Reinvigorating Bicameralism in India

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Abstract

The Supreme Court of India in *Puttaswamy v Union of India I* articulated a bold new vision for the relationship between the individual and the State which recognised that autonomy is the fundamental premise of any protected freedom. However, its holding in *Puttaswamy v Union of India II* went against the grain of its previous decision by validating the constitutionality of the passage of the Aadhaar Act 2016 as a "money bill" by the Lok Sabha under Article 110 of the Constitution of India. The correctness of the underlying constitutional vision in *Puttaswamy II* has now been referred to a Constitution Bench of the Supreme Court in *Roger Mathew v South Indian Bank Ltd.* This article argues against the constitutional rectitude of *Puttaswamy II* in three veins. We do so by first examining the normative basis for the bicameral structure of government in India, which we argue seeks to balance its *demos*-constraining and *demos*-enabling functions. Second, we identify points of capacity-loss through an examination of parliamentary and political practice which denude the capacity of bicameralism to serve its intended ends. We conclude that the capacity of the upper house to be *demos*-enabling and *demos*-constraining can be restored if we reckon with the points of capacity-loss, and generally, with the practice of working the Constitution among political actors, in fora other than courts.

Keywords: Bicameralism; Separation of Powers; Constitutional Politics; Executive Accountability; Political Theory

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1. Introduction

The majority judgment of the Supreme Court of India in *Puttaswamy v Union of India*[1] recognised 'privacy as an independently enforceable right'.[2] Departing from the view of privacy as a bundle of rights, *Puttaswamy I* stands for two propositions: first, that privacy is essential for protecting personal liberty as it allows us to define ourselves and our relations to others;[3] and second, that privacy recognizes the individual autonomy[4] or the 'right of every person to make essential choices' on the course of their life.[5] Therefore, *Puttaswamy I* articulates a bold new vision for the relationship between the individual and the State that recognises that autonomy is the fundamental premise of any protected freedom.

In 2019, the Supreme Court in *Puttaswamy v Union of India*[6] was to answer the question of the validity of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act 2016 in light of its judgment in *Puttaswamy* I,[7] and held that the Act had validly been passed as a "money bill" by the Lok Sabha under Article 110 of the Constitution of India. The inference arrived at by the Court in *Puttaswamy II* rested on a particular vision of the nature of bicameralism in the Indian Constitution, the scope of Article 110, as well as the ambit of the Lok Sabha Speaker's discretion in certifying bills as money bills. The correctness of this vision was the subject of discussion in a subsequent SC judgment on the constitutionality of tribunals under the Finance Act 2017 and has now been referred to a Constitution bench.[8]

In this article, we unpack whether the holding in *Puttaswamy II* on the money bill question is consonant with the holding in *Puttaswamy I* on the relationship between the individual and the State. Specifically, we argue that *Puttaswamy I's* view of the relationship between the individual and the State finds expression in the functional justifications for the bicameral structure of government we see in India. The normative basis of this structure we note, in Section 1, is the balance of *demos*-constraining and *demos*-enabling functions that the Indian bicameral structure was designed to serve. We then argue in Section 2 that while the structure of government was constitutionally designed to serve these *functions*, its *capacity* to do so

[1] *Puttaswamy v Union of India* (2017) 10 SCC 1.
[2] Columbia University of Global Freedom of Expression, 'Puttaswamy v India' <https://globalfreedomofexpression.columbia.edu/cases/puttaswamy-v-india/> accessed 18 August 2019.
[3] *Puttaswamy I* (n 1) [140]-[141].
[4] *Puttaswamy I* (n 1) [141]-[142], [168]-[169].
[5] *Puttaswamy I* (n 1) [113].
[6] (2019) 1 SCC 1.
[7] *Puttaswamy I* (n 1)
[8] *Roger Mathew v South Indian Bank Ltd.* (Civil Appeal No. 8588 of 2019) [123].

has either been largely absent or denuded over time. We explore two reasons for the gap between functions and capacity: first, parliamentary and political practice towards constraining the *demos* in Parliament, and the points of capacity-loss; second, the political practice towards enabling the *demos,* outside of Parliament—in the realm of union-state relations—and the points of capacity-loss. We conclude that the capacity of the upper house to be *demos*-enabling and *demos*-constraining can be restored if we reckon with the points of capacity-loss, and generally, with the practice of working the Constitution among political actors, in fora other than courts.

2. Functional Justifications of the Indian Bicameral Structure

The idea of an upper house was the subject of great disagreement in the Constituent Assembly tasked with framing a Constitution for an independent India.[9] The framers were working to produce a democratic order, under conditions of limited sovereignty, despite deep internal divisions concerning the 'religious and national vision of the newly independent State, as well as a grave need for economic development'.[10] Bhatia, when discussing the range of disagreement in the Constituent Assembly regarding the institution of bicameralism, notes[11]

> *Several members criticized the proposal for a second chamber on the ground that it would 'clog in the wheel of progress', delaying legislative action and preventing speedy transformative decisions. Mohd Tahir argued that it was paradoxical for a body like the constituent assembly to insist on a bicameral legislature. If faith could be reposed only in decisions that had been approved by two separate legislative chambers, then what authority did a unicameral legislature have in insisting on the creation of a second legislative house? Others also expressed anxiety about the*

[9] For a flavour of these disagreements see Constituent Assembly of India Debates (Proceedings) Vol IV, 28 July 1947 <http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C28071947.html> accessed 1 June 2019.

[10] Hanna Lerner, 'The Indian Founding: A Comparative Perspective' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2012) 58.

[11] Udit Bhatia, 'Precautions in a Democratic Experiment: The Nexus between Political Power and Competence' in Jon Elster, Roberto Gargarella, Vatsal Naresh and Bjørn Erik Rasch (eds), *Constituent Assemblies* (CUP 2018) 127 (footnotes omitted).

> *representation of vested interests through the second chamber. In particular, they urged that the second chamber would give disproportionate representation to the interests of the landed classes and block attempts at redistribution of wealth.*

Ultimately, our bicameral system was crafted by building on features of typical upper-houses—to be *"demos-constraining"*—while fulfilling the specific aims of our polity, which even at its founding was described as 'one of the richest countries in the world in terms of its linguistic, ethnic, and religious diversity'[12], of being "*demos-enabling*".

