

## Confusion as Indian Supreme Court compromises on data privacy and ID number

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The fate of India's data privacy legislation and its ID system are intertwined, both depending on whether India's Supreme Court decides that India has an implied Constitutional right of privacy, and whether it extends to data privacy. In two decisions on the same day (11 August 2015) in the same case (*Puttaswamy*)<sup>1</sup> a three judge bench of the Supreme Court has (i) referred to a 'constitution bench' of at least five Justices the existence and content of the constitutional right of privacy; and (ii) in the interim, allowed India's 'Aadhaar' ID number system to continue operating, despite its alleged interference with privacy, but with limitations on how it may be employed.

If the constitutional bench reaches a positive finding that India has a strong constitutional right of privacy, this is likely to have three effects. It could make it impossible for the government to continue with its ID number system unless it first enacts legislation to legitimate it (a much more remote possibility is that the entire ID scheme is declared unconstitutional). But the government may also have political difficulty in obtaining passage of an ID system Bill unless it also enacts data privacy legislation, because previous parliamentary objections to the Bill were in part due to its privacy deficiencies.<sup>2</sup> There will also be increased pressure for the constitutional right to be reflected in data privacy legislation, such as the comprehensive draft The Right to Privacy Bill.<sup>3</sup> Alternatively, the government might strengthen the privacy protections in the ID system Bill without introducing comprehensive privacy legislation.

However, a negative finding by the constitution bench will make it much easier for both central and state governments to continue making the ID number compulsory or integral for all types of benefits, and remove restrictions on sharing of biometric and other data.<sup>4</sup> It will also remove any pressure on the government to enact data privacy legislation (while doing nothing to decrease the need for it).

This article examines these two aspects of the Supreme Court's decision. Since it is unknown how long it will take a constitution bench to be constituted or to reach a decision, the article concludes by explaining why (in the interim) India's current data privacy rules remain broken and ineffective.

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<sup>1</sup> *Justice K S Puttaswamy (Retd.) & Another v Union of India & Another*, 11 August 2015,

<sup>2</sup> See G Greenleaf 'India's draft The Right to Privacy Bill 2014 - will the BJP enact it?' (2014) *Privacy Laws and Business International Report*, June 2014, 21-24.

<sup>3</sup> Greenleaf 'India's draft The Right to Privacy Bill 2014', above.

<sup>4</sup> Section 43A, *Information Technology Act 2000*, and the Rules made under it, could in theory impose some restrictions on corporations disclosing biometric data, but the many deficiencies of those provisions make any clarification or enforcement of such provisions uncertain and unlikely.

### A constitutional right in limbo

Prior to *Puttaswamy*, there was a general understanding that India had an implied constitutional right of privacy, but its boundaries remained uncertain: it extended to government search and seizure or telecommunications surveillance activities, but whether it extended to any type of informational privacy remained unclear.<sup>5</sup> The anticipated clarification did not eventuate from the most recent Supreme Court decision concerning privacy, *Koushal v Naz Foundation* (2013), as the *ratio* of the decision did not require a decision whether there was a constitutional right of privacy.<sup>6</sup>

In *Puttaswamy* the court decided that there were two differing sets of previous Supreme Court decisions on whether there was any implied constitutional right to privacy, and that this was a ‘substantial question’ of constitutional interpretation which required resolution. The Attorney-General, for the government, had proposed this, and counsel for the petitioners had ‘very vehemently opposed’ the argument that previous decisions could not be reconciled, but were unsuccessful.

The surprising result was that the bench in *Puttaswamy* considered that it was necessary for the whole question to be reconsidered, and for it to refer the case a ‘constitution bench’ of at least five justices.<sup>7</sup> The Court therefore referred the issue to the Chief Justice of India to appoint such a constitution bench, which then deals with all matters in the case. It does not just give its opinion on specified constitutional questions. The questions the constitution bench is to answer are therefore not defined. The government said they may include ‘(i) whether there is any “right to privacy” guaranteed under our Constitution ... [and] (ii) If such a right exists, what is the source and what are the contours of such a right as there is no express provision in the Constitution adumbrating the right to privacy.’ But that depends on how the court chooses to decide the case.

How long will this take? Given that some of the divergent Supreme Court cases cited in *Puttaswamy* were comprised of as many as eight judges, the size of the appointed bench may be more than the minimum of five. Also, the Chief Justice is believed to have not yet appointed the constitution bench requested in 2010 in another case. It may be a long wait, but activists are calling on the Chief Justice to speedily appoint a bench.<sup>8</sup>

### Leaving the ID number half-alive

The court ruled on the petitioners’ request for an interim injunction against the government continuing to collect any biometrics from people for the purpose of issuing ID numbers (which the Court referred to as ‘Aadhaar cards’) because of the continuing invasions of privacy involved.

The court accepted submissions by the government that (i) the government and the Unique Identification Authority of India (UIDA or UIDAI) ‘have issued Aadhaar cards to about 90% of

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<sup>5</sup> See Greenleaf *Asian Data Privacy Laws: Trade and Human Rights Perspectives* (OUP, 2014), pgs. 410-12.

