

RIGHT TO PRIVACY- IS UIDAI A VIOLATION OF AN INDIVIDUAL'S 'FUNDAMENTAL RIGHT'?

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RIGHT TO PRIVACY

Right to privacy is vested within right to life and liberty under article 21. A citizen under this right has the right to protect and safeguard the liberty of his own, his family, marriage, procreation, motherhood, childbearing and education among other matters. Before getting into the discussion of right to privacy and its infringement first we should be clear with the word that is "Privacy". According to black's law dictionary "right to be left alone; right of a person to be free from any unwarranted publicity; right to live freely from any unwarranted interference by the public in matter with which public is not necessarily concerned". The expanded scope of article 21 has been explained by the apex court in *Unni Krishnan v. State of A.P*¹ providing that the ambit of article 21 also includes the various other rights as mentioned below²:

1. Right not to be subjected to bounded labor and to be rehabilitated³ after release.
2. Right to hearing
3. Right to information
4. Right to privacy
5. Right to go abroad
6. Right to legal aid
7. Right against public hanging
8. Right to reputation
9. Right against solitary confinement
10. Right against delayed execution
11. Right of decent burial or cremation
12. Right to freedom from noise pollution
13. Right against custodial violence
14. Right against bar falters and handcuffing

¹ (1964)1 SCR 332

² Dr. Durga Das Basu, *Introduction to the constitution of India 118(21st ed.,2013)*

³ State of Madhya Pradesh v. Medha Patkar, AIR (2011) SC 3827(3832)

15. Right to family pension(release)
16. Right to good health⁴
17. Right to speedy, fair and open trail⁵

It was also observed in this case that Article 21 is the heart of fundamental rights and it has extended the scope of Article 21 by observing that the life includes education as well as, as the right to education flows from the right to life. The scope of article 21 is very broad and it covers every aspect of life which is required for an individual to live a healthy and secured life. If we talk of right to privacy then it also contains a broad scope in it like tapping of telephonic conversation⁶, disclosure of dreadful disease⁷, right to privacy and subjecting to medical tests⁸, women's right to make reproductive choices.

In the case *PUCL v. Union Of India*⁹, with respect to the wiretapping of politician's phone calls to be considered as unconstitutional, it was held that The Right to Privacy has not been itself identified under the constitution .As a concept it may be too broad and moralistic to define it judicially .Whether the Right To Privacy can be claimed as or has infringed in a given case would depend upon the facts of the given case. However the court went on to hold that the “the right to hold a telephone conversation in the privacy of one's home or office without any interference can be claimed as right to privacy. From article 19 Right To Privacy can be derived as follows “When a person is talking on telephone, he is exercising his freedom of speech and expression”, the court observed and therefore “telephone-tapping unless it comes within the grounds of restriction under article 19(2) would infract article 19(a) of the constitution”. In *R.M. Malkani v. State of Maharashtra*¹⁰, the supreme court held that the telephonic conversation of an innocent citizen will be protected by the court against the wrongful interference of tapping the conversation but this protection does not stands for the guilty citizen against the efforts of the police to vindicate the law and prevent corruption of the public servant. “Article 21 relates to protection to life and liberty which enables the wife to live with human dignity. The medical test conducted to decide whether the marriage has not been consummated owing to the impotence of the husband could not be against his privacy”¹¹. In the case of *Mohammad. Latif Bhat v. Shamima*¹² it is stated that, the right to privacy is not offended so as to attract the immunity under article 21 of the constitution where a strong prima facie case existed warranting the direction for medical examination of the petitioner for the determination of impotency.

⁴Occupational Health & Safety association v. union of India, AIR (2014)SC 1469

⁵ Vakil Prasad Singh v. state of Bihar, AIR (2009) SC 1822

⁶ *supra*

⁷ Mr. X v. Hospital Z, AIR (1995) SC 95

⁸Sharda v. Dharmpal, AIR (2003) SC 3450

⁹ AIR (1997) SC 568

¹⁰ AIR (1973) SC 157

¹¹ B.Madhan v. N.S. Shanthakumari, AIR (2015) Mad 78.

