

The Concept of Right to Privacy and Constitutional Validity of Aadhar: A Critique

Aman Malik

Research Scholar, Department of Law, M.D. University, Rohtak

Abstract

In the present paper, an attempt has been made to reflect the concept of the right to privacy in India. The Supreme Court of India has asserted that to treat privacy as a fundamental right, it does not need to be explicitly provided in the Constitution. In India, various changes in Social, Political and Economic fields lead to the acknowledgment of new rights. Law will change according to its social change. The right to privacy is one among such rights and this is guaranteed under Article 21 of the Indian Constitution by the Supreme Court. This right gains significance in the present situation where biometric or Aadhar ID removes duplicate or fake IDs and it also serves as an instrument for government welfare scheme. This paper analyzes the legitimacy of the right to privacy in a changed technological scenario where biometric and demographic data is stored for multipurpose. This also discusses the Constitutional validity of Aadhar and various case laws related to privacy in India. In last suggests valuable suggestions to protect the citizen's privacy in the technological scenario.

Key words: Aadhar, Privacy, Biometric, Data, UIDAI, Constitution

A. Introduction

In the 21st century, a government that fails to protect its citizens' right to privacy cannot reliably maintain the democratic rule of equal treatment under the rule of law.¹ Freedom of expression and association; Religious freedom; The ability to make choices and decisions from the community surrounding social pressures depends on protecting the "private sphere".

The right to privacy is thus placed to protect a private space where man can be alone. Privacy has many facets; some may qualify as a fundamental right, some do not. It can be taken to mean a subcommittee on freedom; however the notion of privacy seems to be larger than freedom in some cases. Every country in the world explicitly recognizes the right to privacy in their constitution. In many countries where privacy is not explicitly recognized in the Constitution, the courts have found that right in other provisions. The right to privacy is of paramount importance in the current scenario of eliminating biometric or Aadhaar ID fake, so it is an excellent tool to benefit people living on the margins through government welfare related programs.²

¹ R. Kataria, Right to privacy: What you need to know?, available at <http://www.lawyersclubindia.com>, visited on 01/06/2019

² S. Tripathi, Right to privacy as a fundamental right: Extent and Limitation, available at, <https://papers.ssrn.com>, visited on 02/06/2019

B. Meaning of Right to Privacy

Privacy is a natural need of a human being to establish personal boundaries and control the entry of others into the area. “Privacy” has grown into a larger and more widespread concept. In India, the right to privacy is not defined in the Constitution or any other law. In general, privacy means the freedom to remain secret or to avoid unnecessary interference in one's personal life or affairs. Privacy is the right to be free from confidential surveillance and to determine when, how, and to whom a person's personal or organizational information should be disclosed.

According to Black’s Law Dictionary “right to be let alone; the right of a person to be free from any unwarranted publicity; the right to live without any unwarranted interference by the public in matters with which the public is not necessarily concerned”.³

Article 21 of the Constitution of India states that “No person shall be deprived of his life or personal liberty except according to procedure established by law”. After reading the Article 21, it has been interpreted that the term ‘life’ includes all those aspects of life which go to make a man’s life meaningful, complete and worth living.⁴

According to The Privacy Bill, 2011

Every individual shall have a right to his privacy — confidentiality of communication made to, or, by him — including his personal correspondence, telephone conversations, telegraph messages, postal, electronic mail and other modes of communication; confidentiality of his private or his family life; protection of his honour and good name; protection from search, detention or exposure of lawful communication between and among individuals; privacy from surveillance; confidentiality of his banking and financial transactions, medical and legal information and protection of data relating to individual.⁵

In the broadest sense, it can be classified as

- (1) Physical: control over others to enjoy a person or situation through one or more human emotions;
- (2) Informational: Restriction on the search or disclosure of facts unknown or unknown to others;
- (3) Decisional: control over interference in decisions specific to an organization;
- (4) Dispositional: The control of trying to know a person's mood.

