

● AAROGYA SETU APP: ISSUES REGARDING RIGHT TO PRIVACY



Rajesh Kumar Dube

Abstract

COVID-19 pandemic is a disaster against humanity. This catastrophe caused great human sufferings and substantial loss of life globally and is of such a magnitude as to beyond the coping capacity of the community. In order to mitigate the risk of COVID-19 disaster, the Central Government of India has launched Aarogya Setu mobile application aimed to fight against pandemic by contact tracing of persons infected with COVID-19 and to take proactive medical intervention. This app collects demographic data, contact data, self-assessment data and location data of the individuals and stored on the server managed by the Central Government. There is an issue of violation of right to privacy while sharing of such personal data on server. In this paper the researcher's endeavour is to examine the issue "Whether there is any infringement of right to privacy of the users of Aarogya Setu App while sharing personal data on the server."

Key words

Aarogya Setu App, COVID-19 pandemic, Right to Privacy and Disaster Management.

I. INTRODUCTION

"Download the Aarogya Setu mobile app to prevent the spread of the corona infection. Inspire others to download the app as well."

-Prime Minister Narendra Modi.

The beginning of the Year 2020 witnessed a very contagious pandemic known as COVID-19 which has threatened the very existence of human kind. On March 11, 2020 the World Health Organization has declared COVID-19 epidemic disease as global pandemic which is very infectious disease caused by a novel Corona virus. This virus was first reported at Wuhan in China. Being, a very virulent in nature, this virus has taken within her sweep the whole world in very short time. We are also suffering with the havoc of this pandemic. The first case was reported in India on January 30, 2020 and till July 28, 2020 the number of confirmed COVID-19 cases is 1483157.¹ However, 952743 cases have been recovered but 33425 deaths have been reported.² The Government of India has developed Aarogya Setu mobile application which is a useful technological solution for making easier contact tracing of persons infected with Covid-19 in order to take effective

¹Available at: mygov.in/covid-19 (Accessed on 28th July 2020).

²Ibid.

measures and to mitigate its further spread.³ This Bluetooth enabled mobile application was launched on 2nd day of April 2020 for containing COVID-19 infection and also for the purposes of depicting probable hotspots.⁴ By 28th day of July 2020, there have been 14.68 Crore Indians, who are using Aarogya setu App.⁵ This mobile application records the details of the individuals who have come in contact with any other individual in their usual course of activities, so that if one of them, at later point of time, test positive for COVID-19, the individual can be informed which would enable him to take proactive steps for medical intervention.⁶ The details of the individuals include demographic data,⁷ contact data,⁸ self-assessment data⁹ and location data¹⁰ which are collectively called as "Response Data". The National Informatics Centre has been assigned with the task for collection, processing and managing response data collected from the Aarogya Setu App.¹¹ This mobile application has certain key features like automatic contact tracing,¹² self-assessment test,¹³ and to furnish information if someone has turned COVID-19 positive.¹⁴

³Available at https://static.mygov.in/rest/s3fs-public/mygov_159051652451307401.pdf (Accessed on 15 July 2020).

⁴Ibid. Aarogya setu is now an open source;

⁵Aarogya Setu Mobile App FAQs (Accessed on July 18, 2020).

⁶Ibid.

⁷The demographic data includes name, mobile number, age, gender, profession and travel history of the individual; Available at Supra note 3.

⁸It implies data relating to any other individual that a particular individual may have come in close juxtaposition with any other individual which include time span and geographical location of the contact; Ibid.

⁹It implies the feedback data given by the individual by self-assessment test on Aarogya Setu App; Ibid.

¹⁰It implies data relating to the particular individual's latitudinal and longitudinal geographical positioning; Ibid.

¹¹Supra note 3.

¹²Aarogya Setu App by using Bluetooth of the user detects other devices having the same App, securely exchanges a digital signature of any other users including time, proximity, location and duration and in case, any of the people that the user came in contact within last 14 days tests positive for COVID-19, this App calculates the risk of infection based on recency and proximity of the user's interaction and recommends suitable action on the screen of the user. Available at: Aarogya Setu Mobile App FAQs (Accessed on July 18, 2020).