Typically, the principle behind bicameralism is that the decisions of the majority or the *demos* represented in the lower house ought to be tempered by the particular preferences of sub-national units represented in the upper house.[13] The more the "competences" of the upper house, the more it is capable of constraining the *demos* in the lower house.[14] The Indian upper house is competent to vote on and reject all bills originating in the lower house[15] except money bills,[16] and thus serves a *reactive* role. It also has a weak navette system[17] by which the upper house may delay legislation or force reconsideration by the lower house.[18] In case proposals for amendment cannot be resolved, disagreement between the houses is resolved through a joint sitting.[19] Finally, upper houses are meant to multiply the possible veto players who are able to block, or at least influence legislative outcomes, under conditions of staggered election cycles.[20] Thus, the upper house is designed to be a reactive, *demos*-constraining house, that acts as a "cooling chamber" for and a check on the majoritarian lower house.

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[12] Hanna Lerner, 'Constituent Assemblies and Political Continuity in Divided Societies' in Jon Elster, Roberto Gargarella, Vatsal Naresh and Bjørn Erik Rasch (eds), *Constituent Assemblies* (CUP 2018) 64.

[13] See Alfred Stepan, 'Federalism and Democracy: Beyond the US Model' (1999) 10(4) Journal of Democracy 19.

[14] ibid 22.

[15] Article 108 of Constitution of India 1950.

[16] Article 109 of Constitution of India 1950.

[17] However, the navette system is temporally limited, and inapplicable to money bills as evident from Article 109 of Constitution of India 1950.

[18] Vernon Hewitt and Shirin Rai, 'Parliament' in Niraja Gopal Jayal and Pratap Bhanu Mehta (eds), *The Oxford Companion to Politics in India* (OUP 2010).

[19] Article 109 of Constitution of India 1950. This, however, has not happened since 2002, when the provisions of the Prevention of Terrorism Bill were being debated in a joint session; Press Trust of India, 'POT Bill passed by joint session of Parliament' (*Rediff*, 26 March 2002) < https://www.rediff.com/news/2002/mar/26poto7.htm> accessed 18 August 2019.

[20] Daniel Diermeier and Roger Myerson, 'Bicameralism and Its Consequences for the Internal Organization of Legislatures' (1999) 89(5) American Economic Review 1182.

The Indian upper house's function, however, is not only to enable reflection, but also to guarantee representation.[21] In other words, India's upper house is designed to be uniquely *demos*-enabling, despite the *demos*-constraining features visible at first blush. This is evidenced in the upper house's *proactive* role, in exercise of its competence to initiate bills.[22] Within systems of democratic governance, there is usually a 'necessary correspondence between acts of governance and the equally weighted felt interests of citizens with respect to those acts'[23], where elections to the house by popular vote permit a majority of citizens to 'induce the government to do what they most want it to do and to avoid doing what they most want it not to do.'[24] Upper houses have the ability to bring into the legislative agenda interests outside the contemplation of the lower house's entrenched majority[25] when they are conferred the power to initiate legislation. This is done by using a mode of election and representation that is different from its lower house counterpart. It is for groups unable to influence the legislative agenda in the lower house—being disadvantaged by direct elections—that the upper house serves as a *proactive* forum for initiating legislation.

Typically, upper houses are designed to express a principle of representation which is different from the lower house of Parliament,[26] which is constituted through a direct election on a one-person, one-vote basis from single voter constituencies.[27] Upper houses by using election processes such as the proportional system, reflect the diversity of a particular state, while also possibly serving different electoral cycles (depending also upon the nature of election systems).[28]

In the same vein, the Indian upper house, unlike the lower house, is indirectly elected.[29] It comprises of representatives of States and Union territories[30] while also retaining an epistocratic element in democratic deliberation.[31] In keeping with the aim of representing the several states'

[21] Philipp Norton, 'Adding Value? The Role of Second Chambers' (2007) 15(1) Asia Pacific Law Review 3, 4. See Samuel Patterson and Anthony Mughan (eds), *Senates: Bicameralism in the Contemporary World* (Ohio State University Press 1999).
[22] See Article 107 of Constitution of India 1950.
[23] Michael Saward, *The Terms of Democracy* (Blackwell Publishers 1998) 51.
[24] Robert Dahl, *Democracy and its Critics* (YUP 1989) 95.
[25] Norton (n 21) 5.
[26] Jeremy Waldron, 'Bicameralism and the Separation of Powers' (2012) 65(1) Current Legal Problems 31, 41.
[27] ibid.
[28] Samuel Patterson and Anthony Mughan, 'Senates and The Theory of Bicameralism' in Samuel Patterson and Anthony Mughan (eds), *Senates: Bicameralism in the Contemporary World* (Ohio State University Press 1999) 1.
[29] Article 80(4) of Constitution of India, 1950.
[30] Article 80(2) Constitution of India 1950.
[31] Article 80(3) of Constitution of India 1950; see Bhatia (n 11).

particular interests,[32] the number of representatives a State sends to the upper house is proportionate to the population of the State.[33] Proportionality in this context is a *demos*-enabling feature[34] that comports with the necessity of holding together[35] the many diverse Indian States in the Union.[36]

But where is the place of the individual in this scheme? Both under the *demos*-enabling and the *demos*-constraining functions of the upper house in India, the individual citizen is thought to have the standing to challenge the passage of a bill without upper-house scrutiny.[37] The *demos*-

[32] States are also accorded different rights in relationship to the Union, by constitutional design depending on the unique cultural, ethnic and geopolitical contexts of various territorially concentrated groups. The thinking underlying this arrangement is that unlike purely geographical states, states built on linguistic (Punjab, Rajasthan, West Bengal, Bombay state, Madras state, Mysore state, Kerala and Madhya Pradesh) or ethnic bases (Nagaland, Manipur, Tripura, Meghalaya, Mizoram and Arunachal Pradesh) exhibit stronger intra-group ties and thus are better represented when their subjective contexts and interests are constitutionally accommodated. This is described as an "asymmetric" federal structure. See generally, Alfred Stepan, Juan Linz, Yogendra Yadav, *Crafting State Nations* (Johns Hopkins University Press, 2011) Chapters 4 and 5; Rekha Saxena, 'Is India a Case of Asymmetrical Federalism?' (2012) 47(2) Economic and Political Weekly 70; Louise Tillin; 'Asymmetric Federalism', in Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2012); Nirvikar Singh and Govinda Rao, *Political Economy of Federalism in India* (Oxford India Paperbacks 2006) 65-72; Arun Thiruvengadam, *The Constitution of India A Contextual Analysis* (Bloomsbury 2017) 89-91. Some scholars depart from the framing of Indian federal structure as "asymmetrical" by arguing that the real "management of regional, linguistic or cultural diversity have been constitutionally symmetrical," since no "special protection for the rights of cultural minorities" in these States has been offered; Louise Tillin, 'United in Diversity? Asymmetry in Indian Federalism' (2007) 37 The Journal of Federalism 45.

