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Questions of Fact

India's Aadhaar Matter and the Limits of the Supreme Court

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Executive Summary

On May 10, 2018, the Supreme Court of India concluded its hearings on a landmark case with major implications for the Aadhaar biometric identification project as well as the application of right to privacy in India. In K.S. Puttaswamy and others vs. Union of India ("Aadhaar Matter"), a five-judge bench led by Chief Justice Mishra heard arguments surrounding the creation of the largest biometric identification system in the world – a 12-digit "unique identification" number, or Aadhaar Number generated for every Indian resident using data including iris scans, 10-digit fingerprints and a picture of the face. Proponents of the project argued that the new ID number would resolve issues such as welfare leakages and a lack of access to social benefits from India's poor (arguments which have been largely been dismantled by social welfare researchers). Detractors have pointed to questions of inequality and more generally raised the point that the system violates core rights to privacy for the people of India.

The hearings spanned 38 days over five months and were the second longest in the nearly 70 years of the Indian Supreme Court's history. While five months is in itself a long time, the Aadhaar Matter began six years earlier, in 2012, when Retired judge K.S. Puttaswamy filed a petition before the Supreme Court for the scrapping of the Aadhaar project. Over the next six years, twenty-nine other petitions were tagged together, contesting different aspects of the Aadhaar project and, after 2016, of its legislation under the Aadhaar (Subsidies, Benefits and Services) Act. Between 2013 and 2015, the Supreme Court also passed up to five different interim orders directing that no individual must suffer from not having an Aadhaar Number and that its use must be limited to a few specific government schemes. In the court's final decision, delivered on September 26, 2018, justices ultimately ruled 4-1 in favour of upholding the Aadhaar program within certain constraints – for instance, it cannot be made mandatory for obtaining a bank account or mobile phone, nor in registering for school.

The Aadhaar project raises important questions about the shortcomings of the Supreme Court's practice of judicial review. The problem is largely linked to the nature of Public Interest Litigations, which put the higher judiciary in a peculiar position of being the court of first instance as well as the final court of appeals. As such, India's higher court system is required it to look into questions of fact without the tools that a trial court needs to have at its disposal. The effect of this oddity is especially

pronounced in cases such as the Aadhaar Matter, which involves several complicated questions of fact. Moreover, the practice of affidavit-based evidence that the Supreme Court often uses compromises the justice system as the Court is unable to ascertain the veracity of the facts presented before it. The effect of this practice is all the more pronounced in light of the fact that the Supreme Court passes judgements which are binding on lower courts, and often deal with issues of great social, economic and political import.

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Introduction

On May 10, 2018, hearings concluded in the K.S. Puttaswamy and others vs. Union of India ("Aadhaar Matter"). A five-judge bench led by Chief Justice Mishra heard arguments from both the petitioners and respondents that spanned 38 days over five months.[1] Notably, these were the second longest hearings in the nearly 70 years of the Indian Supreme Court's history.[2] While five months is in itself a long time, the Aadhaar Matter began six years earlier, in 2012, when Retired judge K.S. Puttaswamy filed a petition before the Supreme Court for the scrapping of the Aadhaar project.[3] Over the next six years, twenty-nine other petitions were tagged together,[4] contesting different aspects of the Aadhaar project and, after 2016, of its legislation under the Aadhaar (Subsidies, Benefits and Services) Act. Between 2013 and 2015, the Supreme Court also passed up to five different interim orders[5] directing that no individual must suffer from not having an Aadhaar Number and that its use must be limited to a few specific government schemes.

The complex and contested nature of the Aadhaar project reflects its magnitude as one of the largest biometric identification systems in the world. This project, which was initiated by the government of Prime Minister Manmohan Singh back in 2009, has since pursued the objective of providing a "unique identification" number (or Aadhaar Number) to every resident of the country. It has been run by the Unique Identity Authority of India (UIDAI), an agency that was established through an executive order[6] and that became a statutory body after the passage of legislation in 2016. UIDAI's stated goal is to "issue a unique identification number (UID) to all Indian residents that (a) is robust enough to eliminate duplicate and fake identities,

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1. G. Ananthakrishnan, "Aadhaar Case: Second Longest Hearing in SC Comes to an End, Order Reserved," *Indian Express*, May 11, 2018, available at: https://indianexpress.com.
2. The longest hearings in India were in the landmark case of Kesavananda Bharati vs. State of Kerala (1973) 4 SCC 225.
3. V. Kharbanda, "The Aadhaar Case," *The Centre for Internet and Society*, September 5, 2014, available at: https://cis-india.org.
4. B. Sinha, "Need to Examine Scope for Misuse of Aadhaar Data, Says Supreme Court," *The Hindustan Times*, January 31, 2018, available at: www.hindustantimes.com.
5. Center for Internet Society, available at: https://github.com.
6. Standing Committee on Finance, *The National Identification Authority of India Bill, 2010, 42nd Report, 2011-12*, available at: https://uidai.gov.in.

and (b) can be verified and authenticated in an easy, cost-effective way."[7] The Aadhaar number is a 12-digit randomly generated unique number based on data collected by the UIDAI, which includes thirteen points of biometric data: iris scans (both eyes), fingerprints (all ten fingers) and a picture of the face.

In this paper, I examine the role of the Indian State, particularly that of the higher judiciary in the short history of the Aadhaar project. I attempt to dissect the nature of the judicial review that the Supreme Court of India has exercised with regard to this project, what tools are at the disposal of the judiciary to examine judicial challenges of this nature, and how they have been used. I argue that the nature of Public Interest Litigations (PIL) in India puts the higher judiciary in a peculiar position of being the court of first instance as well as the final court of appeals, thus requiring it to look into questions of fact as well as law, without the tools that a trial court has at its disposal. The effect of this oddity is especially pronounced in cases such as the Aadhaar Matter, which involves several complicated questions of fact. This paper was written before the Supreme Court passed its judgment in the Aadhaar Matter and its analysis is based on public reporting of hearings in the court.

