

Aadhar Card and Right to Privacy

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ABSTRACT:

Over the years legal scholars have attempted to define privacy but it is only in the last century this word has been used as a legal concept to describe the state's duty to let its people alone in certain spheres of their lives. Later in the course of its academic and juristic evolution, the concept was described more succinctly as the claim of individuals, groups or institutions to determine for themselves when, how and to what extent information about themselves is communicated to others. The scheme of Aadhar card infringes on people's privacy as there was misuse of power, trust, personal information and data. Biometric data and iris scan that was being collected for issuing AADHAR violated the citizen's fundamental right to privacy as their personal data was not being protected and was vulnerable to exposure and misuse. Privacy is an essential aspect of dignity. *Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and freedom which the Constitution has recognized. Privacy is the ultimate expression of the sanctity of the individual. It is a constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination.* Expression 'life' under Article 21 means not merely the right to a person's "animal existence" and that the expression 'personal liberty' is a guarantee against invasion into the sanctity of a person's home or an intrusion into personal security.

"Privacy is a special kind of independence, which can be understood as an attempt to secure autonomy in at least a few personal and spiritual concerns, if necessary in defiance of all the pressures of modern society. It is an attempt, that is to say, to do more than maintain a posture of self respecting independence toward other men ; it seeks to erect an unbreakable wall of dignity and reserve against the entire world "

- Clinton Rositter, "The Free Man in the Free Society", the essentials of freedom

I. INFRINGEMENT OF PEOPLES RIGHT TO PRIVACY

- The constitutional validity of the Aadhaar system (a nationwide biometric authentication system) had been challenged before the SC. This issue was before a five judge bench of the Court ("Aadhaar Bench"). One in all the key problems is whether or not the norms for compilation of the demographic biometric information by the government violate the right to privacy. To answer this question the SC had to first answer: whether or not there's a constitutionally mandated basic right to privacy. Due conflicting judgments of the SC within the past, the Aadhaar Bench referred this question before a nine judge bench of the SC ("Privacy Bench") to finally verify whether or not there existed a basic right to privacy. To quote the Aadhaar Bench:

"During the course of the hearing today, it seems that it has become essential for us to determine whether there is any fundamental right of privacy under the Indian Constitution. The determination of

this question would essentially entail whether the decision recorded by this Court in **M.P. Sharma and Ors. vs. Satish Chandra, District Magistrate, Delhi and Ors**¹ by an eight-Judge Constitution Bench, and also, in **Kharak Singh vs. The State of U.P. and Ors**² by a six-Judge Constitution Bench, that there is no such fundamental right, is the correct expression of the constitutional position. (**emphasis as per Court order**)”

- The Privacy Bench unanimously held that the right to privacy is fundamental right protected under the Constitution. The judges have delivered 6 judgments: Justice Chandrachud has written on behalf of himself, Chief Justice JS Khehar, Justice Agrawal and Justice Abdul Nazeer (“**Lead Judgment**”). Justice Chelameshwar, Justice Bobde, Justice Sapre, Justice Nariman and Justice Kaul have written separate judgments providing their own findings, conclusions and observations (referred to as “**Single Judge Judgment(s)**”). A consolidated order (“**Order**”) holds that:

The right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution; and The earlier judgments of the SC in Kharak Singh and MP Sharma to the extent they held otherwise are overruled.

- Privacy is a broader concept and data sharing is only one aspect of privacy and subsequently it directly breaches one of the core types of privacy i.e informational privacy.³ Hence privacy protects liberty and that "privacy protection gains for us the freedom to define ourselves and our relations to others"⁴

The statutory requirement of the state collecting the data from citizens and the purpose for which it will be used should be stringent. Law which encroaches upon the right to privacy will have to “withstand the touchstone of permissible restrictions on fundamental rights” Any infringement of privacy must be by a law which is “fair, just and reasonable”. The three-fold requirement for such infringement would be:

-legality, which postulates the existence of law;

-need, defined in terms of a legitimate state aim; and

-proportionality which ensures a rational nexus between the objects and the means adopted to achieve them”⁵

Moreover when the state itself is restricted by law to encroach upon the privacy of an individual, the non-state parties have no authority or room for collecting, using the data and misusing it. Therefore it has breached on

¹ 1950 SCR 1077

² 1962 (1) SCR 332

³ Bhairav Acharya, "The Four Parts of Privacy in India", *Economic & Political Weekly* (2015), Vol. 50 Issue 22, at page 32

⁴ Justice K.S. Puttaswamy and Ors. vs. Union of India (UOI) and Ors. (24.08.2017 - SC) : MANU/SC/1044/2017

⁵ Ibid

people's privacy as the personal data of citizens which was collected and leaked. Furthermore the personal data was also misused and many cases were reported regarding creation of fake AADHAR cards, withdrawal of cash and booking hotel rooms using such fake created AADHAR cards of someone else. This failure has proved that there is breach in the privacy of the people.

The authority shall ensure security of identity information and authentication and records of individuals, including the information stored in the central identities data repository, and shall also ensure that it is secure, protected against access, use or disclosure not permitted under this act or regulations made there under, and against accidental or intentional destruction, loss or damage⁶.