[33] Article 80(4) Constitution of India 1950. Critics argue that this is only more *demos*-enabling when compared with the American system. One proposal is that each state be allowed a minimum representation regardless of their population size; Commission on Centre-State Relations, 'Report on Constitutional Governance and the Management of Centre-State Relations' (2010) Volume 2, 153.

[34] Stepan (n 13) 23-4.

[35] BR Ambedkar, Constituent Assembly of India Debates (Proceedings), Volume VII, 4 November 1948, <http://164.100.47.194/Loksabha/Debates/cadebatefiles/C04111948.html> accessed 29 May 2019. See also Stepan, Linz and Yadav (n 32) 120.

[36] In contrast, the concern of the American framers was to protect sovereign states *coming together* to form a union, from the 'tyranny of the majority' or the *demos.* The features of the Indian upper house are viewed by scholars as a *demos-constraining* feature, to enable bargaining between sovereign states *coming together* to form a Union; Stepan, Linz and Yadav (n 32) 120. See also Gregory Ablavsky, 'Empire States: The Coming of Dual Federalism' (2019) 128 Yale Law Journal 1792.

[37] The petitioners in the writ petitions challenging the passage of the Aadhar Act 2016 as a Money Bill were Jairam Ramesh Writ Petition (Civil) No 231 of 2016, S G Vombatkere and Bezwada Wilson Writ Petition (Civil) No 797/2016) and Shantha Sinha Writ Petition (Civil) No 342/2017. See also Writ Petition No 15147-8 of 2017 filed by Madras Bar Association before the Madras High Court.

enabling logic[38] of the individual's recourse to the courts is that the division of powers between the Centre and States is intended to guarantee individual liberty, by assuring greater participation in the political process. When citizens vote in smaller constituencies, and directly on issues that affect them, the value of their individual vote is notionally higher, enabling them to 'affect outcomes in the political process'.[39] In addition, the individual is also entitled to represent her particular interests as a member of a sub-national social, cultural or linguistic group. The *demos*-constraining logic for the individual's recourse to the courts is the liberty-interest in being governed by a limited government.[40]

Both the *demos*-enabling and *demos*-constraining bases described here comport with *Puttaswamy I's* fundamental tenet: that the relationship between the individual and the State is marked by a sphere of individual autonomy to represent herself and affect outcomes in the political process. Therefore, any analysis on the validity of the passage of the Aadhaar Act as a money bill by the Lok Sabha, must account for the central role of individual autonomy, as sought to be protected in the *demos*-enabling and *demos*-constraining structure of bicameral government in India.

3. The Gap Between the Bicameral Structure's Function and Capacity: The Problem of Political Practice

Despite the aims of the Indian bicameral structure, political reality in India demonstrates that the majoritarian *demos* is far from constrained, and the sub-national *demos* are far from enabled. Instead, the entrenched majority in the lower house has resulted in a form of 'majoritarian parliamentarism'. In the present instance with the Aadhaar Act, constitutional primacy of the lower house over money bills was exploited by the majority, to pass laws without the approval or due consideration of the views of the upper

[38] William Riker argued that bicameralism protects individual liberty against the tyranny of the majority. Alfred Stepan points out that this is specific to the American federal arrangement in which the Senate is *demos-constraining*. Individuals might also use bicameralism to represent themselves as members of their collectives, against the tyranny of the majority. In India, these collectives are sub-national linguistic or cultural groups ensconced in the states, who are represented in the upper house, proportionate to their population in an asymmetrical federal arrangement. The Indian upper house in Stepan's view is, to that extent, also *demos*-enabling; Stepan (n 13) 22-4, 29-31.

[39] Singh and Rao (n 32) 15.

[40] *Bond v US* 564 US 211 (2011) (US Supreme Court).

house—where the majority (at the relevant time) was not held by the governing party.[41]

The evolution of majoritarian parliamentarism must be understood in contrast with the constitutional design of the Indian system to realise a 'constrained parliamentarism'.[42] In this system, there is a

> *written constitution with an enumerated bill of rights, a supreme or constitutional court with judicial review powers which extend to the invalidation of legislative acts, conditionally co-equal bicameral legislature, an upper house of the legislature that is not as powerful as the lower house, independent agencies*[43]*, for example an independent electoral commission or an auditory body.*[44]

These features are in addition to existing elements of the Westminster system, like the subordination of executive authority to parliamentary authority by way of Parliament's ability to terminate the former through a vote of no-confidence.[45]

In this section, we unpack the conditions of 'majoritarian parliamentarism' that result from a breakdown of constrained parliamentarism. In addition, we examine the gap between the upper house's functions and its capacity to perform such functions, under conditions of majoritarian parliamentarism.

The capacity to fulfil the functions of bicameralism is dependent on factors outside the reach of the codified constitutional text,[46] which we classify in two categories: in the realm of constraining the *demos,* parliamentary and political practice as exemplified by mechanisms for deliberation and accountability within the Parliament; and in the realm of enabling the *demos*, political practice as exemplified in the mechanisms of cooperative federalism and federal bargaining between States and the

[41] See The Supreme Court (Number of Judges Amendment) Act 2019 and the Aadhaar Act 2016.

[42] Richard Albert, 'The Fusion of Presidentialism and Parliamentarism' (2009) 57 American Journal of Comparative Law 531, 536.

[43] Kaarlo Tuori, 'Popular sovereignty and independent bodies' (2019) (They, The People: People, Popular Sovereignty And The Constitution of Illiberal Democracy conference, Budapest, May 2019) 7, for constrained parliamentarism's dependence on independent bodies with value-based justifications and constitutional or statutory origins.

[44] Bruce Ackerman, 'The New Separation of Powers' (2000) 113 Harvard Law Review 633, 718-20.

[45] Subhash Kashyap, 'Executive–legislature interface in the Indian polity' (2004) 10(2-3) The Journal of Legislative Studies 278-94.

[46] George Tsebelis and Jeannette Money, *Bicameralism* (1st ed, CUP 1997) 73-8.

Union. Both these sets of factors diminish the capacity of our bicameral structure of government to serve its functions.

A. Parliamentary and Political Practice in the Demos-Constraining realm

The *demos*-constraining functions of bicameralism are to act as a check on a majoritarian lower house from advancing its legislative agenda without adequate discussion or consultation, and as a corollary, holding the executive government accountable. At a minimum, the upper house should subject the justifications for the lower house's action to a certain level of scrutiny. The erosion of the capacity of the upper house of the Indian Parliament to fulfil these functions is owed to a distortion of the executive-legislative relation, which may be present under conditions of constrained parliamentarism, but is exacerbated under conditions of majoritarian parliamentarism, and results from two factors: the internal practices of the Parliament, as well as internal practices of the political parties. We will discuss each of these in turn.

