

THE AADHAR SCHEME- AMBITIOUS PLAN FOR INDIA’S FUTURE OR VIOLATION OF THE RIGHT TO PRIVACY?

Rudresh Mandal^{*}

ABSTRACT

This essay seeks to provide a brief understanding of the right to privacy – whether it is enshrined in the fundamental rights guaranteed by the Constitution of India, if so, whether it can be waived voluntarily and other allied questions. It also seeks to examine the Aadhar Act, 2016 in light of such understanding. However, the primary focus is on certain provisions in the Act which could be construed to violate one’s right to privacy and whether disclosures made by an individual under the Act are truly voluntary or not. The essay concludes not only by suggesting certain measures for reform of the Act but also by showing that the Aadhar Act, which has great potential, needs to stay true to its stated goal of swift delivery of benefits to various sections of society.

I. INTRODUCTION

A. The Jurisprudence around the Right to Privacy

In *Ram Jethmalani v. Union of India*¹, the Supreme Court of India held that the “right to privacy is an integral part of right to life” calling it a “cherished

^{*} The author is a IIInd Year B.A. LL.B. (Hons.) Student at NALSAR University of Law, Hyderabad. This piece was the winning entry in the recently organized *Ab Initio-NSLR First Year Essay Writing Competition*.

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

constitutional value” and noting that individuals should be entitled to realms of freedom which are not subjected to public scrutiny. The Court further said that the Court being “constitutional adjudicators” would strive to preserve,

“the sanctity of constitutional values, and hasty steps that derogate from fundamental rights, whether urged by governments or private citizens, howsoever well-meaning they may be, have to be necessarily very carefully scrutinized.”

Yet, in the Aadhar hearings, the Attorney General of India has contended that the right to privacy was in fact, not a fundamental right granted by the Constitution. He seems to have based his arguments on two cases, *MP Sharma v Satish Chandra*² and *Kharak Singh v. State of UP*.³ These two cases had laid down that the fundamental right to privacy was not explicitly present in the Constitution. A superficial reading of the Constitution may confirm this, but on a factual basis only. However, “*a constitution is also its unwritten text in the penumbra of judicial decisions*” and the jurisprudence of privacy has progressed ever since *Kharak Singh* was decided in 1963.⁴

Following the case of *Maneka Gandhi*,⁵ the Supreme Court has continually reiterated that the rights guaranteed under Article 21⁶ are multi-

² MP Sharma v. Satish Chandra, AIR 1954 SC 300.

³ Kharak Singh v. State of UP, 1964 SCR (1) 332.

⁴ Jhuma Sen, *Why Aadhar's Backers are Wrong to Say Privacy Rights Can be Voluntarily Waived*, THE WIRE, <http://thewire.in/2015/10/09/why-aadhars-backers-are-wrong-to-say-privacy-rights-can-be-voluntarily-waived-12769/>, (Last updated 9 October, 2015).

⁵ Maneka Gandhi v. Union of India, 1978 SCR (2) 621.

⁶ Article 21 of the Constitution of India, 1950.

dimensional and the words, “life and liberty” should not be subject to a narrow construction, but a broad meaningful one. A change in social realities and the spheres of politics, the economy and society in general often require the law to develop along with it. “*Just as change in social reality is the law of life, responsiveness to change in social reality is the life of the law.*”⁷

It is ironically the minority opinion in *Kharak Singh*, where Justice Subba Rao laid down that it was, “*true our Constitution does not expressly declare a right to privacy as a fundamental right but the said right is an essential ingredient of personal liberty*”⁸ which served as a foundation for later developments with regard to expanding Article 21.

In the case of *Gobind v. State of Madhya Pradesh*,⁹ the Apex Court laid down that the right to privacy is a fundamental right emanating not only from Article 21, but also from Article 19(1) (a) and (d). However, here it was also held that the right to privacy was not absolute and such restrictions had to be made in lieu of compelling public interest. It is this restriction which the Government has relied on to justify its intrusion into the privacy (the intrusions have been explained subsequently) of individuals under the Aadhar Act.¹⁰

⁷ AHARON BARAK, THE JUDGE IN A DEMOCRACY, PRINCETON UNIVERSITY PRESS, 1-3, (2009).

⁸ *Supra* note 3.

⁹ *Gobind Singh v. State of Madhya Pradesh*, AIR 1975 SC 1378.

¹⁰ The Aadhaar (Targeted Delivery Of Financial And Other Subsidies, Benefits And Services) Act, 2016, available at : https://uidai.gov.in/images/targeted_delivery_of_financial_and_other_subsidies_benefits_and_services_13072016.pdf.

