

DEBATE OVER PRIVACY DURING AADHAAR HEARING

Formed expert panel to study issues related to data protection: Centre to Supreme Court

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AMID THE debate over privacy rights, the Centre told the Supreme Court on Tuesday that it had constituted an expert committee under Justice (retired) B N Srikrishna to "study various issues relating to data protection in India... and suggest a draft data protection Bill".

"The Government of India is cognisant of the growing importance of data protection in India. The need to ensure growth of the digital economy while keeping personal data of citizens secure and protected is of utmost importance. It has thus been decided to constitute a Committee of Experts under the Chairmanship of Justice B N Srikrishna, former Judge, Supreme Court of India, to identify key data protection issues in India and recommend methods of addressing them," Additional Solicitor General Tushar Mehta told a nine-judge Constitution bench headed by Chief Justice of India JS Khehar, which is hearing the question of whether privacy is a fundamental right.

Mehta, who appeared on behalf of the Unique Identification Authority of India, the nodal agency for implementing Aadhaar, submitted a copy of the notification issued by the Ministry of Electronics and Information Technology on Monday.

The apex court said that the directive principles of state policy

obliged it to read privacy — which was recognised by international conventions as an inalienable human right — into fundamental rights. The observation came from Justice RF Nariman in response to the submission by senior counsel A Sundaram, representing Maharashtra, that the Constituent Assembly had considered the question whether privacy should be granted fundamental right status and rejected it.

"There are international conventions to which India is a signatory. Privacy is expressly declared in the 1948 UN Convention on Human Rights as an inalienable human right... it is our duty as Constitutional Court to read it into fundamental rights," Nariman told the counsel.

Sundaram told the bench that "the intention of the founding fathers is clear. If the court were to hold that this (not giving privacy fundamental rights status) is no longer good, it will amount to saying that the intent is no longer good. That is introduction and not interpretation. That can be done only by Parliament".

He stressed that "with technological changes, there may be cases of violation of a person's privacy and the remedy is to bring in suitable regulatory mechanism and not by redefining Article 21 (of the Constitution)".

ASG Mehta told the bench that privacy was a very valuable common law right and there was no need to elevate it to a fundamental right to protect it. "If privacy is recognised as a fundamental right,

it will be stepping into very very hazardous territory... under garb or privacy, it will be misused... all out efforts will be made to stop good governance and poor will suffer," Mehta said, referring to what he claimed were beneficial aspects of Aadhaar. "If there is any violation of privacy, statutes can take care of it."

This prompted Justice Nariman to ask, "What makes you apprehend that if we uphold privacy as a fundamental right we will not uphold the Aadhaar scheme?"

The ASG submitted that privacy was a vague right incapable of definition. "You cannot thrust a new fundamental right into the Constitution. This would require legislative deliberations," he added.

On Aadhaar, Mehta submitted that it is a "classic case where human privacy is protected to the maximum". Opposing suggestions that it enabled surveillance, the ASG said "Aadhaar Act considering its scheme and provisions, tracking is impossible".

Justice D Y Chandrachud, who was on the bench, pointed out that there must be some "overarching principles" in protection of privacy rights and that "every holder of information must disclose the purpose for which it is sought for and introduce some guarantees that it will not be used for any purpose other than the purpose for which it is sought for".

Arguments in the matter will continue on Wednesday.

How panel members view data protection

ARGHYA SENGUPTA,

Research Director, Vidhi Centre for Legal Policy



Sengupta was the youngest lawyer to defend the Government in the Supreme Court in the case against linking Aadhaar to PAN in filing of income tax returns in May. Sengupta, who helped in drafting the Aadhaar legislation, is also named as the youngest member of the 10-member committee that will look into data protection and the laws around it.

In August 2015, Sengupta wrote about Aadhaar: "...when a blunt instrument such as a blanket right to privacy is used to petition the court in order to stop the government's Aadhaar programme, which is the context in which this controversy arose, SC is well entitled to pause and require the instrument to be sharpened..."

In May 2017, he wrote: "The Aadhaar Act, 2016, contains an entire chapter dedicated to protection of information, becoming the first modern-day statute in India to explicitly do so. It obliges both the Unique Identification Authority of India (UIDAI) as well as the range of agencies which collect Aadhaar

data to keep data secure."

RAMA VEDASHREE,

CEO of Data Security Council of India



On Aadhaar-based point of sale, *The Times of India* quoted her in April: "When Aadhaar-enabled payment systems proliferate, host of data is deployed at merchants of which some can be phone-based, some through PoS devices. When an entire ecosystem is so closely connected, security by design becomes default."

ARUNA SUNDARARAJAN,

Secretary, Department of Telecom Information



Technology Act, 2000, needed to be amended and the five issues that should be addressed, *Mint* quoted Sundararajan in December 2016 as saying: "First, what should be the security framework for any kind of digital payments? Two, the standards and liabilities of the service provider. Third, data privacy and confidentiality. Fourth, storage and access of data. And if someone fails to comply, what penalty should apply, especially where details

of millions (are involved)."

RAJAT MOONA,

Director, IIT Raipur



In 2015, Moona — then Director of Centre for Development of Advanced Computing — stated that Aadhaar had made e-KYC and e-signatures possible. "We are working with the Election Commission to link the voter card to Aadhaar because it will help in cutting out duplication," *Mint* had quoted him

AJAY BHUSHAN PANDEY,

CEO of Unique Identification Authority of India



Pandey wrote *The Indian Express* in May 2016: "The critics tend to forget that Aadhaar empowers the people, not the state. India's effort to provide unique identification to its people and digitise its citizen databases, public-private, is mistaken as an exercise towards invasion of privacy... Often, the current debate reminds us of Europe's Luddite movement in the 19th century when mechanisation was opposed due to fears of job loss."

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