1. Internal Practices of Legislatures and Executive-Legislative Relations

Even under conditions of constrained parliamentarism, the capacity of the upper house to fulfil its functions may be eroded due to a disuse of parliament's internal deliberative structures, the proliferation of executive involvement in the law-making process, and an erosion of the oversight and accountability mechanisms of the Parliament.[47] However, the

[47]Another way to understand this is that the capacity of bicameral structure of government to achieve its functions is eroded when the *horizontal* (referral to select or standing committees), *diagonal* (questions) and *vertical* (lower house opposition or committees raising questions to the political executive) institutional routes chosen for managing the gap between the functions and capacity of bicameral government show signs of disuse, as has been the case. For example, while literature is not available relating to the Rajya Sabha, in a study of the 14th Lok Sabha, only 11.04 per cent of the total notices received were admitted, and few were responded to. See Rahul Verma and Vikas Tripathi, 'Making Sense of the House: Explaining the Decline of the Indian Parliament amidst Democratization' (2013) 1(2) Studies in Indian Politics 153, 161. For more on this, see generally, Devesh Kapur and Pratap Mehta, 'The Indian Parliament as an Institution of Accountability', Democracy, Governance and Human Rights Programme Paper Number 23 (January 2006) <https://pdfs.semanticscholar.org/2afd/3b8b66df3d25594cdcd7d18dcc5c74f13f35.pdf> accessed 18 August 2019.; Sandeep Shastri, 'Parliamentary committees in India and legislative control over administration in Ajay Mehra and Gert Kueck (eds), *The Indian Parliament: A Comparative Perspective* (Konark Publishers 2003). See also, Arthur Rubinoff, 'The Decline of India's Parliament' (1998) 4(4) The Journal of Legislative Studies 13–33 (on the reduction of the importance of Indian Parliamentary opposition views in the

departure from these parliamentary conventions can only partly explain the failure of the bicameral structure of government to realize its *demos*-constraining aims, especially in the case of the Aadhaar Act's passage. The other part of the explanation is the nature of the relationship between the legislature and executive, under conditions of majoritarian parliamentarism.

Under conditions of constrained parliamentarism, the nature of the relationship between the executive and the legislature in Indian politics exhibited a hybrid *transactional-hierarchical* form. [48] *Transactional* relationships between the executive and the legislature develop when each derives its existence and authority independent of one another. This is rare in parliamentary systems, where the executive is drawn from members of the ruling party or coalition of parties in the legislature. Yet, coalition based governments, which were common in India until 2014, had the capacity to develop transactional relationships, in that the executive-legislature relations while 'hierarchical in terms of the formal relation of the executive to the legislature…are transactional in terms of the relationship of parties to one another, because a bargain between two or more parties is necessary for a government to originate and then survive in office.'[49]

Relationships between the legislature and the executive display *hierarchical* characteristics when executive authority, comprising an executive head and her cabinet, arises out of the legislative assembly and is subject to potential dismissal through a no-confidence vote.[50] Under the hierarchy thesis, executive authority is subordinated to legislative authority because the former's existence is conditioned on the latter's approval in the parliament. This should be a hallmark of parliamentary democracies.

However, the hierarchy in the executive-legislature relationship is inverted when a single party obtains a majority of the seats in the lower

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legislative process). This question of institutional design is also the subject of democracy building literature, cf., International IDEA, 'Bicameralism: (Legislatures with Two Chamber) (Overview)' <http://constitutionnet.org/sites/default/files/bicameralism_0.pdf> accessed 30 May 2019.

[48] For this typology, see Matthew Søberg Shugart, 'Comparative Executive–Legislative Relations' in Sarah Binder, R Rhodes, and Bert Rockman (eds), *The Oxford Handbook of Political Institutions* (OUP 2008) 345.

[49] ibid 354. An example of the expression of this transactional element in the relationship between the legislature and the executive is the manner in which the UPA government in 2008 narrowly won a trust vote in the Lok Sabha on the issue of the Indo-US nuclear deal, at a time when its Left party coalition partners withdrew support for the government over this specific issue; 'A look back at the 2008 floor test when UPA faced no-confidence' (*Hindustan Times,* 22 July 2008) <https://www.hindustantimes.com/india-news/a-look-back-at-the-2008-floor-test-when-upa-faced-no-confidence/story-zEf4TMGoSOK89oYiTrbMnN.html> accessed 18 August 2019.

[50] Article 75(3) of Constitution of India 1950 see also Rule 198 of Rules of Procedure and Conduct of Business in Lok Sabha 1952.

house, thus subordinating legislative authority to executive authority. This is termed 'majoritarian parliamentarism'.[51] The majorities obtained by the Bharatiya Janata Party as the core of the National Democratic Alliance (a coalition comprising a number of other, smaller, regional parties) in both federal elections in 2014 and 2019, exemplify this phenomenon.

The structure of bicameral government, which is intended to multiply the veto points designed to be bulwarks against a lower house majority are easier to bypass under majoritarian parliamentarism. At least three veto points ensure that constitutionally suspect legislation is not passed by brute force. The first veto point is the set of strict textual conditions under which this power of the lower house may be exercised. That is, an ordinary bill 'shall not be deemed to have been passed by the Houses of Parliament unless it has been agreed to by both Houses'.[52] The second veto point is the Speaker's certification of bills that the lower house desires to pass but not as "ordinary bills". In this instance, the Speaker, acting as a constitutional functionary, was to certify the Aadhaar Act as a "money bill" only if it met the conditions laid down in Article 110.[53] The third veto point arises at the stage of judicial review of such certification by the Speaker, albeit to a limited extent given the Speaker's position as a constitutional functionary. However, under conditions of majoritarian parliamentarism, where the executive is in a hierarchical position with respect to the legislature, the weakness of these veto points is such that it permits 'political representatives to restructure the legislative process and to reframe the options open to political executives'[54].

