Aadhaar survives

The Supreme Court finds a pragmatic middle path between the Aadhaar scheme's excesses and its benefits to the marginalised

The Aadhaar project has survived a fierce legal challenge. Ever since a nine-judge Bench ruled unanimously last year that privacy is a fundamental right, opinion began to gain ground that the unique identification programme was vulnerable in the face of judicial scrutiny. It was projected by sceptics, detractors and activists as an intrusion on citizens' privacy, a byword for a purported surveillance system, a grand project to harvest personal data for commercial exploitation by private parties and profiling by the state. But the government has staved off the challenge by successfully arguing that it is essentially a transformative scheme primarily aimed at reaching benefits and subsidies to the poor and the marginalised. Four of the five judges on a Constitution Bench ruled that the law enabling the implementation of the programme does not violate the right to privacy of citizens; instead, the project empowers marginalised sections and procures dignity for them along with services, benefits and subsidies by leveraging the power of technology.

In upholding the constitutional validity of Aadhaar and clarifying areas in which it cannot be made mandatory, the Supreme Court has restored the original intent of the programme: to plug leakages in subsidy schemes and to have better targeting of welfare benefits. Over the years, Aadhaar came to mean much more than this in the lives of ordinary people, acquiring the shape of a basic identity document that was required to access more and more services, such as birth and death certificates, SIM cards, school admissions, property registrations and vehicle purchases. A unique identity number, that could be availed on a voluntary basis and was conceived to eliminate the rampant fraud in the distribution of benefits, had threatened to morph – with the Centre's tacit acceptance – into something that was mandatory for various aspects of life. The judgment narrows the scope of Aadhaar but provides a framework within which it can work. The majority opinion has sought to limit the import of the scheme to aspects directly related to welfare benefits, subsidies and money spent from the Consolidated Fund of India. Thus, controversial circulars and rules making it mandatory to link mobile phone numbers and bank accounts to Aadhaar numbers have been declared unconstitutional. Section 57 of the Aadhaar (Targeted Delivery Of Financial And Other Subsidies, Benefits And Services) Act, 2016, has been struck down to the extent that it authorised body corporates and individuals to use the Aadhaar number to establish someone's identity. Schools have been barred from making the submission of the Aadhaar number mandatory to enrol children. A few other provisions have been read down or clarified.

In upholding Aadhaar, the majority opinion was not oblivious to the impact of disbanding a project that has already completed much ground. For instance, relying on official statistics, the majority favoured the scheme's continuance for the sake of the 99.76% of people included under it, rather than fret over the 0.24% who were excluded because of authentication failure. "The remedy is to plug the loopholes rather than axe the project," the Bench said. With enrolment saturation reaching 1.2 billion people, the programme had acquired a scale and momentum that was irreversible. It was perhaps this pragmatic imperative that led the majority to conclude that the government was justified in the passage of the Aadhaar Act as a 'money bill', even though under a strict interpretation this is a difficult position to defend, the Centre's objective being to bypass the Rajya Sabha, where it did not have a majority. The Court has addressed this issue by accepting the government's argument that Section 7, which enables the use of Aadhaar to avail of any government subsidy, benefit or service for which expenditure is incurred out of the Consolidated Fund of India, is the core provision in the law, and that this makes it a 'money bill'. It has chosen to accept the technical arguments on the safety of the Aadhaar architecture and the end-to-end encryption that underlies the transmission of captured biometric data to the Unique Identification Authority of India. The majority opinion has looked at the larger picture beyond the merits or demerits of the Aadhaar programme and the arguments for and against it. It held that the Aadhaar Act passes the "triple test" laid down in the 'Privacy' judgment under which there ought to be a law, a legitimate state interest and an element of proportionality in any law that seeks to abridge the right of privacy.

