

IN THE SUPREME COURT OF INDIA

WRIT PETITION (CIVIL) NO. 494/2012

I.A. NO. 141212/2017

IN THE MATTER OF:

Justice K.S. Puttaswamy (Retd.) ...Petitioner

Versus

Union of India & Anr. ...Respondents

**WRITTEN SUBMISSIONS ON BEHALF OF THE IMPLEADING APPLICANT,
SWATANTRA**

1. The Impleading Applicant is an organisation that works for and represents the interests of the transgender and sexual minorities communities in India. The Aadhaar Act and Rules, making the Unique Identification number (UID) or the Aadhaar number mandatory, and requiring persons under Section 3 and 6 to provide their personal demographic and biometric information for enrolment is a serious infringement of the constitutional right to privacy and dignity of transgender persons. The Aadhaar Act exposes transgender persons and sexual minorities to violence, surveillance and harassment by the State and private persons once their personal demographic details are obtained under Aadhaar. Once their personal demographic information is declared, it can also be used by various agencies, both public and private, as provided for under the Aadhaar Act, exposing them to surveillance and further violence and discrimination and a deprivation of their fundamental rights including their right to life and liberty, right to equality and freedom to speech and expression, freedom of movement and other fundamental freedoms.

- I. **The Aadhaar Act exposes transgender persons and sexual minorities to surveillance and criminalization based on their gender identity**
2. The transgender community in India has experienced a history of legally and socially sanctioned violence and discrimination from private individuals and State authorities. The enactment of legislations like the Criminal Tribes Act, 1871 and the presence of penal provisions like Section 377 of the Indian Penal Code, 1860 served as enabling provisions for targeting certain identities like *hijras* and harassment of transgender persons and sexual minorities. While the Criminal Tribes Act 1871 was repealed, the provisions of the legislation against transgender persons and sexual minorities or 'eunuchs' as they were referred to, were retained in laws such as the Karnataka Police Act and the Telangana Eunuchs Act previously referred to as the Andhra Pradesh (Telangana Area) Eunuchs Act first enacted in 1919.
3. These laws continue to enable the State to target and persecute communities solely on the basis of their gender identity. The Telangana Eunuchs Act is a draconian colonial legislation which empowers the State to maintain records of "eunuchs" and further make arrests solely on the basis of gender identity. Under the said provision, the Commissioner of Police was empowered to *prevent, suppress or control undesirable activities of eunuchs*". It also allowed for the preparation and maintenance of a register of the names and places of residence of all eunuchs residing in a particular area who were suspected of "*kidnapping and emasculating boys or of committing unnatural offences or any other offences or abetting the commission of such offences.*" Such draconian legislations disproportionately criminalize the transgender community and continue to exist.
4. In Karnataka, Section 36A of the Karnataka Police Act was challenged before the Hon'ble High Court of Karnataka in ***Karnataka Sexual Minorities Forum vs. State of Karnataka & Ors.*** (W.P. No. 1397/2015) relying on the decision of this Hon'ble Court in ***NALSA***. While this litigation was pending, the Karnataka Police (Amendment) Act, 2016 amended the legislation by removing the word "eunuch"

from the Section. The constitutionality of the Telangana Eunuchs Act has also been challenged in WP-PIL 44/2018 titled ***Vyjayanti Vasanta Mogli & Ors. Vs. State of Telangana & Ors.*** filed before the High Court of Judicature at Hyderabad and the same is pending consideration.

5. This Hon'ble Court's decision in ***National Legal Services Authority vs. Union of India, (NALSA)*** (2014) 5 SCC 438, held that the freedom of expression includes one's right to expression of a self-identified gender identity through dress, action behaviour among others. The NALSA judgement, the Telangana legislation remains in the statute books. A recent Report on the Human Rights Violations against Transgenders in Karnataka, 2014 by Ondede records a series of violations of rights of transgender persons, ranging from illegal detentions to false complaints, all of which have occurred subsequent to the decision of this Hon'ble Court in ***NALSA*** (supra).

6. This brief review of existing legislation, ongoing litigation and state action prosecutions confirms that wherever the state has been permitted to aggregate information about the transgender community it has often led to systematic discrimination and oppression of the community in India. Although the right to privacy grants an individual the autonomy over choices of gender identity and sexual orientation, among other intimate choices, in the absence of any legal safeguards to ensure that minority communities like the transgender and queer community in India are able to access public spaces and exercise their freedom of expression of gender identity for fear of discrimination and harassment, the said right remains a hollow ideal.

