

RIGHT TO PRIVACY WITH REFERENCE TO THE VALIDITY OF THE AADHAR

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Abstract

The research paper aims to explain the concept of privacy and the constitutional validity of Aadhaar in India and various case laws related to right to privacy and Aadhaar. Right to privacy has been defined under the black laws dictionary as “*A person's right to be let alone and also a right to be free from any unwarranted publicity in matters which the public is not concerned*” and the right to privacy is laid down under the Article 21 of the Indian constitution. Right to privacy is considered as a fundamental right and the government of India has an obligation to protect the rights of its citizens. The paper talks about the validity of Aadhaar with respect to right to privacy and Aadhaar is an identification document which records the details of all the citizens of India and also the Aadhaar number is used as an identification number and the government of India has linked Aadhaar card with many schemes. Aadhaar has many issues related to breach of security and privacy but Aadhaar is a clear and clean justified programme by the government of India. In this research paper, the researcher has used Doctrinal research methodology, as he has used the secondary data which is available in articles and published sources on various websites and the reference material that will be used in the research is going to be mainly of secondary in nature. The objective in this research paper is to know the constitutional validity of Aadhaar in India. Chapter 1 of the paper briefly gives an introduction about the topic and explains about the Aadhaar card and also about the right to privacy in India and chapter 2 of the paper analyses about the jurisprudential overview of right to privacy, constituent assembly debates on right to privacy, and also discusses about the new facets related to privacy in India. Chapter 3 of the paper analyses the Aadhaar in India, positive aspects of Aadhaar, misuses of Aadhaar and mainly analyses the landmark judgment of Aadhaar in a majority and minority view and the chapter 4 of the paper analyses the topic in detail and concludes. The present paper takes it as a task to explain the validity of Aadhaar with respect to right to privacy in India.

Keywords – Right to privacy, Aadhaar, privacy, fundamental right, Identity.

RESEARCH METHODOLOGY

There are two types of methods of study for conducting research work; they are doctrinal and non-doctrinal methods. Doctrinal method deals with conducting research with secondary data which is available as scholarly articles and judicial principles and books. Non doctrinal method is concerned with primary sources of data like the society than the law and it demands the researchers to surveys to do the research work.

In this research paper, the researcher has used Doctrinal research methodology, as he has used the secondary data which was available in articles and published sources on various websites and the reference material that will be used in the research is going to be mainly secondary in nature.

JURISPRUDENTIAL OVERVIEW OF RIGHT TO PRIVACY

The jurisprudential overview of the Right to Privacy is examined in order to understand how the various scholars have viewed this right over time and expressed their views on it.

Aristotle spoke about difference between the public realm of political affairs and the personal sphere of human life. “Aristotle’s distinction between public and private realms can be viewed as a basis for limiting governmental authority to the actions that fall within the public realm and the activities under the private realm are reserved for the private reflection, familial relations and self-determination”.¹ John Stuart Mill enunciated that there is need for a zone within which the citizen's liberty would be unrestrained by state authority and he also stated that the despotism of the majority could be restrained by the recognition of civil rights. Hungarian Jurist, Mate Daniel Szabo defined privacy as “*Privacy is the right of the individual to decide about himself/ herself*”. Jeffrey Reiman defined privacy as, “*A recognition of one's ownership of his or her physical and mental reality and a moral right to his or her self-determination*”. Salmond articulated right to privacy as “*Right to privacy is every individual's interest and therefore it not only needs to be recognised but also needs to be protected from state's interference as well as from third parties*”. A book titled “*Two Treatises on Civil Government*” talks about the “*Right to privacy*” written by John Locke, it was the first book which talked about the privacy and according to the author the natural rights were inviolable and inalienable, hence the privacy has its origin from the natural law theories. Right to Privacy is a fundamental human right that is inextricably linked to person's personality.

¹ Arpit Gupta, *Changing Dimensions of Right to Privacy in India: A Jurisprudential Aspect*, 2. INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES 1, 4(2018).

