THE USE OF DATA COLLECTED UNDER THE AADHAR SCHEME IN THE CRIMINAL JUSTICE SYSTEM IN INDIA

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ABSTRACT

Technology may have moved on, but unfortunately so have its surrounding privacy issues- it is saddening to note that a significant technological advancement such as Aadhar has been significantly curbed due to its alleged ineligibility of use in the criminal justice system. This Paper explores the scope of use of Aadhar biometric data by the criminal justice system in its judicially circumscribed scope. Through a doctrinal analysis of secondary data, it can be concluded that although the privacy concerns surrounding the use of Aadhar data in the criminal justice system hold little water in the face of far more blatant exceptions to individual privacy, such use may be potentially subject to challenge on the grounds of the purposes of the Aadhar Act's nature as a welfare legislation. This paper explores the current use of technology in the Indian criminal justice system, its governing legislations, the potential use of Aadhar data for forensic purposes, why the same is correct and even welcome and possible ways to make it unambiguously clear that such use becomes constitutionally valid.

INTRODUCTION

It is no news that India's criminal justice system is far from perfect- catching of criminals is increasingly difficult, with their prosecution proving inadequate due to lack of evidence. Even if justice is not denied, it comes at a huge price- the price of time. The lack of infrastructure and the staggering number of cases to be handled plays a big role in impeding criminal justice. Contrary to popular belief, however, lack of technology may play a lesser role than what most imagine. It is however the *lack of use* of existing technology, the grey areas in its regulation and the technical difficulties faced in using such technology that often inhibits the criminal justice system from fully reaping its potential.

The most glaring example is that of use of data collected under The Aadhar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Act, 2016 (hereinafter referred to as 'the Aadhar Act') in the criminal justice system. The possibilities of use of data which is collected by the Unique Identification Authority of India (hereinafter referred to as "UIDAI") are tremendous- since it relies upon the creation of a Central database, not only does the identification of criminals and other concerned persons become far easier but the same may also be used to tackle the menace of trans-border migration of criminals, who tend to commit crimes in one state and flee to another for the purposes of evading law. In addition, it has also been suggested that the data collated by UIDAI should be used in the identification of unidentified dead bodies. Yet, due to the technical issues faced by UIDAI with maintaining a centralised reserve of data and the privacy concerns surrounding the use of Aadhar data, the use of such data in the criminal justice system is not robust.

The scope of this paper is restricted to discussion of the use of the data collated by UIDAI in identifying unidentified dead bodies and in maintaining a database of criminals and undertrials.

USE OF AADHAR BIOMETRIC DATA IN THE IDENTIFICATION OF UNIDENTIFIED DEAD BODIES.

As per a paper on National Security Strategy by the Bureau of Police Research & Development, New Delhi[i], the official numbers of unidentified dead bodies in India for the years 2014, 2015 and 2016 were 35,215 and 34,592 and 43,460 respectively. This poses a serious problem for the criminal justice system- if a dead body is so easy to hide and so difficult to identify, will not conviction be impossible in a large number of cases?

On July 31, 2019, a 32 year old model named Pooja Singh De was found murdered behind Kempegowda International Airport in Kaada Yarapanahalli Village. It turned out that she had first been robbed, then bludgeoned to death and later dumped by the Ola Cab driver who was driving her to her destination[ii]. The cab driver was later arrested and prosecuted, but not without unnecessary delay; as per the statement made by the Investigating Officer, it took the police a staggering 19 days to only identify the dead body- a job which they would have accomplished within 24 hours, had UIDAI been willing to share the Aadhar biometric data of the dead woman. Since UIDAI had declined to share the Aadhar biometric data of the deceased woman,

the police had been forced to resort to traditional methods of body identification, which are time- consuming[iii].

Using Aadhar biometric data for identifying unidentified dead bodies- is it really a problem?