II. **Making the disclosure of Gender under Section 2 of the Aadhaar Act and Regulation 4 of the Aadhaar (Enrolment & Update) Regulations as mandatory demographic Information is violation of Article 14 of the constitution**

7. The Aadhaar Act and Rules require the mandatory disclosure of one's gender identity, which for transgender persons and sexual minorities leads to their criminalisation and discrimination against them.

8. Section 2(k) of the Aadhaar Act, 2016 states that “demographic information” includes information relating to the name, date of birth, address and other relevant information of an individual as may be specified by regulations for the purpose of issuing an Aadhaar number, but shall not include race, religion, caste, tribe, ethnicity, language, records of entitlement, income or medical history. There is no mention of ‘gender’ as required under ‘demographic information’. Further, the state is not barred from procuring information related to the gender of the individual.
9. The Aadhaar (Enrolment and Update) Regulations 2016, under Regulation 4 lists “gender” as additional demographic information to be collected by registrars. Hence for all aadhaar applications, gender is mandatorily required to be disclosed by all persons.
10. The compulsory disclosure of gender identity under demographic information is violative of Article 14 of the Constitution. Biometric and demographic information constitutes the core of Aadhaar Scheme as identification, authentication, targeting of subsidies, benefits and other purposes are based providing the State with this information. It is a core requirement that information collected under biometric and demographic criteria should be sanctioned by the Parliament. This non-exhaustive list of demographic information under the Aadhaar Act read with the absence of a prohibition on seeking gender information leads to an excessive and disproportionate delegation of power to the state.
11. For transgender persons, their gender status in identity documents is not uniform. Many Transgender and intersex persons have different gender markers on different identity documents, based on what is required for gender reclassification. This Hon’ble Court in *NALSA v. Union of India*, (2014) 5 SCC 438 held that the right to life under Article 21 of the constitution includes the right to self-identify one’s gender even without medical gender re-assignment. Despite

this, many authorities and agencies require sexual reassignment surgery before a person's gender marker is changed. For example in getting a gender marker in one's passport to be changed from M to F or to TG, sex-reassignment surgery may not be required, but for a driving license or birth certificate, medical certificates for sex-reassignment are required. An individual needs to produce proof of their self-identified gender before they can secure an Aadhaar card. Hence often transgender persons are ensnared in a web of official identities with different gender markers, which may or may not enable them to get their gender identity of choice on the Aadhaar platform.

12. If a transgender person's gender identity on Aadhar does not match their gender identity on any other identity document such as a voter ID card or a ration card or an HIV treatment card, they become vulnerable and are seen as potential social and security threats. As they are seen to be high risk persons, they have to face humiliating interrogations, physical sexual violations, denial of entitlements and forced outing to family and society. This amounts to serious discrimination against transgender persons and sexual minorities and a violation of Article 14 as it impacts them differently from the manner it impacts others.

13. Further, the Rules by including 'gender' as part of demographic and biometric information, when gender is not included under the parent Act, are without parliamentary sanction and ultra vires the parent Act and hence, must be declared unconstitutional.

14. The Constitutional Court of South Africa in *The City Council of Pretoria v Walker* (Case CCT 8/97) clarified that '*the concept of indirect discrimination... was developed precisely to deal with situations where discrimination lay disguised behind apparently neutral criteria or where persons already adversely hit by patterns of historic subordination had their disadvantage entrenched or intensified by the impact of measures not overtly intended to prejudice them. In many cases, particularly those in which indirect discrimination is*

alleged, the protective purpose would be defeated if the persons complaining of discrimination had to prove not only that they were unfairly discriminated against but also that the unfair discrimination was intentional. This problem would be particularly acute in cases of indirect discrimination where there is almost always some purpose other than a discriminatory purpose involved in the conduct or action to which objection is taken.”

15. Viewed in the above context, the Aadhaar Act must be scrutinised on the basis of the resultant indirect discrimination i.e. the possibility of a patently neutral action by the State resulting in disproportionate repercussions on a particular community, group or class of individuals.

