

**BILL/ ACT COMMENT****The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016**

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**I Introduction**

SINCE ITS inception as the flagship program of the Unique Identification Authority of India (UIDAI), the Aadhaar scheme, has undergone scrutinises and challenges at various levels including the pending challenges in Supreme Court and the heated debates in the Parliament over the Aadhaar Bill, 2016 (now the Aadhaar Act).

The Aadhaar (Targeted Delivery of Financial & Other Subsidies, Benefits & Services) Act, 2016 (hereinafter called the Aadhaar Act) was notified in the Gazette of India on March 25, 2016. The principal purpose as explained by finance minister while introducing the Bill is to empower the state to distribute the resource of the state to the deserving people and save revenue so that it does not go to undeserving people. However, the provisions allowing identification of individual, disclosure of information and use of identity information by private entities have made the objective of the Act difficult to understand.

The focus of this paper is on the debate in the parliament regarding the provisions of the Bill and pointing out certain issues in the Act from a legal point of view. Thus, there is no discussion on the issue of Money Bill or the petitions that are pending in the court.

**II Parliamentary debates**

The Bill was introduced in the Lok Sabha as a 'Money Bill'. A Money Bill does not require approval of Rajya Sabha. The upper house can only give recommendations to the Lok Sabha. It remains the Lok Sabha's prerogative to accept or reject the recommendations.<sup>1</sup>

**Lok Sabha**

Ram Mohan Naidu raised concerns about article 47(1) according to which cognizance by the court will only be taken if the complaint is made by the authority itself. In other words, the authority has to complain on the authority itself. No other person will have any right to

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\* LL.M. (1year 2016-2017).

<sup>1</sup>The Constitution of India, 1950, art. 110.

complain. So, this will be a conflict of interest when officer within the same authority is doing it on the authority.

Jitendra Chaudhury, argued that the benefits under the Act can be given to anybody who has resided 182 days in India implying that non-citizens will be able to avail subsidies as a part of this scheme.

Asaduddin Owaisi raised concerns about the disclosure of the information under section 33 which gives the authority a right to hearing but gives no such right to the individual whose information has been disclosed. He argued provisions of the Act can be misused and will lead to continuous surveillance without any notification to the user even after surveillance ceases.<sup>2</sup>

### **Rajya Sabha**

There was a heated discussion in the Rajya Sabha and many concerns were similar to the ones raised in Lok Sabha. Jairam Ramesh argued that he did not support the Bill because it was not voluntary. He also recommended the use of phrases ‘public emergency’, and ‘public safety’ as provided in the provision for interception of electronic communication in the Telegraph Act, 1885.

Satish Mishra from BSP reiterated the absence of a right to be heard in section 33(1) and the lack of appellate mechanism in that regard. Rajeev Chandrashekhar, had concerns about the application of the Act to residents and not just citizens of the country and the use of Aadhaar for establishing identity.

Although, Arun Jaitley did clarify that if one wants to avail a benefit or subsidy, enrolling in Aadhaar is mandatory. The Lok Sabha, however, did not consider the recommendations on the Aadhaar Bill as given by the Rajya Sabha and passed it in its original form.<sup>3</sup>

## **III Issues involved the Aadhaar Act, 2016**

### **Definition of biometric and core biometric information ambiguous**

Section 2 (g) ‘biometric information’ means photograph, fingerprint, Iris scan, or any other biological attributes specified by regulations;

Section 2(j) ‘core biometric information’ means fingerprint, Iris scan, or any biological attributes specified by regulations.

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<sup>2</sup>Lok Sabha Debate on The Aadhaar Act, *available at*:

<http://164.100.47.194/Loksabha/Debates/Result16.aspx?dbsl=7121> (last visited on March 12, 2017).

<sup>3</sup>How Parliament debated Aadhaar Bill, *available at*: <http://sflc.in/how-parliament-debated-the-aadhaar-bill-2016/> (last visited Mar. 12, 2017).