In February 2019, lawyer and social activist Amit Sahni filed a Petition before the High Court of Delhi praying that the use of Aadhar data for forensic purposes be permitted[iv]. The Petitioner has prayed that directions be given to the Centre, UIDAI, National Bureau for Crime Records (hereinafter referred to as "NCRB") and the states to scan the biometrics of unidentified dead bodies and process them with the Aadhar portal to trace any pre-existing biometric details. In addition, directions have also been sought for instructing the Centre and UIDAI to share pre-existing Aadhar details, if any, without any delay with the NCRB and the states for the identification of bodies.

In its response, the UIDAI stated that the use of Aadhar biometric data for forensic purposes would be contrary to the provisions of the Aadhar Act, which was actually enacted to provide good governance as well as an efficient, transparent and targeted delivery of subsidies, benefits, services and social schemes. In response to the Petitioner's contention that the use of Aadhar data for the identification of unidentified dead bodies should be permitted since the same was being used to trace and identify missing children, the UIDAI stated on affidavit that the biometric data it collects may not be technologically feasible for authentication purposes as both the "live biometric" and the Aadhar number were essential for the same. The UIDAI further stated that neither its technological architecture nor its mandate for Aadhar- based authentication allows for any instance of 1:1 matching wherein fingerprints are matched against the other fingerprints in the UIDAI database. The Petition, as of date, is pending before the High Court.

Privacy concerns vis a vis the Puttaswamy judgment- Are they justified?

A nine-judge bench unanimously upheld the constitutional validity of the Aadhar scheme while upholding the right to privacy of an individual[v]. The Apex Court also read down certain provisions of the Aadhar Act which allowed private entities to collect an individual's Aadhar data as well as the linking of Aadhar details to bank accounts and mobile numbers.

The Court held that a statute is subject to a proportionality test, which includes the aspects of *legitimate goal* (the measure restricting a right must have a legitimate goal), *rational connection* (it must be a suitable means of furthering the goal), *necessity* (there must not be any less or equally effective alternative) and *balancing* (the measure must not have a disproportionate effect on the right holder). However, more than dealing with the right to privacy, the judgment deals with reasonable exceptions to the same; the same was evident when the Supreme Court held in this judgment that the right to privacy cannot be impinged without a just, fair and reasonable law.

Following that the right to privacy is subject to certain reasonable restrictions, is it not desirable that such exceptions also be extended to identification of a dead body?

The Court read down section 57 of the Aadhar Act, keeping in mind that the leakage of an individual's Aadhar data to private entities may give rise to unauthorised use of data and cause possible harassment to the individual. Thus, it can be safely ascertained that the reading down of section 57 is aimed at protecting the privacy rights and unauthorised use of personal data of living persons. The first question to be considered is, what is the status of persons who have ceased to exist? The law recognises the deceased as persons only vis a vis certain rights such as right to reputation, which may be prosecuted upon by the legal heirs of the deceased. Will it not be important to identify whether they are even alive in the first place? Or will such finding out be a violation of their right to privacy?

Herein, the term 'privacy' must be given special attention. The law of the land guarantees the right to privacy. It, however, does not guarantee the right to anonymity. The line between the privacy of a living person and the anonymity of a possibly deceased person must be sharply drawn.

The second question which must be considered is as to whether the identification of unidentified dead bodies through their Aadhar biometric data poses any privacy threats. With a proper policy in place, the answer may be negative. If the matching of biometric data of unidentified dead bodies is done in conjunction with well-established techniques such as physical identification of dead bodies by persons who may know them, the chances of mismatch with the wrong person may be eliminated. It need not be further emphasised that mere physical identification of a dead person does not amount to a breach of his/her privacy

rights, for once deceased, the sphere of his/her privacy rights dramatically reduces as per well-established law. Thus, neither the privacy rights of the living nor the dead stand violated.

Considering further the hypothetical question of the privacy of a dead body, if the identification of an unidentified dead body poses a threat to its privacy, then does not an autopsy of the said body, wherein it is stripped bare and minutely analysed, pose a far greater and yet more undignified violation? The logical corollary to the question is that if autopsies are permitted and not deemed to be violative of the right to privacy, then the mere authentication of an unidentified dead body must not ring any alarm bells. In fact, sections 53 and 53A of the Code of Criminal Procedure, 1973 permit the examination and collection of evidence and even DNA profiling of living persons. If the profiling and detailed examination of living persons can be allowed, then should the mere authentication of an unidentified dead body be rendered impermissible in the name of privacy rights?