III. The Aadhaar Act amounts to discrimination Against Transgender Persons under Article 15 of the constitution on the ground of Gender.

16. The Aadhaar Act impacts the Transgender community disproportionately as transgender persons have suffered violence at the hands of the State owing to criminalization of their gender identity. Sections 3, 6 and 7 of the Aadhaar Act, make it mandatory to declare one's demographic information which includes one's gender identity, address and other details. In the absence of a comprehensive data protection regime in place, the collection and storage of this information without specifying the use of the same exposes transgender persons and sexual minorities to further violence and surveillance at the hands of the State and private persons.

17. Article 15(1) of the Constitution prohibits the State from discriminating against an individual or a group on the ground of religion, race, caste, sex or place of birth. This Hon'ble Court in **NALSA** (supra) has held that “**Both gender and biological attributes constitute distinct components of sex. The biological characteristics, of course, includes 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.¹

Discrimination on the ground of sex under article 15 thus includes within its purview discrimination on the ground of gender identity.

18. Further, a 9 Judge Bench of this Hon'ble Court in ***Justice K.S. Puttaswamy vs. Union of India & Anr.***, held that the right to privacy was a constitutionally protected fundamental right which could be traced to various facets of Part III of the Constitution. In the opinion delivered by Chandrachud J. it has specifically been recorded that "169...***The guarantee of equality is a guarantee against arbitrary state action. When these guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity....***"

19. The Aadhaar Act, 2016 should therefore be scrutinised beyond its stated objects and purpose of providing "targeted delivery of subsidies, benefits and services" and inspected for its effect on making identification and victimisation of transgender community real. This is aggravated owing to the wide scale aggregation of biometric information without safeguards with private parties having access to information.

20. This Hon'ble Court in ***Anuj Garg vs. Hotel Association of India*** (2008) 3 SCC 1 has held that "***Strict scrutiny test should be employed while assessing the implications of this variety of legislations. Legislation should not be only assessed on its proposed aims but rather on the implications and the effects.***"² (Emphasis Supplied). The challenge in this case was to Section 30 of the Punjab Excise Act, which prohibited the employment of any man under the age of 25, and any woman, in any part of an establishment in which liquor or another intoxicating drug was being consumed. It was argued that the legislation was essential to ensure the "security" of women. The Court observed that "the present law ends up victimizing its subject in the name of protection. In that

¹ ***National Legal Services Authority vs. Union of India***, (2014) 5 SCC 438, (para 66), (p.488)

² ***Anuj Garg vs. Hotel Association of India***, (2008) 3 SCC 1 para 46. p.19

regard the interference prescribed by state for pursuing the ends of protection should be proportionate to the legitimate aims.” (Paragraph 36)

IV. The mandatory disclosure of gender identity and mandatory enrolment under the Aadhaar Act, 2016 violates Articles 21 and 19 for transgender persons

21. The Aadhaar Act provides in Sections 3, 6, and 7 the mandatory nature of enrolment for the Aadhaar, the requirement of personal demographic and biometric identification details and the powers of the central and State governments to require the Aadhaar for the grant of any benefit or scheme.

These Sections are as follows:

“Sec. 3. (1) Every resident shall be entitled to obtain an Aadhaar number by submitting his demographic information and biometric information by undergoing the process of enrolment:

Provided that the Central Government may, from time to time, notify such other category of individuals who may be entitled to obtain an Aadhaar number.

Sec. 6. The Authority may require Aadhaar number holders to update their demographic information and biometric information, from time to time, in such manner as may be specified by regulations, so as to ensure continued accuracy of their information in the Central Identities Data Repository.

Sec. 7. The Central Government or, as the case may be, the State Government may, for the purpose of establishing identity of an individual as a condition for receipt of a subsidy, benefit or service for which the expenditure is incurred from, or the receipt therefrom forms part of, the Consolidated Fund of India, require that such individual undergo authentication, or furnish proof of possession of Aadhaar number or in the case of an individual to whom no Aadhaar number has been assigned, such individual makes an application for enrolment:

Provided that if an Aadhaar number is not assigned to an individual, the individual shall be offered alternate and viable means of identification for delivery of the subsidy, benefit or service.”