¹² AIR (2012) J&K 10 (137)

Not only this but recording the conversation of wife by husband without the knowledge will also amount to infringement of her right to privacy as stated in the case of *Rayala M. Bhuvaneshwari v. Nagaphanender Rayala*.¹³ Through these cases and the judgment given by the court it is clear that right to privacy is not only a part of constitution but it also contains different aspects that deals with different types of privacies that an individual have irrespective of the status in society or relation with the person who's right has been violated. When tapping of telephonic conversation and reproductive choice can be considered as right to privacy then how giving our biometric details cannot be considered as infringement of right to privacy. The privacy based arguments have been used to support the conservative claims that neither the government nor the fellow citizens can interfere with the traditional practices merely for the sake of progressive ideas about marriage, family ,social life, or citizenship.¹⁴ .

Right to privacy in India has evolved in three streams where first one deals with the surveillance, second one dealing with the protection of autonomy of fundamental personal choice from social morality and the last one deals with the main portion that is concern with the biometrics and bodily privacy is restrictive under Indian laws. The identification of prisoner act, 1920 and Indian evidence act,1872 provides the right to forcefully take biometrics information's of suspect and convict and court also allow non-consensual taking of biometrics information for the welfare of public health and morality. In 2001,high court of Andhra Pradesh has overturned the privacy argument to permit non-consensual HIV test In certain condition¹⁵ and in the same year supreme court stated that non-consensual administrative of truth serum, lie detectors and mind mapping does not violate the right to privacy instead they offended the freedom of self -incrimination¹⁶. The Information Technology Act,2000 contains several provisions for data protection. In April 2011,the Ministry Of Information and Technology, notified rules¹⁷ under sec 43A in order to define "sensitive personal information" and to prescribe "reasonable security practices" that body corporates must observe in relation to the information they hold. Rule 3 of these regulations also contain password, medical records, biometric, physical, physiological and mental health conditions. Body corporate are forbidden by the rules from collecting sensitive personal information unless:

(a) the information is collected for a lawful purpose connected with a function or activity of the agency.

(b)the collection of the information is necessary for that purpose .¹⁸

¹³ AIR (2008) AP 98

¹⁴ *State v. Rhodes*, 61 N.C. 453, 459 (1868) ("We will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence)

¹⁵ *M. Vijay v. Chairman, Singareni Collieries*, AIR (2001) AP 502

¹⁶ *Selvi v. State of Karnataka*, (2010) 7 SCC 263

¹⁷ The Information Technology (Reasonable security practices and procedures and sensitive personal information)

Rules, 2011. Available at <http://www.mit.gov.in>, last accessed September 15th, 2011

¹⁸ Rule 5 of the rules.

In addition to the restrictions on collection personal information or sensitive information, body corporate must obtain prior consent from the “provider of information”. The body corporate is required to take as prior steps in the circumstances reasonable¹⁹.

Right to privacy is fundamental right which is provided to us by the constitution of India irrespective of individual's identity under article 21²⁰. Right to privacy not only includes our secured passwords on different social networking sites but it includes our smallest personal information and UIDAI through his UID CARD scheme is directly infringing an individual's right to keep his personal information private. Unique identification authority of India (UIDAI) is a governmental agency of New Delhi that serves as an issuing authority of UID card and number's, So the basic question which arises here is that how UIDAI affects the Right to Privacy of an individual.

Before discussing how UID or Aadhar card infringes the right to privacy of an individual, first we should know what is Aadhar card and how it is important that an individual have to provide such personal information to these authorities. A unique identity card(UID) is a card that is issued by the UIDAI a government authority to provide a unique identity to an individual by obtaining his private information in the form of finger prints and vision pattern.

UIDAI has also not mentioned clearly the use of the Aadhar card except mentioning that it has many uses such as it can be used as identity proof and seeks to be a gateway to the services, being sufficient to know your customers' details in various things like opening a bank account or getting mobile numbers or for various other government services.

As it is well known that UIDAI deals with issuing the Aadhar card to every individual of the nation to provide them with a unique identity. So to provide every individual with a unique identity, every individual who is UID card holder has to provide some general details such as name, address, date of birth etc. and some specific details or the biometric information such as vision pattern and finger prints. Physical structure and appearance of an individual is considered as the most private thing that an individual hold. UIDAI in its scheme is directly interfering with the physical body of an individual who has to provide his biometric information aforesaid to get himself registered in the government records. In the case of Mr CJ Karira v. Planning Commission, government of New Delhi. This case pertains to an RTI application filed by the appellant to UIDAI seeking information regarding the sharing of information concerning UID card

¹⁸Sub-Rule 5(3). One wonders about the convoluted language used here when a simpler phrase like “take reasonable steps” alone might have sufficed - reasonableness has generally been interpreted by courts contextually. As the Supreme Court has remarked, “‘Reasonable’ means prima facie in law reasonable in regard to those circumstances of which the actor, called upon to act reasonably, knows or ought to know.

and Sewage Board v. Unique Erectors (Guj) AIR (1989) SC 973

²⁰ Govind v. state of Madhya Pradesh, AIR (1975) SC 1378

held by public authority. The appellant filed an appeal to central information commissioner under section 19(1) of RTI act.