7. UIDAI, *UIDAI Strategy Overview: Creating a Unique Identity Number for Every Resident in India*, 2010, available at: www.prsindia.org.

A brief history of the Aadhaar project

Justifications for a unique identity scheme

Proposals for a national identification scheme emerged out of a narrative to ensure a registry of citizens for national security purposes. The National Population Register, which has had a limited implementation, was initiated out of this idea in 2010.[8] However, by the time the Aadhaar project was conceptualised, the focus of the identification schemes had shifted to identity rather than citizenship. In its early days, the UIDAI project argued that a unique identity was required to effectively provide services, benefits and subsidies to eligible individuals. The assumption was that leakages in the welfare schemes arose due to a lack of single identification scheme.[9] Over the last few years, however, this line of argument has been severely tested. Social welfare researchers have shown that the leakages in the benefits and subsidies systems in India such as the Public Distribution Systems (PDS) for free and subsidised food rations and the liquefied petroleum gas (LPG) system for subsidies, do not suffer from a lack of identity. There are significant leakages that arise until the benefits reach the point of sale shops, which cannot be addressed by a unique identification scheme, nor can corruption in point of sale be addressed by simply correctly identifying the beneficiaries. Only a small part of the problem of leakages is due to the lack of reliable identification programme.[10]

The other significant justification provided for such a project was that the inability to produce an identification document was one of the biggest barriers preventing the poor from accessing benefits and subsidies. To address this issue, the UIDAI conceptualised an innovation called the introducer system, which would involve those without identity documents being able to furnish letters of introduction from prominent local citizens from government and non-government sectors. This would ensure that

8. D. Ollapalli, "India's National Identity and Its Impact on Security Policy under Modi," *Open Forum*. December 10, 2015, available at: www.theasanforum.org.
9. *Ibid*.
10. R. Khera, "Impact of Aadhaar in Welfare Programmes," *Countercurrents*, October 2017, available at: https://countercurrents.org.

those outside formal systems of enrolment would gradually come within it. However, Right to Information applications filed with the UIDAI have revealed that only a very small fraction of registrants have utilised the introducer systems (less than 0.08%). This means that the rest of the 99.9% of registrants already had another identification number.[11]

The other significant advantage often cited about the project is its use by private and public agencies may enable ease of doing business for the parties enrolling or authenticating users. However, this aspect of the programme has come under the court's scanner as it had read down provisions in the Aadhaar Act which enables private agencies to use Aadhaar for authentication of users.

Overview of the Aadhaar Matter

Much of the debate around the Aadhaar project concerned its potential threats to privacy, law, security measures and whether enrolment was compulsory or not. The UIDAI in all its initial communication and documents stated that enrolment was voluntary.[12] However, with time, more and more services required the Aadhaar Number to be furnished in order to access benefits, effectively making it a mandatory identification number. In its first interim order in September 2013, the Supreme Court (SC) very clearly stated that "no person should suffer for not getting the Aadhaar card in spite of the fact that some authority had issued a circular making it mandatory."[13] Later, in November 2013, the SC decided that the Aadhaar Matter was important enough for all the States and Union territories to be impleaded as parties to the case and passed an order to this effect.[14] On March 24, 2014, the Court again reiterated its earlier order and held that no person shall be deprived of any service just because such person lacked an Aadhaar Number if he/she was otherwise eligible for the service. A direction was issued to all government authorities and departments to modify their forms/circulars, etc., so as to not compulsorily require an Aadhaar Number.[15]

11. Governement of India, *UIDAI-RTI reply*: available at: www.thehinducentre.com.
Identity documents accepted for enrolment into the Aadhaar scheme include – among others - Passport, Ration Card or PDS Photo Card, PAN Card, Driving License, Voter ID, NREGS Job Card, Government Photo ID Cards, Arms License, Photo ID Issued by a Recognized Educational Institution, Photo Credit Card, Photo Bank ATM Card, Kissan Photo Passbook, Pensioner Photo Card, Freedom Fighter Photo Card, Disability ID Card.
12. UIDAI, *Aadhaar Enrolment/Correction Form*, available at: https://uidai.gov.in.
13. K. Rajagopal, "Don't Insist on Aadhar, Warns SC," *The Hindu*, March 16, 2015, available at: www.thehindu.com.
14. *Supra* Note 3.
15. J. Venkatesan, "Withdraw Notifications Making Aadhaar Mandatory, Supreme Court Tells Centre," *The Hindu*, March 24, 2014, available at: www.thehindu.com.

In July 2015, the status of fundamental right to privacy was contested before the court and, accordingly, the SC directed that the issue be taken up before the Chief Justice of India.[16] In September 2015, the SC directed the Central Government to publicise the fact that Aadhaar was voluntary. The SC further held that provision of benefits due to a citizen of India would not be made conditional upon obtaining an Aadhaar Number and restricted the use of Aadhaar to the PDS Scheme, in particular for the purpose of distribution of food grains and cooking fuel such as kerosene, and the liquefied petroleum gas (LPG) distribution scheme.[17] The SC also held that information of an individual that was collected in order to issue an Aadhaar Number would not be used for any other purpose except when directed by the Court for criminal investigations. In October 2015, this order was modified to allow the voluntary use of the Aadhaar Number for welfare schemes like the Mahatma Gandhi National Rural Employment Guarantee Scheme (MGNREGS), National Social Assistance Programme (Old Age Pensions, Widow Pensions, Disability Pensions), Prime Minister's Jan Dhan Yojana (PMJDY) and Employees' Provident Fund Organisation (EPFO).[18]

