



CHANGING PERSPECTIVES OF SUPREME COURT INTERPRETATION ON RIGHT TO PRIVACY-WITH SPECIAL CONTEXT TO AADHAAR

Law

R. Mangayarkarasi III LLB(HONS)

ABSTRACT

The term privacy is considered to be the crucial term in our society which has emerged recently and our society has witnessed this term for the past few years. In the recent times, there has been numerous debates on the concept of right to privacy i.e. whether our constitution guarantees the right to privacy and its reasonable restrictions, its non-recognition by some courts and this right has been recognized by the other courts. A lot of Indian jurists has thought whether Art.21 which guarantees right to life includes right to privacy also. But there is no clear cut legal or theoretical frame work to help us in this context. According to Clinton Rossiter 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. This paper deals with the concept of privacy and the constitutional validity of Aadhaar and Supreme court interpretation on different case laws related to right to privacy in India.

KEYWORDS

Aadhaar, *K.S Puttaswamy v. Union of India*, Fundamental Right, Privacy, Article 21 of the Constitution.

INTRODUCTION

In a landmark decision, the Supreme Court unanimously ruled that the right to privacy was a fundamental right under the Constitution. A nine-judge Constitution bench headed by Chief Justice J.S. Khehar ruled that "right to privacy is an intrinsic part of Right to Life and Personal Liberty under Article 21 and entire Part III of the Constitution". Freedoms of press means freedom to present, publish, broadcast, circulate and transmit through any media, news to the masses. This has won freedom for ideas, people and nations throughout the world. It has been through a long battle that this freedom, which eventually emerged victorious in democratic countries. This is explicit from its adaptation in the First amendment of the American Constitution in 1791 which stated that "The Congress shall make no law ...abridging the freedom of speech or of the press..."

The ruling on the highly contentious issue was to deal with a batch of petitions challenging the Centre's move to make Aadhaar mandatory for availing the benefits of various social welfare schemes. The technology and privacy law team of Nishith Desai Associates has presented the analysis of the landmark Supreme Court ("SC") judgment of Justice *K.S Puttaswamy (Retd.) v. Union of India* and Ors.² Justice Nariman has also discussed the state's argument on the "reasonable expectation of privacy test", which provides that, "if information is voluntarily parted with by an individual, no right to privacy exists", as was laid down in *Katz v. United States*³ Justice Nariman has rejected the state's argument that the Court should follow the "reasonable expectation of privacy test", while determining the contours of the right to privacy by referring to the judgment of the SC in District Registrar and Collector, *Hyderabad & Anr. v. Canara Bank*, etc.³, and thereby holding that that the "reasonable expectation of privacy test" has no plausible foundation under Article's 14, 19, 20 and 21 of the Constitution of India.

REVIEW OF LITERATURE

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7. The News of the World? by Peter Burden
8. Bounce by Matthew Syed
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RESEARCH METHODOLOGY

The Research Methodology adopted by the Researcher is the Doctrinal form and the author has referred the secondary sources in doing the research analysis.

RESEARCH QUESTION

- 1) The constitutional validity of the Aadhaar system (a nationwide biometric identification system)
- 2) One of the key issues is whether the norms for compilation of the demographic biometric data by the government violates the right to privacy.
- 3) Whether there is a constitutionally mandated fundamental right to privacy.

HYPOTHESIS

Aadhaar violates the right to privacy guaranteed under Art 21 of the constitution.

SUPREME COURT JUDGEMENT ON AADHAAR ISSUES

The Supreme Court, in its final judgement on Aadhaar upheld the validity of it and further stated that the Aadhaar Act does not violate the right to privacy when a person agrees to share his biometric data. However, the Supreme court barred the private companies from making use of aadhaar card for the purpose of KYC authentication. At the same time the apex court held that aadhaar will still be in use for various other purposes which would include PAN card and ITR filling. Certain important aspects of the judgement in the case of *K.S Puttaswamy v. Union of India* are to be viewed in a detailed sense, for the purpose of better understanding of the ruling of the court on the issue of right to privacy concerning aadhaar.