¹³The self- assessment test is based on ICMR guidelines, evaluates the likelihood of COVID-19 infection based on self-reported symptoms and other relevant information like recent travel, age and gender of the users of the Aarogya Setu App. If, based on self-reported information of the users, there is probability that the user may be infected; the App will seek the consent of the users for uploading and sharing the results of the self- assessment of the users, so as to enable the Government of India for taking appropriate medical and administrative measures. Ibid.

¹⁴Aarogya Setu App does not allow any users to mark themselves as COVID-19 positive. When someone is tested COVID-19 positive, the ICMR approved testing laboratory shares this information with Indian Council of Medical Research (ICMR) - the nodal government agency for COVID-19 testing. Then, ICMR, through a secure Application Program Interface (API), shares the list of COVID-19 positive persons to the Aarogya Setu server and the users of the App will be updated with the current status and it will be helpful in contact tracing as well. Ibid.



There is an issue regarding right to privacy of the users of the Aarogya Setu mobile application:

"Whether while sharing with the "Response Data" consisting of demographic data,¹⁵ contact data,¹⁶ self-assessment data¹⁷ and location data¹⁸ of the user to the server of the Central Government, there would be any violation of the right to privacy which has been established as a fundamental right?"

Before getting into this issue, we shall discuss the genesis and other related aspects of the right to privacy as a fundamental right, in order to resolve the issue appropriately.

II. GENESIS OF RIGHT TO PRIVACY AS A FUNDAMENTAL RIGHT

The Unique Identification Authority of India (here in after referred as UIDAI), a statutory authority was established on 12 July, 2016, under the provisions of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016, hereinafter referred as Aadhaar Act, and now it is under the Ministry of Electronics and Information Technology.¹⁹ The main objective of the UIDAI, is to issue Unique Identification numbers (UID), popularly known as Aadhaar Number, by collecting and compiling both demographic and biometric data of all residents of India. So far, more than 124 Crore people of the population got their Aadhaar Numbers.²⁰ The main objective of the aforesaid Aadhaar Card Scheme is to provide good governance; efficient, transparent and targeted delivery of subsidies, benefits and services to individuals residing in India.²¹

One of the grounds of the objection against the Aadhaar Card Scheme was that the very collection of demographic and biometric data for such scheme was violative of the fundamental "Right to Privacy". The Attorney General of India contended that the existence of a fundamental right of privacy was in doubt as it was held in *M. P. Sharma v Satish Chandra, District Magistrate, Delhi*,²² hereinafter referred as M. P. Sharma, decided by a Bench of eight judges and another, in *Kharak Singh v State of Uttar Pradesh*,²³ hereinafter referred as Kharak Singh, decided by a Bench of six judges. The main issue was whether Right to Privacy was fundamental right or not? The matter was heard by a Bench of three judges of the Supreme Court and they opined that the case involved the "far reaching questions of importance involving interpretation of the Constitution."²⁴ They observed that if the ratio settled in the M. P. Sharma and Kharak Singh is accepted then the robustness and liveliness of the fundamental rights would be

¹⁵Supra note 7.

¹⁶Supra note 8.

¹⁷Supra note 9.

¹⁸Supra note 10.

¹⁹About UIDAI, <https://uidai.gov.in/> (Accessed on 19 July, 2020).

²⁰Ibid.

²¹Aadhaar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Act, 2016: Preamble.

²²(1954) SCR 1077.

²³(1964) 1 SCR 332.

²⁴Justice K S Puttaswamy (Retd.) and Anr. v. Union of India and Ors. SC Writ Petition (Civil) No. 494 of 2012; Date of Judgement: Aug. 24, 2017(para-1; as per R.F. Nariman, J).

denied.²⁵ The matter was referred to a Bench of five judges of the Supreme Court and the same was heard by them on July 18, 2017, and was thereafter, referred to nine judges in view of the fact that the judgement in M.P. Sharma which was decided by a Bench of eight learned Judges of the Supreme Court. The Bench of nine Judges had sole issue as follows:

"Whether Right to Privacy was Fundamental Right or not?" The important pertinent question which is inherent in this issue, if the right to privacy is fundamental right, then what is the extent and ambit of this right? Whether the aforesaid right is absolute or limited? If it is not absolute but limited, what are those limitations? These are very important questions which are to be resolved, as to the validity of the Aadhar Card Scheme lies on those issues.²⁶

The Bench of nine judges considered the issue whether right to privacy is a fundamental right? They held that the right to privacy is an essential and integral part of right to life and personal liberty under Articles 21 and 14 & 19.²⁷ The Court also overruled the M P Sharma and Kharak Singh's ruling.²⁸

On behalf of himself and three more Judges, D. Y. Chandrachud, J. observed that the right to privacy is the constitutional core of human dignity and has both normative and descriptive function.²⁹ Normative function substantiates those values which are the basis of the right to life, liberty and freedom whereas descriptive function incorporates various entitlements and interest which are the roots of ordered liberty.³⁰ The right to privacy cannot be enumerated but certain rights like sanctity of family life, personal intimacies, marriage, procreation of children, sexual orientation etc. are the important one but not exhaustive.³¹ The right to privacy has very wider dimension touching all the aspect of human life which are concerned with human dignity and emanates from personal liberty under Article 21. It cannot be cribbed cabined and confined within four walls of the fundamental right jurisprudence.

As per S. A. Bodbe, J. the right to privacy is interwoven within the texture of the human liberty in such a manner that the same cannot be separated and has been reflected under various provisions of the part III specifically and residue lies under article 21.³² As per Sanjay Kishan Kaul, J. the right to privacy is an inherent fundamental right but subject to specified restrictions under the part-III.³³ As per Abhay Manohar Sapre J. the right to privacy has many facets and the same would be considered on case to case basis whenever any grievance will be raised regarding alleged infringement of the right.³⁴

²⁵Ibid.

²⁶Ibid.

²⁷Supra note 24; (page no. 3 of the Order).

²⁸Ibid.

²⁹Supra note 24; Conclusion-para 3 (E); (as per D. Y. Chandrachud, J. and others).

³⁰Ibid.

³¹Ibid.at para 3(F) and 3 (G).

³²Supra note 24; para 47 b; (as per S. A. Bodbe J).

³³Supra note 24; para 83; (as per Sanjay Kishen Kaul J).

³⁴Supra note 24; para 36; (as per Abhay Manohar Sapre J).



Therefore, it may be observed by the judicial opinion expressed by the Hon'ble Judges of the Supreme Court that the right to privacy is an integral part of the Right to Life and personal liberty under Article 21 and as a part of the freedom guaranteed under Part III of the Constitution.

III. RIGHT TO PRIVACY IS NOT ABSOLUTE RIGHT

The fundamental right to life or personal liberty under Article 21 is itself not an absolute right but is subject to procedure established by law. The procedure must be just fair and reasonable and not arbitrary, fanciful or oppressive.³⁵ In other words a person may be deprived of his/her personal liberty if the procedure established by law applicable for such deprivation is just fair and reasonable. The right to privacy is one of the species of the genus personal liberty. As the personal liberty is not absolute right the right to privacy cannot be absolute. The right to privacy may be encroached by a law and the same must qualify the test of the restriction specified under part-III.³⁶ The Supreme Court endorsed the established rule that invasion of right to privacy under Article 21 may only be justified by a valid law which fulfills the criterion of justness, fairness and reasonableness.³⁷ On behalf of himself and three more Judges, D. Y. Chandrachud, J. observed that right to privacy is like other fundamental freedoms under part III is not absolute right.³⁸ S. A. Bobde, J. observed in total consistency with *R. C. Cooper v. Union of India* that it is very established that right to privacy permeates with all kind of freedom under part III besides right to life and personal liberty under Article 21 and therefore, any interference with the right to privacy by the state must satisfy the test of reasonableness of restrictions under part III as well as that under Article 21.³⁹ Chelmeswar, J. observed that none of the legal right may be absolute and therefore, fundamental right to privacy cannot be absolute and is subject to certain limitation depending upon the nature the right.⁴⁰ Abhay Manohar Sapre, J. observed that right to privacy is very much part of the fundamental rights under part III and obviously will be subject to reasonable restrictions and state is lawfully authorized to impose such restrictions if in the opinion of State, there would be social moral and compelling public interest exist.⁴¹

The aforesaid observations made by learned judges made it explicitly clear that right to privacy is not absolute right. It is limited right and subject to reasonable restrictions and the same must be in conformity with the permissible limit under part III of the Constitution of the India.