<sup>6</sup> *Koushal v Naz Foundation* (2013) Civil Appeal No. 10972 of 2013; [2013] INSC 1096 <<http://www.liiofindia.org/in/cases/cen/INSC/2013/1096.html>>

<sup>7</sup> *Constitution of India*, Article 145(3).

<sup>8</sup> SCOI Report ‘Aadhaar opponents urge speedy setting up of privacy Constitution Bench’ Legally India, 19 September 2015 <<http://www.legallyindia.com/SCOI-Reports/scoi-report-aadhaar-opponents-urge-speedy-setting-up-of-privacy-constitution-bench>>

the population; (ii) they had spent ‘a large amount of money’ doing so; (iii) they do not share any personal information collected with third parties; and (iv) ‘the Aadhaar card is of great benefit since it ensures an effective implementation of several social benefit schemes of the government’. The court did not in its judgment even consider any submissions contrary to these assertions, or the more general surveillance implications of the scheme and its growth toward ubiquity. Critics dispute both the extent of issue, and the claims of its effectiveness in reducing fraud in welfare schemes.<sup>9</sup>

The court concluded that ‘the balance of interest’ (without indicating what it was balancing) would be best served by an interim order (until the constitutional matter was resolved) ordering the Union of India, the UIDA, and other respondents, to proceed in four ways:-

1. *‘The Union of India shall give wide publicity in the electronic and print media including radio and television networks that it is not mandatory for a citizen to obtain an Aadhaar card’.*
2. *‘The production of an Aadhaar card will not be condition for obtaining any benefits otherwise due to a citizen’.*
3. *‘The Unique Identification Number or the Aadhaar card will not be used by the respondents for any purpose other than the PDS Scheme [public distribution scheme] and in particular for the purpose of distribution of foodgrains, etc. and cooking fuel, such as kerosene. The Aadhaar card may also be used for the purpose of the LPG Distribution Scheme’.*
4. *The information about an individual obtained by the Unique Identification Authority of India while issuing an Aadhaar card shall not be used for any other purpose, save as above, except as may be directed by a Court for the purpose of criminal investigation.*

The court therefore did not stop the continuation of the Aadhaar enrolment process, rejecting the petitioners’ request. Commentators have pointed out that<sup>10</sup>, since the government can go ahead and continue enrolling persons (ostensibly with their consent) for the purpose of administering the near-universal PDS and LPG Distribution schemes, it will continue to move toward universal registration while the Supreme Court considers its final position.

### Is anyone obeying the Supreme Court’s orders?

Although it should not be possible for the UIDAI to pro-actively seed the ID number into databases not relevant to the PDS system, the Law Ministry is considering whether the national population register can still incorporate the Aadhaar database.<sup>11</sup>

Unfortunately, the practical scope of the court’s four orders is confusing and uncertain. The court seems to say that the orders are only directed toward ‘the Union of India [and] the UIDAI’, but the third order is clearly directed to ‘the respondents’, which included some (but not all) State governments. Some of the pleas heard in conjunction with that of former Justice

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<sup>9</sup> Usha Ramanathan ‘What will it take for the government to accept court rulings that Aadhaar is not mandatory?’ <Scroll.in> , September 2015.

<sup>10</sup> M Rajshekhhar ‘By limiting Aadhaar, Supreme Court may have given government a way to expand its reach’ Scroll.in, 13 August 2015 <<http://scroll.in/article/748127/by-limiting-aadhaar-supreme-court-may-have-given-government-a-way-to-expand-its-reach>>

<sup>11</sup> Alope Tikku ‘Government moves to minimize impact of SC Aadhaar verdict’ *Hindustan Times*, 21 August 2015.

Puttaswamy included those against decisions of some States to make the ID number compulsory in relation to payment of salaries, provident fund disbursements, marriages and property registrations. This order seems to have no direct effect on the actions of any State governments that were not among the parties, or for that matter, actions of private sector bodies. Some States, banks, employers or anyone else can collect Aadhaar numbers from individuals or from third party sources (but not from the central government or UIDAI), and use them for whatever they like. They have been doing so for some years now, and will continue to do so.

At face value, the immediate effect of the decision is to place strict limits on Aadhaar use by parties to the *Puttaswamy* petitions. Many commentators expect that some of these agencies will nevertheless continue to ignore the court's decision, and require the provision of the Aadhaar before they will provide services, as is occurring in Delhi.<sup>12</sup> The Finance Department's circular advising agencies of the effect of the court's ruling on the PDS scheme, says that if beneficiaries 'voluntarily' provide their Aadhaar, the agencies can include it in their databases so they are 'ready for use' in case the court eventually permits this.<sup>13</sup> Two days after the decision, the Election Commission of India issued a circular<sup>14</sup> to all Chief Electoral Officers throughout India ordering that henceforth all collection of Aadhaar numbers, or other activities using them, must cease, in light of the *Puttaswamy* decision. Critics claim that this is the only example of a government agency clearly and promptly acting on the Court's order, and have started a campaign to expose instances of contempt of court by agencies ignoring the ruling.<sup>15</sup>