22. Article 21 of the Constitution of India states that ***“No person shall be deprived of his life and personal liberty except according to the procedure established by law.”*** A perusal of the Constituent Assembly Debates on Article 21 (Article 15 of the Draft Constitution) would show that the debate around the Article was primarily centered around the words “procedure established by law”

and whether the same should be replaced by the words “due process of law”. On the one hand it was argued by Kazi Syed Karimuddin that retention of the former in favour of due process would mean that a procedure once laid down by the legislature would restrict the power of the judiciary to question the same once complied with. However, those opposed to adding the words “due process of law” were of the opinion that doing so would place excessive power in the hands of the judiciary. To record the words of B.N Rau, the Constitutional Advisor to the Constituent Assembly, “***The courts, manned by an irremovable judiciary not so sensitive to public needs in the social or economic sphere as the representatives of a periodically elected legislature, will, in effect, have a veto on legislation exercisable at any time and at the instance of any litigant.***” The conflict in the Constituent Assembly was put forward by Dr. B R Ambedkar in a simple manner as one that gave the drafting committee the choice between two alternatives. The first, where the Legislature was trusted with the power of making laws which did not abrogate the fundamental rights of an individual and would have to stand the test of constitutionality alone by the Judiciary, and the second, where the Judiciary was not only empowered to question a law as being beyond the scope of authority of the legislature, but also whether it was good law. There is no doubt that the framers of the Constitution chose the latter option where the court was empowered to assess whether the law was good law.

23. The Transgender Community in India was first granted legal status by this Hon'ble Court in ***National Legal Services Authority vs. Union of India (NALSA)*** (2014) 5 SCC 438. Granting legal recognition to the third gender in India, a two Judge Bench of this Hon'ble Court held that the gender identity of an individual refers to their intrinsic sense of being male/female/transgender/transsexual, their internal experience of gender and the same may not necessarily correspond to the sex assigned to them at birth. Further, an individual's right to self-identification and expression of gender

identity is intrinsically linked to dignity as a fundamental right under Articles 21 and 19(1)(a) of the Constitution.

24. Recognising the fundamental rights of a third gender in India, a 2 Judge Bench of this Hon'ble Court in **NALSA** (supra) held that ***“Article 19(1)(a) of the Constitution of India states that all citizens shall have the fundamental right to freedom of speech and expression, which includes one’s right to expression of his self identified gender. The self-identified gender can be expressed through dress, words, action or behaviour or any other form. No restriction can be placed on one’s personal appearance or choice of dressing, subject to the restrictions contained in Article 19(2) of the Constitution..... Gender identity therefore, lies at the core of one’s personal identity, gender expression and presentation and therefore, it will have to be protected under Article 19(1)(a) of the Constitution of India.. that values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of the transgender community under Article 19(1)(a) of the Constitution of India and the State is bound to protect and recognise those rights.”***³

25. Further, on the question of the right to life and dignity as protected under Article 21 of the Constitution, this Hon'ble Court in **NALSA** (supra) held that ***“the recognition of one’s gender identity lies at the heart of the fundamental right to dignity. Gender, as already indicated, constitutes the core of one’s sense of being as well as an integral part of a person’s identity... Self-determination of gender is an integral part of personal autonomy and self expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution of India.”***

26. In the recent decision of this Hon'ble Court in **Justice K.S. Puttaswamy vs. Union of India & Anr**, (2017) 19 SCC 345, the Right to Privacy was held to be a

³ **National Legal Services Authority vs. Union of India**, (2014) 5 SCC 438, para 69, p.489

basic tenet of liberty under Article 21 of the Constitution. Delivering a separate concurring opinion, Chelameswar J. of this Hon'ble Court observed:

*"... the right to privacy consists of three facets i.e. repose, sanctuary and intimate decision. Each of these facets is so essential for the liberty of human beings that I see no reason to doubt that the right to privacy is part of the liberty guaranteed by our Constitution."*⁴

27. The curtailment of liberty, and that of the privacy right in particular, must meet the tests of Articles 14, 19 and 21. The opinion rendered by Hon'ble Chandrachud J. in **Puttaswamy** (supra) categorically lays down the three-fold test for imposing any restriction on the fundamental right to privacy:

- a. Any restriction on the right may only be laid down by means of enacting a law to the said effect;
- b. Such restriction must be in pursuit of a legitimate State interest; and
- c. The restriction imposed must be proportionate to the object and needs sought to be fulfilled.⁵

The Aadhaar Act and the Regulations made under them must satisfy this test under Article 21.