CONSTITUENT ASSEMBLY DEBATES ON RIGHT TO PRIVACY

In the year 1946, the Constituent Assembly officially began the process of drafting the Constitution. The members from the sub-committee on fundamental rights asserted for the right to privacy to be recognised as a fundamental right. Dr BR Ambedkar in his States and Minorities Report advocated for “*The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures*”. KM Munshi wanted to make the right to privacy of one's communications and the inviolability of one's house a fundamental right.

The inclusion of the right to privacy in the list of fundamental rights was criticised by BN Rau and Alladi Krishnaswamy Ayyar. BN Rau was worried that the right to privacy was being infringed upon by the police's investigation authority. Alladi Krishnaswamy Ayyar, argued that providing the right to privacy and secrecy in communications would be detrimental, elevating every private or civil communication to the level of state papers. This would have a negative impact on civil proceedings in which documents are an integral part of the evidence.

BN Rau and Ayyar persuaded the advisory Committee not to include right to privacy under fundamental rights and the advisory committee did not mention about the right to privacy.

In the year 1948, Kazi Syed Karimuddin proposed to include the right of the people to be secure in their persons, houses and effects against searches and seizures in the Article 14 of the Constitution and cited the Assembly of Ambedkar's similar proposal to the Sub-Committee of Fundamental Rights. This proposal was defeated in the assembly. All the previous attempts to include the right to privacy as a fundamental right have failed.

NEW FACETS RELATED TO RIGHT TO PRIVACY IN INDIA

Surveillance and Privacy - The person is kept under surveillance to check his activities and to ensure that he doesn't commit any further crimes and this raises the question of right to privacy of that person, but to protect the public interest the privacy right of such person should be ignored and also persons who have criminal background and who has the frequency of committing the crime should be kept under surveillance. The right to privacy cannot be distinguished, and it cannot be argued that a person's privacy does not have to be protected if he or she has committed a crime. Justice Harlan introduces a test as solution to the above problem, “reasonable expectation of privacy test”¹. This test indicates that if a person has a reasonable expectation of privacy in a certain area, their privacy can never be infringed. A person's residence can be an example of such a place. One of the requirements is that society recognize a reasonable expectation of privacy in such a place. The Indian Telegraph Act also imposes limitations on the government's ability to conduct surveillance by outlining the situations under which it can do so. This would prevent the invasion of a person's privacy on an arbitrary basis. As a result, it can be stated that, though there are some cases where surveillance law exists, there is still a need for special legislation for right to privacy.

Telephone tapping – A violation of privacy - Telephone conversations are the part of man's private life. The telephone conversions be a critical element of privacy. Right to privacy would include telephone conversation in the privacy of a person. “Telephone-tapping would violate Article 21 of the Constitution of India unless it is permitted under the procedure established by law. The Supreme court held that, telephone tapping infringes the guarantee of free speech and expression Under Article 19(1)(a) unless authorized by Article 19(2)”². According to the Court, the basic rights guaranteed by Articles 19(1)(a) and 21 could not be protected in the lack of standards detailing the steps to be taken to avoid improper message interception and publication. The Court, refused to demand judicial scrutiny before monitoring phone conversations. Unless Parliament intervened by creating provisions under section 7 of the Telegraph Act, the Court ruled that “*Those procedural protections would be required to protect a person's right to privacy.*”

LEGAL STATUS OF RIGHT TO PRIVACY IN INDIA

In the case of “**M.P Sharma v. Satish Chandra**”³, the court stated that the power of search and seizure was not intended to be subjected to a basic right of privacy by the Constitution's drafters. Also, the judgement is unclear on whether the constitutional right to privacy is protected by any other fundamental right. In the year 1962, in the case of “**Kharak Singh v. State of Uttar Pradesh**”⁴, the court stated that though the right to privacy is not a fundamental right, the court upheld it by citing police regulation of night domiciliary visits as an unauthorised invasion of personal liberty.

In the case of “**R. Rajagopal v. State of Tamil Nadu**”,⁵ the supreme court stated that the Article 21 guarantees citizens of this country, the right to life and liberty, which includes the right to privacy. The citizen has the right to protect his or her own privacy, as well as the privacy their family matters.