IV. RIGHT TO PRIVACY IS UNDER CERTAIN REASONABLE RESTRICTIONS

Right to privacy is one of the attribute of liberty. Liberty implies the responsible enjoyment of freedom in any politically organized society which is being governed under

³⁵Maneka Gandhi v Union of India AIR 1978 1 SCC 248 at para 48.

³⁶Supra note 24; Para 183; (as per D. Y. Chandrachud, J. and others).

³⁷Ibid.

³⁸Ibid.

³⁹Supra note 24; Para 46; (as per S. A. Bobde, J.)

⁴⁰Supra note 24; Para 42;(as per Chelameswar J.).

⁴¹Supra note 24; Para 36; (as per Abhay Manohar Sapre J.).

rule of law without interfering with the legitimate rights of the others. In any civilized legal system, the liberty or freedom of the people cannot be unrestricted, as unfettered liberty would create a chaos and disorder in the society and the same would not be desirable in the democratic society like India. We the people of India, have our constitutionally protected liberty of thought, expression, belief, faith and worship.⁴² But the aforesaid liberties are not absolute and are subject to reasonable restrictions. It has been well settled that right to privacy is not absolute right and it may be encroached by the State by a law which may sustain the touchstone of permissible restrictions on fundamental rights.⁴³ The permissible restrictions on fundamental rights by a law depriving any person of his/her fundamental right under certain circumstances must satisfy the test of reasonableness. Chelmeswar, J. classified the operation of various kind of reasonableness under part III which may be explained as follows.⁴⁴ First kind is of Article 14 type reasonableness and for this restrictions have been expressly provided under Article 19; Second kind is of a just, fair and reasonable basis type which may be termed as substantive due process and restrictions are as per Article 21 and Thirdly, blended variety of reasonableness consisting of just, fair and reasonable standard under Article 21 and "amorphous standard of 'compelling state interest'".⁴⁵ There is no definite test to adjudge reasonableness of restrictions and for accomplishing the same the following factors are usually considered by the Court the duration and extent of the restrictions; the circumstances under which and the manner in which, that imposition has been authorized.⁴⁶ In view of the aforesaid discussion it may be inferred that right to privacy is an integral part of the fundamental right which has been guaranteed under part III of the Constitution, however it is not absolute right and is subject to reasonable restrictions and the State is authorized to impose reasonable restrictions on the basis of social, moral and compelling public interest in accordance with the provisions established under law.⁴⁷

V. PRIVACY POLICY OF AAROGYA SETU APP

The Central Government has framed a privacy policy for securing personal data of individuals.⁴⁸ Such data collected from the users of the Aarogya Setu App are securely stored on a server operated and managed by the Central Government.⁴⁹ The demographic data⁵⁰ provided by the users are stored on the aforesaid server and a unique digital id, (hereinafter referred as DID), is generated which are used as a virtual identity of the user and all future informations are uploaded along with the DID of the users.⁵¹ The users shall have right to access their profile as well as to modify their

⁴²The Constitution of India, 1950: Preamble.

⁴³Supra note 36.

⁴⁴Supra note 40 at para 43.

⁴⁵Ibid.

⁴⁶M.P. JAIN, Indian Constitutional Law 982 (Fifth Edn. Wadhawa and Company Nagpur 2003).

⁴⁷Supra note 24; Para 35; (as per Abhay Manohar Sapre J.).

⁴⁸Supra note 3.

⁴⁹Ibid. Information collected and manner of collection;

⁵⁰Supra note 7.

