

India's Unique Identification (UID)-related Bill designed to trump the RTI Act on transparency November 26, 2010

Dear all,

Parliamentary Research Services (PRS), Delhi which is doing very valuable work tracking Parliament and briefing MPs on legislative matters has uploaded the text of *The National Identification Authority Bill, 2010* (NIAI Bill) on its website. This Bill is due for introduction during the current session of Parliament. The complete text of this Bill is attached and also available at: <http://prsindia.org/uploads/media/UID/The%20National%20Identification%20Authority%20of%20India%20Bill.%202010.pdf>

A comprehensive critique of the contents of the NIAI Bill and the intention of policymakers in Government to put such a legislation on the statute book has already been published by Prof. Jean Dreze. His article may be accessed at: <http://www.hindu.com/2010/11/25/stories/2010112563151300.htm>

I have keyed below some thoughts on the implications of the NIAI Bill to the transparency regime established by the *Right to Information Act, 2005* and related matters.

What is the NIAI Bill all about?

Readers will recollect that in 2009 the Government of India created the Unique Identification Authority of India (UIDAI) for the purpose of undertaking preparatory work which would eventually lead to the issuing of unique identification numbers (popularly known as Aadhaar numbers) and identity cards for all people living in India. Conceived by the Planning Commission of India and housed currently in that institution, the Unique Identity initiative is also connected to the creation of the National Population Register which is underway. The UIDAI was instituted by executive action. The NIAI Bill has been drafted with the purpose of creating a statutory framework for this entire exercise which is here to stay. The NIAI Bill seeks to establish the National Identification Authority (NIA) for the purpose of spearheading the exercise of giving Aadhaar numbers and identity cards to individuals residing in India on a voluntary basis but upon receiving payment. Prof. Dreze has shown how the voluntarism highlighted in one provisions of the NIAI Bill can lead to compulsion when Aadhaar numbers are made mandatory for accessing benefits of various social welfare schemes and services provided by public authorities. The NIAI Bill provides the statutory basis for compelling people to acquire Aadhaar numbers. As the Planning Commission conceived of Unique Identity as a means to ensure proper delivery of the benefits to the impoverished segments of society, the compulsion falls on them first and foremost. They will have to pay fees (to be specified in the regulations) for enrolling themselves onto the Aadhaar database, acquiring identity cards and also for getting wrong information about them held in country-wide databases corrected. Every time an Aadhaar holder applies to avail the benefit of any welfare scheme and submits his/her Aadhaar information he/she will be required to get it authenticated. This means going back to the NIA, paying fees for authentication with no certainty that it will be authenticated. The NIA has the power to refuse to authenticate but the NIAI Bill does not specify the grounds on which a negative response may be issued to the applicant. **The NIA is designed to be an authority unto itself.**

The NIA will be vested with vast powers to carry out its umpteen functions under the law. An Aadhaar number or identity card to be issued under this law will neither be proof of citizenship nor domicile status in any State. (I wonder why the name Aadhaar then? 'Aadhaar' means 'basis' or 'foundation' in Sanskrit and Hindi and a host of other Indian languages. When the Government cannot assure fool proof identity cards for citizenship and domicile status for every citizen Aadhaar becomes a misnomer for such initiatives. The underprivileged citizen will continue to remain 'Niraadhaar' (without a firm basis) for purposes other than receiving the benefits of welfare schemes and being under surveillance by State agencies.

The NIA is empowered to collect identity information namely, demographic information and biometric information about every individual who approaches it with a request for an Aadhaar number and an identity card. Demographic information includes only the following data: name, age, gender and address of an individual. The NIAI Bill specifically prohibits the collection of information about race, religion, caste, tribe, ethnicity, language, income or health of a person. What kinds of biometric information about an individual will be collected will be specified in the regulations by the NIAI. The demographic and biometric information will be held in a Central Identity Depository over which NIA will have oversight functions. An individual has the right to correct inaccurate data held by the Depository about him/her. As Prof. Dreze points out there is no certainty that the inaccuracies will be corrected or a decision will be taken in a time bound manner. There is no possibility of appeal against the NIA's decisions within the proposed statute. The Identity Review Committee sought to be established under the NIAI Bill can only study the uses to which the Aadhaar system if being put to and submit an annual report. Decisions of the NIA cannot be challenged before this Review Committee. **The NIA is truly designed to be an authority unto itself.**

How does the NIAI Bill affect transparency regime established by the Right to Information Act?