In his dissent, Justice D.Y. Chandrachud argued that the Rajya Sabha's authority has been superseded and that this "constitutes a fraud on the Constitution" – a position that is impossible to fault if one adopts a strict interpretation of what a money bill is. As a result of this "debasement of a democratic institution", he held the Aadhaar Act unconstitutional. He also expressed his displeasure at the government passing a series of orders making Aadhaar compulsory for various reasons, in defiance of interim orders from the Supreme Court. He highlighted the biometric authentication failures that have led to denial of rights and legal entitlements, and located the reason for such failures in the project's inability to account for and remedy flaws in its network and design. He ruled that denial of benefits arising out of any social security rights is "violative of human dignity and impermissible under our constitutional scheme". Few would disagree with him in that "dignity and rights of individuals cannot be made to depend on algorithms and probabilities". Finally, it was the arguments in favour of benefits to the poor and the practical consequences of abandoning the scheme that won the day. Aadhaar possibly was simply too big to fail.

Cutting through the white noise

Despite the cancellation of Foreign Minister talks, movement in India-Pakistan ties is possible

SUHASINI HAIDAR

After a sudden and brief moment of clear signal, the 'India-Pakistan channel' has gone back to static, with the cancellation of talks between the two Foreign Ministers in New York this week. The Foreign Ministers will, no doubt, spar at the UN General Assembly, with a host of diplomats backing them up by exercising their right of reply to the comments made by either side. And ruling party and government spokespersons will bring up the rear in Delhi and Islamabad.

The road travelled

Amidst all this, however, there is space to reconsider developments of the last few months, and recast, if desired, a new way of imagining the relationship. To begin with, the cancellation last week of the meeting between External Affairs Minister Sushma Swaraj and Pakistan Foreign Minister Shah Mehmood Qureshi has not fundamentally changed much on the ground. The two leaders would have gone into the talks with an eye over their shoulders anyway, to gauge the domestic political impact of each gesture, smile and word during the meeting. For Ms. Swaraj, elections are around the corner in Madhya Pradesh, from where she's a Lok Sabha MP, with the general election not far way either. For Mr. Qureshi, fresh from the Pakistan Tehreek-i-Insaf's electoral win, there would have been much scrutiny at this big India-Pakistan encounter, and he'd likely have been very cautious.

Second, the announcement of the talks may have been the destination, but the distance the two governments traversed in the past few weeks was equally important. Ever since Pakistan Prime Minister Imran Khan won the elections, New Delhi had followed a measured but consistent path of engagement with the new government, at the highest levels. Prime Minister Narendra Modi was among the first leaders to call Mr. Khan to congratulate him after the results were declared. The day before he was sworn in as Prime Minister, Mr. Khan was part of the decision to send a ministerial delegation to former Prime Minister Atal Bihari Vajpayee's funeral in Delhi, and the team reportedly held cordial talks with Ms. Swaraj, the first engagement at that level in some years. The government also gave clearance to former cricketer Navjot Sidhu, who is currently a minister in the Congress government in Punjab, to attend Mr. Khan's swearing-in. (It must be noted here that amidst all the 'white noise' over Mr. Sidhu's embrace of Pakistani Army Chief General Qamar Javed Bajwa, there was no statement made by the Prime Minister or the Ministry of External Affairs, although members of the Cabinet from Punjab raised it with Ms. Swaraj.) Mr. Modi sent Mr. Khan a letter the same day, expressing India's commitment to pursuing "meaningful and constructive engagement". In his reply a month later, Mr. Khan went a step further, making a concrete proposal for a meeting between the two Foreign Ministers at the UN, which was accepted by the government a few days later, before it was abruptly cancelled.

Pakistan may have rightly rejected the reasons proffered for the cancellation as "unconvincing", but the cold logic of talks remains: a meeting is only possible when both sides want it, and New Delhi has decided that this is not the time. Even so, the verbal fisticuffs that followed the cancellation do not take away from the careful diplomacy that preceded it, and could be deployed again, if opportunity knocks.