- Both the definitions are not specific and subject to regulations which means at any later time they can include other biological attributes including the DNA. However, leaving the definition so open does not seem reasonable as the attributes already included are sufficient for the generation of Aadhaar for every resident irrespective of gender or age.
- By using the words “other such biological attributes of an individual” the Act opens itself to discretion of the concerned authority or Central Government. What can and cannot be included in the definition should be decided by the parliament since it has implications on the major debate on right to privacy. Further, the present biometric information has been used for all the Aadhaar card enrolment till now. It is difficult to understand what other biological attributes should be added and why they should be added.

### **Conflict with objective and use of Aadhaar**

The Act is meant for delivery of services, subsidies out of the consolidated fund of India, this was the reason given by the Finance Minister for the Bill being introduced as Money bill. However, the Act allows the number to be used for verification by public and private entities. The use of Aadhaar under the Act are:-

- To establish identity: The Aadhaar number can be used by any government or private agency to validate a person’s identity for any lawful purpose, but it cannot be used as a proof of citizenship.<sup>4</sup>
- For access to government services.<sup>5</sup>

Allowing any entity to establish identity or disclose identity is very much against the objective of the Act.

### **Aadhaar is mandatory**

Section 7 makes its mandatory to have an Aadhaar number to access services, subsidies and benefits, and stipulates that in case one does not have the Aadhaar number they must apply for it. This is against the claims made that it will be voluntary.<sup>6</sup> It is also against the Supreme Court order as well which specifies that Aadhaar will be voluntary.<sup>7</sup>

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<sup>4</sup> The Aadhaar Act, 2016, ss. 4, 6, 57.  
*Id.*, s. 7.

<sup>6</sup> A Unique Identity Bill, available at: [http://www.epw.in/system/files/pdf/2010\\_45/30/A\\_Unique\\_Identity\\_Bill.pdf](http://www.epw.in/system/files/pdf/2010_45/30/A_Unique_Identity_Bill.pdf) (last visited on Mar. 12, 2017)

<sup>7</sup> *Justice K.S. Puttaswamy v. Union of India*, WP (Civil) No. 494 of 2012.

The Act also does not provide which services will require Aadhaar card mandatorily. On the other hand, Act provides that there will be viable alternatives where Aadhaar is not assigned.<sup>8</sup> This also indicates that only in case where Aadhaar is not assigned alternative will be provided, it does not mention that alternatives will be provided to anyone who does not apply for Aadhaar. Also, the term viable alternatives are unclear. The UIDAI has said that getting on to the UID database is voluntary. That is, it is clarified, there will be no compulsion from the UIDAI. But, if other agencies make the UID number essential in their transactions, that is a different matter.<sup>9</sup>

### **Disclosure of information**

It is unclear for what purposes it would be necessary for Aadhaar numbers and core biometric information to be made public and it is concerning that such circumstances are left to be defined by regulation.<sup>10</sup> Though a court order from a district judge is required to authorize disclosure of information, the Act fails to define important standards that such an order must meet.

National Security: In the cases where disclosure direction is given 'in the interest of national security', even authorisation by a judge is not required instead it can be authorised by the Joint Secretary of the Government of India.<sup>11</sup> The issues regarding this are: -

- National Security is a broad term and can be misused by the government
- Such order shall be reviewed by the oversight committee, which itself is not defined clearly.<sup>12</sup>
- There is no provision for judicial review of such direction.

### **Oversight committee: Not defined**

The only aspect that is clear about the oversight committee is of its composition and its power to review the direction of disclosure of information in case the same is made in interest of National Security.<sup>13</sup> The role responsibilities and power of the committee is not defined in the Act.

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<sup>8</sup>*Supra* note 5.

<sup>9</sup>*Supra* note 6.

<sup>10</sup>*Supra* note 4, s. 29(4).

<sup>11</sup>*Id.*, s. 33.

<sup>12</sup>*Ibid.*

<sup>13</sup>*Supra* note 4.