There was no progress in the Aadhaar Matter between October 2015 and January 2018, when the hearing before the constitutional bench began. One of the key grounds to question the constitutional validity of the Aadhaar project was that it violated the fundamental right to privacy. However, the then Attorney General, Mukul Rohatgi, in a hearing before the Court in July 2015, stated that there was no constitutionally guaranteed right to privacy. His reliance was on two SC judgments, in M.P. Sharma vs. Satish Chandra (1954) and Kharak Singh vs. State of Uttar Pradesh (1962). Both cases, decided by eight- and six-judge benches respectively, denied the existence of a constitutional right to privacy. As the subsequent judgments, which upheld the right to privacy, were by smaller benches, Rohatgi claimed that M.P. Sharma and Kharak Singh still prevailed over them, until a larger bench overruled them. It took over 600 days before a larger bench of the Court was constituted on July 18, 2017 to clearly establish the fundamental nature of the right to privacy. In the meantime, a growing number of public and private services continued to make Aadhaar mandatory.[19]

16. "Right to Privacy not a Fundamental Tight: Centre Tells SC", *The Tribune*, July 22, 2015, available at: www.tribuneindia.com.
17. K. Nagarajan, "Five SC Orders Later, Aadhaar Requirement Continues to Haunt Many," *The Wire*, September 19, 2015, available at: https://thewire.in.
18. *Ibid*.
MGNREGS guarantees 100 days a year of manual wage-employment per rural household; the goal of PMJDY is to give universal access to basic financial services like bank accounts and credit.
19. A. Sinha and A. Sethia, "Aadhaar Case: Beyond Privacy, An Issue of Bodily Integrity," *The Quint*, May 1, 2017, available at: www.thequint.com.

Separation of powers in the Indian polity

A higher judiciary with wide powers

The doctrine of separation of powers is built on the idea that there must be a tripartite division between legislature, executive and judiciary in government functioning. As India follows the Parliamentary system of government on the lines of the Westminster model, there is a clear separation between the head of the State, in this case, the President, and the head of the government, the Prime Minister. Like in the UK, India has a bicameral Parliament comprising the Lok Sabha, the house of elected representatives and the Rajya Sabha, with nominated members from the States and the Union. The judiciary comprises the SC and the State High Courts (which are the higher judiciary), and other subordinate courts. The system of checks and balances entails that the legislature formulates the laws, the executive passes and implements the laws and the higher judiciary adjudicates on whether the law is unconstitutional, including reviewing its constitutional validity.[20]

The Indian Constitution provides a unique model of separation of powers, different from the American and the Westminster model. The Constitution of India recognises the legislature, the executive and the judiciary, but it does not expressly vest the different kinds of power in the different organs. Unlike Westminster, the Indian Parliament is limited by a written constitution and it does not possess the sovereign character of the British Parliament. In India, the Constitution is supreme, with the SC as its self-appointed custodian, and any legislation or executive actions contrary to constitutional provisions are void. As the executive and the legislature have wide powers, are not elected separately,[21] and often comprise common members, the higher judiciary, particularly the SC, also has wide powers of judicial review of legislative and executive actions, drawing on the American experience.[22]

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20. K. Pandya, *Separation of Powers: An Indian Perspective*, April 22, 2013, available at: https://ssrn.com or http://dx.doi.org.
21. Unlike the US where the President and the Congress are elected separately, in India, general elections are conducted every five years to elect legislators in the Lok Sabha, and the Council of Ministers led by the Prime Minister is appointed by the President from the majority party or coalition.
22. Justice (Retd.) R. Pal, "Separation of Powers," in S. Choudhary, M. Khosla and P. Bhanu Mehta, *The Oxford Handbook of the Indian Constitution*, New York: Oxford University Press, 2016.

Supreme Court's Powers and Public Interest Litigations (PILs)

As stated above, the Supreme Court of India has wide powers of judicial review to test any legislations, rules, regulations, executive actions against Constitutional provisions, and strike them down where they may conflict with the Constitution. Such judicial actions are usually toward the protection of fundamental rights. And the right to move the SC to enforce all rights is, itself, a fundamental right. In its overview of executive and legislative actions, the SC often resorts to the constitutional principles of "due process of law" enshrined in Article 14 and 21 of the Constitution. In order to ensure due process, the judiciary can pass orders reading down actions, which are "arbitrary" or "unreasonable".[23]

Importantly, as we mentioned, the power to move the Court to enforce fundamental rights is itself a guaranteed fundamental right. The power to review matters toward adjudicating on fundamental rights has been described as a core function of the Court. Therefore, while being the final court of appeals, the SC is also the court of original jurisdiction on several matters implicating fundamental rights. One particularly distinctive component of the Court's original jurisdiction is Public Interest Litigations (PILs).

Indian Courts have built their global reputation largely on the basis of PILs, which are a judicial innovation of the late 1970s.[24] The judiciary's complicity with the despotic actions of Indira Gandhi's elected government during the constitutional emergency (1975-77) damaged its reputation considerably. After the emergency, recognizing the need to rehabilitate its image, the higher judiciary championed litigation concerning the interests of the poor and marginalized sections of the society. Toward this, the SC significantly relaxed its rules on legal standing, case filing, the adversarial process and judicial remedies. Through PILs, the Court re-formulated standing rules to allow any member of the public to seek relief from it, on behalf of a person or people whose fundamental rights had been violated but who could not, "by reason of poverty, helplessness or disability or socially or economically disadvantaged position", come before the Court for relief themselves. Through the 1980s and 1990s, the SC passed several landmark judgements, engaging in significant judicial activism, spanning a range of issues such as bonded labour, environmental protection, rights of prisoners and official corruption.[25]

23. G. Subramanium, "Writs and Remedies" in S. Choudhary, M. Khosla and P. Bhanu Mehta, *op. cit.*
24. S. Divan, "Public Interest Litigations" in S. Choudhary, M. Khosla and P. Bhanu Mehta, *op. cit.*
25. *Ibid.*

While PILs have been celebrated widely, there has also been sharp criticism of how the Court goes about them. One strand of criticism has to do with questions of separation of powers, and whether by getting entangled in environmental, social and economic matters, the judiciary is extending its constitutional brief. The other strand has to do with judicial attitudes toward PILs. While accepting the premise and need for PILs, this strand of criticism questions whether these procedures serve their intended purpose of addressing the concerns of the poor and marginalised.[26] Both are inherently normative questions and have to do with understandings of the proper role of the judiciary in a polity.[27] Those concerned with the first strand argue that the social and economic domain should be largely the prerogative of the other branches of government, which are better equipped to analyse, formulate and implement complex policies.

