April 2020).

⁴⁸ *id.*

Figure 2: Types of linkages to Aadhaar in India (dark: compulsory, light: voluntary for convenience)



Source: Unique Identification Authority of India, Annual Report – 2017-18, <https://uidai.gov.in/images/Annual-Report-ENG-2017-18-Final-18072019.pdf> (last visited on 11 April 2020).

4. AADHAAR’S DATA PRIVACY CONCERNS: THE ‘A-ALaRMS’

The central data privacy concern as regards Aadhaar is the nation-wide collection, retention and profiling of metadata (i.e., data about data)⁴⁹ related to the Aadhaar authentication logs of the Indian citizens. The privacy concerns relating to Aadhaar is difficult to fathom for many people because it resembles a puzzle called ‘connecting the dots’. The dots are the Aadhaar Authentication Logs and Related Metadata (A-ALaRM) and the puzzle is packets of metadata-silos made up of the A-ALaRMs. However, when due to state or non-state activities, the puzzle is solved via connecting the dots, i.e., by enabling integration of the A-ALaRM silos to complete the puzzle, the state or non-state entity is able to see through and predict the nature of puzzle. ‘Puzzle’ being the lives and lifestyles of citizens or customers. In real life, the puzzle is pre-arranged owing to the nature of surveillance, e.g., Amazon collects metadata relating to its customers’ shopping and surfing habits, then the stored metadata is fed into data-mining and machine learning algorithms that in the most accurate manner aim to suggest goods for more shopping of our like⁵⁰. However, in the cases of mass surveillance (e.g., STELLERWIND project⁵¹ of mass surveillance in the US post-9/11 terrorist attacks which aims to collect email

⁴⁹ RICHARD GARTNER, ‘Chapter 1: What is Metadata and Why it Matters?’ in METADATA : SHAPING KNOWLEDGE FROM ANTIQUITY TO THE SEMANTIC WEB (Springer International Publishing Switzerland 2016).

⁵⁰ DW Documentary, ‘Amazon, Jeff Bezos and collecting data’, <https://www.youtube.com/watch?v=O90PShJVu58> (last visited 11 April 2020).

⁵¹ The Washington Post, ‘US Surveillance architecture includes collection of revealing Internet, Phone and Metadata’, <https://www.washingtonpost.com/investigations/us-surveillance-architecture-includes-collection->

communications of the US citizens in bulk for five years so that surveillance can be assessed by nature and then initiated, retrospectively) the puzzle can be created as well as resolved retroactively by using bulk metadata.⁵²

Why metadata and not data? What is the difference, if any? Metadata is the invisible data which is automatically collected in the generation or use of data/digital content from digital devices or digital ID cards.⁵³ Metadata is the ‘data about data’, it is the essential automated by-product or footprints of humans in the digital world.⁵⁴ To be clear, in cases of mass surveillance, it is not the data or content which enables profiling or surveillance but the technologically readable and assessable – metadata.⁵⁵ The aggregation of metadata reveals the context beyond that revealed in the content and readily lends itself to effective data analysis by machines.⁵⁶

Edward Snowden in his monograph titled ‘Permanent Record’ states⁵⁷:

Metadata is data about data. ...data made by data...a cluster of tags and markers that allow data to be useful. The most direct way to think about metadata is activity data, all the records of all the things you do on your devices and all the things your devices do on their own. Metadata of phone call – callers, location of the call, minutes of talk time etc.; metadata of an email – type of computer it was generated from, location via IP address, who besides the sender and recipient have access to it etc., ...it is best to regard metadata not as some benign abstraction but the very essence of content, it is precisely the first line of information that the party surveilling you requires. ...you have hardly any control over metadata you produce, because it is generated automatically. Just as it is collected, stored and analyzed by machine, it is made by machine too without your consent. ...the intelligence agencies are far more interested in the metadata – the activity records that allow them both the big picture ability to analyze data at scale and the little picture ability to make perfect maps, chronologies and associative synopsis of individual person’s life, from which they presume to extrapolate predictions of

of-revealing-internet-phone-metadata/2013/06/15/e9bf004a-d511-11e2-b05f-3ea3f0e7bb5a_story.html (last visited 11 April 2020).

⁵² *id.*

⁵³ EDWARD SNOWDEN, ‘Chapter 16 – Tokyo’, in PERMANENT RECORD (Panmacmillan 2019).

⁵⁴ *id.*

⁵⁵ *id.*

⁵⁶ *id.*

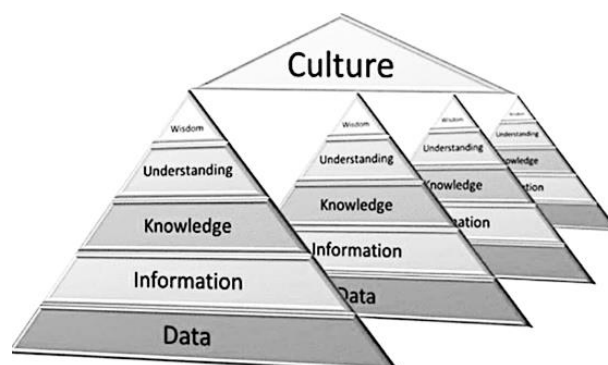
⁵⁷ *id.*

behavior. In sum, metadata can tell your surveillant virtually everything they'd ever want or need to know about you, except what is actually going inside your head.

The metadata phenomenon can be further understood by noting Ackoff's pyramid⁵⁸. Metadata is the underlying machine-readable thread which enables big data fragments to be assimilated into structured information from which we derive meaning from the raw data.⁵⁹ When links are enabled between pockets of information, we can arrive at knowledge of the substance. Interpretation and analysis of the knowledge gives us an understanding as to 'why' from the information of as to 'what'.⁶⁰ Once a complete understanding has been gathered, then we can arrive at the question: what is the best thing? – wisdom.⁶¹

In every stage of the pyramid, it is the metadata that provides the linkages from raw data → information → knowledge → wisdom.⁶² Almost all kinds of metadata are capable for formulating the linkages, especially the descriptive metadata.⁶³ The Cambridge Analytica Scandal apparently proves that gaining understanding of citizen's personality-type through data analytics can help generate powerful political or commercial messaging to meet campaign or corporate objectives.⁶⁴

Ackoff's pyramid



Source: Richard Gartner, 'Chapter 1: What is Metadata and Why it Matters?' in *Metadata : Shaping knowledge from Antiquity to the Semantic Web* (Springer International Publishing Switzerland 2016).

⁵⁸ Gardner, *supra* note 55 at 'From Knowledge to Wisdom' section.

⁵⁹ *id.*

⁶⁰ *id.*

⁶¹ *id.*

⁶² *id.*

⁶³ *id.*

⁶⁴ YouTube, Presentation by CEO of Cambridge Analytica – Alexander Nix on 'The Power of Big Data and Psychographics', <https://www.youtube.com/watch?v=n8Dd5aVXLCc&t=561s> (last visited 13 April 2020). See, YouTube, Documentary – 'The Great Hack', <https://www.youtube.com/watch?v=y26NQdTLtaw> (last visited 13 April 2020).

In the Aadhaar judgment, the parties, especially the judges cumulate many unimportant issues which makes the metadata surveillance diagnosis obscure and incomplete. The ubiquity and revealing nature of metadata is the essence of the data privacy issue in the Aadhaar judgment. All the other issues as regards the protection of the Aadhaar's central database from illegitimate non-state or state activities like hacking; or the fact that there is no clear purpose limitation to Aadhaar's usage and the storage limitation of authentication logs for 5 years is too much; are all in essence based on the key issue whether the Aadhaar Act, 2016 have cogent safeguards against A-ALaRM state or non-state surveillance in India.

