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PRIVACY AND BIOMETRIC ENABLED NATIONAL ID CARD: A BRIEF COMPARATIVE CASE STUDY OF INDIA AND KENYA

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Abstract: *This paper examines the constitutional validity, the statutory backdrop, and the legal administration backgrounds of the Aadhaar system in India and the Huduma Namba in Kenya. India's Aadhaar system, regulated by the Aadhaar Act 2016, has recorded an enrollment of more than 1.3 billion citizens using their demographic and biometric information. The system being integrated as a mandatory requirement for accessing public services raised issues of privacy and proportionality that led to a significant hit on the requirement in the 2018 Supreme Court Judgment. Kenya's Huduma system has faced a constitutional challenge prior to its implementation due to the High Court's ruling that the government violated the need to have a data protection impact assessment shortly before its operative implementation. This paper explores the two countries' aim to use the biometric IDs to enhance financial integration and drive off identity-based fraud while facing the reality that stringent privacy safeguards, consent necessitation, and surveillance control are critical in today's digital identity era.*

Keywords: Privacy, Data protection, Statutory interpretation, Proportionality test

Introduction

In Kenya, the Huduma Bill of 2019 requires Huduma Namba for essential services, such as accessing health, government housing, schools' enrollment, social protection, and others. The Bill requires that all government departments and agencies involved in offering public services provide for its linking to the National Integrated Identity Management System and the usage of the Huduma card as the official government ID for delivery of services and conducting transactions. One should be aware that the Bill stipulation on welfare through digital ID. The High Court of Kenya declared the proposed national digital ID card unconstitutional on October 14, 2021.[36]

In a similar way, in India, the Aadhaar Act of 2016 targets giving unique identity numbers to residents of India to enable the clear and efficacious provision of welfare. Section 7 of the Act sets out relevant provisions for welfare: it makes Aadhaar number/linking necessary as a precondition for getting subsidies, benefits, or services or paying taxes and even receiving financial assistance from the Consolidated Fund of India. The Supreme Court, in affirming the validity of the Act subject to various provisions, has interpreted that the allowances and facilities mentioned in Section 7 are subsidies targeted at identified welfare classes.[37]

Thus, court decisions on the implementation of national identity systems in Kenya and India diverge, which makes this a compelling topic for comparative analysis. In one case, the court in Kenya banned the new concept of id, and in another, the Indian high court denied the claimants in any relief.[38] This research will shed

[36] Sheetal Asrani-Dann, The Right to Privacy in the Era of Smart Governance: Concerns Raised by the Introduction of Biometric-Enabled National ID Cards in India, 47 J. Indian L. Inst. 53, 66 (2005).

[37] "Aadhaar: Platform or Infrastructure? Developing a Taxonomy for India's Digital Public Ecosystem, Indian Council for Research on International Economic Relations (ICRIER), Feb. 22, 2023, https://icrier.org/publications/aadhaar-platform-or-infrastructure-developing-a-taxonomy-for-indias-digital-public-ecosystem/.

[38] Kenyan Court Ruling on Huduma Namba Identity System: The Good, the Bad and the Lessons, Privacy International, http://privacyinternational.org/long-read/3373/kenyan-court-ruling-huduma-namba-identity-system-good-bad-and-lessons (last visited May 11, 2024).

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light on what differences and common features the judicial ratio and legal arguments will expose. Through this analysis, we able to make understanding of the privacy rights, data protection laws, constitutionality that led to acceptance or refusal of the biometric national ID.

Threats to Privacy : Biometric ID cards on National level

The introduction of National ID Systems bring various threats to Individual Right to Privacy. It is justified by several reason. First and foremost, every identity system is built around a central register that contains personal information pertaining to that on the ID Card or on the mother documentation used in the registration of identity events.[39] If this information is stored on a centralized computer filing system, the ID number is turned into a common key to numerous, if not all, governmental record systems.[40] The risks that centralized information poses to individual privacy and liberty in general are staggering. Centralized information is centralized power. The inclusion of a national identifier in the ID card enables all the various entries about a person dispersed across various data banks to be linked and analyzed using modern data mining techniques. That is, an entry in one data bank can affect other data sets. Finally, multi-agency interaction with sensitive personal data or multi-use of the ID card increases the risks of personal data misuse. [41]

Biometric Enabled National ID Cards and its effects on Right to Privacy

The right to privacy is one of the fundamental human rights under several international documents, such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. National constitutions and data protection legislation also safeguard against unreasonable violations of privacy or dissemination of private information[42] . When it comes to BENIC (Biometric Enabled National ID Cards) systems, the algorithms need to be fed, and subsequently maintain, large databases of biometric information, which introduces a challenge to the efforts to protect privacy. Different countries have different regulatory frameworks for BENIC and biometric systems at large, which indicates a difference in their understanding of how concerns of privacy can be balanced against security.