C. Indian Perspective about Right to Privacy

The concept of privacy can be traced out in the ancient text of Hindus. If one look at the Hitopadesh it says that certain matter (worship, sex and family matters) should be protected from disclosure. But Hitopadesh was related to Positive Morality. So, in ancient Indian text there was vagueness about the right to privacy.⁶ But in modern India first time the issue of right to privacy was discussed in debates of constituent assembly

³ M.S. Mondal, Article 21 of the Constitution and Right to Privacy, available at, <http://www.legalservicesindia.com>, visited on 04/06/19

⁴ id

⁵ B. Yadav, Evolution of right to privacy in India, available at, <http://www.legalserviceindia.com>, visited on, 05/06/2019

⁶ Vigneshwaran, Indian Perspective on the Right to Privacy, available at, <https://legalserviceindia.com>, visited on, 05/06/2019

were K.S. Karimuddin moved an amendment on the lines of the US Constitution, where B.R. Ambedkar gave it only reserved support, it did not secure the incorporation of the right to privacy in the constitution.

The question to recognize a right to privacy arose in *Kharak Singh v. State of U.P.*,⁷ wherein Justice Subbarao in his minority opinion expressed a need to recognize such a right even though it is not expressly granted by the Constitution of India. The petitioner, in the afore-mentioned case, was put under surveillance because of his criminal activities. The surveillance was to keep a watch at the petitioners' house which also involves secret visits to the petitioners' house at night. He challenged such provisions of Secret and domiciliary visits of the U.P. Police Regulation as a violation of his right to privacy. The Court, however, refused to give recognition to right to privacy reason being that the Indian Constitution does not give express recognition to any such right. The same view was observed by the Apex Court in *M.P. Sharma v. Satish Chandra AIR*.⁸

Privacy of an individual needs to be protected as long as it does not adversely affect the public at large. Maintaining social order is the first and the foremost objective of law. Fundamental rights cannot be granted, setting aside the norms set for maintaining social order. However, with the growing information technology and arbitrary use of powers by the Government officials, recognition of such a right is essential but then obviously privacy cannot be an absolute right. Hence, it is important to mention another observation of the Supreme Court in this regard- In *Govind v. State of M.P.*;⁹ the Court laid down the following observation-
 -Court cannot completely rely on a right which is not expressly granted by the Constitution. If the Court did so then it would compel the citizens to question the judicial reliability.
 -Right to privacy cannot be an absolute right and it has to comply with the "state interest test".
 -Surveillance cannot be said to be violating right to life and also right to privacy because only those criminals who are suspected of committing a crime are put under surveillance. This step is necessary to prevent the commission of further crimes.

But the underlining principle in the said case can be said to be that the Court unlike previous other cases did not completely deny the existence of a right of privacy. With the increasing number of incidents with regards to infringement of privacy, it was evident for the Apex Court to give recognition to this right. The saying that law should protect an individual both from person and property is in existence from the common law times. However, the biggest challenge before the Court of Justice was how to maintain the balance of between such a right, public order and also other rights guaranteed by the Constitution.

In *People's Union for Civil Liberties v. Union of India*¹⁰ the Court mentioned as follows-
 "We have; therefore, no hesitation in holding that right to privacy is a part of the right to "life" and "personal liberty" enshrined under Article 21 of the Constitution. Once the facts in a given case constitute a right of privacy, Article 21 is attracted. The said right cannot be curtailed "except according to procedure established by law".

⁷ AIR 1963 SC 1295

⁸ 1954 SC 300

⁹ 1975 SCC 148

¹⁰ AIR 1991 SC 207

On 24 August 2017 the Supreme court in case of Justice Puttaswamy v. Union of India, decided that Indians have a fundamental right to privacy.

D. The Concept of AADHAR

The Unique Identification System of India was introduced in 2009 with the aim of creating an inclusive and efficient welfare system.¹¹ It is the world's largest identity project with over one billion residents registered. The unique biometric-based detection system was developed by the technical expert Nandan Nilekani and his team of inventors. It is designed to help grants and social spending achieve their true goals.¹²

Aadhar is a 12-digit unique-identity number issued to all Indian residents based on their biometric and demographic data. The data is collected by the Unique Identification Authority of India (UIDAI), is a statutory authority established in January 2009 by the Government of India, under the Ministry of Electronics and Information Technology, under the provisions of the Aadhar (Targeted Delivery of Financial and other Subsidies, benefits and services) Act, 2016.