The passage and validation of the Aadhaar Act exemplifies the weaknesses of all three veto points. First, in the course of the constitutional challenge, the Court examined issues on the substance of the Act—surveillance, data protection, data minimization, purpose, limitation, time period for data retention, data security; and privacy;[55] the fundamental rights of children; and the validity of Section 57 of the Aadhaar Act—before it came to the issue of the passage of the Act as a money bill.[56] This indicates that the Court had presumed that the legislation could be classified and passed as a money bill within the meaning of Article 110, by answering the substantive issues first. This approach validates the failure of the first veto point. The majority judgment

[51] Søberg Shugart (n 48) 14.
[52] Article 107(2) of Constitution of India, 1950.
[53] *Mangalore Ganesh Beedi Works v State of Mysore* 1963 Supp (1) SCR 275; *Mohd Saeed Siddiqui v State of UP* (2014) 11 SCC 415*; Yogendra Kumar Jaiswal v State of Bihar* 2016 3 SCC 183.
[54] John Uhr, 'Bicameralism' in Sarah Binder, R Rhodes and Bert Rockman (eds), *The Oxford Handbook of Political Institutions* (OUP 2008) 480.
[55] *Puttaswamy II* (n 6) [231].
[56] ibid [398].

of the Court then failed to analyse the decision of the Speaker to certify the Bill as a money bill extensively.[57] When examining the passage of the Act, the first task at hand was to decide if the Speaker's certification was judicially reviewable since the issue was in question; were it not, the Court could not possibly have forayed into examining if the Bill was actually a money bill.[58] This represents a validation of the failure of the second veto point. That the Court chose to validate the two veto point failures is a failure of the third veto point.

In order to restore the capacity of the upper house to fulfill its *demos*-constraining functions, all three veto points need to do the work, and in tandem, under conditions of majoritarian parliamentarism. With all the veto points having failed, the autonomy of the individual in her interactions with the State suffers under the *demos*-constraining rationale.

2. Internal Practices of Political Parties and Executive-Legislative Relations

The internal practices of political parties plays an important role in ensuring that a multiplicity of voices is heard in the framing of law.[59] In the political reality of majoritarian parliamentarism in post-2014 India, when a single party obtains a majority of seats and a charismatic political executive head is able to minimise internal democracy within the party, the political party is fused with the executive, which already occupies a hierarchical position vis-à-vis the legislature.[60] Strong party discipline rules in India, by further centralising power in the executive, further fail to constrain the majoritarian *demos.* This has knock-on effects on the Union-State relations, as the State governments helmed by the same political party as the Union, come under the Union-executive's control through party channels.

While the presumption is that political parties have electoral incentives to preserve the structural Union-State relation,[61] scholars have noted that the resurgence of States after Congress dominated rule ended,[62] might

[57] ibid [412].
[58] ibid [487]. Justice Bhushan, however, sequences the issues appropriately.
[59] In addition to this, consultation with coalition partners in government also plays an important role as exemplified by the internal disagreements in the UPA-II in 2013 about the best way to create institutional arrangements to tackle terrorism; 'Indian Media: Disagreement Over Anti-Terror Centre' (*BBC News*, 6 June 2013_ <https://www.bbc.com/news/world-asia-india-22793402> accessed 18 August 2019.
[60] ibid.
[61] See Mikhail Filippov, 'Riker and Federalism' (2005) 16(2) Constitutional Political Economy 93, 97-9; Goutam Sarkar, 'Federalism & Coalition Politics: A Study on Indian Context,' (2016) 21(4) IOSR Journal of Humanities and Social Science 56 citing William Riker, *Federalism: Origin, Operation, Significance* (Little Brown Boston 1964).
[62] For literature on this point see Balveer Arora et al, 'Indian Federalism' (2013) 2 Political Science 100, 112-14.

have had more to do with *parties* at the state level asserting *their* interests, as opposed to *states* asserting their 'linguistic, cultural, or subnational identity' concerns.[63] In the same vein, centralized national party leadership, even in parties exhibiting a federated structure, can elicit states' complicity if the state is governed by the same party.[64] These developments are anticipated by Riker, who notes that the extent of party control over its legislators—'party discipline'[65]—and the frequency with which such control is wielded over the federal and the State governments—degree of 'disharmony'[66]—can determine the quality of federal bargaining between States and the Union. In India, party discipline as well as a high degree of disharmony are constitutionally sanctioned, as members of legislatures are mandated to obey whips issued by their party high command, on the threat of expulsion from the house, under the Tenth Schedule of the Constitution. This, we suggest, skews outcomes, as political parties are neither required to be[67] nor are internally democratic in India.[68] In addition, political parties are externally unanswerable to voters.[69] This is because voter choice is either based primarily upon a candidate's capabilities (which results in an implicit affirmation of her party affiliation), or upon the political party's capabilities (which results in an implicit

[63] Sudhir Krishnaswamy, 'Constitutional Federalism in the Indian Supreme Court' in Mark Tushnet and Madhav Khosla (eds), *Unstable Constitutionalism: Law and Politics in South Asia* (CUP 2015) 369.

[64] Chanchal Kumar Sharma and Wilfried Swenden, 'Modi-fying Indian Federalism? Center–State Relations under Modi's Tenure as Prime Minister' (2018) 1 Indian Politics & Policy 51, 57.

[65] Jorge Gordin, 'Testing Riker's Party-Based Theory of Federalism: The Argentine Case' (2004) 34 Publius: The Journal of Federalism 21.

[66] William Riker and Ronald Schaps, 'Disharmony in Federal Government' (1957) 2 Behavioral Science 276, 277ff.

[67] Pratap Bhanu Mehta, 'Reform Political Parties First' (2001) <https://www.india-seminar.com/2001/497/497%20pratap%20bhanu%20mehta.htm> accessed 1 June 2019.

[68] Studies find that candidates are nominated by a central committee and are not chosen democratically in the two major national parties in India. Likewise, it is unclear if there is a democratic election for selecting party leadership; Ruchika Singh, 'Intra-party Democracy and Indian Political Parties' (2015) The Hindu Centre for Politics & Public Policy Report (No 7) Chapters III and IV<https://www.thehinducentre.com/migration_catalog/article22981929.ece/BINARY/Intra_Party_Democracy_Ruchika_Policy_Report> accessed May 29, 2019.

[69] Since MPs are answerable to their political parties, and political parties are not answerable to voters, MPs answering to their political parties cannot be answerable to the voters who elected them into power. In other jurisdictions, parties conduct primaries (of their own volition or under legal regulation) in which either all voters, or voters registering support for the particular party - the 'selectorate' - choose from a pool of candidates vying for the party's endorsement. See Giulia Sandri, Antonela Seddone, and Fulvio Venturino (eds), *Party Primaries in Comparative Perspective* (Ashgate 2015) 9.

affirmation of the party's choice of candidate).[70] Consequently, once candidates are elected as parliamentarians, the candidate's party is not anchored to voters' preferences. Since members of parliaments and legislatures are constitutionally mandated to obey whips,[71] they are unable to translate voter preferences that diverge from the party line into policy preferences. These factors combine to create informal channels of power within parties such that diktats of party leadership issued from the central unit override voter preferences.