BENIC in India

The Biometric Enabled National ID Card System in India is based on the Aadhaar framework in which individuals are provided a unique identification number, known as the Aadhaar Number, which is printed on the Aadhaar Card. The Parliament of India passed the Aadhaar Act of 2016, which provides a legal framework for this system. The Act aims to "enable good governance, enhance services, secure information, guarantee the correct identification of persons and prevent the theft of identities" by facilitating the efficient, transparent, and targeted distribution of subsidies and services funded by the Consolidated Fund of India to residents of India by assigning them unique identity numbers[43]. To maximize the reach of Aadhaar-based subsidies and services, the Act establishes the UIDAI and provides it with the ability to prescribe the demographic and biometric particulars needed for enrollment; issue Aadhaar numbers; authenticate these numbers; check their correctness; and designate benefits and services that require Aadhaar authentication.

Aadhaar - A facilitator of development

The inception of the Aadhaar system in 2009, indeed flagged off the world's largest biometric identity programme, implemented to provide every single citizen with proof of identity acceptable throughout the nation. Initiated

[39] Indian Council for Research on International Economic Relations (ICRIER),
[40] Isha Pali et al., A Comprehensive Survey of Aadhar and Security Issues, arXiv:2007.09409, arXiv, July 18, 2020, http://arxiv.org/abs/2007.09409.
[41] Ursula Rao & Vijayanka Nair, Aadhaar: Governing with Biometrics, 42 S. Asia: J. S. Asian Stud. 469 (2019), https://doi.org/10.1080/00856401.2019.1595343.
[42] Buddhadeb Halder, Privacy in India in the Age of Big Data, Ass'n for Progressive Commc'ns, https://www.apc.org/en/pubs/privacy-india-age-big-data (last visited Sept. 7, 2023).
[43] Brett Orren, India's Data Wild West: The Aadhaar System and Its Questionable Data Protections, 45 N.C. J. Int'l L. 619 (2020).

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through the Unique Identification Authority of India, or UIDAI, the Aadhaar number was first distributed in September 2010, propelling the citizens and authorities in a radical shift towards a meaningful identity check. However, the process of laying a comprehensive statutory foundation beneath this initiative has been fraught with difficulties.[44] Indeed, the National Identification Authority of India Bill 2010 was laid before the Rajya Sabha on 3 December 2010 for a statutory foundation implementation of the Aadhaar number. Nevertheless, the 42nd Parliamentary Standing Committee regarding finance of the Lok Sabha scrutinized the Bill and demanded further guidelines for biometric information retention and the framework of the Unique Identification system.[45] While there were several subtleties of the Aadhaar system that necessitated attention, there were ways in which the system was rather advantageous. The UID number has advantages in terms of documentation requirements and the capability to organize the supply of system-specific perks. It had the side effect of offering those who needed it a system that could be utilized to travel through India without worrying about identity verification. Before this legislation, beneficiaries' unique identification for the purposes of schemes like card schemes was available in a variety of formats, necessitating the carrying of multiple identity cards.[46]

Supreme Court of India and Aadhar (BENIC)

The 2017 Justice K. S. Puttaswamy v. Union of India[47] case is a seminal moment in the legal history of India. The Nine-Judge Bench's ruling in the case deemed the Right to Privacy as a Fundamental Right protected by Article 21 of the Constitution of India. This judgment held that the Right to Privacy is an inherent and essential component of personal liberties that cannot be abridged in any circumstance. However, it expressly overturned the opinions in the M.P. Sharma v. Satish Chandra and Kharak Singh v. State of U.P. cases. The broad construction of the Right to Privacy by the Court has permitted people to augment various legal claims and challenges. The parties in a privacy claim must clout privacy against other valid concerns. With no express prioritization of rights in Part III and the cryptic language of the legal system, the case's determination will hinge on the peculiar circumstances and the judicial interpretation used. Therefore, not only did the Court's decision affirm the Right to Privacy as a holy grail of personal liberties, but it also established vital precepts for future legal disputes and conversation about privacy in the Indian legal system.