Provisions for keeping the demographic and biometric information secret are contained in Chapter VI of the NIAI Bill. Under the title: "Protection of Information" Clauses 30-33 regulate the securing and holding of Aadhaar data about individuals in a confidential manner. Ensuring confidentiality of Aadhaar identity information is the responsibility of the NIA. (Sections 30, 31) Irrespective of any other law, the NIA or any of its officers or employees or agencies that maintain the Aadhaar databases, have a duty not to reveal the information they collect and hold. The 3 members of the NIA are required to swear an oath of secrecy after appointment. Secrecy clauses will continue to bind them even after they vacate office. Information from the Aadhaar databases may be provided only upon receiving an order from a competent court. Or information may be disclosed in the interests of national security if an officer of the Government of India of Joint Secretary rank and above authorises disclosure. **In other words the NIAI Bill overrides the RTI Act. It also ousts the jurisdiction of the Information Commissions to deal with information access disputes.**

Why is this problematic?

Chapter VI of the NIAI Bill is problematic for the following reasons:

1) The NIAI Bill throws a veil of secrecy over information about individuals already available in the public domain: Identity information about individuals that will be collected by the NIA has two parts- demographic and biometric information. What kinds of biometric information will be collected is left to the NIA to specify in the regulations. This may include a range of data such as thumb and palm prints, iris recognition, DNA data and other similar means of identifying individuals that may be developed by science in future. Demographic information includes- name, age, gender and address of an individual. If this Bill becomes law in its current form this demographic information will become secret. **But is this data truly secret now?** Every bit of demographic information pertaining to every Indian citizen above 18 years of age contemplated in the NIAI Bill is already available in the Photo Electoral Rolls published by the Chief Electoral Officers under the Election Commission of India on their websites. In fact even the name of the father or husband of a voter is accessible on these public lists which the NIA may not collect under the current version of the Bill. So why should this information be tagged with the 'confidential' label when this is already public information?

In fact the UIADI started its pilot projects by collecting information from these Photo Electoral Rolls (See an admission of this fact on UIADI website: http://uidai.gov.in/index.php?option=com_content&view=article&id=141&Itemid=164) The UIADI's website clearly mentions this usage of publicly available information. **The Statement of Objects and Reasons of the NIAI Bill does not explain why this information must be held confidentially when such information about 700 million voters is already publicly available.**

2) What about demographic information about under-18 year olds?: The Photo Electoral Rolls mentioned above do not contain demographic information about citizens below the age of 18 years as they are not eligible to vote. This is a sizeable number of India's population (about 450-500 million). Section 8(1)(j) of the RTI Act exempts the disclosure of personal information if it may lead to invasion of the privacy of the individual. This clause has served well for denying access to personal information for the last five years. However the NIAI Bill does not recognise the RTI regime. It places in the hands of the NIA all authority to determine information access issues. If access to information is denied under the NIAI law, a person cannot seek the same information using the RTI Act. Despite the NIAI being a public authority as defined in Section 2(h) of the RTI Act the overriding effect of Section 22 will not cover this law as it will be passed after the enactment of the RTI Act. The overriding effect applies only to laws in existence at the time of the enactment of the RTI Act. So the principle of '*generalia specialibus non derogant*' (a general law cannot override a special law) will come into play. The Information Commissions will have no authority over the NIAI. **A major exception to the regime of transparency is being created by the NIAI Bill. This is completely uncalled for as personal information is protected from disclosure under Section 8(1)(j) of the RTI Act and has served well till date. There is no reason why exceptions to the RTI Act should be carved out in this manner. The NIAI Bill must be amended to state that information will be provided in accordance with the RTI Act.**