In cases such as *R. Rajagopal v. State of TN*¹¹ and *PUCL v. Union of India*¹²(albeit in the context of freedom of the press and phone tapping, respectively), the Court has interpreted the right to privacy broadly to mean the right to be let alone, and have held it to be a fundamental right. Yet in each case the court has reiterated that this right is subservient to the interests of the state and the state can infringe the same if a reasonable basis for such infringement is present.

While in each of the above cases, the Courts have interpreted privacy in terms of territory and spatiality, in *Selvi v. State of Karnataka*¹³, the right to privacy has been understood to exist “*in persons, not places*” facilitating a well-rounded understanding of the right. Further, in the above case it was held that an individual had the liberty to decide whether he wanted to disclose a personal fact or not, free from State interference.

The question that now arises is whether the Aadhar scheme is a reasonable basis for intrusion. The jurisprudence so far has dealt with information that was extracted from the individual through coercion, without consent, such as phone tapping in the PUCL case. The Aadhar scheme claims to involve only voluntarily disclosed information by the individual, but since crucial details such as who will use the data, for what ends will it be used and

¹¹ R Rajagopal v. State of Tamil Nadu, 1994 SCC (6) 632.

¹² PUCL v. Union of India, AIR 1997 SC 568.

¹³ Selvi v. State of Karnataka, (2010) 7 SCC 263.

which agencies can access the data, remain ambiguous, the issue that arises is whether the consent of the individual will be taken in all such cases.¹⁴

The Aadhar Act also does not incorporate consent when disclosures are made by the Unique Identification Authority of India (“UIDAI”). The Act could learn from the US Privacy Act of 1974 as well as the UK’s Data Protection Act, 1998 both of which emphasise the consent of the individual. The question of whether the Aadhar scheme is actually voluntary or not will be dealt with subsequently, but even if we progress assuming that the scheme is voluntary, this would not exclude the possibility of breaches of privacy.

II. SUSPICIOUS LINKS

The link between the National Population Register and the Aadhar scheme (that the NPR will forward its data to the UIDAI) is one which also raises apprehension due to its potential to endanger privacy, and seems to have gone relatively unnoticed in the larger debate surrounding the invasions of privacy in the Aadhar Act itself. Similarities have often been drawn between the activities carried out under the Census Act, 1948 and the Aadhar Act and both aim at collection of data from the populace.

The Census Act accords utmost importance to the privacy of the citizens in Section 15¹⁵ where it states that the “*records of census are not open to inspection or admissible in evidence.*” The National Identification Authority Bill

¹⁴ Amba Kak and Swati Malik, *Privacy and the National Identification Authority of India Bill: Leaving Much to the Imagination*, 3 NUJS Law Review, p. 499. (hereinafter Amba Kak)

¹⁵ Section 15, The Census Act, 1948.

however, enables the Government to examine data about its citizens in the Central Identities Data Repository, which actually constitutes the National Population Register; and this is where controversy ensues. The National Population Register is not sanctioned by the Census Act of 1948 and derives its legitimacy from the Citizenship Act and the Citizenship Rules.¹⁶

The problem which subsequently emerges is two-fold:

- 1) Provisions relating to confidentiality are completely absent in the Citizenship Bill, thereby rendering the data contained in the NPR vulnerable to unauthorised entities. On the other hand, it is an explicit aim that the data collected will be made available to the UIDAI.
- 2) The Citizenship Bill and Rules also makes such national identity numbers for every individual an essential legal requirement under Rule 7(3) and also provides for a fine upon failure of fulfilling this requirement. Thus, by linking the UID with the Citizenship Bill and Rules, the Aadhar scheme is made mandatory.¹⁷

To sum the differences up, while the Census Act enables the collection of information so that the state has a profile of the individual; it is not to expressly profile the individual (which is what the UID and the Aadhar do). The Supreme Court has, in its interim order relating to the Aadhar scheme prevented the sharing of the data between the NPR and UIDAI, but only until

¹⁶ Usha Ramanathan, *A Unique Identity Bill*, 45/30 Economic and Political Weekly (2010), p.10. (hereinafter Unique Identity Bill/UID Bill)

¹⁷ *Ibid.*

the matter is heard finally.¹⁸ It is of paramount importance that the Court should prevent such linkages between the NPR and the Aadhar database permanently, to ensure the safety and eliminate possibilities of misuse of personal data.

III. CONTROVERSIAL PROVISIONS OF THE AADHAR ACT

A. Sections 3(1), 2(i),2(o)and 37.

Section 3(1) stipulates that *“Every resident shall be entitled to obtain an Aadhaar number by submitting his demographic information and biometric information”* to the UIDAI. In reality this burden of accepting and recording data is on the various enrolment agencies and registrars, who derive their power from Section 2(i) and 2(o) and have been appointed by virtue of the MoUs signed with various State Governments and other entities.