AP/AMAN SHARMA

Grim backdrop

There is also the situation at the International Border (IB) and Line of Control (LoC) to be considered, before such talks can be feasible. Defence Minister Nirmala Sitharaman's shocking disclosure last week that "heads of Pakistani soldiers are being cut off, but not being displayed" by the Indian Army, followed by the discovery of a Border Security Force jawan's brutally mutilated body on the Pakistani side of the IB, shows the normalisation of barbarity on both sides. Army Chief General Bipin Rawat may have tempered equally incendiary remarks on the need for a "second surgical strike", if he had considered the results of the first one in September 2016 in terms of the data: 2017 saw even more fatal violence on the LoC than 2016, and 2018 is well on its way to becoming the worst in five years when it comes to ceasefire violations and killings of soldiers on both sides, despite a lull between June and September. The Pakistan military spokesperson's response to General Rawat, invoking Pakistan's status as a "nuclear-armed" power, also does nothing to make anyone in the subcontinent feel safer. It is heartening that despite all the hot words in public, the two sides are thinking rationally about improving communication at the border, with the operationalisation of a new hotline last week in Delhi between the BSF and Pakistan Rangers.

With both civil and military ties in gridlock, the question over the choice of interlocutors remains important too. In the past decade, India and Pakistan have found the public channels of engagement – meetings between the Prime Ministers (Ufa, Lahore, etc) and the External Affairs Ministers (Islamabad, Kathmandu) – to be counter-productive to the cause of better relations. Not only does every high-level handshake or hug excite domestic opprobrium in India, it is inevitably followed by a terror attack, or incident at the border that indicates that those in Pakistan's deep state that control terror groups are willing to derail talks at any cost. By cancelling engagement, India effectively acquiesces to those wishes.

The one channel on the Modi government's watch that has proven resilient is that of National Security Adviser (NSA) Ajit Doval with his former Pakistani counterpart, Nasser Khan Janjua. From November 2015 to June 2018, when he resigned due to elections, General Janjua and Mr. Doval carried on a consistent engagement, spoke over the telephone regularly to smooth over crises, and discreetly met more than half a dozen times in various places around the world. None of these meetings attracted the harsh criticism that follows the Prime Ministers' or Foreign Ministers' meetings.

Clearly, the NSAs' conversation is firewalled from the regular outrage that lights up television studios. It would therefore be a pity if Mr. Khan decides to do away with the post altogether, by remerging the NSA division with the Pakistan Foreign Ministry.

Low-hanging fruit

If the two countries can again decide on interlocutors, the points for discussion are many, beginning with the proposal initiated by Pakistan ahead of the UN talks, of a visa-free Kartarpur corridor for Sikh pilgrims to travel to Gurdwara Darbar Sahib for the 550th birth anniversary of Guru Nanak in November 2019. Mr. Khan has spoken about trade ties being a good opener for substantive talks, and any move to consider granting India the long pending most favoured nation status would reap very rich rewards. Another long-pending discussion on visas for journalists on both sides has been raised again by Pakistan's new Information Minister, and it is essential to build an understanding of developments on both sides of the border. When it comes to protecting the 2003 ceasefire, it is possible for this channel to consider reinforcing the fencing at the IB and LoC with a second fence on both sides, or a demilitarised zone of the sort that has withstood the Korean conflict. On the "core issues" of terrorism and Jammu and Kashmir, it is unclear if any serious talks are possible at this juncture, but both sides know exactly what they need to do to, should they wish to listen to each other's concerns, and not just fall quiet amid the static that currently envelops the relationship.

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Opacity in the name of privacy

The draft Personal Data Protection Bill poses a danger to the hard-won right to information

ANIKET AGA & CHITRANGADA CHOUDHURY

On August 24, 2017, the Supreme Court declared the right to privacy a fundamental right, a ruling widely welcomed. But many transparency advocates also felt apprehension, fearing that the right to privacy – meant to protect citizens from arbitrary state and corporate surveillance – might be deployed first and foremost to shield authorities from scrutiny by citizens.