Talking about how UIDAI violates the Right to Privacy is that UDI for the unique identification has allotted many government as well as private small organizations to get the biometrics information due to which these private information of an individual can be used by any organization or person for any purpose.

Providing our personal biometric information to non constitutional authorities for getting unique identity to avoid the future problems of identification upto national level is same as providing key of our homes to the police, when there has been a theft in some locality.

This UIDAI scheme is not only infringing the right to privacy of an individual but can be seen as a nation threat as these UID cards or numbers are not just for civilians but also for people in defense forces and security agencies where biometrics is not just affecting the privacy but will work as a loop hole in national security.

Talking about the security of biometrics information in UID card then it is conducted in two phases where initial stage is the collection of biometrics information is with the private authorities in a very poorly and unorganized manner which results in various reports of data breaches and the storage of these biometrics information in large deposits is considerable risk for the security of these information's and also these data of private information is stored in central identities data repository from where hacking and destroying the data is easily assessable.

In 2010, a bill was floated to lift the confidentiality of biometrics information, allowing it to be shared in the interest of national security²¹.

The security of biometrics information is considered as one of the most tasks of the authorities due to which only in 2011, planning commission of India managed a group of experts to suggest new aspects about the Indian privacy law. Justice Ajit P. Shah who chaired this committee suggested nine various principles of notice, informed consent and opt out choices, collection and purpose limitation, access and correction, non-disclosure, data security, openness and accountability. On this issue justice was contradicted by attorney general's views who defended UID cards in supreme court of India. Attorney general supported his arguments with the outdated cases about the police power to seize and search the private property²². Here supreme court held UID violating the right to privacy and if an individual wants, can waive the right by voluntarily handling their biometrics information but this argument was considered as against the public policy as if one can waive this right then it will directly result in infringing the fundamental rights which cannot be waived in anyway. This situation was affirmed by Supreme Court in 1958²³.

²¹ Clause 33(b) of the National Identification Authority of India Bill, 2010

²² *M.P. Sharma v. Satish Chandra*, AIR (1954) SC 300 and *Kharak Singh v. State of Uttar Pradesh*, (1964) 1 SCR 332

²³ *Basheshar Nath v. Commissioner of Income Tax*, AIR 1959 SC 149

The cure which the government has to look for to solve this problem is to completely abolish this biometrics information providing system in UIDAI as it will not lead to any security or privacy issue. By abolishing the system of biometrics information and just providing general information can also lead to a proper identification of an individual and on records of the government also.

But complete abolition of the UID will require lots of funds by the government and lots of time and to get rid of all these things in a single solution is to destroy only the biometric information and the general data should remain as it is. There has been a large amount wasted of the government funds in this scheme of the government and UIDAI, which, ultimately gave no solution about how to provide unique identity without infringing the rights of the citizens.

Looking very deep into the topic we come across a very important aspect of government's continuous attempts to amending the fundamental rights as government is directly affecting an individual's right to privacy and creating a risk to their personal data which should be kept safe. But it is laid down in the case of *Keshavnanda Bharti v. State of Kerala*²⁴ that any part of the constitution can be changed except for the basic structure of the constitution which also counts fundamental right.

The issue of Right to privacy has become quite subjective in today's world. There are confusions not only among the legislative bodies but the judiciary as well. What all can be included within the definition of privacy and what all can be excluded is a question of concern. The biometric informations so provided are important from the government's perspective and there lies a number of advantages like Aadhar based Direct Transfer Subsidy, Jan Dhan Yojna, Passport in 10 days, Digital locker, Voter Card Linking, Monthly Pension Provident Fund Opening new bank account, Digital Life Certificate and SEBI facilities.