In fact, India is not new to such use of personal data; as per the statement of Shri Ajay Bhushan Pandey, CEO of UIDAI, Aadhar data had been used to trace as many as 500 children as of November, 2017[vi]. Echoing the contention of Mr. Amit Sahni, if missing children can be traced through Aadhar data, then why can unidentified dead bodies not be similarly traced?

It may be argued that the Aadhar Act is a welfare legislation intended to confer benefits on eligible persons and therefore does not encompass the purview of application in forensics. However, it may also be argued that welfare legislations should be construed liberally and that the data collated under the Aadhar Act be used for the benefit of justice in general.

SUGGESTIONS

The technological problems with regard to the use of biometric data for the identification of unidentified dead bodies may have something to do with the data of all the individuals covered under the Aadhar scheme being stored with the Central Identities Data Repository (hereinafter referred to as "CIDR"). CIDR is a government agency that stores and manages data for the Aadhar scheme. When all the data is centralised, it becomes difficult to retrieve the data of specific individuals when the need arises; what was originally brought into place to save time ironically becomes another red-tapism nightmare.

The solution, therefore, lies in decentralisation of data. Assuming that it is technologically not feasible for UIDAI to match the fingerprint data on the database on a 1:1 basis, the solution would lie in creating atleast two pools of data at the national level which would help in streamlining the authentication of unidentified dead bodies. If the UIDAI were made in charge of creating two national databases, the first being that of missing persons reported to the police and the second being that of unidentified dead bodies, it would effectively filter the number of persons with which to match. Such authentication should be done not in exclusion but instead in support of the traditional methods of body identification; the use of Aadhar biometric data must be considered to be a catalyst and not a mere replacement. As far as privacy rights of the missing persons are concerned, the same will not be subject to infringement as the same body which has otherwise collated their biometrics for the Aadhar scheme will be responsible for creating the aforementioned data pool. The use of Aadhar biometric data will allow the law enforcement agencies to use either or both the iris scans as well as the fingerprints of the unidentified deceased persons and missing persons in the event the law enforcement agencies wish to further confirm the identity of the persons concerned by matching with both the biometrics or one of the biometrics has been rendered useless through decay or destruction.

Use of Aadhar biometric data in maintaining a database of criminals and undertrials

In the words of Rabindranath Tagore in *Gitanjali*, "Alcohol taken once must be taken again". Likewise, it is natural for certain persons to commit crimes again and again till they can be summarily classified as habitual offenders or history sheeters.

"Bail, not jail" is an established principle of criminal justice in India. Bail may be granted to an alleged offender either mandatorily (in case of bailable offences) or as per the Court's discretion (in case of non-bailable offences). Various High Courts in the country have laid down certain grounds to be considered while granting bail in case of non-bailable offences. In deciding as to whether or not bail should be granted in a particular case, the criminal antecedents of the alleged offender, though not always of determinative value, should not be totally discarded as irrelevant[vii]. In fact, the Supreme Court in 2015 has cautioned against the liberal grant of bail to habitual offenders in the name of mere parity with first- time offenders[viii]. Furthermore, it has been found in a study that out of several categories of offenders such as juvenile delinquents, youth criminals, women criminals, habitual criminals and professional criminals, it is the category of habitual offenders which tends to abuse the bail process the

most[ix]. In fact, even criminal legislation is wary of such elements- section 110 of the Code of Criminal Procedure, 1973 provides that a Magistrate may, upon receiving news of the existence of a habitual criminal in his local jurisdiction, ask him to showcause as to why he should not be made to execute a bond with sureties for good behaviour for a period not exceeding three years as the Magistrate may consider fit.