5. PROPORTIONALITY TEST IN THE CONSTITUTIONAL LAW

4.1. AHARON BARAK'S PROPORTIONALITY TEST AS THE BENCHMARK

4.1.1. CONSTITUTIONAL RIGHT'S ACTUAL v. REALIZING SCOPE

Barak provides that there is a hierarchy of rights in a legal system with the Constitutional right as the highest, the statutory right lower than the constitutional right and so forth.⁶⁵ The need for such hierarchy of norms in a legal system ensures that a lower norm does not overtake the higher norm without any justification.⁶⁶ In cases where the higher norm is without limitations, explicit or implicit, the higher norm is considered as an absolute norm, i.e., no argument can ever justify its limitations.⁶⁷ However, Barak provides that such absolute constitutional norms are rare and it is generally understood that most of the constitutional norms are relative in nature, i.e., there is an implicit or explicit constitutional limitation clause that allows for the norm to be limited by a sub-constitutional law, i.e., statutory law or common law statute.⁶⁸

Importantly, Barak provides that in cases of such limitation of higher norms, specifically, the constitutional norms, their actual scope, i.e., their constitutional scope is never limited by a sub-constitutional law rather only its realizing scope is under scrutiny as to how the said constitutional norm needs to be realized given a restraining sub-constitutional law through the proportionality analysis.⁶⁹ At the heart of any constitutional limitation clause lies the concept of proportionality. The concept of proportionality functions at a sub-constitutional level, i.e., it only screens and passes the proportional limitations on the constitutional norm's realization by a sub-constitutional law and not affect its actual constitutional scope.⁷⁰ The American constitutional practice is opposite, i.e., it aims to limit the actual constitutional scope by assorting the constitutional rights into three categories given the degree of importance or urgency: a) strict scrutiny – fundamental rights; b) intermediate scrutiny – equal protection and related rights; and c) minimal scrutiny – all other rights in the Bill of Rights. These categories are to be followed in all the cases and limitations need to be assessed, accordingly.⁷¹ Barak

⁶⁵ AHARON BARAK, *'Chapter 4 – Limitation of constitutional rights'*, in PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (Cambridge University Press 2012).

⁶⁶ *id.*

⁶⁷ *id.*

⁶⁸ *id.*

⁶⁹ *id.*

⁷⁰ *id.*

⁷¹ *ibid* at Chapter 9 – 'Proper Purpose'.

notes that the categories are exclusive of any notion of ‘balancing’ between the benefits and harms in the realization of the constitutional right which confines the constitutional analysis when compared to the proportionality test as supported by Barak.⁷²

4.1.2. BARAK’S PROPORTIONALITY v. WEDNESBURY UNREASONABLENESS

According to Barak, the proportionality test when compared to the wednesbury unreasonableness test that consumes most of the common law judges; is a much better, transparent, focused and structured test due to its four-tier, structured examination of proper purpose, rational connection, necessity and proportionality *stricto sensu*.⁷³ As there is no agreement on the components that form the basis of the test of wednesbury unreasonableness since the conventional wisdom is that the reasonableness test is determined on a case-by-case basis given the peculiarity of each case.⁷⁴

According to Barak, reasonableness is not personal but substantive keeping in view all the determinants or factors to be considered in a case.⁷⁵ In the English courts, the judges developed the wednesbury unreasonableness test whereby the judges were hesitant to move against the legislator unless the unreasonableness was so extreme or outrageous in its defiance of logic or moral standards that no sensible person could have arrived at it after applying his mind.⁷⁶ Reasonableness is not a physical or metaphysical concept rather it is a normative concept and achieved through an evaluative than descriptive means.⁷⁷ There is no deductive logic in reasonableness rather it is determined by identifying the relevant considerations and their relationship, i.e., balancing of the properly assigned weights.⁷⁸ Weights are properly assigned as per the factor’s ability to enhance the social benefit.⁷⁹

Chief Justice Lord Dickson of the Canadian Supreme Court held that – unreasonableness rests to a large extent on unarticulated and undeveloped values and lacks the same degree of structure and sophistication of analysis.⁸⁰ In the Daly case⁸¹, Lord Stein provided three ways in which the ‘wednesbury unreasonableness’ test differs from proportionality:

First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional

⁷² *id.*

⁷³ Barak, *supra* note 70 at Chapter 13 – Proportionality and Reasonableness.

⁷⁴ *id.*

⁷⁵ *id.*

⁷⁶ *id.*

⁷⁷ *id.*

⁷⁸ *id.*

⁷⁹ *id.*

⁸⁰ *id.*

⁸¹ *id.*

form of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *R. Ministry of Defence Ex. v. Smith*...is not necessarily appropriate to the protection of human rights.

Barak asks whether keeping the above in mind, if there is any incentive to continue to rely on the ‘wednesbury unreasonableness’.⁸² However, Barak notes that on a close examination of ‘balancing’ as conducted under the Proportionality *stricto sensu* and Reasonableness – there is a significant similarity as both the tests aim to compare the marginal social importance of the benefits gained by achieving the law’s purpose and the marginal social importance of preventing the harm to the constitutional right.⁸³ As per Barak, the technique of balancing in both tests is ‘identical’ in cases where there is a limitation of a constitutional norm by a sub-constitutional law or common law.⁸⁴

I suggest that there is a difference between the basic approaches taken by proponents of the wednesbury unreasonableness vs proportionality. The proponents of the wednesbury unreasonableness prioritizes the legislative prerogatives over the fundamental rights before attempting to balance them. It is linked to the ‘priority of rights model’ as proposed by Tremblay⁸⁵, I would propose that ‘wednesbury unreasonableness’ approach can be called as the ‘priority of legislative interest’ model.

The principle of proportionality, on the other hand as Tremblay suggests is best promoted when no normative priority is given to rights (individual or legislative) against competing norms, values or interests – ‘the model of optimization of values in conflict’.⁸⁶ The model of optimization warrants same normative status in abstract to competing rights and when there is a conflict between such rights, they must be optimized in context taking into account all circumstances of the given case.⁸⁷ Tremblay states in favor of the proportionality based on the model of optimization that:

‘A right can always be limited by a competing value in context, provided that both values are realized as much as possible, given the facts and law.⁸⁸ The conflicting values must always be harmonized in context and none can be totally realized to the detriment of the other. ...the two conceptions are not compatible. Either the rights

⁸² *id.*

⁸³ *id.*

⁸⁴ *id.*

⁸⁵ Luc B. Tremblay, *An egalitarian defense of proportionality-based balancing*, 12(4), INT’L J. CONST. L. (2015).

⁸⁶ *id.*

⁸⁷ *id.*

⁸⁸ *id.*

have normative priority over competing values, or they don't; either they are subject to balancing, or they don't. By disentangling the competing conceptions, one might hope clarifying the actual state of constitutional discourse and practice and understanding the reason why the principle of proportionality tends to become the decisive test within the process of constitutional adjudication.'

4.1.3. BARAK'S PROPORTIONALITY TEST

The proportionality analysis by Aharon Barak consists of a four-step analysis:

- a) Proper purpose
 - a. Types of purposes – justifications for limitation on constitutional rights involving a combined test of both subjective (ex ante) and objective (ex post) legislative intent;
 - b. Degree of urgency required in realizing those purposes.

Proper purpose component of the proportionality analysis provides for a threshold examination of the constitutionally minimum purposes which justifies limitation of a constitutional right in a democracy and the related urgency of such a limitation to realize the purpose.⁸⁹ The constitutionally minimum purposes are found in the society's constitutional foundations implicitly or explicitly.⁹⁰ The proper purpose justification requirement for a limitation on the constitutional right should be both subjective and objective, i.e, the limiting law's stated purpose at the time of enactment and its current purpose, respectively.⁹¹

- b) Rational connection
 - a. Means used by the limiting law should fit or rationally connect to the purpose designed to be fulfilled by the limiting law
 - i. Factual test of a negative nature
 - ii. Even partial connection is sufficient but not marginal or negligible
 - iii. No efficiency requirement

Rational connection component of the proportionality analysis ensures that the means employed by the limiting law is rationally connected to its purpose.⁹² Irrespective of the fact that the means are the only or one of many available alternatives and that it may achieve purpose marginally, not fully (except for cases of minimal or negligible purpose), the rational connection component is fulfilled if the limiting laws' means rationally fits the purpose.⁹³ Additionally, there is no efficiency requirement. Like proper purpose, the rational connection

⁸⁹ Barak, *supra* note 70 at Chapter 9 – Proper purpose.