The base product provides a less sophisticated identity than previously done in India and elsewhere in building this system, at a fraction of the cost. Aadhar registered the resident population of India, created an online verification mechanism for the digital world and directed the ecosystem to use the new identity.

Prior to the enactment of the Act, UIDAI functioned as an attached office of Planning Commission (now NITI Aayog) since 28 January 2009. On 3 March 2016, a money bill was introduced in the parliament to give legislative backing to Aadhar. On 11 March 2016, the Aadhar (Targeted Delivery of Financial and other Subsidies, benefits and services) Act, 2016 was passed in the Lok Sabha. On 26 March 2016, this Act was notified in the Gazette of India.

At present, AADHAR has been linked with several schemes and benefits which are run by the government. The purpose of conflict by the legislature is that this plan was taken off for enhancing degree in implementing welfare plans. Aadhar card is utilized to get LPG appropriation sum directly in the financial balance. This DBTL process is named as PAHAL. You can get travel permit or passport in only 10 days. Under this configuration, police check will be done at a later date rather than the past government requiring police confirmation which used to be tedious. Government of India has launched digital locker (Digi-Locker) system for everyone for storing all personal documents on the government's server. And sign-up process for Digi-Locker requires person to link his/her 12 digit Aadhar card number. Aadhar letter given by UIDAI is presently worthy by banks as a substantial evidence to open ledger. Indeed, it can fill in as an address evidence too given address on Aadhar card and address verification flawlessly coordinates.¹³

¹¹ R. Khera, Dissent on Aadhaar: Big Data Meets Big Brother, available at <https://engineering.stanford.edu>, visited on, 06/06/19

¹² id

¹³ V. Jeevalaya, The Concept of Right to Privacy and Constitutional Validity of Aadhar, available at <https://www.worldwidejournals.com>, visited on, 07/06/19

It is very important to note that by merely providing a AADHAR number to an individual, there is no guarantee of developmental accessibility, or rights and benefits that would be accrued to the poor and marginalized communities in India. The National Identification Authority of India Bill, 2010, which has been mooted for the purpose of providing legal status to the AADHAR project, has raised many concerns including, privacy issues, and mechanisms for effective service delivery. More over civil society has pointed out that the legislative and administrative mechanisms created by the AADHAR authority have not been created through a consultative - democratic process.¹⁴

Hundreds of millions of Indians have been added to the biometric database, with successive governments creating pressure by forcing it into social interests. Even after the ruling of our apex Court.¹⁵

E. Impediments of Aadhar

Though the AADHAR tries to build up recognition and legitimacy on the basis of transparency, and delivery of good governance there are also issues of larger importance that have gone unnoticed by many. These include issues of the privacy and dignity of an individual being affected by the proposed AADHAR scheme. The alarming fact is that little concern has been raised by the opposition about the constitutional and human rights implications of the Aadhaar project. It is natural to have fears and doubts about the effectiveness of implementing the Aadhaar project. Therefore, it is important to analyze the socio-political implications in the context of the current political economy in India.¹⁶

Aadhaar jurisprudence is a growing branch of the Cyber Law. The enactment of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 not only clarified various ambiguous issues and legal concerns related to Aadhaar, but also paved the way for creation of Aadhaar as the legal basis for Identification of the person.

No other project has captured people's imagination in recent memory - or such a surprise and discomfort. Aadhaar started life with a single command: identify those Indian residents who had nothing. Along the way, it evolved into the core technology of the welfare state and changed forever how government, business and society interact.

The project will open up huge opportunities for government oversight and commercial data mining. Once Aadhaar becomes an all-purpose identification tool, your life will be as transparent as a contact lens for the state. Your railway booking details, phone call records and financial transactions and more will be accessible to the government.