In the case of “**People's Union of Civil Liberties vs Union of India**”⁶, it was held that Telephone tapping is a major infringement of an individual's right to privacy, according to the court, telephonic conversations are private in nature, making telephone tapping is unlawful unless carried out according to a legal procedure.

¹ Katz v. United States, 389 U.S. 347(1967).

² Amba Uttara Kak and Swati Malik, *Privacy and The National Identification Authority of India Bill: Leaving Much to The Imagination*, 3, NUJS LAW REVIEW, 485 (2010).

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

⁴ Kharak Singh v. State of Uttar Pradesh, AIR 1963 SC 1295.

⁵ R. Rajagopal v. State of Tamil Nadu, AIR 1995 SC 264.

⁶ People's Union for Civil Liberties v. Union of India, AIR 1991 SC 207.

In the case of “**Ram Jethmalani v. Union of India**”,¹ the court held that “The right to privacy is a fundamental element of the right to life, and it is critical that human beings have domains of freedom that are not subject to public observation unless they do anything unlawful”.²

AADHAR IN INDIA

In the year 2010, the NIAI had introduced the Aadhar Bill in Rajya Sabha. “Aadhar is a twelve-digit unique identification number issued to the citizens of India by the central government”³. Unique Identification Authority of India (UIDAI) manages the Aadhar in India. “Aadhaar is an identification document and it records and verifies the details of every resident of India. The aim of the Aadhar Project is to create a unique digital identity for residents as it is linked to various government and financial services”⁴.

The Aadhaar Bill, 2016 was introduced in the Lok Sabha as a money bill in the year 2016 and in the same year the Aadhaar Act, 2016, was passed in the Lok Sabha. Major provisions of the Aadhaar Bill, 2016 have been borrowed from the previous NIAI Bill, 2010. The major difference is that the previous bill's three-member Identity Review Committee has been removed in the new bill. “The Aadhaar Act's section 8 differs significantly from the NIAI bill of 2010. While the NIAI bill confined authentication to a biometric match with a Yes/No option, the Aadhaar Act allows requesting agencies/persons to obtain additional information pertaining to the person's identity”⁵.

The enactment of the Aadhaar Act in 2016, led to the collection of personal data of the citizens and the enrolment of all citizens under the Aadhaar act. The government stated that the citizens enrolled would avail public benefits, subsidies and also Aadhaar was a solution for eradicating existing undesirable elements in society such as corruption, money laundering, and terrorist financing but there was lot of controversies about the privacy-related issues with Aadhaar as in view of maintaining the data online, the privacy of citizens cannot be avoided. The linking of Aadhaar cards to bank accounts has raised many questions about the Right to Privacy of a citizen.

POSITIVE ASPECTS OF AADHAR

LPG Subsidy - The Aadhar card number can be used to get LPG subsidy sum directly to his/ her bank account. Direct Benefit Transfer for LPG Consumers Scheme is known as PAHAL. The person has to link his Aadhar number with 17-digit LPG consumer number and also link the LPG number with the bank account.

Passport - The procedure of getting a passport can be now accelerated with the help of Aadhar. If a person wishes to have a passport, he/she can apply online for the same by just attaching their Aadhaar Card as identity and residence proof with the application and also attach any further proof in general.

Digital Locker – The digital locker system was introduced by the government, where the citizens can store their personal documents on that server and to sign up in Digital Locker, the person is required to link his/her Aadhaar card number.

Voter Id - Linking the voter's Id with Aadhaar is another vital step taken by the government to eradicate false voters. It would become impossible for any voter to possess numerous voter ID cards, if the Aadhaar is linked to the voter's Id.

Monthly Pension - The pensioners must register their Aadhaar card number to their respective department to receive their monthly pension. It was initiated as there were cases of frauds where the applicants who applied for pensions were found to be fake.

Provident Fund – The record holder who enrolls his/her Aadhaar number with worker provident reserve association gets the provident fund cash.

MISUSE OF AADHAAR

Privacy laws - In India, there are no legal provisions for right to privacy and in the present day, person's privacy is of prime importance than anything. A person's credentials or qualifications are used by the government and this leads to data breach. There are no provisions for Indians to secure their private data against misuse by the government.