What we are concerned with in this paper is the second strand of criticism, which relates to judicial attitudes. In its first year of functioning, the SC comprised eight judges, who considered the admissibility of 1037 cases and delivered 43 judgments. According to the 2014 annual report,[28] the SC now has 31 seats, considered over 60,000 appeals and delivered about 1000 judgments.[29] While the SC adjudicates upon a broad sweep of issues, it has been argued that these expanded powers do not, in fact, address the issues that PILs were meant to. According to World Bank senior economist, Varun Gauri, the SC has been faltering on two counts. The first relates to beneficiaries inequality, where privileged classes have greater means at their disposal providing them better access to the court system, and consequently, more favourable results. The second is policy area inequality where judges, because of their privileged backgrounds, are more likely to address the concerns of those from similar dispositions.[30] But there is a third count on which the SC has stumbled, which has been described as judicial evasion. This involves the judiciary's de-prioritisation of some of the most time-sensitive and significant matters. Scholars such as Gautam Bhatia argue that in such cases, the delays in a matter clearly privilege one party and cause irreversible harm to the other and the delays in ruling may render the remedy infructuous.[31] We will examine below how the Aadhaar Matter

26. V. Gauri, "Public Interest Litigation in India: Overreaching or Underachieving?" *World Bank, Policy Research Working Paper*, No. 5109, 2009: available at : http://documents.worldbank.org.
27. P. Bhushan, "Supreme Court and PIL: Changing Perspectives under Liberalization," *Economic and Political Weekly*, Vol. 39, No. 18, 2014.
28. Supreme Court of India, *Annual Report 2014*, New Delhi, 79.
29. A. Chandra, W. H. J. Hubbard and S. Kalantry, "The Supreme Court of India: A People's Court?" *Indian Law Review*, Vol.1, No. 2, 2017, pp. 145-181.
30. *Supra* Note 25.
31. G. Bhatia, "'O Brave New World': The Supreme Court's Evolving Doctrine of Constitutional Evasion," *Indian Constitutional Law and Philosophy Blog,* January 6, 2017, available at: https://indconlawphil.wordpress.com.

suffers from these shortcomings, which one goes so far as to term as derelictions of duty of the SC.

A Court of first and final instance

When the Aadhaar Matter was first introduced before the SC, it was hesitant to adjudicate on the project. Despite its massive scale, the project did not have any legislative mandate. It was functioning purely as an executive act. Over the next few years, the Court entertained the matter, passing interim orders without staying the project in any way.[32]

Due to the peculiar nature of India's higher judiciary, where the States High Courts and the SC are both the courts of first instance and the final authority, several procedural questions have emerged.[33] Questions of fact are usually determined by a trial court, often district courts and civil courts, which use the rules of evidence, including questions of admissibility, the burden of proof, cross-questioning of witnesses and expert testimony. The higher judiciary was meant to be concerned primarily with questions of law and how the law has been used, and not to establish questions of fact. Therefore, the higher judiciary does not concern itself with evidence, hearing testimony or allowing cross-questioning. However, as they began hearing PILs in the exercise of their writ jurisdiction, the courts were seized with the issue of having to deal with facts.

Over time, the SC evolved judicial innovations to deal with this issue. Most PILs concern themselves with acts of the State, or lack thereof, in ways that they infringe upon the fundamental rights of the public. Therefore, in order to secure a detailed picture of facts, the SC began relying on affidavits from public servants. The Court would usually seek an account of facts from a specific public servant or department, and require them to furnish comprehensive affidavits to that effect. However, this innovation did not lead to speedy, unbiased and in some cases, even reliable information.[34] During the 1980s, when the SC was seized with adjudicating upon environmental issues, a few of its judges flirted with the idea of conducting site inspections to ascertain accurate facts and circumstances. While adjudicating upon waste management issues in Ratlam Municipality vs. Vardhichand, Judge Krishna Iyer visited the town of Ratlam personally.[35] Similarly, for Rural Litigation and Entitlement Kendra,[36] Judge Bhagwati visited the Doon valley and found

32. *Supra* Note 5.
33. *Supra* Note 23.
34. *Ibid*.
35. (1980) 4 SCC 162.
36. *Rural Litigation and Entitlement Kendra* vs. *State of Uttar Pradesh* (1989) Supp (1) SCC 504.

that addressing the environmental issues caused by limestone quarrying would necessarily impact workers, traders and mine owners.

However, it was too impracticable a method for judges to personally make site visits, and soon the SC explored the option of appointing commissions. District judges, a law professor, reputed journalists, an officer of the Court, lawyers, bureaucrats, mental health professionals, expert bodies and social scientists have thus been appointed as commissioners for the purpose of carrying out an inquiry and reporting to the Court.[37] In such cases, the commissioner's report is accepted, much like the affidavits, as prima facie evidence of the facts and circumstances of the case. However, over time, it has emerged that the SC resorts to the option of appointing commissions only when there already are existing bodies of obvious domain knowledge, which are intended to function as independent organisations. For instance, in environmental cases, the SC often appointed the National Environment Engineering Research Institute as the commissioner to do field visits and provide its report.[38] For cases related to forests in India, the SC relied upon the Central Empowered Committee.[39] However, in cases where bodies with domain knowledge are not readily available, the SC has often resisted looking at other options to appoint commissions. In such cases, the Court goes back to the less than satisfactory system of affidavit-based evidence.