While deciding the case of *K S Puttaswamy v. Union of India*, a five constitutional judge bench which was headed by the then chief justice of India Deepak Misra held that Aadhaar would be mandatory for the sake of filling of income tax returns and also for the allotment of Permanent Account Number (PAN). Hence a taxpayer or a person in need of PAN card cannot shun from the Aadhaar. The apex court ruled that Aadhaar is no longer a requirement for the students appearing for CBSE, NEET and UGC exams. In addition to this, the court also held that schools are no longer allowed to seek Aadhaar for the purpose of admission. When it comes to availing of facilities from the welfare schemes brought by the government is a must. Also, for the sake of making use of government subsidies Aadhaar is a must as the subsidies schemes are brought into effect for the very purpose of upliftment of the poor and the people from the marginalized sectors.

The Supreme Court, while delivering the judgement, went a step ahead and struck down section 57 of Aadhaar Act and termed it unconstitutional. By undertaking this measure, the Supreme Court ensured that no private entity or company can now seek aadhaar details from its employees.

While delivering the judgement, the top court also struck down the National Security Exception under Aadhaar Act. This particular act was undertaken by the government to indirectly provide greater privacy to an individual's aadhaar privacy to an individual's aadhaar data and the same was ensured by way of restricting the government access to it.

The Supreme Court while delivering the judgement made a special

exception to children and further held that no child should be denied of the governmental schemes if he or she does not have aadhaar.

JUDICIAL CRITICAL INTERPRETATION

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.² by an eight-Judge Constitution Bench, and also, in *Kharak Singh vs. The State of U.P. and Ors.*³ 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 judgments in total run into 547 pages. The judgments trace the history of Indian constitution, development of jurisprudence with respect to fundamental rights through various SC cases, examine scholastic articles, foreign jurisprudence and case laws and of course international treaties.

The Lead Judgment starts by acknowledging that (i) Privacy allows each individual / person to be left alone in a core which is inviolable; (ii) this autonomy is conditioned by their relationships with the rest of society; (iii) those relationships pose questions to autonomy and free choice. The overarching presence of state and non-state entities regulates aspects of social existence which bear upon the freedom of the individual; and (iv) privacy is required to be analyzed in an interconnected world and the SC has to be sensitive to the needs of and the opportunities and dangers posed to liberty in a digital world. The Single Judge Judgments also refer to digital economy and non-state parties' role. The Lead Judgment relied upon SC judgment in the matter of District Registrar and Collector, *Hyderabad v Canara Bank*⁴ in relation to the informational privacy in the hands of the nationalized Bank. Some Judgments also refer to the recommendations made by the Expert Group's Report set up earlier by the government in 2012, proposing a framework for the protection of privacy concerns in India.⁵ However, no binding observations have been made by the SC with respect to the recommendations made by the Expert Group.⁶

Though the Lead Judgment and Single Judge Judgments reach the same conclusion, each judgment deals with arguments of the petitioner and the state separately and at times in slightly different manner. Hence, an in depth analysis may be required of different aspects to arrive at the binding ratio. Some aspects dealt with in Single Judge Judgments may not be dealt with in the Lead Judgment or may not be dealt with in equal detail. In such cases, the binding nature of such aspect will have to be analyzed further.

Further, all earlier cases that deal with the fundamental rights, its ambit and principles on which restraint may be applied to its exercise will be applicable with respect to privacy as a fundamental right. Hence, in subsequent cases when state action is challenged on the ground of privacy, in addition to the present case, such earlier cases may also come to aid.

The SC's ruling is rooted, inter alia, in the following reasoning: Privacy as an inalienable right: Privacy is a natural right, inherent to a human being. It is thus a pre-constitutional right which vests in humans by virtue of the fact that they are human. The right has been preserved and recognized by the Constitution, not created by it. Privacy is not bestowed upon an individual by the state, nor capable of being taken away by it. It is thus inalienable.

Relationship with Dignity: It was argued by the state that the recognition of privacy would require a Constitutional amendment, and could not be 'interpreted' into the Constitution. The judgment has recognized that privacy was intrinsic to other liberties guaranteed as fundamental rights under the Constitution. 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.

Commitment to International Obligations: The recognition of privacy as fundamental constitutional value was a part of India's commitment⁷ 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. The ICCPR recognizes a right to privacy.⁸ The Universal Declaration of Human Rights too specifically recognizes a right to privacy.⁹

WHAT IS THE BIG DEAL ABOUT PRIVACY?

It traced its recognition in the right to life and personal liberty under Article 21 of the Constitution of India ("Constitution"), but found that it was also footed in certain other rights, such as Article 19¹⁰. Privacy is the basis of the freedom to dissent. With unfettered surveillance, every time you disagree with the state, they can take advantage of the huge imbalance of information between them and you. They can put you under pressure to concede or use information that you did not even know they possessed to embattle you in Court. And their story need not be true.