This delegation of a crucial duty casts aspersions on the confidentiality of such sensitive information. Further, while intentional disclosure of data by these enrolment agencies and registrars are penalised under Section 37, utter negligence (as opposed to malicious intent) is left out of its purview. Given that the UIDAI is engaging in a project centred on personal information, the protection of the same should have been of paramount importance; else privacy of individuals would be risked. Leaving negligence out of the scope of

¹⁸ Dr. Usha Ramanathan, *Decoding the Aadhaar judgment: No more seeding, not till the privacy issue is settled by the court*, The Indian Express, New Delhi, 12th August, 2015.

punishment reflects the complacent attitude of the Government, and the UIDAI towards privacy rights of individuals.

B. Sections 23 and 33

Sections 23 and 33 provide for certain rules and processes relating to the authentication of the Aadhar numbers. However, while this is present in the Act, there are still some vital flaws. The primary flaw which arises is the silence on the source from where the request for authentication of Aadhar numbers can emerge. Given that the Aadhar Act is a welfare scheme, aiming at swift delivery of necessities to the population, it would seem safe to thus infer the kinds of people and organizations who might request for such authentication.

However, when one reads Section 33, the above inference seems to be far from certain. Section 33(b) mentions national security being an interest due to which private records may be disclosed under this Act – something which has in fact not been explicitly disregarded as an objective of the UID programme.

In light of this finding, the type of people and organization from whom such requests for authentication might come, suddenly seems precarious vis-à-vis one's privacy which might manifest itself in the form of state surveillance and tracking of its citizens.¹⁹ Thus, information in the Central Identities Data Repository ("CIDR") may be disclosed to third parties if it is

¹⁹ AMBA, *supra* note 14.

in “the interests of national security”. The term ‘national security’ is vague, and is neither defined in the Aadhar Act, or in the General Clauses Act.²⁰

Generally speaking, individuals often are subjected to numerous restrictions due to larger interests of the country and the interest which must prevail (in the case of a clash of interests) is that of the “mass of men”.²¹ While national security might override individual privacy on certain occasions, it is imperative that guidelines be laid down for when this can occur and more importantly it is required that national security is defined, so as to limit the power of the Government.²²

An amendment to substitute national security with “*public emergency or in the interest of public safety*”²³, terms which appear in the section 5(2) of the Indian Telegraph Act dealing with wire-tapping, was rejected by the Lok Sabha. Further, the Indian Telegraph Act prescribes that only “urgent situations” could necessitate the Joint Secretary ordering tapping of phones.²⁴

The Aadhar Act offers almost unbridled power to the executive in this regard. Due to the existence of this national security clause in Section 33, some have expressed the apprehension that-

²⁰ Shreeja Sen, *National security clause in Aadhaar bill under scanner*, Live Mint, 16 March, 2016.

²¹ *His Holiness Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr*, (1973) 4 SCC 225.

²² Shweta Sengar, *Expand Aadhaar only after 'national security' is defined: Pavan Duggal on the contentious Bill*, CATCHNEWS, <http://www.catchnews.com/national-news/aadhaar-must-be-expanded-only-after-national-security-is-defined-pavan-duggal-takes-a-closer-look-at-contentious-bill-1458536635.html>. (Last updated March 21,2016)

²³ BS reporter, *5 changes RS wanted in Aadhaar Bill, legal challenge next*, Business Standard, 17 March,2016.

²⁴ *PUCL vs Union of India*, AIR 1997 SC 598.

*“the government will get sweeping power to access the data collected, ostensibly for efficient, transparent, and targeted delivery of subsidies, benefits and services as it pleases in the interests of national security, thus confirming the suspicions that the UID database is a surveillance programme masquerading as a project to aid service delivery.”*²⁵

Section 33 also states that the UIDAI may disclose personal data in light of a court order demanding the same. However, here the consent of the individual is done away with it, despite the information being highly sensitive. There is no mechanism through which he can prevent such disclosure, or at least be made aware of the disclosure beforehand.²⁶

Finally, Section 33 also enables the establishment of an Oversight Committee to supervise the disclosure of information under the said section. While prima facie this seems like an adequate protection afforded by the Bill to privacy, and a check on executive action, the shortcoming which arises is the fact that the members of this Committee are all members of the executive. Therefore, members of the executive will have to review executive decisions,²⁷ which is problematic at the very least due to a clear conflict of interest.

It bears noting that an amendment passed by the Rajya Sabha to include the Comptroller and Auditor General and Central Vigilance

²⁵ Amber Sinha and Pranesh Prakash, *Privacy concerns overshadow monetary benefits of Aadhaar scheme*, Hindustan Times, New Delhi, 12th March, 2016.