Misuse of Identity - Reliance Jio agents were arrested for gross misuse of fingerprints which were used for the purpose of activation and sale of Jio Sim cards and this misuse is due to the Central Identities Data Repository which rendered our private data in an insecure and in an unsafe manner.

Data breach - There are several examples of data breaches of Aadhaar numbers via websites run by the government. The private data of around 130 million Aadhaar numbers were leaked from four sites run by the government. Since Aadhaar is linked to several databases, there might be a chance of the data being compromised and therefore can be misused. This is one of the greatest risks that we have with the Aadhaar.

¹ Ram Jethmalani v. Union of India, (2011) 8 SCC 1.

² Rudresh Mandal, *The Aadhar Scheme - Ambitious Plan for India's Future or Violation of the Right to Privacy*, 11, NALSAR STUDENT LAW REVIEW, 197 (2017).

³ RISHIKA TANEJA, SIDHANT KUMAR, *PRIVACY LAW (PRINCIPLES, INJUNCTIONS AND COMPENSATION)* 20 (Abhinandan Malik ed., Eastern Book Company 2014).

⁴ Amba Uttara Kak and Swati Malik, *Privacy and The National Identification Authority of India Bill: Leaving Much to The Imagination*, 3, NUJS LAW REVIEW, 485 (2010).

⁵ Prashant, *Aadhaar versus the right to privacy*, 4, INTERNATIONAL JOURNAL OF LAW 121,132(2018).

Authorization issue - Many citizens face the issue of approvals as their fingerprints are not approved due to similar fingerprints and frequent failure of confirmation of identity of the individual will deprive the individuals' necessary benefits from the government.

ANALYSIS OF LANDMARK JUDGEMENT IN A MAJORITY AND MINORITY VIEW

“Justice K.S. Puttaswamy (Retd.) and Another Vs. Union of India and Others”¹

The apex court ruled that privacy is a basic right, there has been growing concern that the unique identity programme is subject to legal review.

The activists portrayed it as an invasion of residents' privacy, and a big scheme to collect the personal data for exploitation by private parties for governmental monitoring. But the government has argued that it is transformative plan targeted largely at providing benefits and subsidies to the poor.

“The Bench comprised of Justice Chandrachud, Justice Ashok Bhushan, Chief Justice Dipak Misra, Justice A M Khanwilkar and Justice Sikri”.² Justice Chandrachud disagreed with his brother judges and stated Aadhaar is unconstitutional, though the four judges upheld the validity of the Aadhaar Act

Majority View

The Supreme Court held that Aadhaar is a reasonable restraint on individual privacy that serves the government's legitimate goal of providing dignity to a large, marginalised population living in abject poverty and Aadhaar is an unparalleled identity proof.

The bench stated that the Aadhaar and the provisions of the Aadhaar act doesn't create a surveillance state. “The Unique Identification Authority of India and the government held that during the enrolment process, minimal biometric data in the form of iris and fingerprints is collected and it does not collect purpose, location or details of transaction”³. The authentication process is concealed from the internet at large. For authentication requests, the authority is using Registered Devices. The court held that creating a profile of a person solely based on biometric and demographic data available in the Central Identities Data Repository is difficult. However, several data protection provisions have been weakened by the order.

The apex court referred to the earlier Supreme Court decision and determined privacy to be a fundamental right and there are three tests, namely (1) the existence of a law, (2) legitimate state aim, (3) proportionality to fulfilled by any restraint on privacy. The Aadhaar Act and delivery of welfare benefits fulfils the first two tests. The third test of proportionality has been fulfilled because, the purpose of the Act is to ensure that eligible welfare recipients are appropriately identified, as well as to strike a balance between the two fundamental rights, the right to privacy, and the right to food, housing, and employment. But the court held that “the section 7 of the act, which states that the Aadhaar number is in subsidies, benefits and services, would cover only the benefits for which expenditure is drawn from the Consolidated Fund of India and the CBSE, NEET cannot make Aadhaar mandatory as they are not covered by Section 7 and have no legal backing”.⁴

The court allowed the enrolment of children under the Aadhaar Act with the consent of their parents or guardian and there is no requirement of Aadhaar for admission of children to school and also held that Aadhaar can be made mandatory to avail the welfare schemes and also mentioned that no child should be deprived of the welfare schemes though the child doesn't possess Aadhaar card.