In cases that require expert knowledge to provide an accurate depiction of the facts, the Court has also appointed committees of experts to provide considered determinations. The court has relied on the expertise of committees to assist it in various capacities, for instance to provide expert feedback on the environmental impact of contested projects, to monitor and oversee projects[40] and rehabilitate owners whose businesses have been shut by the Court.[41] However, it is noteworthy that in the Aadhaar Matter, the SC relied entirely on the affidavit-based system of evidence, and did not choose to employ any of its various judicial innovations to determine the true facts and circumstances. This was done even though the Aadhaar Matter involved several questions of fact that would have been instrumental in determining how the law applied to this case, and even though the case raised several issues of technological import that required expert testimony for jurists to exercise informed adjudication.

37. *Supra* Note 23.
38. *Indian Council for Enviro-Legal Action* v *Union of India* (1996) 3 SCC 212.
39. *Samaj Parivartana Samudaya* v *State of Karnataka* (2013) 8 SCC 154.
40. *Rural Litigation and Entitlement Kendra* v *State of Uttar Pradesh* (1989) Supp (1) SCC 504.
41. *Ibid*.

Shortcomings in the judicial review

Affidavit-based evidence

An affidavit filed by the UIDAI in the SC in June 2017 made a case for the Aadhaar project by providing statistics on its impact on welfare schemes. It stated that the Aadhaar project would save USD 11 billion annually if applied to social programmes and welfare distribution. The affidavit cited a World Bank report of 2016, titled "Digital Dividends", for these figures.[42] However, when one looks closely at the report, it appears that the figure of USD 11 billion is not an estimate of savings, but of the total value of the money that has been transferred under the Direct Benefits Transfer (DBT) scheme.[43] Moreover, the World Bank report has come to this figure on the basis of two other papers, one by Muralidharan *et al.* (2014), which calculated that biometric registration, authentication, and payments in the MGNREGS led to a 10.8 percentage point reduction in the leakage of funds, and another by Barnwal (2015), which estimated that the Unique Identity (UID)-based transfer policy reduced fuel purchases in the domestic fuel sector by 11-14%, suggesting a reduction in subsidy diversion. In response to queries by news agencies in India, the Work Bank said that the leakage reduction rates in these two reports had simply been extrapolated to all government welfare schemes, amounting to roughly USD 70-100 billion in government expenditures – yields savings in the range of USD 8-14 billion.[44]

First, it is curious that the studies on which the World Bank report's estimate is based are not cited (this omission has been claimed as an oversight). Second, the methodology of simply extrapolating the reduction in the leakage rates in two studies, which specifically relate to the MGNREGS and the DBT scheme in the fuel sector, to all the welfare schemes of the Government of India, without any consideration for the different factors behind the leakage rates, seems deliberately contrived or recklessly cavalier. Third, the two papers on which the figures are based are of suspect standing

42. K. Rajagopal, "Aadhaar Helped Save about Rs 50,000 Crore through DBT, Centre Tells Supreme Court," *The Hindu*, June 9, 2017, available at: www.thehindu.com.
43. The DBT is a scheme to transfer benefits and subsidies of beneficiaries directly to their bank accounts.
44. A. Venkatanarayanan, "The Curious Case of the World Bank and Aadhaar Savings," *The Wire*, October 3, 2017, available at: https://thewire.in.

as indicative of savings under the Aadhaar project. The findings in the Barnwal paper have been debunked by the International Institute for Sustainable Development,[45] various articles in Economic and Political Weekly,[46] and the government's own watchdog, the Comptroller and Auditor General of India (CAG).[47] The Muralidharan study does not look at the Aadhaar project, but at the usage of biometric smart cards in the Centre's MGNREGS.

The affidavit also claimed that the total recorded savings to the Government of India through the DBT scheme had been Rs 49,560 crore (approx. USD 7 billion) in just two years (2014-15 and 2015-16). In the same affidavit, the UIDAI claimed that savings since 2014 were Rs 57,029 crore (approx. USD 8 billion).[48] The claimed benefits of the Aadhaar project in weeding out duplicates, and creating savings for the government's welfare projects form one the key arguments in the Aadhaar Matter. But in the absence of a strict scrutiny of these numbers, it is not clear how the SC can meaningfully assess this argument. *The Wire*, a well-established online news publication, which has scrutinised the numbers stated in the affidavit, has cast serious doubts on their accuracy. For instance, it has highlighted that, as per the Comptroller and Auditor General of India (CAG), the reduction in the pay-out of subsidy for liquefied petroleum gas (LPG) was largely on account of the fall in crude oil prices,[49] and that the DBT Scheme for LPG worked out to just Rs 1,763 crore as opposed to the Rs 29,769 crore claimed by UIDAI in its affidavit.[50]

During the hearings, the bench often repeated that the judicial test of the Aadhaar project's infringement on the fundamental right to privacy would need to look at the question of whether it was a reasonable restriction and whether it satisfied the test of proportionality. In order to establish proportionality, it must be shown that a) the infringement is caused by the State in pursuing a legitimate purpose, b) there is a clear nexus between the purpose and the infringing act, c) a less intrusive measure could not have been used to achieve the State purpose, and d) the action balances the