3) How is the NIA, a government-controlled body, better placed to decide information access issues than Information Commissions?: The NIA is completely controlled by the Central Government unlike the Information Commissions which decide on information access disputes under the RTI Act. The Chairperson and two part-time members of the NIA are appointed by the Central Government. The NIAI Bill does not provide for a selection committee to shortlist candidates for these positions. The Information Commissioners are not appointed by the respective Governments. They are appointed by the President and the Governors at the Centre and in the States respectively, on the basis of recommendations made by statutorily established selection committees. All members of the NIA can be removed by the Central Government for specific reasons mentioned in the Bill. The Information Commissioners appointed under the RTI Act can be removed only through a special process involving a reference to the Supreme Court which will be

investigated and reported upon by the Court. The rank of the members of the NIA is not specified. The CEO of the NIA is of additional Secretary rank. The Chief and Information Commissioners of the Central Information Commission and the Chiefs of the State Information Commissions are equal in rank to judges of the Supreme Court- much higher than an Additional Secretary to Government. The Central Government may issue directions to the NIA and even supersede it if necessary. The Information Commissions cannot be subjected to directives from any authority save the High Courts and the Supreme Court. **Given the complete subordination of the NIA to the Central Government, how is it best placed to have sole authority to decide on information access issues?**

Further, the NIAI Bill does not provide for any forum where a decision of the NIA may be appealed against. This is completely contrary to the principles of data protection that inform privacy laws in other countries. There must be an independent body that will adjudicate over access disputes in the context of personal information. The United Kingdom has established the Data Protection Tribunal for this purpose. In New Zealand the Ombudsman is also the authority for adjudicating personal data access-related disputes. The Privacy Commissioner performs this role at the national level in Canada. The NIAI Bill ignores these international best practices. **The NIAI Bill must be amended to give the Information Commissions established under the RTI Act the job of adjudicating information access disputes under this law.**

4) *The NIAI Bill is silent on how Aadhaar data will be shared with other agencies:* The NIAI Bill contemplates situations where the identity information of Aadhaar number holders will be shared with agencies engaged in delivery of public benefits and public services. The NIA has the power to make regulations to define these procedures. The written consent of the individual is required in such cases. This provision has been drafted ignoring the fact that more than a third of the people in India cannot read or write. When the numbers of neo-literates who can only sign their names is added to this figure, the number of people who cannot possibly give written consent goes up considerably. The NIAI Bill is silent on how the consent of such individuals will be obtained. Yet it is claimed that this statute is intended to serve such underprivileged segments of society.

While this information-sharing provision [Clause 23(2)(k)] appears innocent from the point of view of the Planning Commission's original intention of having Aadhaar type-systems to improve the delivery of welfare programmes, the potential of this provision to enable surveillance of individuals by State agencies becomes clear when viewed through the prism of national security. **An officer of Joint Secretary rank and above can authorise disclosure of this data to any person- even without the consent of the individual. An individual - if at all he/she gets to know that information about him/her has been ordered to be shared with some other State agency can appeal this decision only in courts. Even this procedure is not specified in the NIAI Bill.**

5) *Under data protection laws data collected for one purpose cannot be used for another purpose :* Although the right to privacy is a deemed fundamental right guaranteed by the Constitution, India does not have a privacy or data protection law. The Department of Personnel and Training has recently issued an approach paper aimed at developing such a law for India. In the absence of an overarching data protection law, it is necessary to ensure that crucial international best practice standards informing such laws operational elsewhere on the planet are incorporated in the NIAI Bill. **For example, it is a cardinal principle of data protection laws that personal information collected about individuals by one agency, for a specific purpose, cannot be transferred to some other agency for use in order to achieve a different purpose. This principle is sorely missing in the NIAI Bill. Prof. Dreze has pointed out how Aadhaar system is one of the several measures initiated by the State to create a surveillance mechanism- Big Brother is watching over everybody. This has major implications for people's human rights.**

Did the Department of Personnel and Training object to the creation of exceptions to the RTI regime?