²⁶ AMBA, *supra* note 14, p.504.

²⁷ Anumeha Yadav, *Seven reasons why Parliament should debate the Aadhaar bill (and not pass it in a rush)*, SCROLL.IN, <http://scroll.in/article/804922/seven-reasons-why-parliament-should-debate-the-aadhaar-bill-and-not-pass-it-in-a-rush>, (Last updated 12 March,2016).

Commission in the Committee to ensure greater independence from the executive and thereby facilitating a higher degree of protection to sensitive data was rejected by the Lok Sabha.²⁸

C. Sections 37 and 47

Section 37 provides for certain offences such as intentionally stealing and altering data located in the CIDR and so on, which are ambiguous at best. However, the Bill provides for no mechanism using which an individual whose data has been compromised can know that an offence has been committed. In essence, to add insult to injury, an individual whose privacy has already been violated, would find it exceedingly difficult to discover this fact.

Further, according to Section 47, only an officer clothed with authority under this Bill can file a case and launch prosecution proceedings. Reading Section 28 and 47 together however, leads to the inevitable thought that it may be in the interest of the UIDAI to not disclose infringements on privacy of individuals whose data it stores. The law does not expressly provide for a machinery to solve grievances of an individual. The individual instead has to instead depend on proactive regulation by the authorities under this Act, which in effect allows for the Government to dodge accountability and responsibility.

²⁸ PTI, *Lok Sabha Rejects Rajya Sabha Recommendations, Passes Aadhar Bill*, The New Indian Express, March 16, 2016.

*“Experience has revealed the failure of regulation, yet it is on regulation by the authority that a whole population is asked to place its trust.”*²⁹ Thus, while the Bill takes notice of the fact that there is a possibility that private individual information might reach unscrupulous entities, both within and beyond the territory of India, the mechanism for redressal seems to be ambiguous at best.

D. Section 57

Section 7 of the Aadhar Act enables the assimilation and usage of individual data to fulfil the *“condition for receipt of a subsidy, benefit or service”*. Seemingly therefore, the Act would purport to cover the interaction between the State and its citizens only. However, Section 57 dismisses the above notion by extending use of the UID database to corporate entities for their own uses. Thus, while the objects of the Act limit it to identifying people for swift delivery of benefits, in blatant conflict, Section 57 extends the ambit of the Bill to allow companies also to use the data for any lawful purpose.

Due to this vast coverage of the Aadhar Act, when applications such as TrustID have access to the Aadhar database,³⁰ it has serious implications concerning the personal data of individuals and their right to privacy. The fact that our information can be accessed by corporate houses, let alone the Government is frightening as far as privacy is concerned.

²⁹ UID BILL, *supra* note 16, p.13.

³⁰ Usha Ramanathan, *The future is here: A private company claims it can use Aadhaar to profile people*, SCROLL.IN, <http://scroll.in/article/805201/the-future-is-here-a-private-company-claims-to-have-access-to-your-aadhaar-data>. (Last updated 16 March,2016)

IV. MISCELLANEOUS PROBLEMS ARISING OUT OF THE AADHAR ACT

Apart from the Sections in the Act itself, another problem that arises is that of data convergence into a central repository. Over the course of our daily existence, in exchange for certain services (such as taking loans, seeking admittance into a hospital, obtaining a license etc.) we often provide personal information such as our names, addresses, dates of birth and so on. These organizations will not be able to track or profile an individual with this limited data, and hence privacy and personal security will be victorious. The information that we provide in exchange for a specific end is held in distinct silos, or towers of data, and this in itself does not seem to be of particular concern.

However, if bridges were established between these towers or silos, it would facilitate State or even corporate surveillance over the individual and enable the State to track the movements of a citizen at the press of a button.³¹ The United Nations has in the past been accused of misusing the biometric information of Iraqi and Syrian refugees to facilitate attempts of various countries to track them.³² Such data convergence also creates fears for ethnic cleansing³³ on the basis of ID cards, as was done in Rwanda.³⁴

³¹ *Ibid*, p.11.

³² PTI, *Opposition alleges Aadhar data could be used for 'mass surveillance, ethnic cleansing'*, The Indian Express, 11 March, 2016.

³³ IANS, *Lok Sabha passes Aadhaar bill to further empower citizens*, The Economic Times, 11 March, 2016.