Given that bail is liberally granted in India and that it is the habitual offenders who abuse it the most, a proper cataloguing of the latter becomes crucial for being able to detect future crimes, or, even better, for being able to prevent them before their occurrence. In fact, Report No. 268 prepared by the Law Commission of India[x] emphasises the need for a central intelligence database. The reasoning behind such emphasis is that although criminal antecedents can be discovered through a record of FIR and judgments, both of which can be found online, the information is piecemeal and not easily accessible. In fact, it has been recommended in the same Report that the technical architecture of the Crime and Criminal Tracking Network Systems (hereinafter referred to as "CCTNS") scheme may be adapted and utilized to ensure that the person accused of an offence does mark his appearance, by, amongst other means, his Aadhar number. With reference to a direction by the High Court of Delhi to the Central Bureau of Investigation to start a cell on criminal records of abductors and kidnappers, the Report may be quoted as stating, *"These links may call for the active involvement of the Ministry of Home Affairs, facilitated by various state and national authorities."*

In fact, the Report goes so far as to even recommend the substitution of the following section in place of the present section 88 of the Code of Criminal Procedure, 1973:

> ***88. Power to take bond for appearance.-*** *When any person for whose appearance or arrest the officer presiding in any Court is empowered to issue summons or warrant, is present in the Court, such officer may require such person for his appearance in the Court, or any other Court to which the case may be transferred for trial, and for this purpose may require the person to furnish security for such appearance:*
>
> *Provided that if the person furnishes non-monetary security mentioning therein members of his family, if any, their age(s) and address(es) with particulars of Aadhar Card or PAN Card, or any other document recognised by law, the Court may, on being satisfied, dispense with filing of sureties till the need arises:*

Provided further that the method of release contained in this sub-section shall not be applicable to a person who has been previously convicted of cognizable and non-bailable offence.

It is thus evident that setting up a national database of habitual offenders is highly desirable for the purpose of curbing crime rates and that certain provisions in existing criminal legislation may need to be added, altered or amended in order to facilitate the same.

Law relating to collection of biometrics and current databases maintained by India

The Identification of Prisoners Act, 1920 (Act No. 33 of 1920)[xi] allows for the collection of fingerprints of persons convicted of any offence punishable with rigorous imprisonment for a term of one year or upwards, or of any offence which would render him liable to enhanced punishment on a subsequent conviction. The Act provides for the collection of fingerprints of even those who have been order to give security of good behaviour under section 118 of the Code of Criminal Procedure, 1908. The Act even makes resistance to give measurements (i.e., samples of fingerprints or footprints) punishable under the Indian Penal Code, 1860 and gives the concerned authorities the power to use "all means necessary" to secure the same. With a view to keeping a check on habitual offenders, section 7 of the Act provides for the destruction or turning over of measurements to convicts who have not been previously convicted of an offence punishable with rigorous imprisonment of one year or upwards and who have either been released without trial or been discharged or acquitted by any Court in the criminal proceedings in connection with which the measurements had been taken.

Criminal legislation explicitly provides for the surveillance of habitual offenders. Most states have their own Habitual Offenders Act in place, which allow the Magistrates as well as the law enforcement agencies to monitor the movements of whom they define a 'habitual offenders'. All the state acts have the following common elements[xii]:

a) The Preliminary part which contains the title and the definition of the term 'habitual offenders'
b) Provisions relating to the registration of habitual offenders, the procedures to be followed and the restrictions to be imposed on their movements
c) Provisions relating to the corrective training of habitual offenders and,
d) Penalties for non-compliance with the provisions of the Act.

As an example, the Karnataka Habitual Offenders Act, 1961 has all of the abovementioned features. Of particular interest are section 6 (power of the District Magistrate or any officer designated by him/her to order that the fingerprints, palm impressions, footprints and photographs of habitual offenders be taken) and section 7 (habitual offenders to mandatorily notify every change of residence and report themselves).

As for the technological backup for storing and sharing fingerprints, the criminal investigation system presently uses an electronic system called Fingerprint Analysis and Criminal Tracing System (hereinafter referred to as "FACTS"), which was co-developed by NCRB and CMC Ltd based on Automated Fingerprint Identification System (AFIS), the electronic system for storing and processing fingerprints currently in use in the United States of America (USA).