### Current data privacy laws remain crippled

India's 'Rules' under s43A of the *Information Technology Act* are a very defective data privacy system,<sup>16</sup> but in some instances such as failure by companies to provide reasonable security over personal data, individuals may be able to obtain compensation and other remedies. Complaints are made to Adjudicating Officers (AOs), one of whom is appointed in each State, with a right of appeal against their decisions to one central Cyber Appellate Tribunal (CAT).<sup>17</sup> Although information is scarce about the decisions (if any) of some AOs, in other cases (for example, the AO in Maharashtra State) numerous decisions have been made, some requiring compensation, of which some are on appeal to the CAT.<sup>18</sup> Some involve security breaches by

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<sup>12</sup> Ramanathan, above.

<sup>13</sup> Finance Ministry Office Memorandum, 19 August 2015 <[http://finmin.nic.in/dbt/DBT2\\_WPC372015\\_interimOrderSC19082015.pdf](http://finmin.nic.in/dbt/DBT2_WPC372015_interimOrderSC19082015.pdf)>

<sup>14</sup> Election Commission of India, *Circular No. 23/1/2015 (NERPAP)-ERS*, 13 August 2015 <<http://www.elections.tn.gov.in/NERPAP-AADHAAR-%2013.08.2015.pdf>>. It said that all officials must be 'sensitised' to the decision and publication of Aadhaar use must stop. Aadhaar linkage had previously been a cornerstone of the Commission's 'National Electoral Rolls Purification and Authentication Programme' (NERPAP).

<sup>15</sup> SCOI Report, cited above.

<sup>16</sup> See G Greenleaf 'India's data protection impasse: Conflict at all levels, no privacy' *PL&B Int*, Feb 2014, pp. 23-24; see for more details Greenleaf *Asian Data Privacy Laws*, Chapter 15.

<sup>17</sup> For an explanation of the system, see Greenleaf *Asian Data Privacy Laws* (OUP, 2014), pgs. 424-27.

<sup>18</sup> Na. Vijayashankar 'Current Status of Cyber Appellate Tribunal' *Cyber Laws by Naavi* website, January 26, 2015 <<http://www.naavi.org/wp/?p=2653>>; see also the valuable reports by the Center for Internet & Society (CIS), Bangalore: D Joshi *A Review of the Functioning of the Cyber Appellate Tribunal and Adjudicatory Officers under the IT Act*, 16 June 2014, <<http://cis-india.org/internet-governance/blog/review-of-functioning-of-cyber-appellate-tribunal-and-adjudicatory-officers-under-it-act>> and B Acharya *An Analysis of the Cases Filed under Section 46 of the Information Technology Act, 2000 for*

banks which result in disclosure of personal data. Other decisions, and appeals, concern matters such as intellectual property disputes or e-commerce fraud. Matters with broad implications are on appeal, including a decision from the Karnataka State AO holding that ‘person’ did not include companies.

On 1 April 2015 Dr S S Chahar took up his appointment as a Member (Judicial) of the Cyber Appellate Tribunal.<sup>19</sup> The date is appropriate because no Members can make any decisions until a Chair of the Tribunal is appointed, and there has been no Chair since June 30 2011, for reasons of government paralysis.<sup>20</sup> Appeals just continue to pile up, awaiting a Chair.<sup>21</sup> The current system therefore remains crippled.

### Conclusions: Confusion Raj and its aftermath

‘Confusion Rules’ is the real result of the Supreme Court’s decisions in the *Puttaswamy Case*, at least until (at some uncertain future time) a constitution bench makes its decision, and events unfold in light of that, as suggested in the introduction. It is therefore likely to remain unknown for considerably longer whether India will enact credible data privacy legislation. Until then it will continue with incoherent and ineffective legislation with an appeal system which has not functioned for four years. Meanwhile, the coverage of its ID system expands toward ubiquity, its uses are likely to multiply despite the Supreme Court’s interim injunction (particularly in the States), and the likelihood of it even being brought under effective legislative control become increasingly remote. The Supreme Court’s ‘compromise’ in *Puttaswamy* may turn out to be a capitulation. It may also result in continuing defiance or avoidance of Supreme Court orders by the Executive that is dangerous for India’s constitutional relationships.

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*Adjudication in the State of Maharashtra*, 30 September 2013, <<http://cis-india.org/internet-governance/blog/analysis-of-cases-filed-under-sec-48-it-act-for-adjudication-maharashtra>>.

<sup>19</sup> See ‘Latest News’ Cyber Appellate Tribunal website <<http://catindia.gov.in/>> (as at 30 August 2015).

<sup>20</sup> See G Greenleaf ‘India’s data protection impasse: Conflict at all levels, no privacy’ *PL&B Int*, Feb 2014, pp. 23-24.

<sup>21</sup> The post of Chairperson has been advertised in 2015.