³⁴ Jim Fussell, *Group Classification on National ID Cards as a Factor in Genocide and Ethnic Cleansing*, SEMINAR SERIES OF THE YALE UNIVERSITY GENOCIDE STUDIES PROGRAM, http://www.genocidewatch.org/images/AboutGen_Group_Classification_on_National_ID_Cards.pdf

It is the UID number (also known as Aadhar numbers) which would serve as this bridge, since it is a largely universal number which can be used in multiple, unconnected databases. Not only the state, but private business organizations can access these now connected silos to profile an individual, harass and invade his privacy through intrusive marketing strategies and render him insecure.³⁵

In response to such allegations of convergence, RS Sharma, UIDAI's Director General stated that since the Aadhar scheme did not require information such as race or caste, individual profiling was impossible.³⁶ However, the fact remains that the UID number may be used as a common denominator by organizations to link the data each of them hold separately, ultimately leading to easy profiling.³⁷

Functionality creep, or function creep is a phenomena under which the original intent with which data was collected is expanded to include within its purview purposes differing from the initial prescribed purpose. Often, this expansion takes place without the approval of the individual who provides the information. The Aadhar Act, being phrased and implemented in its existing form runs the risk of eventually being used as a tool of discrimination along the lines of identity. The Indian Government and the UIDAI could learn from the American experience with regard to the Social Security Numbers.

³⁵ Usha Ramanathan, *An attempt to kill the Right to Privacy*, The Statesman, 9th September, 2013.

³⁶ RS Sharma, *Identity and the UIDAI : A Response*, 45/35 Economic and Political Weekly (2010).

³⁷ Ruchi Gupta, *Justifying the UIDAI : A case of PR over Substance?*, 45/40 Economic and Political Weekly (2010), pp.135-136.

While the SSNs started off as a venture relating to taxation, today it has broadened its ambit to include everything ranging from driving licenses to employment. The phrase “not for identification” used initially during the promulgation of the SSN is now redundant, as the SSN is the country’s foremost identification number.³⁸ The database of information about individuals could be used by the State as a weapon against the citizens as long as threats of oppression and victimization of marginalised segments of the populace using this database cannot be ruled out. This goldmine of data could also facilitate surveillance by the State and investigation by the police.³⁹ For example, both the Goa and Kerala police have used the UID’s biometric database to further their own investigations.

A continuous and widespread access to biometric information by the police could lead to large scale violations of human rights.⁴⁰ Dissenters or public intellectuals expressing views against the dominant political narrative may also be victims of this misuse of the UID database. With the Government already lending its support to encounter killings and other methods not permitted by the Constitution being adopted by the police and the Army, the environment seems ripe for the State and its instruments to misuse the UID

³⁸ Dr. Valsamma KM, *Aadhaar, Function Creep and The Emerging Symbiotic Relationship between Society and Technology*, 3 Paripex - Indian Journal of Research 8,184-85 (2014).

³⁹ R. Ramakumar, *Suspend Aadhaar, it is leading India to a surveillance state*, Deccan Herald, 29 September, 2013.

⁴⁰ R. Ramakumar, *Identity Concerns*, Frontline, 19 December, 2011.

database, which was originally collected for confirming identity, and to enhance social welfare of the people.⁴¹

V. QUESTIONS ON VOLUNTARINESS

A. If the Aadhar Scheme is Voluntary, Can one waive his Fundamental Right to Privacy to avail of the same?

In the case of *Behram v. State of Bombay*,⁴² the Apex Court laid down that the Constitution containing fundamental rights was not to ensure that the individual could benefit from them. Fundamental rights are a subset of public policy, and hence it is beyond the power of the individual to give up his fundamental rights. This ruling established that the doctrine of waiver of rights would be inapplicable when the rights in question were fundamental rights. In *Bashehar Nath v. The Commissioner of Income Tax*⁴³, Justice Bhagwati held that the Constitution was “*sacrosanct*” and that “*it is not permissible to tinker with those fundamental rights by any ratiocination or analogy of the decisions of the Supreme Court of the United States of America*”, which allowed fundamental rights to be waived when the right ensured individual benefit. Thus the rule that fundamental rights cannot be waived is well established in Indian constitutional

⁴¹ Nivedita Menon, *Eight reasons why you should oppose Unique Identification: Stop UID Campaign*, KAFILA, <https://kafila.org/2010/10/04/eight-reasons-why-you-should-oppose-the-uid-stop-uid-campaign/>. (Last updated 4 October, 2010).

⁴² *Behram v. State Of Bombay*, AIR 1955 SC 123.

⁴³ *Bashehar Nath v. The Commissioner of Income Tax*, 1959 SCR Supl. (1) 528.

jurisprudence, and has later been upheld in *Muthiah v. Commissioner of Income Tax*⁴⁴, *Suraj Mall Mehto v. A.V. Visvanath Sastri*⁴⁵ and so on.