⁹⁰ *id.*

⁹¹ *id.*

⁹² Barak, *supra* note 70 at Chapter 10 – Rational Connection.

⁹³ *id.*

component is a threshold test of both subjective and objective nature i.e., the limiting laws' stated purpose at the time of enactment and its current purpose, respectively.⁹⁴

c) Necessity

- a. There exists an alternative means that can advance the purpose of the limiting law equally or better than the limiting law;
- b. The hypothetical means limits the constitutional right to a lesser extent than the limiting law.

Necessity component is a crucial test under the proportionality analysis.⁹⁵ In the necessity test, an assessment needs to be made of all the plausible alternatives as against the limiting law that in efficiency and intensity (qualitatively, quantitatively and probability wise) achieves the objectives of the limiting law while limiting the constitutional right, the least.⁹⁶ It involves a thorough assessment of the factually available data and not mere theoretical estimate.⁹⁷ The test is both of a subjective and objective nature i.e., the limiting law's stated purpose at the time of enactment and its current purpose, respectively.⁹⁸

d) Proportionality *stricto sensu*

- a. Whether the weight of the marginal social importance of the benefits from the limiting law or its alternative is heavier than the weight of the marginal social importance of preventing the harm (weights are assigned as per society's fundamental perceptions)?

Proportionality *stricto sensu* is the heart of every proportionality analysis.⁹⁹ It is a result-oriented test that examines the balance between marginal social benefit of the realization of the purposes of limiting law and the marginal social harm due to the limitation of the constitutional right in consequence of the limiting law.¹⁰⁰ The balance is a metaphor and in reality it is in finding the appropriate societal relation/balance between the marginal benefits and harm in light of the limiting statute that actually reflects the basis of the proportionality *stricto sensu*.¹⁰¹

All the above three tests were based on means-ends analysis, but this is the only test that is based on balancing analysis.¹⁰² The balancing gives expression to the consideration of the constitutional right and the justification for its violation.¹⁰³ The weights attached to the benefit of the limiting law and the harm to the constitutional right are determined in light of the society's fundamental precepts – social history, particular character which also derives from

⁹⁴ *id.*

⁹⁵ Barak, *supra* note 70 at Chapter 11 – Necessity.

⁹⁶ *id.*

⁹⁷ *id.*

⁹⁸ *id.*

⁹⁹ Barak *supra* note 70 at Chapter 12 – Proportionality *stricto sensu* (balancing).

¹⁰⁰ *id.*

¹⁰¹ *id.*

¹⁰² *id.*

¹⁰³ *id.*

the constitution.¹⁰⁴ Pertinent to note here is that a right which constitutes a condition for the exercise of another right may be regarded as more important of the two – e.g., privacy is an important condition to exercise various other liberties.¹⁰⁵

Probabilities of actual realization of benefits to the society and the harm to the constitutional right will matter in assigning societal weights on each scale.¹⁰⁶ Barak essentially provides that such balancing is principled balancing which is an intermediate of the general balancing vs. specific balancing as the former is too abstract and the latter is too particular or ad hoc.¹⁰⁷ The ‘principled balancing’ ensures a middle path to ensure an expression of or a consideration of set principles providing adequate justification of a constitutional rights’ limitation in both theory and in fact.¹⁰⁸

4.2. AADHAAR JUDGMENT: BALANCING BETWEEN PRIVACY AND CONVENIENCE

4.2.1. AADHAAR AND THE RIGHT TO PRIVACY IN INDIA

4.2.2. PRINCIPLE OF PROPORTIONALITY

Both the majority and the dissent provide that the correct approach to resolve the conflict between the constitutional right to privacy and the Aadhaar’s objectives is to adopt the ‘proportionality test’ as provided by an ex-Israeli Supreme Court Judge Aharon Barak which has been accepted by the Supreme Court in *Modern Dental College and Research Centre and Ors. v. State of M.P. and Ors.*¹⁰⁹ –

...A limitation of a constitutional right will be constitutionally permissible if it is designated for a proper purpose, the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose, the measures undertaken are necessary in that there are no alternative measures that may similarly achieve the same purpose with a lesser degree of limitation and there needs to be a proper relation (proportionality *stricto sensu* or balancing) between the importance of achieving the proper purpose and social importance of preventing the limitation on the constitutional right.¹¹⁰

¹⁰⁴ *id.*

¹⁰⁵ *id.*

¹⁰⁶ *id.*

¹⁰⁷ *id.*

¹⁰⁸ *id.*

¹⁰⁹ Civil Appeal No. 4061 of 2009.

¹¹⁰ Justice Puttaswamy (Retd.) & Anr. v. Union of India and Others, Writ Petition (Civil) No. 494 of 2012, majority Judgment Paragraph – 118, Page, 203 of 567.

The MpJ clarified that Aharon Barak's proportionality test *strictly* follows the German jurisprudence.¹¹¹ They state that the proportionality *stricto sensu* is the determinative test in both approaches. The German approach on proportionality test pushes most of the issues to the balancing stage because in the legitimate goal stage, any goal which is legitimate will be accepted; at the suitability stage even a marginal contribution to the achievement of the goal will suffice and at the necessity stage, it is very rare for a policy to fail because less restrictive alternatives normally come with some disadvantages and cannot be considered equally effective.¹¹² Thus, in German approach, the 'balancing' or 'proportionality *stricto sensu*' dominates the legal analysis and therefore is usually determinative of the outcome.¹¹³

On the contrary, in the Canadian jurisprudence – the *Oakes* test provides that the purpose must be of sufficient importance to warrant overriding a constitutionally protected right or freedom, there must be a rational connection between measure and objective, the means must impair as little as possible, the right to freedom and finally there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom and the objective which has been identified as of sufficient importance.¹¹⁴ Hence, more issues were addressed at the earlier stages and instead of accepting any legitimate goal, *Oakes* test requires a goal of sufficient importance to warrant overriding a constitutionally protected right or freedom.¹¹⁵ Further, the minimal impairment test is different from the German necessity test both in the way in which it is formulated – there is no requirement that the less restrictive measure be equally effective. In the way it is applied in practice, the Canadian Supreme Court tends to resolve cases at that stage and not as in the German Federal Constitutional Court at the balancing stage.¹¹⁶

There is a great debate as to which of the two is a better approach?¹¹⁷ Some jurists believe that the proper application of the German test to a practice of constitutional review suffers from two connected problems:

...first, usually almost all moral work is done at the balancing stage, arguably rendering the earlier stages largely useless and throwing doubt on the truth of the popular argument that proportionality is a valuable doctrine partly because it structures the analysis of the rights issues in a meaningful way.¹¹⁸ Secondly, the balancing act at the final stage is often carried out in an impressionistic fashion which seems to be largely

¹¹¹ *id.*, majority judgment at para. 120, pg. 210 of 567.

¹¹² *id.*, majority judgment at para. 121, pg. 211 of 567.

¹¹³ *id.*

¹¹⁴ *id.*, majority judgment at para. 122, pg. 212 of 567.

¹¹⁵ *id.*, majority judgment.

¹¹⁶ *id.*, majority judgment.

¹¹⁷ *id.*, majority judgment at para. 123, pg. 212-213 of 567.

¹¹⁸ *id.*, majority judgment at para. 123, pg. 213 of 567.

unguided by principle and thus opens the door for subjective, arbitrary and unpredictable judgment encroaching on what ought to be the proper domain of the democratic legislature.