With the increasing amount of government schemes Aadhar Card is being considered more important and mandatory for every individual who wants to avail the benefits of the schemes so launched by the Government.

After all the advantages or disadvantages UIDAI may have the major question that remains unanswered is whether it is against Right to Privacy or not.

In one of the articles, Justice P.S Puttaswamy, retired judge of Karnataka High court said, "There are no safeguards or penalties and no legislative backing for obtaining personal information, and the proposed law introduced by the government has been rejected by the Parliamentary Standing Committee on Finance. Provisions for collection and retention of biometric data have been held impermissible in the United Kingdom and France by their top courts."²⁵

²⁴ (1973) 4 SCC 225

²⁵ J.Venkatesan, *Aadhar Infringes Privacy*, THE HINDU, Sep 23, 2013

Moreover, he alleged, that Aadhar numbers were given indiscriminately, including to migrants without papers, creating a serious threat to national security. The executive order was malafide as the whole object of rushing through the Aadhar schemes was to secure “political gains”.²⁶

Attorney General Mukul Rohatgi, while backing the Aadhar Card scheme, has contended that Right to Privacy is not a Fundamental right. “No judgment explicitly cites right to privacy as a fundamental right. It is not there under the letters of Article 21 either. If this court feels that there must be clarity on this subject, only a Constitution Bench can decide,” he had said.

A trade-off between the Aadhaar and Right to privacy is incomprehensible. Our evolving constitutional jurisprudence on privacy rights post *M.P Sharma & Ors. v. Satish Chandra, District Magistrate Delhi & Ors.*²⁷, unambiguously affirms the right to privacy as an integral part of the right to life and right to personal liberty envisaged in the expansive interpretation of article 21.

In *Govind v. State of Madhya Pradesh*²⁸, the Supreme court recognized the “man’s inviolable personality”, the inner man, “rights inherent and inalienable” and “private space” in which man may become and remain himself.

It also referred to article 8 of the European Convention on Human Rights which recognizes the “right to respect for private and family life”²⁹

The right to dignity since then has been declared by the Supreme Court as non-negotiable constitutional right flowing from the spirit of the constitution and the explicitly guaranteed “right to life and personal liberty” in article 21. Importantly, by equating “privacy-dignity” claims and suggesting that these deserved to be “examined with care and to be denied only when an important countervailing interest is shown to be superior”, the court, following *Kharag Singh*, by implication derived the right to privacy from the notion of dignity of the individual, which while not specifically spelt out as a fundamental right is referred to in the preamble of the constitution as an aim to be secured by and under the national charter.

Declaring that article 21 clubs life and liberty, justice Krishna Iyer reminded us, in the context of interplay of articles 14, 19, and 21, that “man is not dissectable into separate limbs and likewise cardinal rights in, an organic constitution which make man “human” have a synthesis”. Indeed Justice Iyer was endorsing the constitutional principle espoused by

²⁶ ibid

²⁷ (1954)AIR 300

²⁸ (1975)SCR(3)946

²⁹ The UN Charter (1945), Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights (1966), all of which have been ratified by India, affirm “the natural dignity of man”

Justice Cardoza that “kindered aims shade off into one another by imperceptible gradations”³⁰

A holistic reading of the constitutional jurisprudence would demonstrate that the rights to privacy is firmly embedded in our constitutional scheme as a non-negotiable imperative that owes no apology to a myopic view of our republican charter. Indeed considering a fundamental principles of the nation as not “rules for passing hour, but principles for an expanding future”, the apex court as the ultimate arbiter of constitutional conscience, has given fundamental rights their meaning in new settings consistent with the aspirations of our people. This is so that we may have a ‘living constitution’ which can protect, preserve and defend sacrosanct libertarian values that remain the bedrock of the republic and constitute the core of the Constitution. Rather than deny us our constitutional right, the Union government ought to enact a privacy legislation to clearly define the rights of citizens consistent with the promise of the constitution³¹. In Indian constitution right to privacy is not expressly recognized under fundamental rights as an article but right to privacy is considered as ‘penumeral right’ in the constitution and after the case of *Govind v. state of Madhya Pradesh*³² the Supreme Court for the first time recognized the right to privacy which is implicit in the constitution under article 21. The Supreme Court held that right to privacy is an integral part of right to life which straight away denies the statement of Attorney General Mukul Rohatgi right to privacy is not a fundamental right. Seeing the other side of his statement which signifies that being well aware with the laws he should have known the fact that right to privacy is a universally recognized human right. Referring to the pronouncements made in *A.K Gopalana*, *Maneka Gandhi* and *Bank Nationalization* cases, the top law officers has said “that inconsistencies with regard of certain fundamental rights can only be “squared up” by a large bench”. The Supreme Court of America has identified associational privacy, informational privacy, anonymity, and privacies of religion, thought and intellects requirements of first amendments, giving rise to a robust First Amendment jurisprudence of privacy and private choice.³³ The concept of privacy plays a major role in jurisprudence of the first but also the Third, Fourth, Fifth and Fourteenth amendment. First amendment privacy law is especially in rich context for freshly assessing the past success and future potential of privacy concept-based jurisprudence as an instrument of progressive social change for African Americans, women, gay, lesbian and