The Court's rather broad and vague understanding of the right to privacy has cleared the way for an extensive range of legal claims. While the specifics of the restraints on the right to privacy will change from case to case, privacy claims will often need to be competed against competing demands for privacy. Given the absence of a ranked list of priorities among the wide range of rights safeguarded by Part III and the Constitution's complicated language, the outcome of each case will be determined by the circumstances of a particular situation and the interpretation of the judiciary.[48]

However, the politics of the post-Emergency era made this a model that the Court has never returned to since. Thus began the second phase of the Court's history, deploying Public Interest Litigation to expand the number of and uses for constitutional rights. In this period, the Supreme court addressed the matter of maladministration and recognized different sorts of constitutional rights, although with mixed success. Although the Supreme Court continued a pattern of deference where civil rights are concerned, this is also the era of the TADA and Naz foundations cases.[49]

[44]Shankkar Aiyar, Aadhaar: A Biometric History of India's 12-Digit Revolution, Westland Publ'ns Ltd (2017).
[45] Id
[46]Kavita Dattani, 'Governtrepreneurism' for Good Governance: The Case of Aadhaar and the India Stack, 52 Area 411 (2020), https://doi.org/10.1111/area.12579.
[47] (2017) 10 SCC 1; AIR 2017 SC 4161.
[48]Gautam Bhatia, Revisiting the Aadhaar Judgment, Constitutional L. & Phil., https://indconlawphil.wordpress.com/2019/11/11/revisiting-the-aadhaar-judgment/ (last visited May 11, 2024).
[49] Govind Kelkar, ed., Aadhaar: Gender, Identity and Development, 1st ed., Academic Found. 110 (2014).

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Kenyan High Court and Biometric National Identity Card

On the issue of privacy rights in Kenya, the Kenyan High Court rejected the government's claim.[50] "In reality, the current infrastructure of the government does not provide the capability of building a safe organization to store the data, which raises the issue of privacy and data infringement. The point of individual privacy acquires particular significance, and it is argued that governments'' leaving the card entirely online is a major challenge. This was a clear violation of Section 31 of the Kenyan Data Protection Act, [51]and presumably showed that the government was unsure that their misuse of the data would be forgiven. It is clearly vital to understand these problems and find solutions to avoid them. Thus, an identification system on one side has a database of files guaranteed resistance, and protection data with at least two files under the right of reasonable rights on the client, the security of the data is offered, but not of the server.

To understand where the Huduma Card fits into Kenya's digital identification blueprint, it must be set in relation to the primary system which is the National Integrated Identity Management System patterned in some way the Aadhaar Card in India. The latter was introduced through the Statute (Miscellaneous Amendments) Act, No. 18 of 2018[52] that amended Kenya's civil registration law, the Registration of Persons Act in 2018 by Introduction of a new section, section 9A which established NIIMS[53]. The Act came into being on January 18, 2019 and from there on, in March 2019 the Government of Kenya began a nationwide process to collect personal information, some of which were biometric. However, the High Court brought questions about the legality of the law and implementation of NIIMS. [54]

For one, in the original constitution of NIIMS the court found a hostile agency to constitutional rights and freedoms. The principal point of dispute was that, as of that time, there was no law which enabled the protection of privacy in Kenya in line with the constitution, because the Kenya Data Protection Act was passed after NIIMS. As such, collection of private information such as GPS coordinates, DNA and other biometrics was declared sensitive and unconstitutional because they were mandatory in the information collection exercise, infringing on privacy rights. Ultimately, a High Court judgement on January 30, 2020 declared that NIIMS can go ahead, but only if the NIIMS regulations are well aligned with the constitution, on the condition that the DNA, GPS and other sensitive biometric data, the privacy infringement measures, are struck off. The KDPA was later enacted on November 2019[55], and the court also said in its judgement that the processing of NIIMS data should not continue before the KDPA was operationalized and regulations made. As such, data protection in NIIMS is protected by the constitution, and the KDPA, Registration of Person's Act, The Registration of Persons (National Integrated Identity Management System) Rules, 2020 and Data Protection (Civil Registration) Regulations. In October, the government made two regulations: that regulated NIIMS as a source of identity and the ground-law that gave the legal basis for the regulation of NIIMS data. A Huduma Bill was also proposed to lay a ground-law for NIIMS . As such, the government continued the process of introducing a system of state-owned identification, but this time the National Integrated Identity Management System through the Ministry of Interior through the Huduma Card. This was short-lived as activists sought judicial review in the High Court, where the government won but the case exposed and continues to expose the near-legal state in