Blichitz provides a solution by focusing on the necessity stage of the test as he takes issue with both the German test according to which almost all policies are necessary because any alternative policy will usually have some disadvantage which means that it cannot be considered equally effective and the Canadian minimal impairment test, which, taken seriously, narrows down the range of constitutional scrutiny, namely the measures which impairs the right least.¹¹⁹ The alternative seems to be to either construct the necessity (minimal impairment) test as filtering out almost nothing or to allow only on policy, thus rendering the other test superfluous.¹²⁰

In order to preserve a meaningful but not unduly strict role for the necessity test, Blichitz proposes the following inquiry:

...a range of possible alternatives to the measure employed by the Government must be identified; b) the effectiveness of these measures must be determined individually; the test here is not whether each respective measures realizes the governmental objective to the same extent, but rather whether it realizes it in a real and substantial manner and c) the impact of the respective measures on the right at stake must be determined.¹²¹ Finally, an overall judgment must be made as to whether in strict means-end assessment favored by Grimm and the German version of the proportionality test will also require a form of balancing to be carried out at the necessity stage.¹²² Insofar as second problem in German test is concerned, it can be taken care of by avoiding ad hoc balancing and instead proceeding on some bright line rules, i.e., by doing the act of balancing on the basis of some established rule by creating a sound rule.¹²³

The MpJ provided that while undertaking this exercise it has also to be seen that the legitimate goal must be sufficiently important to warrant overriding a constitutionally protected right or freedom and also that such a right impairs freedom as little as possible.¹²⁴ The MpJ

¹¹⁹ *id*, majority judgment.

¹²⁰ *id*, majority judgment.

¹²¹ *id*, majority judgment.

¹²² *id*, majority judgment.

¹²³ *id*, majority judgment, para. 124, pg. 215 of 567.

¹²⁴ *id*, majority judgment, para. 126, pg. 216 of 567.

provided that this Court in its earlier judgment applied German approach while applying proportionality test to the case at hand.¹²⁵ The MpJ provided that on that very basis which is tempered with more nuanced approach as suggested Blitchtz is the amalgam of German and Canadian approach.¹²⁶ The MpJ as well as J. Chandrachud provided that the proportionality test as provided in the *Modern Dental College* judgment will be the best method with the MpJ asserting that in addition it will be sensitive to the parameters as noted by Blitchtz.¹²⁷

4.2.3. APPLICATION OF PROPORTIONALITY

Majority Panel of Judges (MpJ)

The MpJ attempted to resolve the key contentious issues, especially the issue of metadata outside of the proportionality analysis.¹²⁸

On retention of metadata related to authentication logs, the MpJ provided that as per the respondents, there are three types of metadata: technical, business and process metadata.¹²⁹ The process metadata notes outcomes of such operations: logs key data, start time, end time, CPU seconds used, disk reads, disk writes and rows processed valuable for authenticating transaction, troubleshooting security, compliance and monitoring and improving performance.¹³⁰ As per the state, the metadata under the Aadhaar Act, 2016 is the ‘process metadata’ only.¹³¹ The state referred to section 2(d) of the Aadhaar Act, 2016 which defines ‘authentication record’ to mean the time and authentication, identity of requesting entity and the response provided by the authority. Regulation 26 would not go beyond section 2(d) of the Aadhaar Act, 2016.¹³² However, the MpJ held that the Aadhaar Act, 2016 needs to be clear in terms of defining ‘metadata’ definitively to remove any concerns pertaining to its usage for state or non-state surveillance.¹³³

On storage time-limits, it was provided by the MpJ that it needs to be of shorter duration of six months as against five years beyond which the data needs to be deleted except when any judicial matter requires otherwise.¹³⁴ As the Regulation 27 provided that the Authentication Regulations require the UIDAI to retain the authentication transaction data which includes the metadata for a period of 6 months and then to archive the same for a period of 5 years.¹³⁵ Further, Regulation 18(3) and 20(3) allow the requesting entities (RE) and Authentication Service Agencies (ASA) to retain the authentication logs for a period of 2 years and then

¹²⁵ *id.*, majority judgment.

¹²⁶ *id.*, majority judgment.

¹²⁷ *id.*, majority judgment, para. 125, pg. 216 of 567. In J. Chandrachud’s Judgment, see para. 203, pg. 277.

¹²⁸ *id.*, majority judgment, para. 127, pg. 217 of 567. Also note para. 26, at pg. 330 of 567.

¹²⁹ *id.*, majority judgment, para. 200, pg. 278 of 567.

¹³⁰ *id.*

¹³¹ *id.*

¹³² *id.*, majority judgment, para. 201, pg. 279 of 567.

¹³³ *id.*

¹³⁴ *id.*, majority judgment para. 205, pg. 238 of 567.

¹³⁵ *id.*

archive them for 5 years. It is required to be deleted only after 7 years unless retained by a court.¹³⁶ The MpJ provided that the right to be forgotten is affected and further there is no provision to delete the biometric information once a person is enrolled.¹³⁷ Thus, there is no reason for archiving the authentication transaction data for a period of five years.¹³⁸ Retention of this data for a period of six months is sufficient after which it needs to be deleted except when such authentication transaction data are required to be maintained by a Court or in connection with any pending dispute.¹³⁹ Thus, Regulations 26 and 27 needs to be amended, accordingly.¹⁴⁰

As regards section 33(2) which permits disclosure of identity information and authentication records under direction of an officer not below the rank of Jt. Secretary to Central Government in the interest of national security, has no provision for judicial review.¹⁴¹ The Oversight Committee does not have a judicial member. Insofar, as section 33(2) of the Act in the present form is concerned, the same was struck down.¹⁴²

Section 57 provides that the Aadhaar Act, 2016 would not prevent the use of Aadhaar number for establishing the identity of an individual for any purpose, i.e., inclusive of commercial usage.¹⁴³ The MpJ held that after applying the proportionality test without explicitly providing so, section 57 cannot pass the constitutional muster.¹⁴⁴

Following the basic premise of the balancing, especially by citing the Binoy Vishwam case, the MpJ provided that the linkage of Aadhaar with PAN card was constitutional but linkage with bank accounts and mobile sim cards was held to be disproportional to the Aadhaar's objectives as it lacks reasonableness.¹⁴⁵ The MpJ specifically provided that to stop money laundering, specific studies should have been conducted to note the kinds of bank accounts that could have been utilised for illegal activities as selective mandatory linkage with Aadhaar should be promoted in light of the fact that bank accounts are a common necessity for every citizen in today's digital world.¹⁴⁶ The MpJ clarified that the security threats from the non-verification of the sim cards cannot be a justification to overwhelm the entire population with Aadhaar linkage to their sim cards and other different viable alternatives should be put in place.¹⁴⁷

¹³⁶ *id.*

¹³⁷ *id.*

¹³⁸ *id.*

¹³⁹ *id.*

¹⁴⁰ *id.*

¹⁴¹ *id.*, majority judgment para 217, pg. 292 of 567.

¹⁴² *id.*

¹⁴³ *id.*

¹⁴⁴ *id.*

¹⁴⁵ *id.*, majority judgment, para. 425, pg. 502 of 567.

¹⁴⁶ *id.*, majority judgment, para. 434-435, pg. 514-515 of 567.

¹⁴⁷ *id.*, majority judgment, para. 441-442, pg. 520-521 of 567.

Lastly, the MpJ provided that the state needs to bring in a robust data protection regime into law on the basis of Justice BN Srikrishna Committee Report with the necessary modifications as appropriate to take into account the privacy issues under the Aadhaar project.¹⁴⁸

The above in addition to the clarifications on data privacy and security made by the state, the MpJ in the Aadhaar verdict provided that most of the apprehensions of the petitioners against Aadhaar were resolved.¹⁴⁹

Proportionality analysis

The MpJ clarified that the arguments in pursuant to the constitutionality of the Aadhaar project, the proportionality analysis as conducted by them will center around section 7¹⁵⁰ and 8¹⁵¹ of the Aadhaar Act, 2016 only.¹⁵² The MpJ agreed that owing to section 7 and 8 of the Aadhaar Act, 2016, the voluntary option of Aadhaar as a digital identity becomes almost inescapably ubiquitous to receive any service, subsidy or benefit from the state, thus making Aadhaar compulsory in essence.¹⁵³ Therefore, it is of key importance that the Aadhaar project meets the test of proportionality to be constitutionally valid.¹⁵⁴

The MpJ went through the proportionality analysis via the four-step process: proper purpose, rational connection, necessity and proportionality *stricto sensu*. They included another test of ‘requirement of law’ before ‘proper purpose’.

¹⁴⁸ *id.*, majority judgment, para. 219, pg. 294 of 567.

¹⁴⁹ *id.*, majority judgment, para. 230, pg. 301 of 567.