³⁰ Benjamin N. Cardozo, *The Nature of the Judicial Process*.

³¹ Ashwani Kumar *privacy, a non-negotiable right*, THE HINDU, Aug 10, 2015

³² AIR 1975 SC 1378

³³ *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995) (holding that a state may not ban anonymous political literature opposing taxes); *Yoder*, 406 U.S. at 234 (holding that a state may not require members of the Amish faith to send children to school pursuant to compulsory schooling laws that violated their religious beliefs); *Stanley*, 394 U.S. at 568 (holding that criminalizing the mere possession of obscene material in the home is prohibited by the First and Fourteenth Amendment); *Patterson*, 357 U.S. at 466 (holding that a state may not require organization to reveal names of its rank-and-file members)

bisexual Americans.³⁴ In the background of the question raised whether Aadhar infringes the right to privacy or not the centre replied to the Supreme Court on July 22, 2015 that privacy was not a fundamental right. Attorney General said that right to privacy was not a fundamental right as mentioned earlier as well, he even quoted the cases like the Kharag Singh case where the Supreme Court has held the Right To Privacy was not a “guaranteed right” under the constitution. The second amendment would appear little to do with privacy.³⁵ But the jurisprudence of second amendment has come to incorporate ideals of the places we live in as protective sanctums wherein privileges of self-defense and ownership are inconsistent with gun control laws that rule out the private decision to possess readily operable handguns in private homes. For example, the court recently struck down a local Washington D.C law prohibiting possession of unlicensed firearm possession, including in private homes, on the grounds that the second amendment confers on an individual an individual right to protect themselves and their families.³⁶ It clearly shows that the jurisprudence be that of India or America has emphasized on the question of privacy either implicitly or explicitly from time to time.

Conclusion

The above discussion of right to privacy and how unique identity affects the right to privacy provided to us by Indian constitution we have concluded that as far as biometric information is concerned in the UDI it is infringing the right to privacy of the individuals and would cause serious issues with individual's as well as national security.

From time to time Supreme Court has recognized right to privacy as a fundamental right no matter on what grounds the centre has denied it as a fundamental right. The constitutional jurisprudence has also recognized the right to privacy as an ultimate right to protect individual's private or personal life. UIDAI is definitely violative of the fundamental right of privacy as it misuses the personal information for a variety of purposes not only by government organization but also private institutions. The cure which the government has

³⁴ Wallace v. Brewer, 315 F. Supp. 431 (M.D. Ala. 1970) (finding that a state may not demand names and registration of members of a Nation of Islam group that purchased land in state)

³⁵ It reads: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II.

³⁶ District of Columbia v. Heller, 554 U.S. 570, 635–36 (2008) (“[W]e hold that the District’s ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense. . . . [T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home. Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.” (emphasis added)). In McDonald v. City of Chicago, 130 S. Ct. 3020, 3026 (2010) (Alito, J.), the Supreme Court held that the Fourteenth Amendment makes the Second Amendment right to bear arms as articulated in Heller fully applicable to the States

to look for to solve this problem is to completely abolish this biometrics information providing system in UIDAI as it will not lead to any security or privacy issue. By abolishing the system of biometrics information and just providing general information can also lead to a proper identification of an individual and on records of the government also .An individual has a lot of privacies and among all his body is the most private things that belongs to him .The finger prints or the retina scan or any other biometric method of storing one's personal information and then using it without his consent is totally violative of the fundamental right of Right To Privacy envisaged in Right to life under article 21 forming the heart of fundamental rights.