45. K. Clarke, "Estimating the Impact of India's Aadhaar Scheme on LPG Subsidy Expenditure," *International Institute of Sustainable Development* March 16, 2016, available at : www.iisd.org.
46. R. Lahot, "Questioning the "Phenomenal Success" of Aadhaar-linked Direct Benefit Transfers for LPG," *Economic and Political Weekly*, Vol. 51, No. 52, December 2016.
47. Comptroller and Auditor General of India, *Report of Comptroller and Auditor General of India on Implementation of PAHAL (DBTL) Scheme*, 2016, available at: https://cag.gov.in.
48. The break-up was the following: break-up: Direct Benefit Transfer Scheme for LPG subsidy: Rs 29,769 crore, PDS system: Rs 14,000 crore, MGNREGS: Rs 11,741 crore, National Social Assistance Program: Rs 399 crore and Other Schemes: Rs 1,120 crore. See N. Pasha, "Data Put Forth by the Modi Government on Aadhaar Is Anything but Authentic," *The Wire*, May 28, 2018, available at : https://thewire.in.
49. *Supra* Note 44.
50. *Supra* Note 45.

potential public benefit of a State action against the extent of its intrusion into individual rights.[51] Most of the discussions during the hearings in the Court focussed on the second and third test of proportionality, as if the first requirement of the test of proportionality that the State was pursuing a legitimate purpose were already assumed to be met. This assumption was largely based on the government's claims about the benefits of the Aadhaar project. However, it is not prudent of the SC to accept these claims without any factual scrutiny of the aforementioned benefits. This is borne out clearly by the numerous factual inaccuracies made in affidavits by government entities, despite the fact that lying in such affidavits is a criminal offence punishable by up to seven years of imprisonment, as well as amounting to the contempt of Court.

Judicial evasion

On September 23, 2013, the SC passed the first in a series of interim orders in the Aadhaar Matter. It stated that, "no person should suffer for not getting the Aadhaar card in spite of the fact that some authority had issued a circular making it mandatory." On November 26, 2013, the Court passed another order stating that all the States and Union territories needed to be impleaded in the respondents in the matter for the Court to provide effective directions, and emphasised that its earlier order would continue to apply. Despite this, the State and its various institutions continued to make Aadhaar compulsory for availing their services. In an affidavit filed by one of the petitioners in January 2014, it was pointed, among other transgressions, that:

- the Government of the National Capital Territory of Delhi and the State of Jharkhand had made the Aadhaar compulsory for registration of marriages;
- the State of Maharashtra had made Aadhaar mandatory for government employees to draw salary;
- the State of Karnataka had made the Aadhaar number mandatory for availing benefits under government schemes such as social security pensions, LPG connection, ration card, etc.;
- the Ministry of Petroleum & Natural Gas had made the Aadhaar number mandatory for DBT scheme for LPG customers;
- the Ministry of Rural Development had made it mandatory for every beneficiary under the MGNREGS to have an Aadhaar number.[52]

51. M. Kamil, "Aadhaar Hearing [Weeks 2 and 3]: Petitioners' Case in Detail," *LiveLaw*, February 12, 2018, available at: www.livelaw.in.
52. "Additional Affidavit on Behalf of the Petitioners", Supreme Court of India Civil Original Jurisdiction, Writ of Petition (Civil), No. 829 of 2013, available at : https://ia800103.us.archive.org.

While the number of services mandating Aadhaar continued to increase, the SC took little to no judicial sanction to ensure that its orders were not flouted. In cases where the executive refuses to comply with its directions, the SC can exercise its inherent powers to punish for contempt. The SC has always claimed the power to punish for contempt as an inherent power drawing from the common law principle that a court of record may punish persons for not complying with its recorded orders. While there is some controversy about whether this power is inherent or whether it draws from the Constitution, and about its use to punish for 'criminal contempt' in cases where acts or speech scandalise or lower the authority of the court, the need for this power to enforce the SC's orders is accepted as necessary.[53]

Upon submission of various affidavits by petitioners on the number of services making Aadhaar mandatory, the SC, in March 2015, passed an order taking note of the fact that "Aadhaar identification is being insisted upon by the various authorities", and asked the Union and the States to adhere to its earlier orders. In this case also, the SC chose not to go into the specific instances, nor did it rap any government department for flouting its orders; the Court simply passed a general order. It must also be mentioned that at this point, the Aadhaar project had been in existence for about seven years, merely on the basis of an executive action and without any legislative mandate. It is established jurisprudence in India that fundamental rights may only be restricted through legislative actions.[54] However, by August 2015, according to the UIDAI, over 90% of the population of the country had already been enrolled in the program and the government had undertaken large scale seeding of other government databases with Aadhaar numbers of beneficiaries.[55] This was a clear, prime facie case, that these developments were significant encroachments into the fundamental rights of the citizens. However, the SC at no point even considered imposing a stay on the program until it had adjudicated on the issues. This was, as Bhatia has pointed out, a classic case of judicial delays that clearly privileges one party and causes irreversible harm to the other. By not imposing a stay on the enrolments under the Aadhaar project until its legal validity had been established, the SC allowed irreversible transgression into the fundamental rights to people by allowing their data to be collected and shared. The effect of these transgressions, where the individuals' data is collected, compromised and mandated to be shared with different agencies, cannot be reversed by a later order.

53. *Supra* Note 23.
54. *Maneka Gandhi* vs *Union of India*, (1978) 1 SCC 248.
55. UIDAI, *Introduction to Aadhaar* available at: https://trai.gov.in.

Later in 2015, the SC passed orders restricting the use of the Aadhaar Number to the PDS Scheme, the LPG distribution scheme, the MGNREGS, National Social Assistance Programme (Old Age Pensions, Widow Pensions, Disability Pensions), the Prime Minister's Jan Dhan Yojana (PMJDY) and the Employees' Provident Fund Organisation (EPFO) only.[56] It emphasised again that enrolling in the Aadhaar scheme is purely voluntary and cannot be made mandatory until the matter is finally decided by the Court. A clear reading of the two orders passed by the SC would lead to an interpretation that: a) while there was no stay on enrolment into the Aadhaar project, it was to remain purely voluntary, b) it could not be made mandatory to avail any services, c) the government must not use the Aadhaar Number as an identification number for any schemes other than those specified in the orders.