The main privacy concerns brought about by the Aadhaar project are: regional and data privacy. Aadhaar poses a risk to an individual's privacy, as information circulating in the public domain will now be brought to a stage of conversion by Aadhaar. Officers may misuse this information. Next, there are issues of privacy

¹⁴ G. Goyal & R. Kumar, (2016), "The Right to Privacy in India", 1st Edn., Partridge house Co., New Delhi, p. 104

¹⁵ R. Khera, Dissent on Aadhaar: Big Data Meets Big Brother, available at, <https://engineering.stanford.edu>, visited on 07/06/19

¹⁶ G. Goyal & R. Kumar, (2016), "The Right to Privacy in India", 1st Edn., Partridge house Co., New Delhi, p. 103

breaches due to the use of biometric information in the project. Collection and identification based on biometric information can be understood as a breach of one's territorial privacy and the confidentiality of one's data.

F. Constitutional Validity of Aadhar

In the year 2017, 24 August the nine judge bench of the Supreme court made an important decision in the case of K.S. Puttaswamy Vs. Union of India. It was a remarkable and renowned judgment consist of 547 pages and here the court unanimously held that 19 Art. 21 include right to privacy and it is a fundamental right.¹⁷ This concept of Aadhaar and issuance of Aadhaar is reaping many benefits and saving a person's precious time by making quick transactions. This notion of support violates a person's privacy.

This ruling may indicate a slight impetus for the base camp, but the true test of the fundamental right to privacy will occur when it applies to certain legal cases. As conceived by Justice Louis Brandeis, secrecy as a right to privacy can be understood. Being a right, it is acknowledged to be part of Article 21; Violation of this right by the proposed Aadhaar scheme would seem unconstitutional. The Aadhaar card programmed does not become unconstitutional due to privacy being held as a fundamental right. While the right to privacy case stemmed from a batch of petitions challenging the constitutional validity of the identification scheme, Aadhaar by itself is out of the scope of the judgement. Aadhaar card was purely voluntary” and could not be made mandatory. Privacy in our country is not a right that is clearly stated; therefore, clarity is important as projects such as the AADHAR are increasing the need for individuals to have the right to privacy.

G. Suggestions

1. Legislative Safeguards: We need clear rules to protect our data and privacy, especially regarding biometric information like fingerprints and iris scans. Laws should outline how data can be used, when we need to give permission, and who is responsible if something goes wrong.
2. Transparency and Accountability: Government agencies like UIDAI must be open about what they do with our data and take responsibility if they make mistakes. Regular checks and an independent watchdog can make sure they're doing their job properly, which helps us trust Aadhaar.
3. Public Awareness and Education: People need to know their rights about privacy and understand what Aadhaar means for them. By learning more, we can make smart choices about how we share our information and protect ourselves.
4. Judicial Scrutiny: Courts play a big role in making sure our rights are respected, including privacy rights. They need to carefully consider cases about Aadhaar and privacy to make sure everyone is treated fairly and with respect.

¹⁷ Want to know where your Aadhaar has been used?, India Today, available at, <https://www.indiatoday.in>, visited on, 06/06/19

5. International Collaboration: India should work with other countries to tackle privacy issues together. By sharing ideas and working together, we can find better ways to protect our data in a global world.

H. Conclusion

Aadhar has been linked with several beneficial schemes provided by the government. It tries to build up recognition and legitimacy on the basis of transparency, and delivery of good governance. There are also issues of larger importance that have gone unnoticed by many. From the above discussion, we can conclude that Aadhar project have serious implications on privacy. It has severe impact on territorial and data privacy. It poses enormous risk to an individual's privacy. The information that is now scattered in the public domain will be brought into one point of convergence through the AADHAR. The information can be misused by the authorities. Further, there are issues of privacy infringement due to the use of biometric information in the project. As we already discussed, the objectives of Aadhar scheme is public welfare. So, there is a need to find a middle path to maintain the balance between Aadhar scheme and citizens privacy. The abovementioned suggestions will be helpful for the protection of individual's right to privacy.