28. From the stage of its introduction, the Aadhaar Scheme was popularised as a voluntary scheme of personal identification in addition to the other identity cards being issued by the State. Section 3 of the Aadhaar Act states that Aadhaar is to be an entitlement and makes no reference to the same being a mandatory form of identification for an individual. However, under Section 7 of the Aadhaar Act, 2016, empowers the Central Government to notify the mandatory requirement of an Aadhaar or proof of application for enrolment under the Scheme for the purpose of availing benefits under the welfare schemes and benefits of the State. The Central Government has gone far beyond section 7 to mandatorily require Aadhaar identity in over 100 separate legal regulations and notifications. This in

⁴ *K.S. Puttaswamy vs. Union of India*, (2017) 10 SCC 345, para 371, p.528

⁵ *K.S. Puttaswamy vs. Union of India*, (2017) 10 SCC 345, para 325, p.509

effect amounts to a deprivation of the right to life and liberty and fundamental freedoms guaranteed under Articles 19 & 21 of the Constitution.

29. It is a well settled principle of law that any act of the State that results in a curtailment of a fundamental right must pass the constitutional muster of compelling State interest. The Aadhaar Act, when compelling individuals to furnish personal biometric information pertaining to gender identity, results in undue intrusion into the personal lives of transgender persons and sexual minorities. Aadhaar facilitates linkages with several schemes and provides a database that connects with every other database pertaining to an individual, thereby creating compulsory access to personal data without establishing any compelling state interest for the collection and storage of personal data on a mass scale, giving no due consideration to the disproportionate repercussions the same may have on minority communities like Transgender persons in India, who have often faced oppression on the basis of identity markers like gender. Further, the Aadhaar Scheme also fails to establish the need for making the Aadhaar a mandatory identification and authentication document owing to the lack of an alternative means for establishing the identity of an individual.

30. In addition to violating the procedure established by law and the reasonable restrictions standard as laid down under Articles 21 & 19 of the Constitution, the above-quoted Sections 3, 6, 7 & 57 of the Aadhaar Act, 2016 are also *ultra vires* the Constitution on account of the breach of privacy that is being committed in the collection storage and use of data acquired by the State for the purpose of Aadhaar.

31. The decision in **NALSA** (supra) having laid the foundation of transgender rights jurisprudence in India, this Hon'ble Court in **Justice K.S. Puttaswamy vs. Union of India & Anr**, (supra) further recognised gender identity as the personal and intimate aspect of an individual's life over which they enjoy autonomy under the

fundamental right to privacy. In the opinion delivered by Chandrachud J.it has been recorded as under:

“298...Privacy lies across the spectrum of protected freedoms. The guarantee of equality is a guarantee against arbitrary state action. ... When these guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity. The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. Above all, the privacy of the individual recognises an inviolable right to determine how freedom shall be exercised. An individual may perceive that the best form of expression is to remain silent...”⁶

32. Laying down the contours of the privacy right, Nariman J. in ***Puttaswamy*** (supra) has recorded as under:

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

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

For instance, we can ground physical privacy or privacy relating to the body in Articles 19(1)(d) and (e) read with Article 21; ground personal information privacy under Article 21; and the privacy of choice in Articles 19(1)(a) to (c), 20(3), 21 and 25.”⁷

33. The right to privacy, as upheld by the Hon’ble Supreme Court would thus include the right to informational privacy which grants the individual control over

⁶ ***K.S. Puttaswamy vs. Union of India, (2017) 10 SCC 345 para.298, p.498***

⁷ ***K.S. Puttaswamy vs. Union of India, (2017) 10 SCC 345, para 521, p.598***

dissemination of personal information as in the case of one's gender identity, over which the concerned individual enjoys absolute freedom. The gender identity of a person, therefore, is intrinsic to an individual's dignity, which in turn is a hollow ideal without the right to privacy. It is in the context of these two decisions that the question of exercise of the freedom of expression and the privacy right by transgenders in public spaces becomes a contentious issue. The current scheme of the Aadhar Act, 2016 not only deprives the transgender community of autonomy over personal information, but in view of Section 57 of the Act, also violates a basic tenet of informed consent over the extent of use of such information owing to the lack of transparency of procedure being adopted to make the Aadhar a mandatory requirement for authentication under several welfare schemes. Mandating enrolment for the Aadhar Scheme without specifically laying down the purpose for which the data supplied thereunder may be used is a curtailment of the informational privacy of an individual.

