

STIFLING PRIVACY AND INHIBITING DEMOCRACY: A CASE FOR AADHAAR SCHEME IN INDIA

Himanshi¹

The foremost instance of intellectual anarchy, better known as aadhar, issued by the government of India is meant to be a repository of biometric as well as demographic information of individuals, possibly the largest biometric database to be. It provides an easy access of such data to unaccountable bodies without a legal backing. This paper seeks to look into various aspects of Aadhar as a violation of right to privacy of individuals backed by the principle of waiver of fundamental rights. The first part deals with right to privacy as a fundamental right and its evolution through a catena of judicial decisions to arrive at a conclusion. The second part entails privacy issues within Aadhar and their impact. The third part brings these two points together as a discussion on waiver of fundamental rights as has been construed by the Indian judiciary. The fourth part deals with the doctrine of unconstitutional conditions and its implementation in this context. The paper concludes on a note about the crucial nature and disastrous effects of the system and seeks for the establishment of a more accountable and constitutional procedure.

Keywords: Aadhar, Biometric, Fundamental right, Privacy, Waiver.

¹ School of Law, Christ University, Bangalore.

I. RIGHT TO PRIVACY IN INDIA

Black's law dictionary defines privacy as the right that determines the non-intervention of secret-surveillance and the protection of an individual's information. It has been described as the rightful claim of the individual to determine the extent to which he wishes to share of himself with others and his control over the time, place and circumstances to communicate with others². The concept emerging as a right is clearly a result of individualisation of the concept of welfare as varied from society. Little is found in the constitutional assembly debates on this aspect for the reason that privacy as a constitutional right had little or no legal ground at that time. However, a number of judicial decisions have looked into this aspect as a part of right to life and personal liberty. An exploration of these decisions will help us understand the scope and context of the present matter in a better way.

An 8 judge bench of the apex court in the case of *M.P. Sharma v. Satish Chandra*³ refused the existence of a right to privacy under the Indian constitution. However, the observation made by the court was only a part of the obiter dicta of the case and hence cannot be considered as binding on subsequent judicial decisions. The court stated in a one liner: "*When the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction.*"⁴ The next crucial judgement to this effect came in the case of *Kharak Singh v. State of UP*.⁵ It was held that there is no fundamental right of privacy against the State's authority to keep surveillance on the activities of a person. However, they argued that such a conclusion cannot be good law any

² ADAM CARLYLE BRECKENRIDGE, *THE RIGHT TO PRIVACY*, (University of Nebraska Press, 1971).

³ *M.P. Sharma v. Satish Chandra*, AIR 1954 SC 300.

⁴ THE CENTER FOR INTERNET AND SOCIETY, *Right to privacy in peril*, <http://cis-india.org/internet-governance/blog/right-to-privacy-in-peril> (Last visited Sep. 3, 2016).

⁵ *Kharak Singh v. State of U.P.*, AIR 1963 SC 1295.

more in view of the express declaration made by a seven-Judge bench decision of this Court in *Maneka Gandhi v. Union of India*⁶. The court in this case, expressed deep concern on the protection of a person's freedom against the power exercised by the state and J Subbarao in his partly concurring and partly dissenting opinion stated: "*It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty.*"⁷ It can be construed that right to privacy to an extent was read under Article 21 and hence a constructive interpretation was provided in this aspect.

The case of *Govind v. State of Madhya Pradesh*⁸ basically solidified a protected right to security as a part of individual freedom, to be encroached just by a barely custom fitted law that served a convincing state interest. This proved to be a step ahead in the inclusion of right to privacy under Article 21. In the case of *R. Rajagopal v. State of T.N.*, this court held that the right of privacy has two aspects: the tortious aspect, which provides damages for a breach of individual privacy; and the constitutional aspect, which protects privacy against unlawful governmental intrusion. This distinction brought a clear picture of the scope of constitutional right to privacy being looked into. "*The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a right "to be let alone."* A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters. None can publish anything concerning the above matters without his consent-whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy."⁹ The case of *PUCL v. Union of India*¹⁰ set the ground for strong construction of privacy rights and is one of the most crucial cases citing Kharak Singh, Govind and Rajagopal as an example of privacy being read under Article 21. The most important cases

⁶ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

⁷ *Supra*

⁸ *Govind v. state of Madhya Pradesh*, AIR 1975 SC 1378.

⁹ *R. Rajagopal v. State of Tamil Nadu*, (1994) 6 SCC 632.

¹⁰ *People's Union for Civil Liberties v. Union of India*, 1 SCC 301.

after PUCL have been *Selvi v. State of Karnataka*¹¹, decided in 2010, where it was held that any techniques that interfere with a person's mental processes in order to extract information are an infringement of right to privacy. Recently, in *Ramlila Maidan Incident, In re*¹², the Apex Court cited its previous decisions (including PUCL) to hold that the right to privacy is a fundamental right of the citizens and a part of life under Article 21. Therefore, it can be concluded that there has been a silent consensus among the Indian judiciary to reach at a position where right to privacy stands a solid ground in the constitutional jurisprudence.