⁵¹Supra note 49.



personal informations.⁵² The location data⁵³ are also updated on the server, whenever, self-assessment is done by the user and the duration of stay of the user is for 15 minutes at any place.⁵⁴ When Bluetooth enabled registered users come in contact with each other, the Aarogya Setu App will exchange their DIDs with their GPS location and time.⁵⁵ If any user test positive for Covid -19 or the self-assessment test is either YELLOW or ORANGE, the information will be securely uploaded along with the DID of the users.⁵⁶ The personal data provided by the users will be used by the Government in an anonymized form for the purpose of Covid-19 management and the users will be communicated for any medical and administrative interventions if necessary, whether there is existence of disease cluster in any location, likelihood of the users being infected with Covid-19 etc.⁵⁷ The App is furnished with excellent security system and personal data is uploaded in encrypted form and would not have any accessibility by the others.⁵⁸ All data will be retained on the mobile device for 30 days and if it is not uploaded on the server, the same will be removed from the App and if it has been uploaded the same will be removed from the server after 45 days but in case the user was tested positive with Covid-19 the same will be removed after 60 days after being cured from disease.⁵⁹ Now, we shall examine the issue whether by sharing Response data⁶⁰ to the server of the Central Government, there would be any violation of right to privacy.

VI. INVASION OF RIGHT TO PRIVACY: TRIPLE TEST

As it has been established that right to privacy is not absolute right and the same may be invaded by the State under certain circumstances after testing under triple test as laid down by the Supreme Court. In right to privacy case, on behalf of himself and three more Judges, D. Y. Chandrachud, J. observed that the right to life or personal liberty may be invaded by fulfilling three requirements. Firstly, 'legality' which implies there must be existence of valid law; Secondly, 'need' of such law in order to fulfill the legitimate state aim; and thirdly, 'proportionality' for ensuring reasonable nexus between the object which is required to be achieved and the means for achieving the same.⁶¹ We shall test the privacy policy of the Aarogya Setu App under triple test criteria.

(A) The Existence of Law

There shall be existence of valid law for invading right to privacy. The COVID-19 pandemic is a disaster means a catastrophe or calamity or grave occurrence in India

⁵²Ibid.

⁵³Supra note 10.

⁵⁴Supra note 49.

⁵⁵Ibid.

⁵⁶Ibid.

⁵⁷Use of Information; Ibid.

⁵⁸Ibid.

⁵⁹Ibid.

⁶⁰The "Response Data" is collection of Demographic data, Contact data, Self-Assessment data and Location data of the Aarogya Setu Mobile App users.

⁶¹Supra Note 24; para 180 (as per D. Y. Chandrachud, J. and others).

arising from natural or man-made⁶² and substantially affected human life and caused human suffering physically, psychologically, socially and economically and is of such a nature or magnitude as to be beyond the coping capacity⁶³ of the Indian community. There is a valid law to deal with such a disaster, enacted by the Parliament named as the Disaster Management Act, 2005,⁶⁴ (hereinafter will be referred as DM Act, 2005). This Act empowers the National Authority⁶⁵ to lay down the policies, plans and guidelines for managing with COVID-19 pandemic like disaster.⁶⁶ The Central Government shall constitute a National Executive Committee⁶⁷ to assist the National Authority.⁶⁸ The National Executive Committee would be responsible for implementing the policies and plans of the National Authority and ensure that the directions issued by the Central Government for managing the COVID-19 like disaster are being complied within the country.⁶⁹ The National Executive Committee has in exercise of her power under the DM Act, 2005 and for the purpose of COVID-19 pandemic management in the country provided a useful technological solution in the form of the Aarogya Setu Mobile Application.⁷⁰ The Central Government by Orders⁷¹ constituted Empowered Groups under the DM Act, 2005 for identification of problem areas regarding COVID-19 pandemic and to suggest working solutions therefor. The National Executive Committee for managing the COVID-19 pandemic under the Act of 2005 has created a Technology and Data Management Empowered Group.⁷² The aforesaid empowered group issued several directions regarding collection, protection and systematic utilization of "response data"⁷³ for mitigating and redressing Covid-19 pandemic by Aarogya Setu Mobile Application.⁷⁴ The Central Government is empowered under the Epidemic Diseases Act, 1897⁷⁵ to prevent the outbreak of epidemic disease or the spread thereof

⁶²Covid-19 pandemic may be man-made as investigation is under process. Chinese are suspects.

⁶³Covid-19 pandemic is beyond the coping capacity as there is neither any medicine nor any vaccine against this Novel Corona virus.