¹⁵⁰ Section 7 of the Aadhaar Act, 2016 - The Central Government or, as the case may be, the State Government may, for the purpose of establishing identity of an individual as a condition for a receipt of a subsidy, benefit or service for which the expenditure is incurred from, or the receipt therefrom forms, part of, the Consolidated Fund of India, require that such individual undergo authentication, or furnish proof of possession of Aadhaar number or in the case of an individual to whom no Aadhaar number has been assigned, such individual makes an application for enrolment: Provided that if an Aadhaar number is not assigned to an individual, the individual shall be offered alternate and viable means of identification for delivery of the subsidy, benefit or service.

¹⁵¹ Section 8 of the Aadhaar Act, 2016 - (1) The Authority shall perform authentication of the Aadhaar number of an Aadhaar number holder submitted by any requesting entity, in relation to his biometric information or demographic information, subject to such conditions and on payment of such fees and in such manner as may be specified by regulations. (2) A requesting entity shall – (a) unless otherwise provided in this Act, obtain the consent of an individual before collecting his identity information for the purposes of authentication in such manner as may be specified by regulations; and (b) ensure that the identity information of an individual is only used for submission to the Central Identities Data Repository for authentication. (3) A requesting entity shall inform, in such manner as may be specified by regulations, the individual submitting his identity information for authentication, the following details with respect to authentication, namely: (a) the nature of information that may be shared upon authentication; (b) the uses to which the information received during authentication may be put by the requesting entity; and (c) alternatives to submission of identity information to the requesting entity. (4) The Authority shall respond to an authentication query with a positive, negative or any other appropriate response sharing such identity information excluding any core biometric information.

¹⁵² Puttaswamy (n 110), majority judgment at para. 128.

¹⁵³ *id.*, majority judgment, para. 216, pg. 330 of 567.

¹⁵⁴ *id.*

→ Requirement of Law

The MpJ provided that the Aadhaar Act, 2016 was duly passed by the Parliament which fulfils the requirement of law.¹⁵⁵

→ Proper purpose

In the proper purpose test, the MpJ held that there is an apparent legitimate state aim which is substantiated in the public conscience – Preamble, Statement of Objects and Reasons of the Aadhaar Act, 2016 as relevant for reading and understanding section 7 and 8 of the Act.¹⁵⁶

→ Rational connection

In the rational connection test, the MpJ provided that it is not the enrolment but the process of authentication in the Aadhaar project which is the core concern of the petitioners.¹⁵⁷ However, at this stage, the MpJ are concerned with only issues as related to section 7 and 8 of the Aadhaar Act, 2016, whether there is a rational connection between the means of the Aadhaar Act, 2016 with its stated purpose.¹⁵⁸ The MpJ, briefly reinstated that the means of enrolment and authentication into the Aadhaar project is related to cover all the citizens in need of state benefits, subsidies or services who could not prove their identity or were so denied due to fraudulent identities or corrupt middlemen are now equipped with a unique digital identity to stand for their rights through the medium as provided by the Aadhaar.¹⁵⁹ Hence, the MpJ noted that there is a rational connection between the means and purpose adopted by the Act.¹⁶⁰

→ Necessity test

The MpJ provided that the necessity test stands answered in the discussion on the component of requirement of law and the legitimate state aim.¹⁶¹ The judges clarified that owing to the mass-scale problem of connecting genuine citizens in need of the state funds with the state schemes and the biometrics-based unique digital identification platform provided by the Aadhaar, there is no equally viable alternative in place and scale as compared to Aadhaar.¹⁶²

→ Proportionality *stricto sensu* (balancing)

The MpJ clarified that they were against the arguments of the respondents that there cannot be any reasonable expectations of privacy because the demographic and biometric information is

¹⁵⁵ *id.*, majority judgment, para. 261, pg. 331 of 567.

¹⁵⁶ *id.*, majority judgment, para. 261, pg. 332 of 567.

¹⁵⁷ *id.*, majority judgment, para. 279, pg. 350 of 567.

¹⁵⁸ *id.*

¹⁵⁹ *id.*

¹⁶⁰ *id.*

¹⁶¹ *id.*, majority judgment, para. 280, pg. 351 of 567.

¹⁶² *id.*

generally taken by various entities to authenticate identity of an individual.¹⁶³ The MpJ provided that the concerns raised under Aadhaar needs to be assessed in light of the fact that the information is collected and stored by the state or instrumentality of the state making it imperative to ensure its constitutionality.¹⁶⁴ However, the MpJ provided that the fact that such information is shared by individuals voluntarily with various other service providers for identification purposes will form a factor for consideration in the assessment.¹⁶⁵

The balancing was undertaken at two levels:

(a) whether the legitimate state interest ensures reasonable tailoring?¹⁶⁶ i.e., 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? and (b) a balance between two competing fundamental rights, right to privacy on the one hand and right to food, shelter and employment on the other hand, i.e., although both the rights are based on human dignity, in this case, they are in conflict and the question being when an individual who seeks government welfare as part of his right to life with dignity whether he sacrifices his right to privacy, to what extent it becomes so invasive to create an imbalance?

Both the questions overlap in as much as it needs to be determined whether there is a least intrusion into privacy while ensuring that the individual gets the benefits under welfare schemes.¹⁶⁷

The MpJ provided that all matters regarding an individual do not qualify as being inherent part of right to privacy but only those which concern matters over which there can be a reasonable expectation of privacy that needs to be protected under Article 21 of the Constitution.¹⁶⁸ The MpJ provided that it needs to be assessed whether the petitioners' claim as regards the information supplied in the course of authentication process needs to be protected - is based on a reasonable expectation.¹⁶⁹

¹⁶³ *id*, majority judgment, para. 284, pg. 353 of 567.

¹⁶⁴ *id*.

¹⁶⁵ *id*.

¹⁶⁶ *id*, majority judgment, para. 285, pg. 354 of 567.

¹⁶⁷ *id*, majority judgment, para. 286, pg. 355 of 567.

¹⁶⁸ *id*, majority judgment, para. 287, pg. 355 of 567.

¹⁶⁹ *id*, majority judgment, para. 289, pg. 359 of 567.

Reasonable expectation consists of two aspects:

a) claims for the protection of privacy must be established vis-a-vis some harm which is likely to be inflicted upon privacy on account of an alleged act and (b) the concern should not be trivial but a reasonable concern.¹⁷⁰

After citing *Katz v. US*, 389 U.S. 347 and *R. Wood v. Commissioner*, 442 US 735, the MpJ provided that for the claim of privacy to be included in Article 21 of the Constitution of India, the Court needs to apply the reasonable expectation of privacy test which should inter alia include:

(a) What is the context in which a privacy claim is set up?¹⁷¹; (b) Does the claim relate to private or family life, or a confidential relationship?; (c) Is the claim a serious one or is it trivial?; (d) Is the disclosure likely to result in any serious or significant injury and the nature and extent of disclosure?; (e) Does disclosure relates to personal and sensitive information of an identified person?; and (f) Does disclosure relate to information already disclosed publicly? If so, its implication?

The MpJ held that the demographic information collected in the course of implementing the Aadhaar project is already required under many other enactments¹⁷². Further, the biometric information under the project comprises of finger prints, iris scan is minimal information essential for enrolment and authentication in a public sphere and relational context.¹⁷³ Fingerprints and iris scans have been considered to be the most accurate and non-invasive mode of identification which is the reason that have also been used for driving licenses, passports, visa as well as at the time of registration of documents by the state.¹⁷⁴ They are freely used in digital instruments like mobile and laptops for security purposes while the International Civil Aviation Organisation (ICAO) has recommended use of biometric passports and many developed nations have introduced biometric identity cards.¹⁷⁵ Thus, the collection of information according to the majority judges was considered not to be unreasonable.¹⁷⁶

¹⁷⁰*id.*

¹⁷¹ *id.*, majority judgment, para. 292, pg. 362 of 567.

¹⁷² Companies Act, Special Marriage Act, Central Motor Vehicle Rules, Registration of Electoral Rules, the Citizenship Rules, the Passport Act and even the Supreme Court Rules. *Supra* note at 110, paragraph 294, page 361 of 567.

¹⁷³ *id.*, majority judgment, para. 296, pg. 363 of 567.