The court stated that many sections of the Aadhaar act as unconstitutional and has struck down those sections. The important is the Section 57 of the act, which allows the use of Aadhaar by private companies for creating identification for any purpose, whether by the state, a corporation, or an individual, in accordance with any law or contract.

The court stated that permitting any company or individual to use Aadhaar for authentication, under the terms of a contract between the company and the individual, would allow exploitation of private data and hence it is unconstitutional. “The provision which enables body corporate and individuals to seek authentication, on the basis of a contract between the individual and such body corporate or person, would impinge upon the right to privacy of such individuals. This part of the section, thus, is declared unconstitutional.”⁵

The court stated that to a create unique identification, the Aadhaar is introduced and the citizens can be benefitted by the government subsidy, the expenditure for which would be from the Consolidated Fund of India, hence the act can be passed as a money bill. “The court held that the mandatory provision of Aadhaar to open a bank account or maintain an existing one does not stand the test of proportionality and violates the right to privacy of a person which extends to banking details.”⁶

The bench while examining the right to privacy, the bench held that all the three tests namely, the existence of a law; A legitimate State interest; and the test of proportionality are satisfied.

¹Justice K.S. Puttaswamy (Retd.) and Another Vs. Union of India and Others, AIR 2017 SC 4161.

² V K AHUJA, HUMAN RIGHTS - CONTEMPORARY ISSUES 235(Abhinandan Malik ed., Eastern Book Company 2019).

³ Jeevalaya. V, *The Concept Of Right To Privacy And Constitutional Validity Of Aadhaar*, 7, INDIAN JOURNAL OF RESEARCH, 157(2018).

⁴ V K AHUJA, HUMAN RIGHTS - CONTEMPORARY ISSUES 235(Abhinandan Malik ed., Eastern Book Company 2019).

⁵ Justice K.S. Puttaswamy (Retd.) and Another Vs. Union of India and Others, AIR 2017 SC 4161.

⁶ Shrikrishna Upadhyaya & Sukrit, *A Case for Universal Basic Income in India*, 11, NUJS LAW REVIEW, 2(2018).

Minority View

Justice Chandrachud disagreed and stated Aadhar is unconstitutional. Justice Chandrachud stated that “Introducing the Aadhaar Act as a money bill deprived the power of Rajya Sabha to reject or amend the Bill. Since the Aadhaar Act was introduced as a Money Bill in the Lok Sabha and the recommendations made by the Rajya Sabha were rejected by the Lok Sabha, but the legislative body's legislative responsibility cannot be eliminated by passing a Bill that is not a Money Bill as a Money Bill”.¹ That would be a deception, which a constitutional court would reject. In a democratic society, disagreements must be handled through communication and compromise. It is not possible to resolve differences with other constitutional institution by simply ignoring it. It could be politically advantageous to do so. However, it is unconstitutional under the law and debasing the democratic institution cannot be allowed to pass and it may cause peril to the democratic structures. “The Act thus fails to qualify as a Money Bill under Article 110 of the Constitution, since the Act was passed as a Money Bill, even though it does not qualify to be a money bill and therefore the Act violates Article 110 and is unconstitutional”.²

Justice Chandrachud mentions that the UIDAI is the only authority which regulates the Aadhar project. The Aadhar Act does not give any responsibility to UIDAI to protect the citizens personal information. The Act doesn't talk about the liability of UIDAI. Section 23(2)(s) of the Act, states that the UIDAI is required to establish a grievance redressal mechanism for administering the project, also to address grievances arising from the project. “Section 47 of the Act violates the right to seek remedy. Under Section 47(1), a court can take cognizance of an offence punishable under the Act only on a complaint made by UIDAI or any officer or person authorised by it. There is no grievance redressal mechanism if any breach or offence is committed by UIDAI itself”.³ The Act does not include a mechanism for any individual to seek prompt remedy for data leaks. Section 47 is arbitrary because it lacks a mechanism for individuals to seek effective remedies when their right to privacy is violated.

