



Finding an equilibrium

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Highlights

- The victory of the right to privacy was presaged by K.S. Puttaswamy v. Union of India (2017), but that nine-judge Bench had left open the question of Aadhaar: whether the “national security” perspective (the vital role of surveillance to curb terror and prevent money laundering and crime financing) and “social welfare state” perspective (Aadhaar ensured that subsidies went to the right people) provided constitutional grounds for “reasonable restrictions” (reasonable because non-arbitrary).
- Although conceived and executively implemented during the UPA-2 regime, the project got coercive statutory backing only during the NDA regime, in 2016.
- The Aadhaar Act has now been upheld, and Aadhaar is mandatory for all government benefits, as somewhat narrowly re-crafted by the majority.
- The court examined only whether the entire scheme was constitutionally valid under the nine-judge Bench enunciation of the right to privacy and whether the decision of the Speaker of the Lok Sabha to pass the Aadhaar Act as a Money Bill was declared so “final” by the Constitution as to exclude even the jurisdiction of the apex court.

The Money Bill question

- Whether this decision disappoints those who had high expectations or remains enigmatic on key aspects is a question which will be debated for long.
- But clearly the majority disappoints with the lack of constitutional scrutiny on the finality of the Speaker’s decision on what amounts to a Money Bill under Article 110(3) of the Constitution.
- The other view is that the Speaker, like all constitutional functionaries, is bound to exercise the discretion reasonably; purposive as well as strict pragmatic scrutiny carrying “lethal emanations” from Article 14 and 21 must ensue when a large number of bills are tagged with Money Bills.
- This is dangerous because it removes the rationale for bicameral legislatures, because the Constitution does not foreclose the Rajya Sabha’s collective right to meaningfully deliberate legislative change.
- Justice Chandrachud fully dissents and holds the law invalid as a “fraud on the Constitution”, that is a colourable exercise of constitutional power.
- He maintains that the “notion of absolute power” is anathema to the Constitution and that there is need to “liberate its founding principles from its colonial past”.
- Its purpose cannot be to shield an excess of power from being questioned before the court, nor to clothe a high functionary with utter impunity.

Constitutional purpose

- Memorably, he says that the “ultimate test” is whether the ouster of “judicial review is

designed to achieve a constitutional purpose” that “meets the test of functionality, assessed in terms of a constitutional necessity”.

- Pointedly, Justice Chandrachud says: “In the seventh decade of the republic, our interpretation of the Constitution must subserve the need to liberate it from its colonial detritus.” Accordingly, he holds that the decision to give the Aadhaar Bill the status of a Money Bill violates the principle of bicameralism, declared as a part of basic structure, and an aspect of federalism and entails a “debasement of a democratic institution” which “cannot be allowed to pass”.

The proportionality test

- Perhaps, a salient reason for the majority decision is to be found in ‘balancing’ interests under the ‘proportionality test’: simply put, any conflict of interest requires balancing, keeping in view constitutional first principles and its vision, values, and the mission.
- The majority decision offers a harmonious construction, but the dissenting opinion shows why this is not the only or necessarily the best way.
- Do the ways of upholding the Aadhaar also open the floodgates of being constitutionally nir-aadhaar?

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