However, if we observe the subsequent actions of the government, the interpretation that they adopted seemed to be that the Aadhaar Number could be used as an identification number of all schemes and services, and its mandatory use would only be restricted to the six schemes mentioned in the orders. Yet again, the SC failed to come down on the Union and State government departments that adopted this reading of its orders. In a few cases where the SC stayed the acts of the government, such as in the case of the National Scholarship Portal where the Ministry of Electronics and Information Technology had made Aadhaar mandatory to avail of the scholarship, a two-judge bench of the court mysteriously adopted the second reading of the earlier orders only requiring that Aadhaar is not a mandatory requirement to avail the services but could be a voluntary requirement.[57]

Judicial inconsistencies

This state of affairs continued until the passage of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act (Aadhaar Act) in 2016. The passage of the Act has allowed the use of Aadhaar by both private and public parties and permitted making it mandatory for availing any benefits, subsidies and services funded by the Consolidated Fund of India. The spate of services for which Aadhaar has been made mandatory since 2016 suggests that, as per the government, the Aadhaar Act has, in effect, nullified the orders by the SC. This was stated in so many words by Union Law Minister Ravi Shankar Prasad in the Rajya Sabha in April, 2017.[58]

56. *Supra* Note 17.
57. Srivas A., "Supreme Court Shuts Down Mandatory Aadhaar Requirement in Modi's Scholarship Portal," *The Wire*, September 23, 2016: available at: https://thewire.in
58. "Do Supreme Court Orders on Aadhaar Still Matter?", *Software Freedom Law Centre (SFLC)*, April 17, 2017, available at: https://sflc.in.

This view, in my opinion, is an erroneous one. While acts of Parliament can supersede previous judicial orders, they must do so either through an express statement in the objects of the Act, or implied when the two are mutually incompatible. In this case, the Aadhaar Act, while permitting the government authorities to make Aadhaar mandatory, does not impose a clear duty to do so. Therefore, reading the orders and the legislation together leads one to the conclusion that all instances of Aadhaar being made mandatory under the Aadhaar Act are void.[59] However, despite the repeated appeals of the petitioners, the Court continuously refused to pass interim orders on the legality of such instances of use of the Aadhaar Number.

By the time the hearings in the Aadhaar Matter began in January 2018, Aadhaar was used as an identification number for practically all public and private services in India. More significantly, it had been made mandatory for a range of benefits and welfare schemes such as:

- Pradhan Mantri Ujjwala Yojana for women below the poverty line;
- a supplementary nutrition program and training under Integrated Child Development Services of the Ministry of Women and Child Development;
- institutional delivery among the poor pregnant women under the Janani Suraksha Yojana;
- a welfare scheme to help needy employees, especially covering the women and children, belonging to lower income groups and their dependents under the Griha Kalyan Kendra;
- financial support under National Mission for Empowerment of Women;
- participation in activities conducted by the Union Sports Ministry and the School Games Federation of India;
- the National Apprenticeship Promotion Scheme;
- scholarship and financial support given under National Means-cum-Merit Scholarship;
- subsidies under the PDS and LPG schemes;
- a crop insurance benefit from the Ministry of Agriculture;
- benefits under the National Health Mission.[60]

59. The question may be more complicated for cases where Aadhaar has been made mandatory through other legislation, such as the Prevention of Money Laundering Act, as they clearly mandate the linking of the Aadhaar Number, rather than merely allowing it.
60. R. Jha, "List of Services You Need Aadhaar For in India," *India.com*, July 13, 2017, available at: www.india.com.

Government data shows that Aadhaar authentication is required to avail benefits from 139 welfare schemes.[61] Aside from welfare schemes, now the Aadhaar Number is also mandatory in order to file income taxes, to open bank accounts and to get new mobile phone connections.

In 2016, a writ petition sought a direction from Court to establish a mobile phone subscriber verification scheme and to ensure that fake subscribers cannot misuse their mobile phones. In this case, the government filed a counter-affidavit stating that a scheme for Aadhar-based e-KYC[62] for mobile connections had been initiated, that "there will be almost 'NIL' chances of delivery of SIM to wrong person" and that "the traceability of customer shall greatly improve". In its order, the SC observed that it was "satisfied", that the points raised in the writ petition had been "substantially dealt with", and that an effective process was developed to ensure identity verification. Beyond this observation, the SC gave no direction that the Aadhaar Number must be linked to SIM cards.[63] However, the Telecom Regulator and the Ministry of Electronics and Information Technology seized on this mentioning of the Aadhaar Number during the oral discussions, and began stating in their public materials that the linking of the Aadhaar Number to SIM cards was mandated by a direction of the SC.

The Telecom regulator and the Ministry may, indeed, be faulted for misrepresenting the facts in their public announcements, but how the SC's judges handled the matter also left a lot to be desired. While the Court had already passed its judgments clearly stating the services for which Aadhaar could be used, during the hearings, some judges made stray statements encouraging the use of the Aadhaar Number for other services. Such behaviour does paint a poor picture of the seriousness with which the Court views its own orders. Further, even when this issue was brought up by one of the judges in April 2018, during the hearing in the Aadhaar Matter, it was discussed in the course of a pleasant exchange where the government's lawyer accepted that the SC, indeed, had not given such direction. The judges did not deem it fit to seek any explanation from the government as to why it had misrepresented its directions and forced telecom subscribers to link their Aadhaar Numbers to phone numbers.[64]

61. A. Sanyal, "'You Cleared Aadhaar for 6 Schemes, Centre Made It 139': Court Told," *NDTV*, December 14, 2017, available at: www.ndtv.com.
62. Aadhaar e-KYC is a paperless Know Your Customer (KYC) process, wherein the Identity and Address of the subscriber are verified electronically through Aadhaar Authentication. It can be used as an alternative to the current KYC process, which is done on the basis of physical photocopies of the original documents (ID proof and proof of Address).
63. R. Matthan, "A Game of Chinese Whispers in the Aadhaar Case," *LiveMint*, May 1, 2018, available at: www.livemint.com.
64. *Ibid*.