Thus, party-practices under conditions of majoritarian parliamentarism distort Union-State relations, which is aggravated by the inversion of the executive-legislature hierarchy. This has deleterious consequences for the bicameral structure, which ends up enabling rather than constraining the majoritarian *demos,* whose voice is channelled by the political party holding electoral majority.[72]

B. On the Political Practice of Federal Bargaining in the Demos- Enabling Realm

The *demos*-enabling function of bicameralism is to enable the voice of sub-national interests—be they ethnic, linguistic, or geo-political—of citizens residing in the various States. The erosion of the capacity of the upper house of the Indian Parliament to fulfil this function is owed to the seeming complicity of states in the agenda of the Union-executive—in this case to establish and institutionalise Aadhaar.

While the Aadhaar project began under conditions of constrained parliamentarism, it was reified and operationalised under conditions of majoritarian parliamentarism. States were solicitous of Aadhaar as early as in 2010—when the legal basis for Aadhaar was a mere notification[73]—evidenced by the MOUs they signed with the Unique Identification

[70] This may be why parliamentary or assembly election campaigns are becoming increasingly modelled on campaigns for presidential elections; Eswaran Sridharan, 'Behind Modi's Victory' (2014) 25(4) Journal of Democracy 20.

[71] Tenth Schedule of Constitution of India 1950.

[72] There are no structural or design features that guard against such concentration of power. The only factor tempering is 'the possibility that internal party disagreements might come into the open.' Søberg Shugart (n 48) 354.

[73] Notification No. A.03011/02/2009-Adm dt 28 January 2009 introduced when the National Identification Authority of India Bill, 2010 had been rejected by a Parliamentary Standing Committee Report; the Aadhaar Act 2016 was passed as a money bill, and received Presidential assent on 25 March 2016.

Authority of India (UIDAI) to implement it.[74] The MOUs were signed at the same time that UIDAI received a budgetary boost for developing Aadhaar infrastructure.[75] States went on even to link Aadhaar to social welfare programs.[76] Needless to say, the Union Government continued to enlist[77] the states' cooperation successfully[78] after enacting the Aadhaar Act 2016. Reportedly, the Union Government also contemplated incentivizing State governments to enact and implement Aadhaar, for "Direct Benefit Transfer" (DBT) under all central sector and centrally sponsored schemes,[79] and encouraged States to bring State sponsored schemes under

[74] All the MOUs between UIDAI and States/UTs were signed between March and August 2010; 'MOUs Signed with State Registrars' <https://uidai.gov.in/ecosystem/enrolment-documents/mous.html> accessed 1 June 2019.

[75] Sujay Mehdudia, 'Big boost for UIDAI' (*The Hindu*, 26 February 2010) <https://www.thehindu.com/sci-tech/technology/Big-boost-for-UIDAI/article16832285.ece> accessed 1 June 2019.

[76] Yogendra Kalavalapalli, 'UID gets off the ground with test phase in Andhra Pradesh' (*The Hindu*, 08 April 2010) <https://www.thehindu.com/news/national/UID-gets-off-the-ground-with-test-phase-in-Andhra-Pradesh/article16365266.ece> accessed 1 June 2019; Sangeetha Unnithan, 'Unique ID cards for schoolchildren' (*The Hindu,* 7 January 2010) <https://www.thehindu.com/todays-paper/tp-national/tp-kerala/Unique-ID-cards-for-schoolchildren/article15963137.ece> accessed 1 June 2019; Press Trust of India, 'Maharashtra to link school admission with Aadhaar' (*The Hindu*, 23 April 2015) <https://www.thehindu.com/news/national/other-states/maharashtra-to-link-school-admission-with-aadhaar/article7134236.ece> accessed 1 June 2019; PTI, 'LPG subsidy to be credited directly in bank accounts from June 1 in 18 districts' (*The Hindu* 29 May 2013) <https://www.thehindu.com/business/Economy/lpg-subsidy-to-be-credited-directly-in-bank-accounts-from-june-1-in-18-districts/article4762963.ece> accessed 1 June 2019.

[77] The 11th Inter-State Council Meeting, held on 16 July 2016, had on its agenda "Use of Aadhaar as an identifier and use of DBT for providing Subsidies, Benefits and Public Services". The Prime Minister stated: "The passage of this Act enables us to use Aadhaar for Direct Cash Transfers for subsidy and other services. As on date, 102 crore Aadhaar cards have been distributed in our country of 128 crore people. 79 per cent of our people now have Aadhaar cards. Among adults, 96 per cent people have Aadhaar cards. ... Therefore, eschewing criticism, we must lay emphasis on promoting social reform schemes through mutual cooperation. Many of these schemes have been designed by subgroups of Chief Ministers under the aegis of the NITI Aayog." See Press Information Bureau Government of India (PIB), 'Prime Minister to chair the Inter-State Council meeting tomorrow' (15 July 2016) <http://pib.nic.in/newsite/PrintRelease.aspx?relid=147109> accessed 1 June 2019; PIB, 'English rendering of excerpts of the PM's inaugural address in eleventh Inter State Council Meeting at New Delhi' (16 July 2016) <http://interstatecouncil.nic.in/wp-content/uploads/2016/08/inaug-pm-english.pdf> accessed 1 June 2019.

[78] The Prime Minister's remarks were: "The Prime Minister expressed happiness at the near total acceptance of Aadhaar as a tool to promote good governance and transparency." PIB, 'PM's concluding remarks at the Inter State Council Meeting' (16 July 2016) <http://interstatecouncil.nic.in/wp-content/uploads/2016/08/concld-pm.pdf> accessed 1 June 2019.

[79] Special Correspondent, 'States to get sops based on Aadhaar's DBT platform' (*The Hindu*, 23 July 2016) <https://www.thehindu.com/business/Economy/States-to-get-sops-based-on-Aadhaar%E2%80%99s-DBT-platform/article14503122.ece> accessed 1 June 2019.

the Aadhaar-DBT mission.[80] Complying with centrally-issued instructions,[81] several States took steps to institutionalise Aadhaar, even though the constitutionality of the centrally enacted Aadhaar Act was an undecided matter at the time.[82] As a descriptive matter, through the mechanisms of federalism that were at work from as early as 2010, States had "cooperated" with the Union to such an extent, that the passage of the Act had become a mere formality.

Normatively, the seeming complicity of the States with the Union-executive on the Aadhaar project was made possible by the shared legislative powers for the Union and the States in this sphere. Aadhaar and the UIDAI were brought into being in 2009[83] by the Ministry of Planning, acting under the legislative field "economic and social planning",[84] which, like other social welfare fields[85] is open to both the Union and the States to legislate on under List III.[86] In the realm of this shared legislative power, even our best-case scenario[87] could not have led to *demos*-enabling outcomes any more than the outcome of *Puttaswamy II*.[88] After the States had signed MOUs with the Union for establishing Aadhaar and expended

[80] Arup Roychoudhury, '3,500 state, central schemes worth Rs 6 lakh cr to come under DBT soon' (*Business Standard,* 6 September 2017) <https://www.business-standard.com/article/economy-policy/3-500-state-central-schemes-worth-rs-6-lakh-cr-to-come-under-dbt-soon-117090500535_1.html> accessed 1 June 2019.