[50]Nubian Rights Forum & 2 Ors. v. Attorney General & 6 Ors., Petitions 56, 58 & 59 of 2019 (Consolidated), [2020] eKLR.
[51]Kenya Data Protection Act, No. 24 of 2019, § 31.
[52]Statute Law (Miscellaneous Amendments) Act, No. 18 of 2018 (Kenya).
[53]Statute Law (Miscellaneous Amendments) Act, No. 18 of 2018 (Kenya).
[54]Kenyan Court Ruling on Huduma Namba Identity System: The Good, the Bad and the Lessons, Privacy Int'l, http://privacyinternational.org/long-read/3373/kenyan-court-ruling-huduma-namba-identity-system-good-bad-and-lessons (last visited May 11, 2024).

[55] Case Study: Kenya's Biometric ID System, Catalysts for Collaboration, https://catalystsforcollaboration.org/case-study-kenyas-biometric-id-system/ (last visited May 11, 2024).

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which Kenya's digital identification work occurs.[56]

In the case of NIIMS, The Court's reluctance to explore further the technical aspects of the NIIMS structure is understandable as the judiciary may lack the expertise to address intricate technological matters properly. However, this concern is dispelled by the presence of expert witnesses from all sides and the meticulous documentation of evidence by the Court. Overall, despite the fundamentally complex nature of the subject, the Court explored the available expert evidence in depth, indicating its commitment to understanding the technical nuances completely.[57]

Drawing Conclusions

Comparing these two countries remains a challenge to some extent, because of a number of different contexts or legal systems. For instance, although India and Kenya have a common history in terms of British colonization, the use of common law jurisdictions does not create enough space for direct comparisons[58]. However, a comparison of their democracies allows distinguishing patterns[59]. India's democracy is more secure and allows for greater legislative flexibility and development, as can be seen in the example with the Aadhaar ecosystem, that could be criticized for insufficient concern for privacy and enforceability. On the contrary, the development of Kenyan law is hampered by poor bar associations, which reduces the quality and adequacy of legislation. Nonetheless, advocacy organizations such as the Law Society of Kenya and judicial activists have made progress. The High Court of Kenya finding that individual privacy rights were violated by new biometric national identity cards exemplifies how such initiatives create. When we look at K.S. Puttaswamy judgement and Huduma card judgement, courts in both cases examine the test of right to privacy, but in India, the Supreme Court upheld the Aadhar bill by accepting it as a money bill because of the financial intergration attached to it.

When the Aadhaar Matter was initially presented to the Supreme Court, it shown reluctance to pass judgment on the initiative. Although the project was extensive, it lacked any statutory mandate. It was operating solely as an executive action. In the subsequent years, the Court considered the issue and issued temporary rulings without halting the project in any manner. Over time, the Supreme Court developed new and creative legal approaches to address this problem. The majority of Public Interest Litigations (PILs) focus on the actions or omissions of the government that violate the basic rights of the general public. Thus, to have a comprehensive understanding of the facts, the Supreme Court started depending on sworn statements from government officials. The Court typically requests a detailed report of the facts from a designated public official or department, and mandates them to provide thorough affidavits confirming the same.[60]

In conclusion, the Kenyan court's assessment of the NIIMS framework and Justice DY Chandrachud 's opinion in the Aadhaar Case correspond to the central issues associated with the collection, retention, and processing of biometric data and the underlying concepts of privacy and dignity and personal freedom. High Court of Kenya points out the necessity of adopting data protection regulations before proceeding with extensive data collection, focusing particularly on the central privacy issues associated with biometric information.

