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**LEGAL EYE**

## Aadhaar and the right to privacy

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*In the 21st century, a government that cannot protect its citizens' right to privacy cannot credibly maintain a democratic regime of equal treatment under the law.*

The Supreme Court has cut straight to the heart of the issue in the Aadhaar petitions. On behalf of all Indian citizens, it asks the current 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?

In the 20th century, governments that recognised no private sphere of thought, expression, and action outside their reach and the ruling party's reach were called "totalitarian". Aware that such governments are antithetical to freedom, the world's democracies were willing to sacrifice tens of millions of their citizens' lives in the Second World War to defeat them militarily. The democratic constitutions that rose on the ashes of European totalitarianism explicitly recognised the integrity of a private sphere that governments may not invade, as the U.S. Constitution's Bill of Rights, as interpreted by its Supreme Court, has also done. The post-Independence Indian Constitution does this as well.

In the 21st century, a government that cannot or will not protect its citizens' privacy rights cannot credibly maintain a democratic regime of equal treatment under the rule of law. Freedom of opinion and association; freedom of religion (or irreligion); the ability to make choices and decisions autonomously in society free of surrounding social pressure, including the right to vote — all of these depend on the preservation of the "private sphere."



Yet, the Government of India (GoI), speaking through its Attorney-General, has repeatedly declared that it is the government's position that Indian citizens have no constitutional right of privacy. Whether GoI is ultimately prepared to restate that position and risk a political loss before the Supreme Court remains to be seen.

The pressure on the government very much increased last week, when the Supreme Court 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. By referring these government applications to a constitutional bench whose composition has been announced last week, the court has assured Indians that a decision on their fundamental rights will not be long delayed.

The Attorney-General argued that the poor, whose welfare is at stake in the continuance of subsidy payments and other benefits, must be prepared to surrender their right of privacy, if any, in order to continue receiving benefits. This argument was sharply rejected by the bench, which recognises that the poor have the same rights as the rich, ad interim as well as permanently, in any democratic society.

This is not, as GoI has been claiming, a conflict between the needs of the poor and "1 or 2 or 10 persons" who care about everyone's fundamental right to privacy. The government's most basic obligation is to protect its citizens' rights — both their right to sustenance and their right to the privacy that enables freedom — equally. The ultimate resolution of this present controversy must recognise both the need for Aadhaar — in order to provide efficient and honest government services to citizens — and the need for stringent rules concerning access to and security of citizens' biometric data, in order to preserve their privacy.

GoI cannot adopt the posture that only one aspect of government's protective responsibility matters — that the costs of privacy destruction can be imposed upon the poor in return for LPG subsidies, or any other social benefit on which they absolutely depend. The Supreme Court's action this week ensures that GoI must respond to both halves of the problem.

In particular, the Indian Supreme Court is likely to find itself asking GoI about what in Indian and U.S. law is called the "doctrine of unconstitutional conditions". Both Supreme Courts have held that the government cannot condition receipt of public benefits on waiver of fundamental rights. This is in sharp contradiction to the argument offered in the Supreme Court this week by the counsel for Center for Civil Society, when he told the bench that "a person who has a right to privacy should be allowed to waive it for greater benefit."

We are about to begin one of the most important constitutional cases of India's post-Independence legal history. The good news is that the Supreme Court has shown it knows exactly what's at stake. In any democracy, that's a necessary place to start.

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