34. In this context, reference must be made to the recent decision of the Court of Appeals of the United Kingdom in ***Secretary of State for the Home Department vs. Tom Watson & Ors.*** [2018] EWCA Civ. 70, wherein the Court of Appeals ruled significant provisions of the Investigatory Powers Act, 2016 to be unlawful owing to the lack of adequate safeguards for data protection. The Investigatory Powers Act, 2016 (IPA) more popularly known as the "Snooper Charter" is the successor to the Data Retention & Investigatory Powers Act, 2014 (DRIPA). The Court of Appeals held Section 1 of the DRIPA to be inconsistent with the EU charter owing to its failure to limit access to the data retained solely for the purpose of fighting serious crime. The Court issued declaratory relief in the following terms:

"27. In these circumstances I consider that it is appropriate to grant declaratory relief in the following terms:

Section 1 of the Data Retention and Investigatory Powers Act, 2014 was inconsistent with the EU law to the extent that, for the purposes of prevention, investigation, detection, and prosecution of criminal offences it permitted access to retained data:-

(a) Where the object pursued by that access was not restricted to solely fighting serious crime;

(b) ***Where access was subject to rpio review by a Court or an independent administrative authority.***"

35. It is also an accepted position under and conventions that personal data cannot be collected by governments without adequate data protection measures in place for the protection of person's right to privacy. The **Principles of Convention 108 to the Collection and Processing of Biometric Data (2005)** issued by the Council of Europe recognise that as soon as biometric data is collected with the view of being automatically processed in order to be linked to an identified or identifiable person, it becomes personal data and is thus eligible for data protection and privacy. The **United Nations Declaration on Bioethics and Human Rights adopted on October 19, 2005**, also clearly establishes that a person's identity includes the biological, the psychological, social, cultural and spiritual dimensions. Hence one's gender identity is personal data and cannot be released or used without adequate safeguards in place that it would not be used for any other purposes.

36. In this regard, the Philippines Supreme Court in ***Ople vs. Torres***⁸ quashed the Administrative Order No. 308 titled as "Adoption of a National Computerized Identification Reference System" on the grounds of it being violative of the Right to Privacy. The Administrative order No. 308 aimed to provide the citizens and foreign residents of Philippines with the facility to conveniently transact business with basic service and social security providers and other government instrumentalities. In order to achieve this goal it was decided that a computerized system would be required to properly and efficiently identify persons seeking basic services on social security and reduce, if not totally eradicate, fraudulent transactions and misrepresentations. Pursuant to this, the notification directed the generation of a Population Reference Number (PRN) generated by the National Statistics Office, which would serve as the common reference number to establish a linkage among concerned agencies through the use of "Biometrics Technology" and "computer application designs". Setting aside the order on account of aside impermissible intrusion into the citizenry's protected zone of

⁸ ***Blas F Ople. vs. Reuben D. Torres & Ors., G R No. 127685, 23rd July, 1998***

privacy, the Court observed that:

“The concept of limited government has always included the idea that governmental powers stop short of certain intrusions into the personal life of the citizen. This is indeed one of the basic distinctions between absolute and limited government. Ultimate and pervasive control of the individual, in all aspects of his life, is the hallmark of the absolute state. In contrast, a system of limited government safeguards, a private sector, which belongs to the individual, firmly distinguishing it from the public sector, which the state can control. Protection of this private sector — protection, in other words, of the dignity and integrity of the individual — has become increasingly important as modern society has developed. All the forces of a technological age — industrialization, urbanization, and organization — operate to narrow the area of privacy and facilitate intrusion into it. In modern terms, the capacity to maintain and support this enclave of private life marks the difference between a democratic and a totalitarian society.”