Lack of expertise

As mentioned earlier, the SC evolved several judicial innovations to address the fact that, while being the final court of appeals, it had to engage with several matters as a court of first instance and deal with issues of evidence. In a case like the Aadhaar Matter, there were significant issues of technological import that would inform the judges' understanding of the questions of fact. I would claim that the Court has not appreciated the degree of importance these issues of fact present, and its own suitability, or lack thereof, in gaining a full understanding of them without the assistance of experts, or a trial where opposing lawyers get opportunities to cross-examine the evidence and subject it to scrutiny. I have already mentioned the problems in the lack of scrutiny of the affidavit-based evidence it is considering. There are some issues for which I claim that the Court ought to have appointed experts to advise it on a fair and accurate assessment of the biometric technology in question and its use, so as to have a full appreciation of how they may or may not transgress upon fundamental rights.

During the course of the arguments made before the Court, the CEO of the UIDAI made a detailed presentation to explain the technology to the judges and allay their fears about privacy, exclusion and other concerns raised about the Aadhaar project.[65] He spoke of the rates of authentication failures of the biometric authentication number, which according to UIDAI's data from 2016 onwards, would be as low as 13%. The methodology for calculating the rate of failure does not account for subsequent multiple attempts as long as they culminate in a successful authentication. Independent observers who have analysed the same data have claimed that this assessment completely ignores the "hardship and distress faced by people each time [authentication] does not work and citizens are required to make multiple trips."[66] Rather than merely relying on the presentation made before it, the bench would have been better placed in appointing an independent expert committee to examine the claim regarding authentication failures, and see whether they represent a low enough threshold to stand up to claims of exclusion. In a paper based upon data from an experiment performed at an early stage of the Aadhaar programme, a mathematician estimated the expected proportion of duplicates as 1/121, which is extremely high for a population the size of India.[67] This figure does

65. "UIDAI CEO to Make Presentation on Aadhaar before Supreme Court," *Indian Express*, March 22, 2018, available at: www.newindianexpress.com.
66. "Truth of Authentication Failures on the Ground," *Rethink Aadhaar*, March 30, 2018, available at: https://rethinkaadhaar.in.
67. H. Verghese Mathew, "Flaws in the UIDAI Process," *Economic and Political Weekly*, Vol. 51, No. 9, February 27, 2016.

not even take into account the field conditions of sweat and grime, which may affect biometric authentication, nor does it account for issues such as worn out fingerprints and cracked fingers, which would affect certain category of people more.[68]

With respect to exclusions, Article 14 of the Constitution of India is relevant. It provides for equality before the law or equal protection and prohibits discrimination on grounds of religion, race, caste, sex or place of birth. The State is required to not deny to any person equality before the law or equal protection of law. In the Aadhaar Matter, exclusion relates to both exclusions from the Aadhaar programme, and exclusions from benefits and services that mandate Aadhaar. In order to address both, the State has issued notifications for the creation of special mechanisms for individuals with partial/no biometrics and for locations where enrolment facilities are unavailable. As long as there are mechanisms to address these issues of exclusion, it may be argued that the SC may not be inclined to read down aspects of the project for this reason. However, the promulgation of notifications to address exclusions may be far removed from the ground realities. Therefore, the Court ought to have appointed a committee to study the ground realities of the exclusion caused by the Aadhaar program to make decisions effectively.

Finally, the biometric report of the UIDAI itself cautioned about biometric authentication issues for a country like India, where those involved in manual labour have worn-out and changing fingerprints.[69] Even if the SC is satisfied that the failure rates of biometric authentication are low enough, it is important to note that the nature of the exclusions due to technology failures are not random, but systemic. What this means is that the impact of the technology failures are not randomly distributed across the population, but concentrated within those more prone to have worn fingerprints and cracked fingers. This raises important questions about the discriminatory nature of a technology that is intended to mediate the entire relationship between the State and the citizens. These are also issues where the Court could have benefited from expert testimony or impact assessments of the biometric technology and where it may have framed specific questions for experts to answer.

68. A. Venkatanarayanan, "A Response to Nandan Nilekani on Aadhaar (Updated)", *Medianama*, April 5, 2017, available at: www.medianama.com.
69. UIDAI, *Role of Biometric Technology in Aadhaar Enrolment*, 2012, available at: www.dematerialisedid.com.

Conclusion

On the date of writing this article (summer 2018), the judgment in the Aadhaar Matter had been reserved and was still awaited. While we continued to wait for the SC to rule on various questions related to the Aadhaar project, on its use by welfare and other schemes and on the governance of the program by the Aadhaar Act, the Aadhaar Number continued to be mandatory for a host of public and private services. Over 99% of the population in India is supposed to be enrolled in the project at this point.

On August 11, 2015, when the two judge-bench referred the question of the fundamental nature of the right to privacy to a larger constitutional bench, they stated that, “Having regard to importance of the matter, it is desirable that the matter be heard at the earliest.” More than three years passed before the September 2018 decision could be handed down. This situation has been caused, in one part, by the failures of the other two organs of the State, wherein large-scale public projects with significant impact on public interest, fundamental rights and due process are validated through an executive fiat, and ratified post facto by the legislature without any real deliberation, and, in significant part, by the judiciary's inability to deal with the repercussions of such failures of the rule of law process. The PILs are a necessary and important judicial innovation in India, where the lower judiciary often lacks the capacity to administer justice. However, the affidavit-based form of evidence has led to significant dilutions of the rules of evidence where courts settle questions of fact.

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