II. PRIVACY APPREHENSIONS IN AADHAR

Initially, Privacy concerns were raised by the Parliamentary Standing Committee on Finance which in 2011 rejected the National Identification Authority of India (NIAI) Bill 2010 on the basis of privacy, feasibility, uncertainty.¹³ The correspondence of Aadhar number to the biometrics of an individual enables the government to track all activities of an individual including bank account transactions, personal data and all such information that are synced with their Aadhar number according to the MoU signed with the HRD ministry.¹⁴ The agency responsible for processing the biometric information is an independent agency free from government control and hence the accountability of such a body can be a big question to the validity of Aadhar. The fact that UIDAI is contrary to the sanctity of democracy and its values cannot be denied. However, it is seen similar to social security number in USA which was in fact not an identity document and it is compulsory for the federal agencies to gain the consent of an individual before disclosing their Social security number. Although, the UIDAI scheme is not compulsory in India, the government by declaring it compulsory for a number of schemes has made it de facto necessary for an individual to enrol with the UIDAI. Illuminating the differences between the social security number and the unique identification

¹¹ *Selvi v. State of Karnataka*, (2010) 7 SCC 263.

¹² *Ramlila Maidan Incident, In re* (2012) 5 SCC 1.

¹³ *The Hindu*, *Blow to Aadhaar project as Bill is rejected*, available at <http://www.thehindu.com/news/national/blow-to-aadhaar-project-as-bill-is-rejected/article2698907.ece>, (Last visited on August 5, 2016)

¹⁴ *The Economic Times*, *HRD Ministry signs MOU with UIDAI*, available at http://articles.economictimes.indiatimes.com/2010-10-27/news/27630259_1_uid-number-uidai-unique-identification-authority, (Last visited on August 3, 2016).

scheme, it can as well be compared to UK's failed model of such an identity document. Convergence procedure of this document is matter of major concern as information generated by this scheme can be imparted to other bodies who might use such data for any purpose ranging from profiling to harassing an individual. The only safeguard that has been considered by experts in this scheme can be national security. However, it does not find any mention in the statement of objects of the bill.¹⁵ Also, section 33(b) of the bill provides that such information can be disclosed when considered crucial for national security. The scope of national security is too vague and broad and compromise of an individual's privacy for the sake of such pursuit cannot be justified because of the haziness of the provision and the concept itself. Moreover, the question of who determines what constitutes as a threat to national security is also not answered in clear terms which is again a gigantic threat to an individual's privacy.

III. WAIVER OF THE RIGHT TO PRIVACY

Waiver is defined in the Black's Law Dictionary as "The voluntary relinquishment or abandonment (express or implied) of a legal right or advantage." It stems from the belief that a person is the best judge of his rights and privileges and may choose to give up such rights as and when required. K. K. Venugopal in the apex court tried to invoke the doctrine of waiver while arguing that if an individual wishes to waive his right to privacy in order to gain material advantages from the various schemes under UIDAI. Now, this argument is of crucial significance because more than the logical question of whether a right can be waived, it raises the fundamental aspect of such an activity, that is whether a state can put forth a condition on its citizens (of waiving their rights) in order to grant them benefits whatsoever. However, this aspect is outside the scope of current discussion and an insight into the judicial decisions concerning waiver of fundamental rights will make the picture clear. In the case of *Behram v. State of Maharashtra*¹⁶, Justice Venkatrama made a distinction between rights

¹⁵Ruchi Gupta, Justifying the UIDAI: A Case of PR over Substance? Economic and Political Weekly (Mumbai), (October 2, 2010), <http://www.epw.in/journal/2010/40/discussion/justifying-uidai-case-pr-over-substance.html>

¹⁶ Behram v. State of Maharashtra, AIR 1955 SC 123.

conferring benefits on individuals and rights conferring benefits on general public while it was held that fundamental rights are not merely rights for individual's purpose but it was a matter of public policy and hence waiver of such rights cannot be allowed. Further, in the case of *Basheshar Nath v. IT Commissioner*¹⁷, the court restricted its view to Article 14 and said that right to equality being a sacrosanct and endeared principle of the constitution cannot be waived as the duty to protect such rights is granted to the state and an individual cannot compel the state for omission of the same by waiver of their rights, However, this was a relatively liberal interpretation restricting itself to Article 14. The apex court in the case of *Nar Singh Pal v. Union of India*¹⁸ held that "fundamental rights cannot be bartered away. They cannot be compromised nor there do any estoppel against the exercise of fundamental right available under the constitution."¹⁹ The Hon'ble Supreme Court while listening to a batch of petitions filed regarding privacy apprehensions of Aadhar in an interim order warned against making aadhar compulsory. "No person should be denied any benefits or "suffer" for not having the Aadhaar cards issued by Unique Identification Authority of India."²⁰

However, such stern warnings of the Hon'ble Supreme Court have remained moot in the present circumstances where Aadhar is nothing but de facto necessary to avail the benefits of schemes that offer privileges to a class of people that can hardly prioritise between their rights and certain privileges necessary for their livelihood. Therefore, Aadhar, as an optional privilege conferring scheme is a farce.