In the context of government schemes, another crucial case to analyse here is *Ahmedabad St Xavier's College v. State of Gujarat*⁴⁶ where the Supreme Court, echoing Justice Sutherland in *Frost & Frost Trucking Co. v. Railroad Commission*⁴⁷ upheld the doctrine of unconstitutional conditions describing it as, “any stipulation imposed upon the grant of a governmental privilege which in effect requires the recipient of the privilege to relinquish some constitutional right.” The choice between relinquishing the necessary financial benefits and giving up the right to privacy is nothing more than a choice “between the rock and the whirlpool.”⁴⁸

To narrow it down further, Das CJ in *In re: The Kerala Education Bill v. Unknown*⁴⁹ speaking in the context of establishing minority educational institutions stated that, “financial necessities should not force anyone to concede their fundamental rights under Article 30(1) of the Constitution.” What the Aadhar Act purports to do is in striking contradiction to Das CJ’s opinion, as it compels people to give up their right to privacy in exchange for financial necessities which are especially indispensable for the poor section of society. In other words, the Aadhar Act makes it mandatory for the poor to give up their privacy

⁴⁴ *Muthiah v. Commissioner of Income Tax*, AIR 1956 SC 269.

⁴⁵ *Suraj Mall Mehto v. A.V. Visvanath Sastri*, AIR 1954 SC 545.

⁴⁶ *Ahmedabad St Xavier's College v. State of Gujarat*, 1975 SCR (1) 173.

⁴⁷ *Frost & Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583 (1926).

⁴⁸ *Ibid.*

⁴⁹ *In re: The Kerala Education Bill v. Unknown*, 1959 1 SCR 995.

rights, lest they be deprived of financial benefits. The Aadhar Act, “*though in form voluntary, in fact lacks none of the elements of compulsion.*”⁵⁰

The Aadhar scheme is a clear violation of the fundamental right to privacy of an individual, and the argument that the scheme be permitted since an individual can voluntarily waive his fundamental rights (doctrine of waiver of rights) cannot be accepted. It would fall under the doctrine of unconstitutional conditions as laid down by the Apex Court. The trade-off between the waiving of the right to privacy and the Aadhar scheme is simply not a trade off at all, since the State cannot promulgate a scheme which requires the citizen to surrender his/her right to privacy.

The individual is faced with a “*false choice*” since he/she has to decide between the fundamental right to privacy and certain benefits that are crucial to his/her livelihood. The choice that the individual is faced with is not ‘free’ since access to privileges is contingent upon surrendering of rights. It would thus be beyond the power of the State to invoke the doctrine of waiver of fundamental rights as an essential pre-requisite for acquiring the stipulated benefits.⁵¹

⁵⁰ *Supra* note 48.

⁵¹ Gautam Bhatia, *Aadhar, Waiver of Fundamental Rights, and the Doctrine of Unconstitutional Conditions*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, <https://indconlawphil.wordpress.com/2015/10/06/aadhar-waiver-of-fundamental-rights-and-the-doctrine-of-unconstitutional-conditions/> (Last updated 6 October, 2015).

B. Is the Aadhar Scheme Really Voluntary?

Further, the Aadhar Act is not supported by an opting out mechanism; and the citizen has to waive his fundamental right to privacy without any hope of apparently reclaiming it. Rule 5(7) of the Information Technology Rules stipulate that when an entity seeks information or data from an individual, it must provide the individual with a procedure for opting out of the database. However, the *“irrevocable nature of alienation of privacy rights by surrendering biometric information means that the opt-in mechanism is not supported by an opt-out one.”*⁵² The existence of an opt out process in the context of the Aadhar Act is crucial, given the sensitiveness of our personal information, and the pervasiveness of an individual's biometric data.⁵³

While the official documents relating to the Aadhar scheme specify that obtaining a UID number required to avail of the benefits the same is purely voluntary, the implementation of the scheme tells us a different story altogether. While Section 3 deems acquiring the Aadhar number to be a voluntary exercise, the implication of Section 7 of the Aadhar Act is that once the Government makes receiving benefits contingent upon compulsory authentication of the Aadhar number, then citizens would be forced to acquire the number.⁵⁴ Further, the marginal note to Section 7 lays down that acquiring

⁵² JHUMA, *supra* note 4.

⁵³ USHA, *supra* note 30.

⁵⁴ Vanya Rakesh, *Aadhaar Act and its Non-compliance with Data Protection Law in India*, THE CENTRE FOR INTERNET & SOCIETY, <http://cis-india.org/internet-governance/blog/aadhaar-act-43a-it-rules> (Last updated 14 April, 2016).

the Aadhar number cannot be bypassed to avail of certain benefits or subsidies.⁵⁵

As a form of consolation, Section 7 also ensures the provision of alternate means of identification for delivery of benefits to the individual in the event that he/she is not assigned an Aadhar number. Such vague phrasing leads to the possible interpretation that these alternate means will be accessible merely to those who have not been assigned an Aadhar number, despite applying for the same.⁵⁶ Thus, application for an Aadhar number is made mandatory in the sense that is essential in order to receive benefits.