The submission on the invalidity of the statutory provision authorising telephone tapping was based on the right to privacy being a fundamental right Under Articles 19(1) and 21 of the Constitution. Justice Kuldeep Singh adverted to the observations contained in the majority judgment in *Kharak Singh* which led to the invalidation of the provision for domiciliary visits at night under Regulation 236(b). PUCL cited the minority view of Justice Subba Rao as having gone even further by invalidating Regulation 236, in its entirety. The judgment, therefore, construes both the majority and minority judgments as having affirmed the right to privacy as a part of Article 21:

*Article 21 of the Constitution has, therefore, been interpreted by all the seven learned Judges in Kharak Singh case MANU/SC/0085/1962 : [(1964) 1 SCR 332: AIR 1963 SC 1295] (majority and the minority opinions) to include that "right to privacy" as a part of the right to "protection of life and personal liberty" guaranteed under the said Article.*⁷

- 1) Similarly, in *PUCL v. Union of India*, MANU/SC/0149/1997 : (1997) 1 SCC 301, this Court dealt with telephone tapping 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 to privacy, Article 21 is attracted. The said right cannot be curtailed "except according to procedure established by law".*⁸

- 2) The Grand Chamber of 18 judges at the ECtHR, in *S. and Marper v. United Kingdom* (supra), examined the claim of the applicants that their Right to Respect for Private Life Under Article 8 was being violated as their fingerprints, cell samples and DNA profiles were retained in a database after successful

⁶ The gazette of India, the Adhar Act 2016, chapter VI, pg 10.

⁷ Justice K.S. Puttaswamy and Ors. vs. Union of India (UOI) and Ors. (24.08.2017 - SC) : MANU/SC/1044/2017

⁸ Justice K.S. Puttaswamy and Ors. vs. Union of India (UOI) and Ors. (24.08.2017 - SC) : MANU/SC/1044/2017

termination of criminal proceedings against them. The Court held that there had been a violation of Article 8 of the Convention. Finding that the retention at issue had constituted a disproportionate interference with the applicants' right to respect for private life, the Court held that "the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons...fails to strike a fair balance between the competing public and private interests and that the Respondent State has overstepped any acceptable margin of appreciation". It was further held that:

The mere storing of data relating to the private life of an individual amounts to an interference within the meaning of Article 8. However, in determining whether the personal information retained by the authorities involves any of the private-life aspects mentioned above, the Court will have due regard to the specific context in which the information at issue has been recorded and retained, the nature of the records, the way in which these records are used and processed and the results that may be obtained.⁹

II. IS AADHAR SCHEME VALID OR DOES IT VIOLATE THE CONSTITUTION

- 1) It is clear that the right of privacy is an inalienable human right which in every person by virtue of the fact that he or she is a human being.¹⁰ Privacy is an element of human dignity, and ensures that a human being can lead a life of dignity by, among other things, exercising a right to make essential choices, to express oneself, dissent, etc. Dignity was, consequently, an intrinsic aspect of the right to life and liberty enshrined under Article 21 of the Constitution, as 'life' was not limited to mere existence, but was made worth living because of the attendant freedom of dignity. It was only when life could be lived with dignity that liberty could be of any substance.
- 2) Despite there is no specific right of privacy in the constitution, privacy as fundamental constitutional value was a part of India's commitment¹¹ to safeguard human rights under international law under the International Covenant of Civil and Political Rights ("ICCPR") which found reference in domestic law under the Protection of Human Rights Act, 1993.
- 3) Similarly, the International Covenant on Civil and Political Rights was adopted on 16 December 1979 and came into effect on 23 March 1976. India ratified it on 11 December 1977. Article 17 of the ICCPR provides thus:

⁹ Ibid

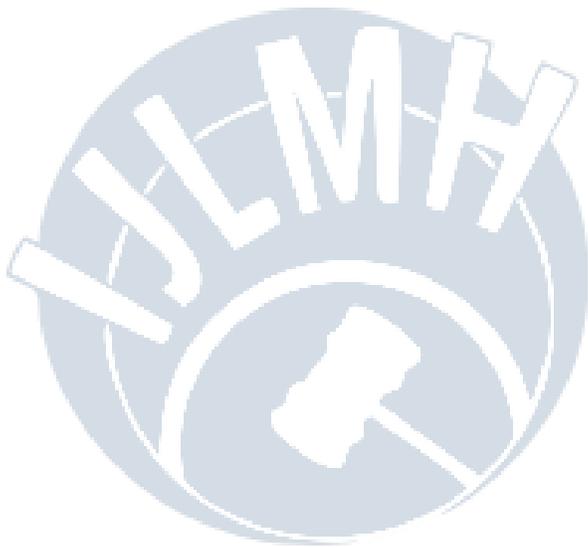
¹⁰ Justice K.S. Puttaswamy and Ors. vs. Union of India (UOI) and Ors. (24.08.2017 - SC) : MANU/SC/1044/201

¹¹Article 51(c) of the Constitution, which forms part of the Directive Principles mandates that India foster respect for international law and its treaty obligations

The obligations imposed by this Article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of the right.”¹²

4) The Universal Declaration of Human Rights too specifically recognizes a right to privacy as under¹³

“Article 12 : No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”¹⁴



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¹² Article 17 of the ICCPR states: 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation 2. Everyone has the right to the protection of the law against such interference or attacks.

¹³ Article 12, Universal Declaration of Human Rights

¹⁴ Justice K.S. Puttaswamy and Ors. vs. Union of India (UOI) and Ors. (24.08.2017 - SC) : MANU/SC/1044/2017