[81] Aman Sharma, 'States act on Aadhaar, link it to local schemes' (*The Economic Times,* 30 August 2017) <economictimes.indiatimes.com/articleshow/60283931.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst> accessed 1 June 2019; See UIDAI Circular No 23011/Gen/2014/Legal-UIDAI 15 June 2016.

[82] For instance, the Maharashtra Act2017 with effect from 2016, Uttar Pradesh Act 2018, with effect from 2017, Uttarakhand Act 2018, with effect from 2017; Haryana Act 2017; Gujarat Act 2017, Rajasthan Act 2017, Jharkhand Act 2017, Karnataka Act 2018. Noteworthy outliers were West Bengal, which challenged the Aadhaar Act in the Supreme Court in *State of West Bengal v Union of India* Writ Petition (Civil) No. 841 of 2017 and Madhya Pradesh which enacted the Madhya Pradesh Act 2019 after *Puttaswamy II* (n 6).

[83] Notification No. A.03011/02/2009-Adm.

[84] List Entry 20 of Constitution of India 1950.

[85] List Entry 23-5 of Constitution of India 1950. The only outlier is List II Entry 6.

[86] Article 246(2) of Constitution of India, 1950.

[87] The two best cases are if the Speaker had not certified the bill as a money bill in 2016, and Rajya Sabha had returned or rejected the Bill, or if the Court had struck down the Aadhaar Act for not being a money bill, in 2018.

[88] In examining if the bill was indeed a money bill, the Court tried to save the passage of the Aadhaar Bill by substantively modifying the scope and content of the Aadhaar Act. These interpretive gymnastics, aimed at portraying the appropriation from the Consolidated Fund of India as the linchpin of the Act, enabled the Court to conclude that it was validly a money Bill. This reasoning is a fatal error, not least for the fact that the Court puts the cart before the horse. The only way the Aadhaar Act could have been constitutional was if it contained "only provisions" dealing with powers enumerated under Article 110(1)(a)-(f) or any matter incidental to them. This was not true of the Aadhaar Act, which contained all manner of provisions on setting up and running the Aadhaar infrastructure.

resources to discharge obligations under them,[89] the Bill's passage was necessarily in the interests of the States as political units. However, since States as political units are mere proxies for the sub-national interests ensconced within them, it is those unique and subjective sub-national contexts and interests that ought to have been advanced by the States' representatives in the upper house. In other words, States ought to have been voicing the interests of the *demos* that inhabit them, for the bicameral structure of the government to have the capacity to be *demos*-enabling.

The takeaway from the Aadhaar experience is key: under conditions where States are willing collaborators with the Union in a shared legislative field as a matter of political practice, the structure of Union-State relations fails to enable the sub-national *demos,* whose particular views are rendered irrelevant when the upper house is bypassed. Instead, the political practice of Union-States relations enabled the majoritarian *demos* and constrained the sub-national *demos.* Consequently, the individual's autonomy to affect political outcomes, or to represent herself as a member of a social group, or even to be governed by a limited government was compromised. In this fashion, the capacity of the bicameral structure of the government to enable the sub-national *demos* is eviscerated.

How can this capacity be restored? The avenue for states to advance their various interests as claims to autonomy[90] of various citizens and social groups, in the realm of shared powers, is constitutional "process".[91] States retain executive power in shared legislative fields in which the Union has not yet enacted laws.[92] To this extent, the interests of sub-national *demos* inhabiting States are safeguarded.[93] Yet, States were either unable or

[89] The MOUs signed with UIDAI in 2010 required state governments to 'Put in place an institutional mechanism to effectively oversee and monitor the implementation of the UID project in general', 'Provide required financial and other resources to the Registrars to carry out the enrolment processes as per the phasing decided by the State Government/Union territory', and 'Cooperate and collaborate with and provide all assistance and support to the Deputy Director Generals (DDG) concerned of the UIDAI and other staff members/consultants/advisors of the UIDAI to effectively implement the UID project in the State of Uttar Pradesh.'

[90] Scholars note that government can only be "federal" as distinguished from "decentralized" if the Union and States have distinct spheres of autonomy from each other. Singh and Rao (n 32) 4 ; Thiruvengadam (n 32) 75 citing Mahendra Prasad Singh, *Indian Federalism: An Introduction* (National Book Trust Delhi 2011) 20. See also Heather Gerken, 'Federalism 3.0' (2017) 105 California Law Review 1695, 1698.

[91] The constitutional processes that states may use to defend states' autonomy are laid out in Article 80, 254, 263 and the Fourth Schedule of Constitution of India 1950.

[92] Proviso to Article 73(1) of Constitution of India, 1950; *Union of India v V Sriharan* (2016) 7 SCC 1.

[93] By virtue of the States retaining executive power over shared fields, the Union could have validly exercised executive powers in "economic and social planning" only if Parliament had passed an Aadhaar legislation. Since the Aadhaar Act was not forthcoming till 2016, all acts of the UIDAI and the Ministry of Planning between 2009 and 2016 are unconstitutional.

unwilling to resist the Union's impositions in the period between 2010-16 despite a constitutional recognition of their powers in the field. To be clear, States have in the past successfully used these constitutional processes and powers to espouse their interests.[94] This shows that while constitutional processes are necessary, they are not a sufficient condition for enabling the sub-national *demos* in various States. Something more is necessary.

One such necessity is leverage. The question to ask is whether States can exempt themselves from obligations that are centrally imposed, in mammoth centrally-imposed programs such as the Aadhaar.[95] States might be unable to resist the Union's impositions if they lack the leverage to bargain with the Union.[96] Since the Union Government has funds but lacks personality, centrally conceptualized programs are reliant on state infrastructure, personnel and resources to realize their aims. States will be equipped to push the Union towards a more favourably designed welfare program, provided they control sufficient resources or infrastructure to use as leverage.

A second necessity for States, particularly for their political leadership, is the incentive to resist coercive bargains imposed by Union. As we argued in the previous section, political parties helming State governments are assumed to act on electoral incentives, while in fact, they answer to the incentives of the political party. Thus, even when States have leverage, in the absence of their legislative and regulatory autonomy being guaranteed in balance with the Union's in the realm of shared legislative powers, States' political leadership may have no incentive to obey voter preferences. Since constitutional doctrine on legislative and regulatory

[94] See Rajeshwari Deshpande et al, 'States as Laboratories: The Politics of Social Welfare Policies in India' (2017) 16 India Review 85, 96-8.