Issue of accountability

The Personal Data Protection Bill, 2018, drafted by the Srikrishna Committee, confirms these concerns. The Bill identifies "personal data" as any data that directly or indirectly identifies a person. It then calls for amending clause 8.1.j of the Right to Information (RTI) Act, 2005. The clause currently exempts the following from disclosure: "information which relates to personal information, the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Public Information Officer... is satisfied that the larger public interest justifies the disclosure. Provided that the information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person."

The Srikrishna Committee suggests amending this clause to authorise public information officers, or PIOs, to deny information containing 'personal data', if they feel that such disclosure is likely to cause harm to 'the data principal', and if such harm outweighs public interest. The Bill defines 'data principal' as whoever the data relates to. This amendment may seem reasonable on first reading, but for the practical experiences of RTI users in the past years.

The RTI Act's core aim is to bring accountability by making available public records that disclose the actions and decisions of specific, identifiable members of the political class and the bureaucracy. The Data Protection Bill extends the cloak of 'personal data' over all such information. It asks PIOs (now overwhelmingly appointed at junior levels) to weigh public interest against the potential for harm to those identifiable in public documents. The Bill defines harm expansively to include everything from blackmail and bodily injury to loss of reputation, humiliation and "mental injury". The Bill ignores that another key aim of the RTI Act is "containing corruption". By bringing corruption to light, dogged RTI users have served public interest and caused 'harm', in terms of the Bill, to those exposed.

GETTY IMAGES/ISTOCKPHOTO

A 'powerful proviso'

Further, most public records identify one or more persons. For instance, file notings identify bureaucrats making decisions by their posts, or even initials/names; public records, such as contracts awarded or clearances issued, identify specific private actors. Under the proposed amendment, PIOs will be forced to test public interest versus potential for harm to multiple "data principals" in just about every request that they handle, and this is a responsibility they will be reluctant to take on. When nine judges of the Supreme Court are unable to frame the bounds of privacy, can we expect PIOs to assess which information is private, and then weigh the potential harm to individuals due to disclosure, guided all the while by public interest and the cause of accountability?

The amended clause will chill the RTI Act, as PIOs will now have a strong legal ground to play safe, and toss out RTI requests deploying an amended clause 8.1.j. In fact, this is already happening on account of how the Supreme Court has perhaps inadvertently mangled the privacy safeguard provided in the existing Section 8.1.j. The RTI Act currently provides an acid test to help PIOs respond to requests: "Provided that the information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person." This is a powerful proviso, also retained in the proposed amendment. It implies that PIOs can deny only that information to applicants which they would deny to Parliament or State legislatures.

However, in *Girish Deshpande v. Central Information Commission & Ors.* (2012), a two-judge Bench of the Supreme Court ignored this proviso and prior precedents in order to rule that the assets and details about the performance of a public servant constituted personal information, and were exempt from disclosure. This has set a precedent for subsequent court rulings and for PIOs to indiscriminately expand the ambit of personal information, and reject RTI requests, using clause 8.1.j. Recently, the Union Department of Personnel and Training denied information about the mere number of IAS officers whose annual performance appraisal reports were pending, as of 2017. The PIO cited clause 8.1.j and the 2012 SC ruling as grounds for denial. In essence, the court has implicitly read down the powerful proviso above, prompting PIOs to "profusely abuse" the privacy exemption in the RTI Act, as Central Information Commissioner M. Sridhar Acharyulu has observed. According to Acharyulu, PIOs' "misuse of 8.1.j is rampant", and is reducing RTI to "a mockery."

The government should be addressing these alarms raised by the Central Information Commission, the RTI's apex watchdog. The precedent created by *Deshpande* and its widespread abuse by PIOs need to be corrected, to reaffirm the fundamental right to information. Instead, the government is embarking on a project to legalise such 'abuse', by diluting transparency in the guise of an amendment furthering privacy.

If the Bill is passed as is, and the RTI Act amended, it will deal a body blow to India's hard-won right to information. The Ministry of Information Technology is accepting public feedback on the Data Privacy Bill until the end of September. Citizens should use this window to urge the government not to amend the RTI Act.