The Central Finger Print Bureau (hereinafter referred to as "CFPB") is the Central Repository for storing and processing fingerprints. Most states have a state finger print bureau closely modelled on the CFPB and both the Central and State Bureaus work in tandem with each other.

As of 30th November, 2018, the CFPB had a database of 12,07,152 ten-digit fingerprint slips on record[xiii].

The Indian Government has even taken steps for creating databases for specific crimes[xiv]. The National Database on Sexual Offenders (hereinafter referred to as "NDSO") was launched by the Ministry of Home Affairs on 20th September, 2018. NDSO is a central database of sexual offenders in the country which is being maintained by the NCRB. As on 28th December, 2018, the NDSO had 04,93,778 records of offenders involved in sexual offences like rape, gang rape, eve teasing, stalking, child abuse etc.

Is this enough?

While it is laudable that the Government is considering and to a certain extent even implementing the idea of creating multiple databases of similar types of crimes grouped together, it will be worthwhile to consider utilising the biometrics already available under the Aadhar scheme. There are no foreseeable privacy issues in this regard, as the law enforcement agencies already resort to surveillance measures such as storage of fingerprints, recording of demographic details of accused while they are out on bail etc. The use of Aadhar biometric data will be beneficial in the sense that the law enforcement agencies will not have to spend

their time in collecting biometric data afresh when it is already stored centrally in another database. Since the biometric data collected under the Aadhar scheme also includes iris scans, an alternative to fingerprints will thus be able too.

It is suggested that a centralised database of Aadhar biometric data of persons who are being prosecuted for the first time in a cognizable offence be created for storing of Aadhar biometric data of such persons on a temporary basis. The Aadhar biometric data of such persons must be collected preferably on the very date when charges have been framed against them and it becomes clear that they will be subjected to trial. In all cases, this collection of biometric data must be done before grant of anticipatory bail to the accused. The application for sharing of Aadhar biometric data must be made by a designated officer of the concerned law enforcement agency to the UIDAI in a prescribed format and along with a certificate bearing the sign and seal of such designated officer stating that such biometric data will be erased from the system of the concerned law enforcement agency within a stipulated amount of time after the conclusion of the trial. The result of the trial will be immaterial to the decision of erasing the biometric data of the accused; if convicted, their biometric data may be recorded as per the Identification of Prisoners Act, 1920 (Act No. 3 of 1920) and if acquitted, then storing their biometric data will not be necessary as they will then be deemed innocent and harmless as per law.

While the Identification of Prisoners Act, 1920 (Act No. 33 of 1920) and state legislations for habitual offenders call for the collecting of the measurements of persons who have already been convicted, the suggestion of collecting Aadhar biometric data is limited only to undertrials charged for the first time with a cognizable offence who may be enlarged upon bail. The reason for such a suggestion is that since many serious crimes are committed by persons enlarged on bail, it becomes important to cast as wide a net as possible to nip potential troublemakers in the bud. Although there are provisions for collecting the measurements of repeat offenders, there is no law as of date which mandates the collection of the biometric data of a first time offender in a cognizable offence who has been enlarged on bail.

CONCLUSION

While the existence of state-of-the-art technology in the criminal justice system in India is highly commendable, we are yet to fully harvest the full potential of such technology. Within

the scope of this paper, it has come to light that the hesitance to allow the use of Aadhar biometric data in the criminal justice system springs from privacy concerns, which, given that surveillance is more than encouraged in the criminal justice system, are largely unfounded. Needless to say, there need to be certain amendments brought about first in the Aadhar Act so as to make the sharing of Aadhar biometric data for forensic purposes constitutionally valid as per the Aadhar Act, followed by subsequent amendments in present criminal legislation, especially the Code of Criminal Procedure, 1973.

Considering that legislations such as Identification of Prisoners Act, 1920 (Act No. 33 of 1920) and the habitual offender laws existing at the state level clearly prioritise threats to public security over a convict's privacy, the concerns about use of Aadhar biometric data in the criminal judicial system are much ado about nothing. As long as the body concerned with storing Aadhar data is kept in the loop and responsibility for unauthorised data leakage is appropriately placed, there should be little cause for concern- for either the living or the dead.

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