### **Over delegation of powers to UIDAI**

A number of important powers which should ideally be within the purview of the legislature are delegated to the UIDAI. The UIDAI has been managing the project since its origin, and a number of issues have already been found in process such as collection, verification, sharing of information, privacy and security. Instead of addressing these problems, the Act allows the UIDAI to continue to have similar powers.<sup>14</sup>

### **Lack of representation for individual**

In case of a court order identity information and authentication records of an individual can be revealed without any notice or opportunity of hearing to the individual affected. Aside from allowing the UIDAI a right to be heard, the Act does not provide any means by which an individual can contest such an order or challenge it after it has been passed.

This Act gives the authority the exclusive right to lodge complaints for prosecution.<sup>15</sup> Thus, no individual can lodge a complaint even if there is a violation that affects them. For example, if there is identity theft or wrongful handing over of information from the database, even the complaint against the authority can only be lodged by the authority.<sup>16</sup>

### **Lack of independence of grievance redressal mechanism**

The Act does not provide a grievance redressal mechanism. The power to set up such a mechanism is delegated to the UIDAI.<sup>17</sup> However, making the administrative body also responsible for providing for the frameworks to address the grievances arising from the project severely compromises the independence of the grievance redressal body.

### **Right to opt out**

One of the core principles of right to privacy is the right to opt-out. The individual should have a choice to opt out by not providing their Aadhaar number, and in such a scenario any service should not be denied to that individual. This principle was also recognised by committee on privacy headed by AP Shah J.

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<sup>14</sup>Salient points in the Aadhaar Bill and concerns, *available at*: <http://cis-india.org/internet-governance/salient-points-in-the-aadhaar-bill-and-concerns> (last visited on March 12, 2017).

<sup>15</sup>*Supra* note 4, s. 47.

<sup>16</sup>Comments on The National Identification Authority of India Bill 2010, *available at*: <http://www.sacw.net/article1745.html> (last visited on March 12, 2017).

<sup>17</sup>*Supra* note 4, s. 23 (2) (s).

The Aadhaar Act does not provide an opt-out provision and also does not provide an option to withdraw consent at any point of time.<sup>18</sup> Section 7 of the Aadhaar Act actually implies that once the central or state government makes Aadhaar authentication mandatory for receiving a benefit then the individual has no other option but to apply for an Aadhaar number.

The only concession that is made is that if an Aadhaar number is not assigned to an individual then he/she would be offered some alternative viable means of identification for receiving the benefit.<sup>19</sup>

#### IV Conclusion

This is not legislation without flaws. There is a lot that's left to be clarified through delegated legislation which the government is slowly doing by means of regulations. However, it cannot be denied that the UIDAI has got very wide powers to make regulations by virtue of section 54 of the Act. The government has to be very careful with regard to the use of the information collected since the Act allows private entities to perform any function given to them by a contract.

Since its inception the Aadhaar scheme has been under scrutiny therefore there are many cases filed against different aspect of the scheme. The three major aspects are the right to privacy and the Act being passed as a Money Bill. The petitions with regard to these are still pending in the court. With regard to the nature of the scheme of Aadhaar the main argument of the government is that the services are voluntary but if a person wants to avail a service he should have Aadhaar, this really makes it rather mandatory in nature. The government has been regularly notifying the services for which Aadhaar is mandatory, the latest one is the mid-day meal scheme.

Demerit of living in a digital world, privacy has become the biggest concern now, examples like Hillary Clinton's use of private email servers, the alleged Russian hacking of the Congress's server and most importantly the NSA spying exposed by Snowden show us that the law unfortunately has not kept pace with technology. The same happened in the case of Aadhaar where the Act was passed few years after the beginning of registration of Aadhaar.

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<sup>18</sup>Report of group of experts on Privacy, *available at*:

[http://planningcommission.nic.in/reports/genrep/rep\\_privacy.pdf](http://planningcommission.nic.in/reports/genrep/rep_privacy.pdf) (last visited on March 12, 2017).

<sup>19</sup>Aadhaar Act and its Non-compliance with Data Protection Law in India, *available at*:<http://cis-india.org/internet-governance/blog/aadhaar-act-and-its-non-compliance-with-data-protection-law-in-india> (last visited on Mar. 12, 2017).

It must be noted that countries like China, Australia, UK and France have rejected similar identity schemes. Therefore, only time will tell whether the benefits of Aadhaar outweighs the risks involved.