Justice Chandrachud stated that, state has its welfare obligations to provide benefits to school children who are from the marginalised segments of the society. Instead of enforcing the Aadhaar programme as the exclusive repository of identification, this valid goal can be achieved by implementing less intrusive procedures and the state has failed to demonstrate that a less intrusive measure other than biometric authentication. The state has been able to compel everyone to use the Aadhaar system is due to overbreadth of Section 7. “Consequently, the inclusion of benefits and services in Section 7 suffers from a patent ambiguity, vagueness and overbreadth which renders the inclusion of services and benefits arbitrary and violative of Article 14.”⁴ One right cannot be taken away at the behest of another, particularly when the State has not persuaded the Court that the two rights are mutually incompatible. The state bears the burden of evidence in demonstrating that the Aadhaar scheme's right to food and other benefits could not have been protected without infringing on fundamental rights to privacy and dignity. “Section 7 suffers from overbreadth since the broad definitions of the expressions services and benefits enable the government to regulate almost every facet of its engagement with citizens under the Aadhaar platform. The inclusion of services and benefits in Section 7 is a pre-cursor to the kind of function creep which is inconsistent with the right to informational self-determination, Section 7 is therefore arbitrary and violative of Article 14 in relation to the inclusion of services and benefits as defined.”⁵

Justice Chandrachud stated that a bill to be considered as a Money Bill, must contain provisions which fall within the ambit of the matters mentioned in Article 110. “Section 7 of the Act allows the Aadhaar number to be made mandatory for availing of services, benefits and subsidies for which expenditure is incurred from the Consolidated Fund of India. Under clause (e) of Article 110(1) the money bill must deal with the declaring of any expenditure to be expenditure charged on the Consolidated Fund of India, but the Section 7 does not declare the expenditure incurred on services, benefits or subsidies to be a charge on the Consolidated Fund of India”.⁶ As a result, even Section 7 is not covered by Article 110(1). (e). Despite the fact that Section 7 is deemed preferable to Article 110, this does not apply to the Act's other provisions. Article 110 does not apply to any of the Act's other provisions (1). Adding one provision (Section 7) does not make the Act a Money Bill if the Act's other provisions go beyond the bounds set down in the Constitution. In the year 2019, the supreme court of India declared with a 4:1 majority that the Aadhar Act, 2016 was valid and not violative of the fundamental right to privacy.

CONCLUSION

The Aadhaar project introduced by the government is very effective and has simplified the processes. Everything has two sides on the same coin; there are negative aspects of the Aadhaar project as well. The Government will have to find an effective solution to Aadhar for protecting the welfare of the citizens. Since its inception, the Aadhar case has undergone multiple revisions, with multiple considerations such as citizen protection, serving the interests of justice, and upholding the idea of the Right to Privacy. Finally, it can be said that Aadhaar has long term benefits and the positive aspects of Aadhar outweighs many concerns. But the government needs to work towards negative aspects of Aadhar and also it should take an action against the grievances of the people.

¹ Justice K.S. Puttaswamy (Retd.) and Another Vs. Union of India and Others, AIR 2017 SC 4161.

² RISHIKA TANEJA, SIDHANT KUMAR, *PRIVACY LAW (PRINCIPLES, INJUNCTIONS AND COMPENSATION)* 20 (Abhinandan Malik ed., Eastern Book Company 2014).

³ Amba Uttara Kak and Swati Malik, *Privacy and The National Identification Authority of India Bill: Leaving Much to The Imagination*, 3, NUJS LAW REVIEW, 485 (2010).

⁴ Prashant, *Aadhaar versus the right to privacy*, 4, INTERNATIONAL JOURNAL OF LAW, 121 (2018).

⁵ Rudresh Mandal, *The Aadhaar Scheme - Ambitious Plan for India's Future or Violation of the Right to Privacy*, 11, NALSAR STUDENT LAW REVIEW, 197 (2017).

⁶ Justice K.S. Puttaswamy (Retd.) and Another Vs. Union of India and Others, AIR 2017 SC 4161.