As Jean Dreze put it, *“This (the Aadhar scheme) is like selling bottled water in a village after poisoning the well, and claiming that people are buying water voluntarily.”*⁵⁷ Various states have mandated that the UID number be required to obtain various services. Not only gas and PDS, but the issuance of RuPay ATM cards, filing RTI requests, booking seats in the railways and registration of vehicles all require the UID number today.⁵⁸ Just recently, the University Grants Commission made the usage of Aadhar numbers compulsory for the purposes of scholarships.⁵⁹ The interim order of the Supreme Court forbidding such services depending on the UID number has not been complied with, *“in letter*

⁵⁵ Express News Service, *Aadhar Voluntary...Mandatory*, The New Indian Express, 20 March, 2016.

⁵⁶ Amber Sinha, Press Release, March 15, 2016: The New Bill Makes Aadhaar Compulsory!, THE CENTRE FOR INTERNET & SOCIETY, <http://cis-india.org/internet-governance/blog/press-release-aadhaar-15032016-the-new-bill-makes-aadhaar-compulsory> (Last updated 16 March, 2016).

⁵⁷ Jean Dreze, *Unique Facility or recipe for trouble?*, The Hindu, 25th November, 2010.

⁵⁸ The Centre for Internet and Society, Unique Identification Scheme (UID) & National Population Register (NPR), and Governance, cis-india.org/internet-governance/blog/uid-and-npr-a-background-note (Last accessed on 7th May, 2016).

⁵⁹ PTI, *Aadhar now must for UGC scholarship*, The Tribune, 21 July, 2016.

and spirit".⁶⁰ If such essential services require the Aadhar number, it is evident that today an individual cannot live without this number. Thus, is it actually voluntary? The gap between precept and practice provides us with the answer.

VI. CONCLUSION

At the outset, the reason why a clause on "*national security*" is present in an Act which seeks to provide for efficient, transparent, and targeted delivery of subsidies, benefits and services is unclear, and suspicious at the very least since it raises justifiable concerns of mass surveillance, profiling and tracking of citizens.⁶¹ As has been mentioned earlier, the Aadhar Act fails to define "*national security*". In this context, a look at jurisprudence on national security and fundamental rights in the European Union might prove helpful.

In *Leander v. Sweden*⁶² the Court, while interpreting 'national security' in Article 8 of the European Convention on Human Rights held that law which places its reliance on national security considerations had to be precise in relation to the circumstances and conditions under which the State could rely on this "*secret and potentially dangerous interference with private life*". Thus, laws which have a tendency to intrude on privacy need to be precise with "*clear and detailed*" guidelines.⁶³ In *Rotaru v. Romania*⁶⁴ the Court expressed its disapproval at a

⁶⁰ Aadhar Related Articles, aadhaar-articles.blogspot.in/2016/02/9353-press-statement-national-security.html (Last accessed on 7th May, 2016).

⁶¹ Jean Dreze, *The Aadhar coup*, The Hindu, March 15, 2016.

⁶² *Leander v. Sweden*, 9 EHRR 433.

⁶³ *Kruslin v. France*, (1990) 12 EHRR 547 ; *Huvig v. France*, (1990) 12 EHRR 528.

⁶⁴ *Rotaru v. Romania*, (2000) ECHR 192.

Romanian law related to the collection and storage of personal information on grounds of national security, since sufficient safeguards were not provided for.

Under Section 33 of the Aadhar Act, private data can be disclosed pursuant to an order passed by the Joint Secretary of the Government of India, subject to review of an Oversight Committee, as mentioned earlier. However, no guidelines are given as to the circumstances in and conditions on which private data will be disclosed, except for the blanket national security clause.

It is imperative that national security be defined in the Act to prevent misuse of the same.⁶⁵ However, given that despite repeated demands for the same, nothing has been done and with the Lok Sabha rejecting the substitution of national security with an apparently narrower clause of “*public emergency or in the interest of public safety*”⁶⁶, the author, placing reliance on *Al-Nashif v. Bulgaria*⁶⁷ would like to suggest the incorporation of adversarial proceedings in Section 33.

The implementation of measures having a detrimental impact on rights such as privacy (such as the disclosure of private data under Section 33) should be contingent upon adversarial proceedings between the individual who’s data it is and the State which seeks to justify disclosure in the name of national security. A body, independent of Government officials, in contradistinction to

⁶⁵ SHWETA, *supra* note 22.