The thorough examination of Section 31 of the Data Protection Act, which identifies biometric data as a unique category because of its distinct physical association with relevant

[56]How the Kenyan High Court (Temporarily) Struck down the National Digital ID Card: Context and Analysis, Future of Privacy Forum, https://fpf.org/blog/how-the-kenyan-high-court-temporarily-struck-down-the-national-digital-id-card-context-and-analysis/ (last visited May 11, 2024).

[57]Notes From a Foreign Field: The Kenyan High Court's Judgment on the National Biometric ID System, Constitutional L. & Phil., https://indconlawphil.wordpress.com/2020/02/08/notes-from-a-foreign-field-the-kenyan-high-courts-judgment-on-the-national-biometric-id-system/ (last visited May 15, 2024).

[58]Sandra Fullerton Joireman, The Evolution of the Common Law: Legal Development in Kenya and India, 44 Commonwealth & Comp. Pol. 190, 207 (2006), https://doi.org/10.1080/14662040600831636.

[59]Id

[60]Constitutionality of Aadhaar Act: Judgment Summary, Supreme Ct. Observer, https://www.scobserver.in/reports/constitutionality-of-aadhaar-justice-k-s-puttaswamy-union-of-india-judgment-in-plain-english/ (last visited May 15, 2024).

individuals, emphasizes the importance of intensive legal protection. Justice Chandrachud, in turn, raises significant concerns with provisions of the Aadhaar Act concerning biometric information. He evaluates five areas, specifically that distribute excessive autonomy to the UIDAI that could be used for intrusive data collection practices. Furthermore, his emphasis on the violation of foundational claims regarding concepts, such as the aspect of personal agency over data and the lack of actual remedies for privacy violations that are present in sections 28 and 47. Both assessments make a critical point about the need for clear legal frameworks that protect individuals' privacy claims and ensure the honest and open application of biometric technology. The emphasis on constant scrutiny and monitoring to prevent abuse and uphold fundamental liberty rights is particularly noteworthy. Furthermore, this decision highlights the central link between privacy issues and biometric information collection and suggests difficulty or need for paring technological advancement with ethical and legal concerns.

The Kenyan case, though, seems to be an additional example of how the constitutional legitimacy of Aadhaar, in general, and Justice Chandrachud's ruling, in particular, has attracted the courts of various nations to examining identifying databases with a renewed zeal. Justice Chandrachud was the single one among the Supreme Court of India who opposed the majority ruling of 4 to 1 in favor of the constitutional legality of Aadhaar.[61]

In the case study of Kenya, the country witnessed a situation similar to the one in India prior to the September 26 th, 2018 when the government claimed that anyone who does not have the number or the card would be left without the government services. The high court of Kenya, similar to that of India, ruled that people could not be denied any services due to the absence of Huduma Namba. However, the high court had no saying on the refusal of the registration for NIIMS, and the Kenyan government went on with the mass registration as had been suggested earlier. Hence, a Public Interest Litigation was initiated to contest the constitutional legality of the National Identification and Integrated Management System project.[62]

The comparative study shows that many countries already test the appropriate documents and HRDs [63] knowledge have to keep the pace faced these or those issues. Thereby it may be concluded that the assessment of the overall situation in biometrical ID systems introduction geography is ambiguous and remains the area for further research and work for policymakers and human rights activists.[64] However, two main areas should be identified: cultural characteristics of the countries, and among which the system is functioning and the system of transparency and efficiency which is proclaimed by governments and the national constitutions. Judging on the cases of the projected measures implementations, it may be concluded that the current typical situation is dangerous for the citizens. The reason is that the governments do not have proper mechanisms to control the operations of the security service during the periods of national distress or revolution and the digital shadowing, warning in many mass media works and devotees academic research.

[61]Aadhaar's Kenyan Cousin, Huduma Namba, Faces Constitutional Test in Court, The Week, https://www.theweek.in/news/world/2019/09/24/aadhaar-kenyan-cousin-huduma-namba-faces-constitutional-test-court.html (last visited May 11, 2024).

[62]Gautam Bhatia, Notes From a Foreign Field: The Kenyan High Court's Judgment on the National Biometric ID System, Constitutional L. & Phil., Feb. 8, 2020, https://indconlawphil.wordpress.com/2020/02/08/notes-from-a-foreign-field-the-kenyan-high-courts-judgment-on-the-national-biometric-id-system/.

[63]Human Rights Defenders.

[64] Fullerton Joireman, supra note 23, at 209–10.