The availability of mass data does not automatically reveal the truth. The truth has to be extracted from it. The details of your phone calls, movements, purchases, demographics and social interactions can be used to construct any number of different truths.

NEED FOR ELEVATING IT TO THE STATUS OF FUNDAMENTAL RIGHT

Privacy can be otherwise protected through codified mechanism through a statute then why do we need as sacrosanct as a constitutional right? The reason that we elevate to the status of fundamental right is take outside the ambit of the legislative majority so that no brutal majority is in a position to overturn the particular right. Because a statutory right is effectively a creature of a particular statute and therefore it can be curtailed where as a fundamental right is there for all time to come and forms part of basic structure.

RELEVANCE AND CONTEMPORARY STANDPOINT

From relevance and contemporary stand point the fact that privacy is extremely important concern in technology intensive society which aims to become information based society especially at a time when we are pushing for Digital India.

AADHAAR AND THE RIGHT TO PRIVACY

Recently, the Supreme Court of India refused simultaneous applications by multiple agencies demanding relief from the Supreme Court's interim order limiting the use of Aadhaar pending the Court's final decision.

In the context of this evaluation, it is imperative to note that the Aadhaar scheme which was first introduced as a means of targeted distribution of subsidies, is today being implemented towards a variety of purposes, including the fight against black money, transaction authentication, and 'know your customer' requirements for banks and telecom companies. Aspects of Aadhaar Act, such as (i) security of the Aadhaar system, (ii) the inability of the individual to file complaints (for violation under the Aadhaar Act) relating to theft or misuse of their data,¹¹ and (iii) the inability to withdraw / delete one's data once registered with the UIDAI, will also likely come under scrutiny.

The following observations of the court in the judgment throw light on some of the questions surrounding the Aadhaar challenge. First, while the court rejected the argument that furtherance of welfare objectives should take precedence over right to privacy,¹² it has indicated that the fulfillment of welfare objectives would be a legitimate aim towards which the right to privacy could be infringed (provided the other conditions of a reasonable restriction are met).¹³ Secondly, the primacy of individual consent (in relation to one's data / information) as highlighted by the Court¹⁴, provides possible context to the discussion on the mandatory and permanent nature of the Aadhaar. The court has

referred these government applications to a constitutional bench. With this, on one side the court has assured Indians that a decision on their fundamental rights will not be long delayed and on the other side it has increased pressure on the government.

The court has asked the government to address the most basic questions in a democracy governed by the law: what are the privacy rights of its citizens; and are they protected equally, with the same justice for the rich and the poor alike?

WHY THERE IS A NEED TO PROTECT CITIZEN INFORMATION?

Identifying citizens for providing various services, maintaining security and crime-related surveillance and performing governance functions, all involve the collection of information.

In recent years, owing to technological developments and emerging administrative challenges, several national programmes and schemes are being implemented through information technology platforms, using computerized data collected from citizens.

With more and more transactions being done over the Internet, such information is vulnerable to theft and misuse. Therefore, it is imperative that any system of data collection should factor in privacy risks and include procedures and systems to protect citizen information.

WHAT SHOULD THE GOVERNMENT DO?

Instead of arguing that privacy is not a fundamental right, it should assure the court that it has the technology and systems to protect the data collected. It should assure the citizens of India that it will do everything possible to prevent unauthorized disclosure of or access to such data.

It should recognize all dimensions of the right to privacy and address concerns about data safety, protection from unauthorized interception, surveillance, use of personal identifiers and bodily privacy. The data controller should be made accountable for the collection, processing and use to which data are put.

CENTRE'S STAND ON AADHAAR LINKAGE

While the judgment itself does not seek to (and was not intended) to answer the constitutional challenge to The Aadhaar (Targeted Delivery of Financial And Other Subsidies, Benefits And Services) Act, 2016 ("Aadhaar Act"), the judgments will have bearing on Aadhaar ruling. The Aadhaar Act will have to satisfy the three pronged test as discussed above, since under the Aadhaar Act personal information such as biometric information is collected and processed by the government. Other than Aadhaar Act itself, the manner in which the use of Aadhaar Card is being mandated by the government for various purposes, will also need to be tested on the basis of the privacy judgment. Strongly backing the Aadhaar scheme, the Centre submitted that the right to life of millions of poor in the country through food, shelter and welfare measures was far more important than privacy concerns raised by the elite class.