¹⁷⁴ *id.*

¹⁷⁵ *id.*

¹⁷⁶ *id.*

The MpJ clarified that the main issue is not of the kind of information but its storage and retention through authentication processes that is important to the petitioners.¹⁷⁷ The MpJ held that their concerns have already been resolved earlier to the proportionality analysis.¹⁷⁸

On the second issue of balancing of the two human rights – right to life with dignity and right to privacy, the majority held that the Aadhaar Act, 2016:

...truly seeks to secure to the poor and deprived persons an opportunity to live their life and exercise their liberty.¹⁷⁹ By ensuring targeted delivery through digital identification, it not only provides them a nationally recognised identity but also attempts to ensure the delivery of benefits, service and subsidies with the aid of public exchequer or Consolidated Fund of India.

The MpJ provided that the National Security Food Act, 2013 and the MGNREGA Act, 2005 are examples whereby the government has implemented a rights-based approach and aims to ensure the fundamental right to life and personal liberty of the poor people in rural areas.¹⁸⁰

The MpJ provided that various countries have read socio-economic rights into human dignity and the right to life, specially, Germany, Switzerland, South Africa, Hungary and Italy.¹⁸¹ The MpJ provided that Aadhaar is an enabler to direct welfare needs to the most needy in the country.¹⁸² The necessity of Aadhaar lies in the need to target the genuine beneficiaries only.¹⁸³ The project is efficient, transparent and targets delivery of subsidies, benefits and services to the needy by removing the middle men at various levels of distribution which deprives the genuine person from receiving these benefits.¹⁸⁴

The MpJ provided that as against the larger public interest, the invasion into the privacy rights of these beneficiaries is minimal.¹⁸⁵ By no means it can be said that it has disproportionate effect on the right holder.¹⁸⁶ Intensity of review depends upon the particular context of question in a given case.¹⁸⁷ Another substantial point to be emphasised at this stage viz. dignity in the form of autonomy – informational privacy and dignity in the form of assuring better living standards of the same individual.¹⁸⁸ The MpJ held:

¹⁷⁷ *id.*

¹⁷⁸ *id.*, majority judgment, para. 297, pg. 364 of 567.

¹⁷⁹ *id.*, majority judgment, para. 298, pg. 365 of 567.

¹⁸⁰ *id.*

¹⁸¹ *id.*, majority judgment, para. 299-304, pg. 366-368 of 567.

¹⁸² *id.*, majority judgment, para. 307, pg. 372-373 of 567.

¹⁸³ *id.*

¹⁸⁴ *id.*

¹⁸⁵ *id.*, majority judgment, para. 308, pg. 376 of 567.

¹⁸⁶ *id.*

¹⁸⁷ *id.*, majority judgment, para. 309, pg. 376-77 of 567.

¹⁸⁸ *id.*

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.¹⁸⁹ The fact 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 facts of dignity. Here, we find that the inroads into 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.

The MpJ judges cited *People's Union for Civil Liberties (PUCL) and Anr. v. Union of India and Anr.* (2003) 4 SCC 399 where the court had to balance right to privacy with public interest and the court leaned in the favour of the latter by holding:

When there is a competition between the right to privacy of an individual and the right to information of the citizens, the former right has to be subordinated to the latter right as it serves the larger public interest.¹⁹⁰

In addition, the court cited *State of Madras v. VG Row*, AIR 1952 SC 196:

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.¹⁹¹ The legislation should not invade the rights and should not smack of arbitrariness. The test of reasonableness cannot be determined by laying down

¹⁸⁹ *id.*

¹⁹⁰ *id.*, majority judgment, para. 310, pg. 378 of 567.

¹⁹¹ *id.*, majority judgment, para. 312, pg. 380 of 567.

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 the 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. ...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 from the standpoint of the interest of the general public and not from the point of view of the person upon whom the restrictions are imposed or abstract considerations.

The MpJ judges concluded:

Thus, even when two aspects of the fundamental rights of the same individual which appear to be in conflict with each other is done, we find that the Aadhaar Act has struck a fair balance between the right to privacy of the individual with right to life of the same individual as a beneficiary.¹⁹² In the fact of the all-pervading prescript for accomplished socio-economic rights, that need to be given to the deprived and marginalised section of the society, as the constitutional imperative embodied in these provisions of the Act, it is entitled to receive judicial imprimatur.

¹⁹² *id*, majority judgment, para. 313, pg. 383 of 567.

The Court clarified that in cases of authentication failures the remedy is to adopt alternative methods for identifying such persons after finding the causes of failure in their cases.¹⁹³

On the definition of benefits, subsidies and services under section 7, the Court provided that the Government cannot enlarge the scope of subsidies, services and benefits which are not in the nature of the welfare schemes for which resources are to be drawn from CFI.¹⁹⁴ Specifically, the MpJ held that the benefits and services under Section 7 should be those that have the color of some kind of subsidies etc., namely, welfare schemes of the Government whereby Government is giving out such benefits which are targeted at a particular deprived class through the Consolidated Fund of India.¹⁹⁵ Thus, the court struck down the CBSE, NEET, JEE and UGC requirements for scholarship and clarified that it shall not be covered under section 7 of the Aadhaar Act, 2016 unless it is demonstrated that the expenditure is incurred from the CFI.¹⁹⁶ The expression benefit has to be read ejusdem generis with the preceding word subsidies to narrow down the scope of 'benefits'.¹⁹⁷

- J. Chandrachud

J. Chandrachud's proportionality analysis is actually the Wednesbury Unreasonableness principle in disguise, however, it is clearly not the 'priority of legislative interest model' but the 'priority of rights model' judgment. There is no pattern set in his reasoning in terms of the four steps essential to fulfil the Barak's proportionality analysis, especially the proportionality *stricto sensu*. The assessment by J. Chandrachud promptly attempts to assess the reasonableness or proportionality of certain controversial features of the Aadhaar Act, 2016 after assessment of the legitimate state interest behind the measure.

J. Chandrachud outlined the Indian jurisprudence¹⁹⁸ on proportionality and a comparative jurisprudence on proportionality¹⁹⁹. However, he provided that the cases so cited are not

¹⁹³ *id.*, majority judgment, para. 319, pg. 388 of 567.

¹⁹⁴ *id.*, majority judgment, para. 320-319, pg. 389-390 of 567.

¹⁹⁵ *id.*, majority judgment, para. 322, pg. 391-392.

¹⁹⁶ *id.*, majority judgment, para. 321, pg. 390 of 567.

¹⁹⁷ *id.*

¹⁹⁸ *Adalah v. The Minister of interior*, HCJ 7052/03; *Om Kumar v. Union of India* (2001) 2 SCC 386; *Chintaman Rao v. State of MP*, 1950 SCR 759; *State of Madras v. VG Row*, 1952 SCR 597; *State of Bihar v. Jamla Kant Misra*, 1969 3 SCC 337; *Mohammed Faruk v. State of M.P.*, 1969 1 SCC 853; *Bishambhar Dayal Chandra Mohan v. State of UP*, 1982 1 SCC 39; *Om Kumar v. Union of India*, 2001 2 SCC 386; *Teri Oat Estates v. U.T., Chandigarh*, 2004 2 SCC 130; *Modern Dental College and Research Centre v. State of MP*, 2016 7 SCC 353; *KS Puttaswamy v. Union of India*, 2017 10 SCC 1.