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LETTERS TO THE EDITOR

Letters emailed to letters@thehindu.co.in must carry the full postal address and the full name or the name with initials.

Banks and NPAs

The statement by Finance Minister Arun Jaitley ("NPAs with PSU banks declining: Jaitley", September 26) that banks are expected to recover ₹1.8 lakh crore this year may enthuse markets. But it would be interesting to know if he reveals the amount of "haircuts" banks will have to take to realise such a huge amount of NPAs, which is almost 20% of the gross NPA of nationalised banks. Data by the Bank Employees Federation of India show that during the four-year period, 2014-18, public banks realised a gross profit of ₹5,89,359 crore, but ended with a net loss of ₹77,642 crore due to high provisioning of ₹6,67,001 crore on NPAs.

This being so, the Insolvency and Bankruptcy Code along with National Company Law Tribunal proceedings appear to be in favour of corporate wilful defaulters. And banks are advised to forego a considerable amount in order to reduce NPAs. Therefore, one feels that the statement of the Finance Minister has to be viewed in this perspective.

G.B. SIVANANDAM,
Coimbatore

***The Hindu* at 140**

I am a regular reader of the daily and it is of great help that the paper is now available on a regular basis in the eastern and northern regions, though it is a bit expensive.

The articles on the Editorial and OpEd pages are very useful in one's preparation for competitive examinations. Many students use the daily to learn English as it is suggested as reading material ("24-page tabloid, "The Hindu @ 140", September 20).

SHUBHAM KUMAR,
Patna, Bihar

■ The milestone of 140 years is a significant event and I wonder why this is not prominent in the masthead. I also feel that the volume and issue of the paper, which were being printed earlier, should be restored.

S. VIDYADHAR SANGAWAR,
Hyderabad

■ *The Hindu* has been a part of my life since 1998. It has played a tremendous role in my career, as an English teacher handling secondary and senior secondary classes. I keep telling my students to make reading the daily a habit. In fact, the students' edition was a product we readily subscribed to. It is disappointing that the publication of "Folio" has been stopped. Another point is the decision to confine the distribution of the fortnightly supplement, Literary Review, to certain areas in Kerala.

KRISHNA PRASAD S.,
Palakkad, Kerala

■ I was a regular reader of a rival publication when I was an undergraduate in Andhra Pradesh but began to read *The Hindu* when I joined MCC, in Chennai, for my post-graduate studies in 1966. It has been five decades now. My grievance is the subtle anti-BJP line being taken in recent years. But for this, it is still a great paper.

B. SURYA PRAKASA RAO,
Hyderabad

■ I have been a reader since standard 10, back in 1968. After my retirement from a private firm, in 2011, I returned to my town, at Noyyal, only to find that the daily was not available as there was no agent. But this was no obstacle. I became an agent for this newspaper and got both *The Hindu* and *The Hindu Tamilthisai* also. There are now a number of readers in the area (English and Tamil).

P. LOGANATHAN,
Noyyal, Karur, Tamil Nadu

All eyes on Dhoni

No other captain of any national cricket team has the clout in the administration of the game in his country which the captain of the Indian cricket team enjoys ('Sport' page, "The Dhoni question raises its head again", September 26). This includes selection of the Indian cricket team in which the captain has the final say. Given the manner in which M.S. Dhoni is revered, he may not be dropped till he himself opts out. His progressive diminishing of reflexes which hampers his batting must not be lost sight of. His batting slot at any number is irrelevant as every slot is crucial in a limited overs game. Selectors have been giving him a long rope in the hope that he can rediscover his past magic, which is unlikely to happen.

V. LAKSHMANAN,
Tirupur, Tamil Nadu

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CORRECTIONS & CLARIFICATIONS:

A Sports page story – "Anand's presence lifts India" (Sept. 24, 2018) – erroneously referred to India's *sorrow of having missed a historic medal* that left the players understandably disappointed. A reader said that India had *won a bronze medal* then. The reader is right.

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