Controversially, Attorney General K K Venugopal arguing for the Centre also stated that privacy claims required better priority in developed countries "not in a country like India where a vast majority of citizens don't have access to basic needs".

The government was categorical that after enrolling nearly 100 crore citizens spending an astronomical amount of Rs. 6,300 crore there was no going back. He said the right to privacy cannot be invoked to scrap the Aadhaar scheme. Right to Privacy was always known or assumed to be a common law right. Occasionally, it was recognised in some verdicts as a fundamental right.

In concluding that "the right to be left alone" is an inalienable part of being human, the court has restated a fundamental principle, namely that some rights are natural and inherent; constitutions only recognize them and make them explicit.

In the interim period of two years of a wait for the Right to Privacy judgement, the Government of India has violated the prior orders of the Court restraining the use and expansion of Aadhaar.

It has linked and made Aadhaar mandatory for filing taxes, operating

bank accounts, for children's schemes to get school lunches, scholarships, taking exams, stipends for the disabled, causing hardship to ordinary citizens.

So, it became necessary mainly due to a strange and perverse argument by the Union government in the course of the hearings on the validity of its Aadhaar-based unique identity scheme that privacy is not a fundamental right.

WHAT IMPLICATIONS THE RULING WOULD HAVE ON STATE POLICY AND CITIZENS' RIGHTS

A welcome aspect of the judgment is that it makes it clear that sexual orientation is part of privacy and constitutionally protected, and that the 2014 verdict upholding Section 377 of the Indian Penal Code is to be questioned. This opens up the case for a much-needed reconsideration. As for Aadhaar, it is pertinent to note that the judges have referred to the restrictions and limitations that privacy would be subject to.

The test to decide the validity of any such restriction is that it is reasonable based on fair procedure and free from arbitrariness or selective targeting or profiling. It can also be based on compelling state interest. This is where a cautionary note is in order. Courts exercising writ jurisdiction should be cautious about the nature of the relief they grant based on wide and open-ended claims of breach of privacy. The verdict has advanced and revived core constitutional principles in an era in which privacy is compromised against state interest. Somehow, privacy as a value finds itself, at loggerheads with notions of national security, the needs of a knowledge society and Socio-economic policy. Hopefully, this judgment will set many such concerns at rest and bring about a more equitable relationship between citizen and state.

CONCLUSION

The right to privacy broadly encompasses physical privacy, informational privacy and decisional autonomy. The interplay of technological advances and the right to privacy in the digital age needs to be closely scrutinised. The nine-judge bench has rightly emphasised the need for data protection laws — a task now entrusted, at a preliminary stage, to the Justice Srikrishna Committee. Justice Kaul has stated in Para 70 of his opinion that:

"The State must ensure that information is not used without the consent of users and that it is used for the purpose and to the extent it was disclosed"

This assertion has been supported by an observation by Justice Chandrachud in Para 177 of the Lead Judgement¹⁵ Read together, it appears that the need for 'consent' in the data protection regime will be one that is constitutionally mandated as part of the right to privacy. But, irrespective of any technological changes, the respect of the right of individuals to make a choice of how and where they want to live, work and pursue their individual dreams must be protected. Nine judges of the Supreme Court have protected, for decades to come, the most important right emphasized by Justice Brandeis: The right to be left alone.

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27. Article 51 of the Constitution, which forms part of the Directive Principles mandates that India foster respect for international law and its treaty obligations
28. 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.
29. Article 12, Universal Declaration of Human Rights
30. Article 19 of Constitution of India: Protection of certain rights regarding freedom of speech etc.
31. See Section 47, the Aadhaar Act;
32. Paragraph 154-155 of the Lead Judgment, Paragraph 45 of Justice Nariman's judgment
33. Paragraph 154-155 of the Lead Judgment..
34. Paragraph 176 of the Lead Judgment.
35. 15 "The sphere of privacy stretches at one end to those intimate matters to which a reasonable expectation of privacy may attach. It expresses a right to be left alone. A broader connotation which has emerged in academic literature of a comparatively recent origin is related to the protection of one's identity. Data protection relates closely with the latter sphere. Data such as medical information would be a category to which a reasonable expectation of privacy attaches.. This is evident from the emphasis in the European data protection regime on the centrality of consent. Related to the issue of consent is the requirement of transparency which requires a disclosure by the data recipient of information pertaining to data transfer and use"