IV. THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS

The doctrine of "unconstitutional condition" means any stipulation imposed upon the grant of a governmental privilege which in effect requires the recipient of the privilege to relinquish

¹⁷ *Basheshar Nath v. CIT*, AIR 1959 SC 149.

¹⁸ *Nar Singh Pal v. Union of India*, AIR 2000 SC 1401.

¹⁹ *Id.*

²⁰ *The Hindu, Don't insist on Aadhar, warns SC*, available at <http://www.thehindu.com/news/national/aadhaar-not-mandatory-sc-reiterates/article6999924.ece> (Last visited Aug 8, 2016).

some constitutional right.²¹ This doctrine basically controls the powers of the state with respect to the fact that the state is the grantor of numerous rights; however, it cannot put restrictions on these rights as a condition for the purpose of fulfilment of some aspect. Such restriction or condition would amount to state exercising its powers ultra vires the constitution and hence would be against constitutional principles. The constitution is a sacrosanct document which religiously protects all the rights granted to its individuals, providing this power to the state to allow/ compel individuals to waiver these crucial rights would be a violation of rule of law. This issue assumes a deeper value when it comes to Aadhar since the poorer sections that it is meant for hardly are able to prioritise between the two which is essentially a choice between an allowance and a right. Such a right holds no value to them without a livelihood. Although, the doctrine finds its basis in US law, Dr. Ambedkar made a mention of the same in the constitutional assembly debates when he talked about the aspect in terms of privilege and equality. *“Ask those who are unemployed whether what are called Fundamental Rights are of any value to them. If a person who is unemployed is offered a choice between a job of some sort, with some sort of wages, with no fixed hours of labour and with an interdict on joining a union and the exercise of his right to freedom of speech, association, religion etc., can there be any doubt as to what his choice will be ? How can it be otherwise? The fear of starvation, the fear of losing a house, the fear of losing savings, if any, the fear of being compelled to take children away from school, the fear of having to be a burden on public charity, the fear of having to be burned or buried at public cost are factors too strong to permit a man to stand out for his fundamental rights. The unemployed are thus compelled to relinquish their fundamental rights for the sake of securing the privilege to work and to subsist.”*²² He used the term privilege to mean that for the unprivileged, material benefits would seem much more than their fundamental rights and hence the state cannot be allowed to make use of such condition in order to disregard these rights.²³ The state has a duty to protect and ensure the rights of its citizens against violation or taking away of such rights. Through the Aadhar scheme; the government of India is imposing unconstitutional conditions as right to privacy is being voluntarily waived because of the arbitrariness of state action.

²¹Indian Constitutional law and philosophy, *Aadhar, waiver of fundamental rights and the doctrine of unconstitutional conditions*, available at <https://indconlawphil.wordpress.com/2015/10/06/aadhar-waiver-of-fundamental-rights-and-the-doctrine-of-unconstitutional-conditions/>(Last visited on Sep. 5, 2016).

²²Indian Constitutional law and philosophy, *Ambedkar on unconstitutional conditions*, available at <https://indconlawphil.wordpress.com/tag/unconstitutional-conditions-2/> (Last visited Aug 9, 2016)

²³*Supra*

V. CONCLUSION

The social contract principle behind formation of a state, particularly the idea of giving up of certain rights to the state in order to gain protection and privileges is now a feudal concept and needs to be refurbished. The modern welfare structure of the state ensures rights to its citizens that cannot be taken away by the state itself. In this era, a Government that does not provide right to privacy acts essentially contrary to the principles of democracy and rule of law. Such a state has no fundamentals of a welfare state and such principles or rules need to be scrutinised on the touchstone of constitutionalism. The Aadhaar scheme takes away exactly what it proposes to provide- identity. The biometric data collection and usage might lead to dangerous consequences as it confers arbitrary power at the hands of the state and hence is contrary to the principles of rule of law and that of a person's right to life and personal liberty. The preamble of the Indian constitution provides for ideals that it strives to enshrine within itself such as dignity of an individual. The present case is a clear instance of violation of dignity of individuals and hence qualifies as a matter of crucial importance in the present scenario. It also violates the just, fair and reasonable test for any procedure that interferes with the rights of an individual. Therefore, the aadhar project is a complete imbroglio and needs a framework of change with respect to the right to privacy of individuals and upholding of constitutional values.

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