V. Mandatory Requirement of Aadhaar with HIV Treatment is a violation of the Right to Life and Health

37. The Aadhaar Act makes the proof of an Aadhaar number necessary for receipt of certain subsidies, benefits and services. The impugned Section reads as under:

“7. Proof of Aadhaar number necessary for receipt of certain subsidies, benefits and services, etc.- The Central Government or, as the case may be, the State Government may, for the purpose of establishing identity of an individual as a condition for receipt of a subsidy, benefit or service for which the expenditure is incurred from, or 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:

38. Section 7 of the Aadhaar Act empowering the Central as well as State Governments to require the Aadhaar for benefits such as accessing medical care treatment for HIV/AIDS and other such subsidies and services is being used as a tool for systematic deprivation of benefits to those individuals and groups who are dependent on the welfare schemes and policies of the State for access to basic means of livelihood. The transgender community is one such community that faces stigma and discrimination due to their gender identity and sexual orientation and owing to their poor social standing has been recognised as an educationally and socially backward class of citizens by this Hon'ble Court in **NALSA**.

39. Over the course of years, the judicial interpretation offered to the Right to Life as enshrined under Article 21 by this Hon'ble Court has evolved to that of a life that is more than a mere animal existence and is the repository of such rights and liberties as are essential to living a life of dignity. One such right which has been held to be integral to the right to life under Article 21 is the Right to health and the corollary constitutional obligation of the State to provide healthcare services.⁹

40. As per the "HIV Human Rights & Social Exclusion" Report, 2010 of the United Nations Development Programme (UNDP-India), the prevalence of HIV and Sexually Transmitted Infections tends to be higher in transgender persons who as a group are extremely vulnerable to such HIV. Further, they are faced with rampant discrimination particularly in the field of health care and the barriers of access on account of poor economic status only worsen the situation.

41. Section 7 of the Aadhaar Act, 2016 empowers the State to curtail entitlements and benefits that are to ensure to citizens by virtue of their constitutional rights and thus imposes an arbitrary condition on them. The introduction of the Aadhaar Based Biometric Authentication for availing HIV treatment at anti-retroviral therapy centres under the aforesaid section poses an additional hurdle in access to health care for the transgender community. First, in the absence of any data to substantiate the claim patients fraudulently obtaining treatment for HIV, a scenario that in itself does not seem plausible, there is no legitimate State interest to impose restrictions on the right to informational privacy of transgender persons by compelling them furnish personal information to secure health benefits. On the contrary, it has lead to patients steering clear of hospitals fearing disclosure of identity. Nor can such restriction be justified on the test of proportionality, for the dissipation of social benefits cannot be at the cost of the right to health which is a fundamental right under Article 21 of the Constitution.

⁹ *Bandhua Mukti Morcha Vs. Union of India & Ors.*, (AIR 1984 SC 802); *Vincent Vs. Union of India*, (AIR 1987 SC 990); *Consumer Education Research Centre & Ors. Vs. Union of India*, (AIR 1995 SC 42); *Paschim Bangal Khet Mazdoor Samiti & Ors. Vs. State of West Bengal & Ors.*, (AIR 1996 SC 2426).

42. The mandatory requirement of furnishing an Aadhaar Card for the purpose of availing treatment for HIV/Aids amounts to an arbitrary restriction on the fundamental right to privacy as well as a violation of the right to health of transgender persons under Article 21 of the Constitution. In a welfare state, the State is under an obligation to partake in the upliftment of socially and economically backward classes and access to such benefits as provided for the said purpose cannot be made contingent upon the restriction of constitutional rights, unless a legitimate State interest proportionate to the breach is established.

43. The deep discrimination and social stigma faced by the transgender and sexual minorities community places them in a more vulnerable position increasing dependence on State sponsored programs in order to enable their inclusion in society and the mandatory linking of such benefits with Aadhaar which attacks their privacy amounts to a complete deprivation of their constitutional rights. They would be forced to choose between either enrolling under Aadhaar by disclosing their personal demographic details and exposing themselves to violence or not accessing benefits and schemes which would enable them to fulfill their right to health, livelihood, education and employment which are also components of the right to life and dignity.

44. Hence on all the above grounds, it is prayed that the Aadhaar Act 2016 and the Rules framed thereunder be held as being unconstitutional as it violates the fundamental rights under Articles 14, 15, 19 and 21 of transgender persons and sexual minorities and deserves to be set aside in the interest of justice and equity.

Place: New Delhi

Date: 20.3.2018

Counsel for the Impleading Applicant