⁶⁶ Express News Service, *Aadhaar bill is through after Opposition scores a few brownie points*, The Indian Express, 17 March, 2016.

⁶⁷ *Al-Nashif v. Bulgaria*, (2003) 36 EHRR 655.

the current Oversight Committee should be established to hear such proceedings.

Section 7 of the Aadhar Act, as it stands is in conflict with the interim order of the Supreme Court which stated that no one should be denied access to benefits in the absence of an Aadhar number. The section is phrased in a manner such that it appears as though enrolment or application under the Aadhar scheme is essential in order to identify oneself for the delivery of benefits.⁶⁸ It should be remembered that Aadhar *“is an entitlement, and not a compulsion.”*⁶⁹

A welfare state, such as India⁷⁰ is required by default to ensure the economic and social well-being of its citizens⁷¹ through inter alia, the provision of benefits, subsidies and so on. Despite the cost-cutting impact of the Aadhar programme,⁷² the requirement of the number to avail of the benefits should be purely voluntary. The phrase ‘alternative means’ as used in Section 7 should also be clarified, in order to lessen the degree of ambiguity present.⁷³ In this context, it is also crucial that an opt-out mechanism is provided for under the

⁶⁸ AMBER, *supra* note 57.

⁶⁹ SFLC_Admin, *Evaluating the Aadhar Bill against the National Privacy Principles*, SOFTWARE FREEDOM LAW CENTRE, <http://sflc.in/evaluating-the-aadhaar-bill-against-the-national-privacy-principles/> (Last updated 11 March, 2016).

⁷⁰ Kapila Hingorani vs State Of Bihar, 2003 Supp(1) SCR 175.

⁷¹ The Editors of Encyclopædia Britannica, *Welfare State*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/topic/welfare-state> (Last updated 21 August, 2015).

⁷² PTI, *Aadhaar ID saving Indian govt. about \$1 billion per annum: World Bank*, The Economic Times, January 14, 2016.

⁷³ AMBER, *supra* note 57.

Act, which would provide for the deletion of all the data of the individual from the database. As of now, no such mechanism is stipulated.⁷⁴

Further, Section 57 is problematic to the extent that it allows a “*body corporate*” to access the Aadhar database, excluding core biometric information, for the purposes of identification. Here, it is crucial that the Bill be amended to incorporate consent of the individual while handing such data over to a private company. Allowing private companies entry into the Aadhar database has serious implications with regards to the privacy of individuals apart from potential harassment through telemarketing and so on, and hence it is imperative that their consent is included.

The Aadhar Act is one with huge potential in terms of socio-economic welfare benefits delivery. The Aadhar number provides the foundation upon which delivery of all benefits – ranging from healthcare, to food and nutrition to education could be drastically improved.⁷⁵ It could lead to large-scale innovation both at the level of government and the private sectors. Financial inclusion at a level, which would be unthinkable a decade ago, may soon be a reality and leakages in Government subsidies totalling Rs. 50,000 crore annually could possibly be eliminated.⁷⁶

However, the fact that the information accumulated under the Aadhar Act might be shared with other parties, or even worse, stolen by entities both

⁷⁴ PTI, *Centre opposes in SC Jairam Ramesh's plea on Aadhaar Bill*, Business Standard, May 10, 2016.

⁷⁵ Unique Identification Authority of India, *Frequently Asked Questions - Use of Aadhar*, UIDAI, <https://uidai.gov.in/faq.html?catid=28>.

⁷⁶ Nandan Nilekani, *Basis of a Revolution*, The Indian Express, 9 March, 2016.

within and beyond the boundaries renders the privacy of the individual supplying the information highly vulnerable. Intelligence agencies may also use the data to trace patterns of behaviour, identify an individual as a threat, possibly incorrectly, and harass him, violating his right to be let alone (privacy). The possibilities for violations of privacy are endless, especially with no mechanism for redressal of grievances.

The Aadhar scheme has far reaching effects on the fundamental rights of an individual and his security apart from the relationship the State shares with its citizens. It is imperative that the project be suspended and such considerations be taken into account while fine tuning the project. Public debates should ensue; constitutional experts consulted, thus ultimately inspiring trust and confidence amongst the people.⁷⁷ The aim should be to reach a stage where the monetary benefits far outweigh the privacy concerns, if any. Only upon reaching such a stage, should the Aadhar scheme, the world's largest biometric identification programme⁷⁸ be implemented.

⁷⁷ Upendra Baxi, AP Shah et al, *On the UIDAI*, 45 Economic and Political Weekly 43,5 (2010).

⁷⁸ TNN, *Aadhar world's largest biometric ID system*, The Times of India, 27 April, 2015.