The Department of Personnel and Training (DoPT) under the Ministry of Personnel is the administrative department for the RTI Act. Prior to seeking the Union Cabinet's approval for tabling the NIAI Bill in Parliament, the Government would have sent the text of the Bill to the relevant Departments for inter-ministerial consultations. This is a mandatory requirement. Was the DoPT involved in this consultation process? Did the DoPT object to the implied exclusion of the RTI Act? **In an age of RTI we cannot know unless we file RTI applications to find out.** Later the Bill would have been put up for deliberations in the Committee of Secretaries. This is also a mandatory requirement. Did the Secretary, DoPT point out to the contradictions between the NIAI Bill and the RTI Act in this meeting? **In an age of RTI we cannot know unless we file RTI applications to find out.** Did the Ministry of Law which is required to vet all Bills for ensuring that no other law is violated by its provisions, point out that the NIAI Bill carves out an exception to the RTI Act? **In an age of RTI we cannot know unless we file RTI applications to find out.**

The Minister of State for Planning and Parliamentary Affairs is likely to table this Bill in Parliament in the current session. After the exit of the Minister of State for Personnel the Minister of State for Planning is in charge of this Ministry also. Has any attention been paid to the need for harmonising the provisions of this

Bill with the regime of transparency established by the RTI Act? In an age of RTI we cannot know unless we file RTI applications to find out.

The effectiveness of the RTI Act is being curbed through other statutes. Readers will remember this trend began with the Collection of Statistics Act, 2008 which ousted the jurisdiction of the RTI Act in a similar manner.

The NIAI Bill may be violative of a fundamental right guaranteed by the Constitution:

Chapter VII of the NIAI Bill lists out penalties for specific offences. Offences such as impersonation, identity theft, unauthorised collection or disclosure of identity information of any individual, tampering, interfering with or causing harm to the management of the Aadhaar databases may be punished with a prison term up to three years and fines extending up to INR 10,000 (US\$ 218) The fines for offences committed by companies are stiffer. However there is a sinister clause which prescribes a general penalty without specifying any offence. Clause 41 of the NIAI Bill specifies a prison term of up to three years and a fine up to INR 25,000 (US\$ 545) for any offence for which no penalty is provided elsewhere in the Act. Clauses 34-40 are the only provisions dealing with offences under this proposed law. All of them are linked to specific penalties. It is not clear what purpose the general penalty clause will serve in the absence of an identifiable offence. This provision may be violative of Article 20(1) of the Constitution of India. Every citizen has the fundamental right not to be convicted of "any offence except for violation of a law in force at the time of the commission of the Act charged as an offence..." So unless a law specifically terms an act as an offence a person cannot be tried and punished for such an act. Clause 41 may be struck down on grounds of violating a fundamental right guaranteed by the Constitution.

Readers who have been following the unravelling of the UID process will have many more concerns over the provisions of the NIAI Bill. I request them to share this email within their circuits. I have not recommended a course of action to correct these anomalies in the Bill as I would like to learn from other viewers about their thoughts on this important subject. Kindly send your response to this email id.

In order to access the our previous email alerts on RTI and related issues please click on: http://www.humanrightsinitiative.org/index.php?option=com_content&view=article&id=65&Itemid=84

You will find the links at the top of this web page. If you do not wish to receive these email alerts please send an email to this address indicating your refusal.

[I have not posted this message on humanenge@googlegroups.com. However this message may be automatically relayed through that group to unintended recipients. My apologies in advance for the inconvenience caused to such recipients.]

Thanking you,

Yours sincerely,

Venkatesh Nayak

Programme Coordinator
Access to Information Programme
Commonwealth Human Rights Initiative
B-117, I Floor, Sarvodaya Enclave
New Delhi- 110 017
tel: 91-11- 43180215/43180200/ 26864678
fax: 91-11- 2686 4688
website: www.humanrightsinitiative.org
alternate email: nayak.venkatesh@gmail.com