¹⁹⁹ *Elloy de Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*, 1999 1 AC 69; *Huamng (FC) v. Secretary of State for the Home Department*, 2007 UKHL 11; *Federal Census Act Case*, 1993 65 BVerfGE 1; *S and Marper v. United Kingdom*, 2008 48 EHRR 1169; *Ayaguer v. France*, Application no. 8806/12; *Association pour la promotion de l'image, Conseil d'Etat in France*, 26 October 2011; *Digital Rights Ireland Ltd. v. Minister*, C-293/12 and C-594/12; *Michael Schwarz v. Stadt Bochum*, 2013 EUECJ C-291/12; *Madhewoo v. The State of Mauritius* 2016 UKPC 30; *Vernonia School District 47J v. Acton*, 515 US 646 1995; *Skinner v. Railway Labor Executives' Association*, 489 US 602 1989; *Whalen v. Roe*, 429 US 589 1977; *US v. Dionsio*, 410 U.S. 1 1973; *Bowen v. Roy*, 476 US 693 (1986); *In re Crawford*, 194 F. 3d 954 (9th

applicable in the context of the Aadhaar project as they dealt with narrowly tailored legislations to achieve very specific purposes as against the overarching impact of Aadhaar on the citizens in India.²⁰⁰

J. Chandrachud began by providing that the Aadhaar judgment has a special significance for the balance between socio-economic and other human rights in the Constitution.²⁰¹ Citing Upendra Baxi, he provided that the choice between bread and freedom is a false choice.²⁰² In a democracy where there is an applied principle of rule of law, the citizen need not have to choose between one against the other but it is the role of state to ensure both to the citizens.²⁰³ The notion of proportionality lies on the bedrock of balance between conflicting rights so differing and varied human rights can coexist in a democratic society governed by rule of law.²⁰⁴

Specifically, J. Chandrachud highlighted the function creep associated with a unique biometric database:

As a unique identifier, biometric data not only allows individuals to be tracked, but it also creates the potential for the collection of an individual's information and its incorporation into a comprehensive profile.²⁰⁵ Central databases, data matching or linking and profiling are technical factors that facilitate function creep (slippery slope according to which information can be used for functions other than that for which it was collected). Privacy advocates believe that any identification scheme can be carried out with a hidden agenda and that the slippery slope effect can be relevant to several factors such as motivations of governments and business, and on the existence of safeguards. The special nature of biometric data makes function creep more likely and even attractive. The legal measures possible to control function creep are still limited. However, there are several ways in which function creep can be curtailed. They include: (i) limiting the amount of data that is collected from any stated purpose; (ii) enabling

Cir. 1999); *Haskell v. Harris*, 669 F. 3d 1049 (9th Cir. 2012); *Utility Workers Union of America v. Nuclear Regulatory Commission*, 664 F. Supp. 136 (SDNY 1987); *Nicholas A Lacobucci v. City of Newport*, 785 F. 2d 1354 (6th Cir. 1986); *Thom v. New York Stock Exchange*, 306 F. Supp 1002 (S.D.N.Y 1969); *Perkey v. Department of Motor Vehicles*, 1986 42 Cal. 3d 185; *Buchanan v. Wing*, NYS 2d 865; *People v. Stuller* 10 Cal App., 3d 582 (1970); *United States v. Kelly*, 55F2d 67 (2d. Cir. 1932); and *Brown v. Brannon*, 399 F. Supp. 133 (MDNC 1975).

²⁰⁰ *id.*, dissent judgment, para. 217, at pg. 301-302.

²⁰¹ *id.*, dissent judgment, para. 221, at pg. 305.

²⁰² *id.*, dissent judgment, para. 190, at pg. 262.

²⁰³ *id.*

²⁰⁴ *id.*, dissent judgment, para. 191, at pg. 262-264.

²⁰⁵ *id.*, dissent judgment, para. 239, at pg. 306-307.

regulation to limit technological access to the system; (iii) concerted debates with all stakeholders and public participation; (iv) dispersion of multiple enablers for a system; and (v) enabling choices for user participation.

J. Chandrachud approached the issue of data privacy and metadata through emphasising on a report by Professor Manindra Agarwal, IIT Kanpur which provided that the verification log database wherein all the authentication transactions are stored per UIDAI number holder is the most sensitive of all databases as it enables the state to not only capture the various transactions but through Aadhaar number can empower the state to link various public-private databases to fully profile any or all citizens in India for any good or bad deeds without prior consent of the citizens.²⁰⁶

J. Chandrachud very aptly outlined that the Aadhaar number is a unique key for every private or public databases linked with Aadhaar authentication processes by both the public or private entities.²⁰⁷ Noting the same, J. Chandrachud clarified that the Aadhaar Act, 2016 is inapt to cover multiple types of data violations which can occur owing to the architecture of the Aadhaar project.²⁰⁸ There are not enough safeguards to secure all the data privacy prerequisites or the independence or competency of institutions required to ensure a thorough data privacy protocol that could safely answer all the data privacy concerns in light of the vastness of the project, especially the fact that citizens do not have a legal right under the Aadhaar Act, 2016 to seek remedy for any data privacy violations unless the UIDAI approves.²⁰⁹

Additionally, J. Chandrachud emphasised that the vagueness of definitions pertaining to ‘benefit’, ‘services’ and ‘subsidies’, especially, the former two – gave the state an extensive power to basically seek Aadhaar authentication for all kinds of state aids like pensions and mid-day meals or scholarships to poor children, which is disproportionate.²¹⁰ There needs to be a proper discrimination between areas where Aadhaar is justified and other areas where other kinds of identification works without requiring a unique biometric digital identity in order for the Act to be proportional.²¹¹

J. Chandrachud emphasised on multiple and diverse identities imbibed within the Indian Constitution and therefore imposition of any single overarching identity without a proper discrimination takes away the choice of citizens to express their varied identities in their daily lives.²¹² Additionally, the source code for the biometric de-duplication technology of Aadhaar

²⁰⁶ *id*, dissent judgment, para. 228, at pg. 318.

²⁰⁷ *id*, dissent judgment, para. 231, at pg. 321. Also note para. 247, pg. 340.

²⁰⁸ *id*, dissent judgment, para. 239, at pg. 307.

²⁰⁹ *id*, dissent judgment, para. 236, at pg. 329.

²¹⁰ *id*, dissent judgment, para. 248, at pg. 342.

²¹¹ *id*.

²¹² *id*, dissent judgment, para. 252, at pg. 350.

belongs to a US-based corporate entity – L-1 Identity Solutions Ltd. who has an access to the Aadhaar database thus creating privacy concerns amounting to national security issues.²¹³

Reference was made to a 2010 policy paper wherein a group of offices noted the need for a privacy legislation and highlighted the potential that the UID data could be used directly or indirectly by market forces for commercial exploitation as well as for state surveillance.²¹⁴

Further, Chapter V of the National Identification Authority of India Bill, 2010 provided for the constitution of an Identity Review Committee that will be entrusted to carry-out the function of ascertaining the extent and pattern of Aadhaar management.²¹⁵ The Committee is required to report annually in relation to the Aadhaar usage across the country and recommendations to the state to limit the extent to which the Aadhaar numbers could be used. However, such provisions are not included in the Aadhaar Act, 2016.²¹⁶

Cumulatively, J. Chandrachud provided that although there is a clear legitimate state concern behind the Aadhaar Act, 2016, the said legislation fails the test of necessity and proportionality for the above mentioned reasons, specifically section 7, 8 and 57 of the Aadhaar Act, 2016 are in breach of Article 14 and 21 of the Constitution.

As regards seeding of Aadhaar to the PAN card, J. Chandrachud provided that since the edifice of section 139AA of the Income Tax Act, 1961 is based on the structure created by the Aadhaar which is presumed to have been enacted under a valid piece of legislation.²¹⁷ The validity of the legislation seeding Aadhaar to PAN is dependent upon and cannot be segregated from the validity of the parent legislation.²¹⁸ The validity of seeding Aadhaar to PAN under section 139AA must therefore depend upon the constitutional validity of the Aadhaar Act as it is determined by this Court.²¹⁹ Although there is a legitimate state interest to curb black money and related financial corruption, since the explanation to section 139AA adopts the definition of the expressions – ‘Aadhaar number’, ‘enrolment’ and ‘resident’ from the parent Aadhaar legislation – the decision as regards disproportionality of the Aadhaar Act will have a direct impact on the constitutional validity of the legislation.²²⁰

J. Chandrachud clarified that the SIM cards linkage with Aadhaar is not proportional in a liberal society.²²¹ Mobiles are not just instruments to facilitate telephonic conversations but they are a storehouse of data reflecting upon family, workplace and personal life.²²² Seeding Aadhaar

²¹³ *id.*, dissent judgment, para. 231, at pg. 324.

²¹⁴ *id.*, dissent judgment, para. 241, at pg. 333.

