

A RENEWED ATTACK ON PRIVACY: ON AADHAAR BILL

Relevant for: Governance in India | Topic: E-governance - applications, models, successes, limitations, and potential incl. Aadhar & Digital power

On Friday, the Lok Sabha, without any attendant discussion, passed the [Aadhaar and Other Laws \(Amendment\) Bill, 2018](#). On any reasonable reading it ought to be plainly apparent that the Bill flagrantly flouts both the Constitution and the Supreme Court's judgment which gave the Aadhaar programme a conditional imprimatur. It is therefore entirely likely that the government is banking on a sense of political fatigue having set in over the project, and perhaps it believes it has made the programme so ubiquitous that a few additional legislative tweaks are unlikely to shock and jolt the dissenters. But the present move is so brazen that we will be failing in our collective duties were we to allow the amendments to be carried out without any debate. For, if enacted, the law will once again allow private corporations, including banks and telecom operators, to use Aadhaar as a means to authenticate identity.

Astonishingly, this change has been proposed despite the government's abject failure to enact comprehensive legislation protecting our data and our privacy. Therefore, unless the Rajya Sabha places a constraint on the government's impudence, the consequences will prove devastating.

There is no doubt the Supreme Court's judgment, delivered last September, enjoined Parliament to make certain specific legislative changes. To that end, some of the court's concerns are addressed by the Bill, such as the inclusion of a clause intended at ensuring that children are not denied benefits on account of a failure to possess Aadhaar. But the essential object of the law is to countermine those portions of the judgment that the regime deems inconvenient. So inconvenient that the Bill was introduced, as the lawyer Vrinda Bhandari has argued in *The Wire*, by altogether overlooking the state's own "pre-legislative consultative policy".

This policy places an onus on the ministry introducing a law to publish the draft of any proposed legislation, together with, among other things, the objectives behind the law and an estimated assessment of the impact that such legislation may have on fundamental rights, and to thereafter invite comments from the public. Yet, here, the Bill, which makes amendments not only to the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016, but also to the Indian Telegraph Act, 1885, and the Prevention of Money Laundering Act, 2002 (PMLA), was introduced without any prior consultation, leading to a credible belief that the proposed changes are an act of subterfuge.

Originally, Section 57 of the Aadhaar Act allowed both the state and private entities to use the programme to establish an individual's identity pursuant to a law or a contract. It was on this basis that various notifications were issued allowing corporations of different kinds, including telecom operators, e-commerce firms and banks, to use Aadhaar. But when the Supreme Court ruled on the validity of the legislation, although it upheld vast portions of the law through a 4:1 majority, it unanimously struck down Section 57 insofar as it applied to private entities.

Justice A.K. Sikri, in his judgment for the majority, wrote: "Even if we presume that legislature did not intend so, the impact of the aforesaid features would be to enable commercial exploitation of an individual biometric and demographic information by the private entities. Thus, this part of the provision which enables body corporate and individuals also to seek authentication, that too on the basis of a contract between the individual and such body

corporate or person, would impinge upon the right to privacy of such individuals. This part of the section, thus, is declared unconstitutional.”

Although this leaves little room for doubt, the government, for its part, may well defend the Bill by arguing that the majority’s judgment nonetheless permits the enactment of a new law allowing the use of Aadhaar by private entities so long as a person voluntarily consents to such authentication. In its aid, the government will likely point to paragraph 367 of Justice Sikri’s opinion. “The respondents may be right in their explanation that it is only an enabling provision which entitles Aadhaar number holder to take the help of Aadhaar for the purpose of establishing his/her identity,” he wrote. “If such a person [voluntarily] wants to offer Aadhaar card as a proof of his/her identity, there may not be a problem.”

But this passage scarcely expresses an opinion on private entities. To the contrary, it merely reaffirms the position that even for the state to utilise Aadhaar, in cases not involving the drawing of subsidies, benefits or services from the Consolidated Fund of India, the authentication must be voluntary and backed by separate legislation. While there are indeed portions of the majority’s ruling that are vague and indeterminate, on Section 57 the opinion is unequivocal. Inasmuch as the provision allows private companies the authority to authenticate identity through Aadhaar, even by securing an individual’s informed consent, the clause, Justice Sikri held, disproportionately contravened the right to privacy.

Since the Supreme Court has found that the operation of Aadhaar by private entities violates fundamental rights, there is today no avenue available for fresh legislative intervention, unless the government chooses to amend the Constitution. In any event, the proposed legislative amendments virtually seek to impose Aadhaar as a prerequisite for the availing of certain basic services. For example, the amendments proposed to the Telegraph Act and the PMLA state that service providers — telecom companies and banks, respectively, — ought to identify their customers by one of four means: authentication under the Aadhaar Act; offline verification under the Aadhaar Act; use of passport; or the use of any other officially valid document that the government may notify.

Therefore, if the government fails to notify any new form of identification, a person’s identity will necessarily have to be authenticated through Aadhaar or through her passport. Given that only a peripheral portion of India’s population possess passports, Aadhaar is effectively made compulsory. Allowing private corporations to access and commercially exploit the Aadhaar architecture, as we have already seen, comes with disastrous consequences — the evidence of reports of fraud emanating out of seeding Aadhaar with different services is ever-growing. Hence, the amendments not only fly in the face of the Supreme Court’s verdict but are also wholly remiss in attending to the dangers both of slapdash data protection and of corruption and scamming.

This move, to restore the use of Aadhaar by telecom companies and banks, however, is not the Bill’s only problem. There is a hatful of other concerns, including the re-introduction of a marginally refurbished Section 33(2). In its original form, the clause had allowed an officer of the rank of Joint Secretary to the Government of India to direct disclosure of Aadhaar information in the “interest of national security”. The Supreme Court declared the clause unconstitutional and ruled that while disclosure in the interest of national security may be important, such disclosure should spring out of a request of a “higher ranking officer”. What is more, in order to avoid any misuse of the provision, requests of this kind, the court held, ought to require separate scrutiny, and, therefore, “a Judicial Officer (preferably a sitting High Court judge) should also be associated with” the process. However, the Bill, merely seeks to substitute the words “Joint Secretary” with “Secretary” in Section 33(2), completely disregarding the Supreme Court’s order demanding inquiry by a judge.

Ultimately, the Bill seeks to pave the path for Aadhaar to permeate through every conceivable sphere of human activity, transferring all authority over our bodies, in the process, from the citizen to the state, and, in many cases, from the citizen to private corporations. The Rajya Sabha, therefore, should resist any developing sense of ennui around the programme, and reject this Bill, for the utter contempt of democracy that it represents.

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