⁶⁴Act No. 53 of 2005.

⁶⁵National authority means National Disaster Management Authority established under Section 3 of the Disaster Management Act, 2005 consisting of the Prime Minister of India, who shall be Chairperson, ex officio and other members not exceeding nine.

⁶⁶Under Sub- Clause 2 of Section 6 of the Disaster management Act, 2005, the National Authority may lay down policies, approve the National plan, laydown guidelines to be followed by the State Authorities and take such measures as would be necessary for the prevention and mitigation of Covid-19 pandemic.

⁶⁷Under Section 8 of the Disaster Management Act, 2005, the Central Government shall constitute a National Executive Committee consisting of the Secretary to the Government of India who shall be Chairperson, ex-officio; the Secretaries to the various Ministries or Departments like agriculture, energy, drinking water supply, environment and forest, finance (expenditure), health, power, rural development, science and technology, telecommunication etc. for assisting National Authority.

⁶⁸Ibid.

⁶⁹The Disaster Management Act, 2005 (Act No. 53 of 2005) s. 10.

⁷⁰Vide Orders No. 40-3/2020-DM-1(A) dated 29.03.2020 and 01.05.2020.

⁷¹Ibid.

⁷²Ibid.

⁷³Supra note 60.

⁷⁴Supra note 70.

⁷⁵Act No. 3 of 1897.



and may take special measures.⁷⁶ The DM Act, 2005 has been enacted with an objective to tackle the COVID-19 like disaster in effective manner. The Aarogya Setu Mobile Application fulfilled all the requirement of the DM Act, 2005. Therefore, the privacy policy of the Aarogya Setu qualifies the first test that it is backed by the valid law.

(B) Need of such Law on the basis of the Legitimate State's aim

The second test is the need of such law on the basis of the legitimate aim of the State. The legitimate aim of the of the State is to protect the life and health of the people against the COVID-19 pandemic and for that purpose the DM Act, 2005 enables the State to provide technological solution in the form of Aarogya Setu mobile application against such pandemic. The nature and content of the DM Act, 2005, which enables the Central Government to collect response data⁷⁷ through Aarogya Setu App, is in consonance with the provisions of Article 14 of the Constitution of India and within the ambit and extent of the required reasonableness. One of the requirements of the legitimate State aim is that the law through which the privacy has to be invaded should not suffer from apparent arbitrariness⁷⁸ and the DM Act, 2005 fulfill such requirement. In order to manage COVID-19 there will be requirement of continuous process of planning and implementation of effective measures like prevention, mitigation or reduction of risk, capacity building, preparedness to deal, prompt response to deal with, assessment of the magnitude and rehabilitation of the affected people with COVID-19 disaster.⁷⁹ The Aarogya Setu mobile application is efficient mechanism for managing the COVID-19 pandemic by tracing of infected persons and for taking timely medical intervention and other effective measures for mitigating its spread. The COVID-19 pandemic has potential to cause loss of human life,⁸⁰ socio-economic sufferings,⁸¹ and social sufferings.⁸² The State has its legitimate aim to take effective measures against such sufferings.

(C) Proportionality Test

The third test is proportionality test which is insurance against arbitrary action of the State and it ensures that the nature and quality of the curtailment of right to privacy is not disproportionate to the purpose of the DM Act, 2005.⁸³ In *Elloy de Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*,⁸⁴ the Privy Council held that in order to test the proportionality of any law for abridgement of fundamental

⁷⁶Ibid. S. 2A.

⁷⁷Supra note 60.

⁷⁸Supra note 61.

⁷⁹The Disaster Management Act, 2005 (Act No. 53 of 2005), s. 2.

⁸⁰Many people have been died in India due to COVID-19 pandemic. This is great loss of human resources of the Country. It is prime duty of the State to save precious life.

⁸¹Due to lock down many people have been unemployed or jobless which causes socio-economic sufferings.

⁸²COVID-19 pandemic caused sufferance of the people against socialization as it prevents social gatherings etc.

⁸³Supra note 61.