²¹⁵ *id.*, dissent judgment, para. 242, at pg. 334-335.

²¹⁶ *id.*

²¹⁷ *id.*, dissent judgment, para. 278, at pg. 386-389.

²¹⁸ *id.*

²¹⁹ *id.*

²²⁰ *id.*

²²¹ *id.*, dissent judgment, para. 285, pg. 394-395.

²²² *id.*

with SIM cards will have a grave impact on personal autonomy.²²³ He asked the state to direct deletion of all Aadhaar-related data by the telecommunication companies within two weeks.²²⁴

J. Chandrachud as regards the linkage of Aadhaar to every financial account client under the Prevention of Money Laundering (Maintenance of Records) Second Amendment Rules, 2017, even though the state has a legitimate aim in preventing money-laundering requiring every client in an account based relationship to link the Aadhaar number with a bank account and to impose an authentication requirement is excessive to the aim and object of the state.²²⁵ There can be no presumption that all existing account holders as well as every individual who seeks to open an account in the future is likely a money-launderer.²²⁶ There needs to be a reasonable discrimination between the clients who are most likely to enter into money laundering.²²⁷ In light of the fact that non-submission of Aadhaar number will lead to ceasing of the accounts of even the genuine customers.²²⁸

5. ANALYSIS

The Aadhaar project is a necessary public good in India. It provides a unique biometric digital identity to 1.3 billion people. It enables the state to target public funds to uplift the lives of people living at below the poverty line thus ensuring the necessary welfare and development. Nandan Nilekani's vision of Digital India is aspirational, ambitious and transformative for all the citizens in many ways than one. Digital India ensures smart development through optimization of data technologies. However, as well-known that *with great power comes great responsibility* given that freedoms can only exist so long as there is a concurrent responsibility to manage those freedoms properly.

I propose that a balance needs to be struck between the expansive scope of Aadhaar usage and the related privacy concerns based on the idea of 'consent' and 'transparency'. Digital data is generated due to the activities of the people who use the technology. Data, in essence is the citizen's footprint in the digital world which means it is their 'property'. It is pertinent to ensure 'consent' and 'transparency' at appropriate stages to ensure that the people can usefully utilize the data they generate through Aadhaar usage but are also aware about the 'privacy' of their data – as regards when and to whom their data is accessible over what period of time so that they can manage 'access' of their data to any state or non-state entity. As the choice between bread and freedom is false, so is the choice between privacy and convenience. The state should be a guarantor and guardian of both the freedoms to fulfill its human rights and socio-economic constitutional obligations for its citizens. Obviously, the exceptional situations like national security and related public exigencies require flexibility but it should be reasonably measured through proper legal safeguards and procedures to limit its use to only public emergencies.

²²³ *id.*

²²⁴ *id.*

²²⁵ *id.*, dissent judgment, para. 296, pg. 408-411.

²²⁶ *id.*

²²⁷ *id.*

²²⁸ *id.*

The Aadhaar judgment has endeavored to navigate the ‘data privacy’ for the first time in the Indian judicial history. Understandably, the magnitude of the project in light of the subtlety of the issue such as data privacy led to an inability on the part of judges to credibly resolve the issues as regards let alone to circle the main concern. The sequence of issues and the flow of judgment adopted by the judges will leave any reader in a disarray ending in confusion. However, J. Chandrachud’s judgment is comparatively understandable and well-written.

As any reader will notice, the MpJ subsumed the issue of metadata related to authentication logs and mass surveillance under an issue of definitional clarity pursuant to Regulation 26 of the Aadhaar Authentication Regulations, 2016 and section 2(d) of the Aadhaar Act, 2016. They proposed that by explicitly narrowing of the metadata definition, the data that can be retained in the Aadhaar database will include only process metadata, in this manner the issue of metadata-related mass surveillance can be easily resolved. Like many controversial aspects of the Aadhaar project especially the main issue of metadata, that needed to be assessed under the proportionality analysis to ascertain the constitutional responsibility of the state, the MpJ repeatedly tried to fine-tune the contested provisions outside the proportionality analysis by suggesting amendments, apparently trying to protect the legislation from being declared disproportional under Article 14 and 21 of the Constitution. Thus, we can note an inclination towards ‘priority of legislative interest’ model, where normatively, legislative policy concerns are prioritized before they can be balanced with individual fundamental rights.

Comparatively, we note that J. Chandrachud has exceptionally been able to focus on the most controversial issue and unlike MpJ tabled all the controversial issues for the constitutional test of proportionality without himself suggesting the required amendments to safeguard the legislation prior the proportionality analysis. Thus, comparatively, J. Chandrachud’s judgment is clear, transparent and substantive in terms of the main contentions against the Aadhaar project.

The MpJ narrowed the assessment of proportionality to test only section 7 and 8 of the Aadhaar Act, 2016 which provide for the enrolment and authentication processes central to the function of Aadhaar project. Critically, the MpJ although negated the submission by the state that there cannot be any reasonable basis for claiming right to privacy against demographic and biometric data commonly given by the citizens to various other service providers across public and private sectors outside the Aadhaar project, the MpJ utilized this very fact to ultimately tilt the balance in favour of the state. It held that although there is a reasonable basis to have concerns regarding privacy owing that biometric data is being sought by the state, but since it is usually given by the citizens for many other services the invasion into privacy as argued by the petitioners is not so grave. Further, they fine-tuned again the expansive definition of ‘benefits’ and ‘services’ in the Aadhaar Act, 2016 to rather suggest that they interpret the scope of ‘benefits’ and ‘services’ in tandem to the scope of ‘subsidies’ and not beyond it to be granted under the Consolidated Fund of India. Whereas J. Chandrachud raised the issue of expansive scope of ‘benefits’ and ‘services’ that can progressively include any aids supplied by the state or its instruments are disproportional in their broadness, e.g., pension, mid-day meals and such

other basic state aids which will require mandatory Aadhaar linkage. Especially, J. Chandrachud held that the scope of subsidies provided by the government which incur expenditure from the CFI is not the same as that of other benefits and services which the government provides to its citizens and therefore, benefits and services cannot be measured with the same yardstick as subsidies. J. Chandrachud logically linked this overarching scope to the issue of function creep where data violations become almost unmanageable under the Aadhaar requiring a proper consolidated legal and institutional structure to protect data privacy.

Lastly, the proportionality assessment as applied by the judges in the Aadhaar judgment will leave scholars in the constitutional law craving for a thorough or complete analysis. Both the majority and the dissent so discussed in this paper did not fulfill the need to properly complete the assessment of proportionality under the Constitutional law as expounded by Aharon Barak, especially the most important test of proportionality *stricto sensu*. The balancing test required the judges to assess through a factual analysis in the India's social context where such issues were being contested, whether the marginal societal benefit from achieving the objectives of Aadhaar project outweigh the marginal harm caused to the right to privacy under the Indian constitution by the project?

In this paper, we note that there is much to be desired in terms of a balanced privacy safeguard at the level of Aadhaar project and beyond (IndiaStack initiative) which will truly answer the main question at the foundation of the balancing analysis. In light of the discussion above, 'no', the marginal societal benefits gained from the fulfillment of the Aadhaar project does not outweigh the marginal societal harms caused to the right to privacy under the Indian constitution and the MpJ did not substantively justify their support for the law.

6. CONCLUSION

The choice between privacy and convenience is a false choice. In a democracy governed by rule of law, where 'we the people' reign supreme in the Constitution, a state is under a constitutional obligation to ensure both the privacy and convenience in balance to its citizens. The balance between human rights and socio-economic rights in a democratic society warrants a holistic understanding of the societal implications of various new developments and its speed of transformation. Digital technologies are here to stay. Through the Aadhaar and IndiaStack initiatives at the foundation, such digital technologies will exponentially transform the way public-private sectors and citizens interact in a society. Thus, it is imperative for the power accumulated through such technologies by the state and its instruments to be balanced with the responsibilities that come with such power. The balance can be struck when there is an adequate law in place that guarantees citizen's right to their data and command the state to comply with essential consent, transparency and accountability requirements before it can utilize citizen's data to run or expand such digital technologies for public good.