[95] The (US) Affordable Care Ac, 2010, which was challenged in *National Federation of Independent Business v Sebelius* (2012) 567 US 519 (US Supreme Court) is a comparable "cooperative federalism" welfare program from the US. See Samuel Bagenstos, 'The Anti-Leveraging Principle and the Spending Clause after NFIB' (2013) 101 Georgetown Law Journal 861.

[96] The lack of state leverage is meant to be a descriptive claim. Indeed, one cannot assert a normative claim to leverage against the Union's impositions, being that States' resource endowments are a consequence of historically, sociologically and geopolitically contingent variables. Descriptively speaking, little is known of the type of leverage States possessed against the promised incentives or rewards, when they were made to sign the Aadhaar MoUs, besides scant journalistic reportage such as here; Special Correspondent, 'States to get sops based on Aadhaar's DBT platform' (*The Hindu*, 23 July 2016) <https://www.thehindu.com/business/Economy/States-to-get-sops-based-on-Aadhaar%E2%80%99s-DBT-platform/article14503122.ece> accessed 1 June 2019.

autonomy of states[97] is focused on which side was empowered to act,[98] such doctrine applied to the present context reduces the issue into a zero-sum analysis of which side ought to "win".[99] On the other hand, cooperative federalism has not been illuminating on the degree of state autonomy either.[100] As Singh and Rao note, 'the difficult problems are often ones where...one party in a dispute can gain only at another's expense.'[101] Policy recommendations emerging from the cooperative federalism standpoint, they note, appear to be mere 'exhortations [to the Union and States] to get along with each other.'[102] If this was all that was needed, the Constitution need do no work; extra-constitutional factors like party-hierarchy and leaders' personal relations[103] have dictated the degree to which States and the Union got along in the era of nationalised parties.[104] To restore the capacity of the bicameral structure of government to realize its *demos*-enabling function, incentives to bargain with the Union for the subjective interests of the *demos* inhabiting them, must be restored to States' political leadership.

4. Conclusion

In this article, we set out to understand whether the holding in *Puttaswamy II* on the money bill question is consonant with the holding in *Puttaswamy I* that the individual's autonomy is central to her relationship with the State.

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[97] See *KC Gajapati Narayan Deo v State of Orissa* AIR 1953 SC 375; *State of Rajasthan v G. Chawla* 1959 SCR Supl.(1) 904; *Gujarat University v Krishna Ranganath Mudholkar* 1963 SCR Supp (1) 122; *Hoechst Pharmaceuticals Ltd v State of Bihar* 1983 SCR (3) 130; *Vijay Kumar Sharma v State of Karnataka* (1990) 2 SCC 562; *State of Karnataka v Drive-in Enterprises* (2001) 2 SCR 378.

[98] This is not the case in the realms of President's rule under Article 356, and the termination of Governor's service at the pleasure of the President, in which the partisan perversion of constitutional design is tackled frontally by the Courts.

[99] Gerken (n 90) 1699.

[100] See Inter-State Council Secretariat, 'Report of the Sarkaria Commission on Centre-State Relations' (2016). Inter-State Council Secretariat, 'Report of The Commission On Centre-State Relations' (2010). The Bharatiya Janata Party, in its election manifestos for national elections in 2014 and 2019, also used this idiom, see Bharatiya Janata Party, 'Sankalp Patra: Lok Sabha 2019'.
<https://www.hindustantimes.com/static/ht2019/4/BJP2019.pdf> accessed 4 February 2020.

[101] Singh and Rao (n 32) 90.

[102] ibid.

[103] ibid 49.

[104] Balveer Arora and KK Kailash, 'The New Party System: Federalised and Binodal' in Ajay Mehra (ed), *Party System in India: Emerging Trajectories* (Lancer Publishers 2013) 235, citing Daniele Caramani, *The Nationalization of Politics: The Formation of National Electorates and Party Systems in Western Europe* (CUP 2004).

We set the stage for this analysis by showing that the bicameral structure of government was constitutionally designed to serve functions that enhance the autonomy of the individual. These functions are to constrain the majoritarian *demos* which finds expression in the popularly elected lower house, by requiring reflection, and to enable the sub-national *demos* inhabiting the various states, by requiring representation. Notwithstanding this, we find ourselves governed by an ordinary law—the Aadhaar Act—because it was passed as a "money bill" by the majoritarian lower house, not subject to upper house scrutiny. In other words, the Aadhaar Act's passage enabled the majoritarian *demos* and constrained the sub-national *demos* and thus effaced the relationship of the individual vis-à-vis the state, as envisioned by *Puttaswamy I.* This, we concluded was possible owing to the emergence of majoritarian parliamentarism in India post-2014, in contrast with the constitutional design for a constrained parliamentarism.

We set out, then, to analyse the points at which the bicameral structure is denuded of the capacity to fulfil its functions, under conditions of majoritarian parliamentarism. The first point of capacity-loss lay in the internal practices within the Parliament, in which the executive occupies a hierarchical position vis-à-vis the legislature, and the veto points of constitutional text, the Speaker's power to certify compliance with constitutional text, and judicial review powers over the Speaker's decision, all fail successively. The second point of capacity-loss lay in the internal practices of political parties. Owing to party discipline norms, and the absence of internal democracy and answerability to voters, we found that the political party voted by an electoral majority can not only become fused with the political executive, but also exert control through party channels over State governments helmed by the same party. This, we found, not only further concentrates power in the already hierarchically dominant executive vis-à-vis the legislature, but also distorts the Union's relations with the States. Both these points of capacity loss impinge on the *demos*-constraining function of the upper-house. The final point of capacity loss–in the realm of federal bargaining between the States and the Union, in legislative fields shared concurrently by both—impinges on the *demos*-enabling function of the upper house. We found that even though States were constitutionally protected both by powers and by process to resist the Union's impositions to set up the Aadhaar program, they were either unable or unwilling to do so. This, we found, was because States as advocates of the interests of their many ethnic, linguistic, and socially disparate *demos*, lack not only the leverage to exempt themselves from centrally imposed obligations, but also the incentive to resist such imposition. Since political practice is noticeably centripetal, we are sceptical that the upper house can advance the interests and preferences of sub-national *demos* inhabiting the various States.

We conclude that these three points of capacity-loss must be reckoned with, for the upper-house to restore its capacity to discharge its *demos*-enabling and *demos*-constraining functions. We also found that all capacity-loss occurs in political practice, whether within parliament or outside of it. From this, we conclude that the manner in which non-judicial, political actors work the Constitution of India is key to understanding outcomes which—despite being contrary to constitutional principles and design—are validated as "constitutional".