⁸⁴[1999] 1 AC 69.

rights, the following important points to be considered: (i) the objective of the law should have ample justification for curtailing fundamental rights; (ii) there must be rational nexus with objective of the law and the law itself and (iii) the means to infringe the right or freedom should not be more than necessary to achieve the objective of the law.⁸⁵ The 'compelling state interest' accompanied with 'narrow tailoring'⁸⁶ is another criteria for determining the proportionality test. It was observed by the Supreme Court: "*When the compelling State interest standard is to be employed must depend upon the context of concrete cases.*"⁸⁷ The strictest scrutiny should be the guiding standard for compelling State interest criteria regarding proportionality of Law.⁸⁸ The extent of proportionality is also important considerable factor. The Supreme Court observed that the extent of interference by law must be proportionate to the need for such interference and which should be backed up by the procedural guarantees against the abuse of such interference.⁸⁹ The proportionality test of the DM Act, 2005 has to be carried under the aforesaid criteria. The Objective of the DM Act, 2005 to manage COVID-19 pandemic like disaster and the curtailment of right to privacy by collecting response data collected from the Aarogya Setu mobile application users may be amply justified by the fact that the purpose of such collection is to save the life and protection of the health of the people of India. There is rational nexus with objective of law i.e. effective management of COVID-19 like disasters and the provisions of the DM Act, 2005. The means to infringe right to privacy by collection of response data of the Aarogya Setu users are not more than necessary to achieve the objective of law. As far as test regarding narrow tailoring of the DM Act, 2005 is concerned; it is being clarified by the privacy policy⁹⁰ of the Central Government is committed to protect the personal data collected from the users of the Aarogya Setu App and would be purged from the server after certain specified days. There are compelling State interest to protect the life and health of the people of India which justifies the curtailment of right to privacy. Therefore, from the aforesaid discussion it may be established that laws relating to the Aarogya Setu App qualifies the proportionality test.

⁸⁵Ibid.

⁸⁶"The 'narrow tailoring' means that law must be narrowly framed to achieve the objective" cited from Supra note 24; para no. 45; (as per Chelameswar, J.).

⁸⁷Supra note 24; para no. 45; (as per Chelameswar, J.).

⁸⁸Ibid.

⁸⁹Supra note 24; para no. 71; (as per Sanjay Kishan Kaul, J.).

⁹⁰Supra note 3; Aarogya Setu Privacy Policy.



VII. CONCLUSION

Aarogya Setu mobile application is very useful technological solution for containing COVID-19 pandemic. This pandemic has potential to cause irreparable loss to the most populous and densely crowded country like India. Our health infrastructure is not sufficient enough to sustain the catastrophic situation of the pandemic at the time of peak level. Prevention is better than cure. Aarogya Setu App provides a proactive solution by contact tracing of the infected people with COVID-19, so as to provide timely proactive interventions. In order to have optimal and effective operation of the Aarogya Setu App, it shall be used by maximum number of the people in India so that the tracing of the potentially infected persons can be done and preventive measures may be taken against further spread.

The response data (consisting of demographic data, contact data, self-assessment data and location data) collected from the Aarogya Setu App of the users will have to share to the server of the Central government for processing and other purposes of the mobile application. The issue that by sharing of the response data to the server of the Central government would violate the fundamental right to privacy of the users of Aarogya Setu App, in this regard it is submitted that such right is not absolute right and like other fundamental rights are subject to reasonable restrictions and it may be invaded under certain circumstances by observing triple test as laid down by the Supreme Court in "Right to Privacy Case"⁹¹

In this case, the Court has held that for invading right to privacy, there shall be existence of a valid law; such law is needed for fulfilling legitimate aim of the State and there shall be reasonable nexus with the objective of the law and the law itself for sufficient justification of the invasion of right to privacy i.e. proportionality test. The Aarogya Setu App has been created by the Central Government by exercising its power under the Disaster Management Act, 2005, an existing valid law for managing disasters like COVID-19. The State has legitimate aim to manage such disaster for protecting the life and health of the people of India. This law also satisfies the proportionality test regarding invasion of right to privacy. Therefore, we may conclude that by sharing response data collected from the users of the Aarogya Setu mobile application, there will not be any violation of fundamental right to privacy.

⁹¹Supra note 24.