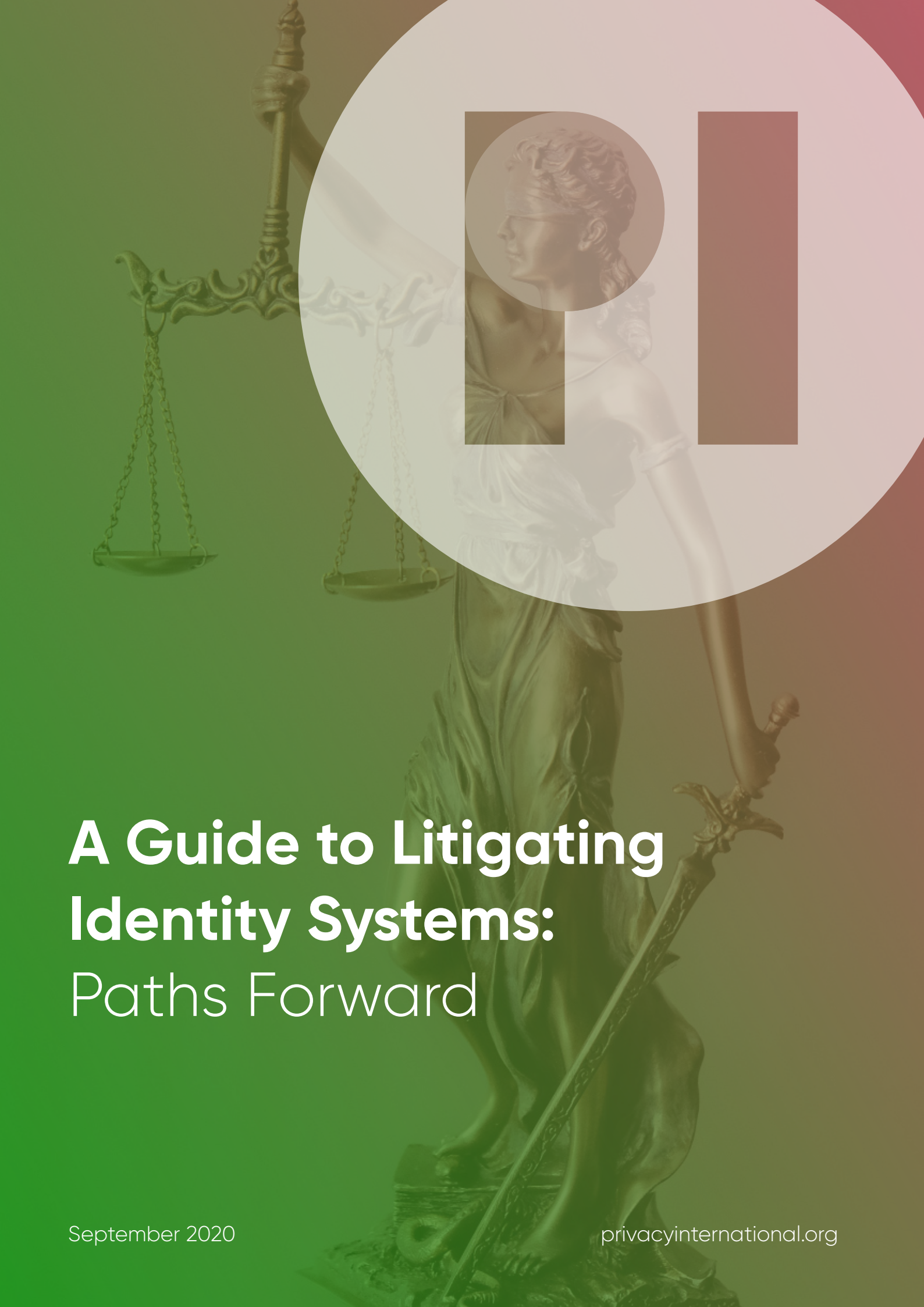




A Guide to Litigating Identity Systems: Paths Forward

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PART FIVE:

PATHS FORWARD

DEMOCRACY, THE RULE OF LAW, AND ACCESS TO JUSTICE

71. This analysis of the jurisprudence on identity systems leads to the conclusion that the manner in which identity systems are introduced and designed poses serious threats to democracy, the rule of law, and access to justice. The Jamaican Supreme Court observed that governance in a constitutional democracy based on the rule of law is an institutional arrangement, with each arm performing its designated functions.³¹³ However, the adoption of identity systems is rarely preceded by rigorous legislative debates and democratic deliberation.³¹⁴
72. According to the dissenting opinion in the *Aadhaar* judgment, the passing of the Aadhaar Act as a “Money” Bill was unconstitutional. Under the Articles of the Indian Constitution, a Money Bill is a category of bill (draft law) that contains provisions to deal with the specific list of matters such as the withdrawal of money from the Consolidated Fund of India and the regulation of taxes.³¹⁵ The dissent in the *Aadhaar* judgment held that the incorrect classification of the draft Aadhaar legislation as a Money Bill, amounted to “a

313 *Julian J. Robinson v. The Attorney General of Jamaica*, Claim No. 2018HCV01788, ¶ 167 (2019).

314 See Privacy International, *The Clash between Democracy and Biometrics*, 31 January 2018, <https://medium.com/@privacyint/identity-policies-the-clash-between-democracy-and-biometrics-95adabd9f263> (last visited 20 November 2019).

315 Article 110 of the Indian Constitution.

fraud on the constitution" because it led to the bypassing of the Upper House of the Parliament (Rajya Sabha) and undermined the constitutional scheme of bicameralism and the legitimacy of democratic institutions.³¹⁶ While this was the position adopted in the dissenting opinion of the *Aadhaar* judgment, it is pertinent to note that the Indian Supreme Court has, in a subsequent decision, questioned the majority's decision that Aadhaar was correctly certified as a Money Bill. The court referred the question of whether the Aadhaar Act was correctly certified as a Money Bill for reconsideration to a larger Bench of the Supreme Court.³¹⁷

73. Petitioners in the Kenyan case similarly raised arguments regarding the lack of public participation in the legislation establishing the Kenyan national identity system, in particular the use of an omnibus bill that the Kenyan High Court previously cautioned against using for anything other than non-substantive amendments.³¹⁸ While the Kenyan court ultimately upheld the method used to introduce the legislation, this instance provides another example of the need for respect for democratic processes that allow for complete public participation in the design and implementation of proposed national identity systems. The rule of law and the proper functioning of democracies also depends on the efficient functioning of legal institutions to ensure access to justice for all.
74. An important element of the rule of law is judicial oversight, an element that takes on particular significance in the implementation of identity systems given their wide-ranging implications on individuals rights and liberties. The Indian Supreme Court in the *Aadhaar* judgment found that Section 47 of the enacting legislation, which barred courts from admitting complaint in relation to the Aadhaar Act unless filed by the UIDAI (the statutory authority

³¹⁶ *Aadhaar Judgment*, Justice K.S. Puttaswamy and Another v. Union of India and Others, Writ Petition (Civil) No. 494 of 2012 & connected matters, ¶ 117 of dissent (2018).

³¹⁷ IndiaToday, "Supreme Court re-examines Aadhaar as money bill, refers issue to larger bench," 4 November 2019, <https://www.indiatoday.in/india/story/supreme-court-re-examines-aadhaar-as-money-bill-refers-issue-to-larger-bench-1618683-2019-11-14> (last visited 20 November 2019).

³¹⁸ *Huduma Namba Judgment*, Nubian Rights Forum and Others v. The Hon. Attorney General, Consolidated Petitions No. 56, 58 & 59 of 2019 ¶ 676 (2020).

established under the legislation to implement the identity system) or a person authorised by it, was unconstitutional because it barred individual citizens from seeking judicial remedies for breach of data.³¹⁹ Similarly, the Mauritian Supreme Court rejected the Mauritian identity system's storage regime partly because of the lack of judicial oversight for data sharing.³²⁰ The dissenting opinion of the Indian Supreme Court also holds that the government's brazen disregard of the Supreme Court's interim orders to stop the expansion of the Aadhaar project when the constitutional challenge to Aadhaar was being heard signalled a disrespect for the principle of separation of powers rooted in the rule of law and affected the rights of citizens who rely on judicial institutions for the protection of their rights.³²¹ These courts, by asserting the judiciary's role in securing individual rights within an identity system, suggest that the effective judicial remedies and access to justice for violation of rights are crucial to the framework governing identity systems in countries committed to democracy and the rule of law.

³¹⁹ *Aadhaar Judgment*, ¶ 353 at 427.

³²⁰ *Madhewoo v. The State of Mauritius and Anor*, 2015 SCJ 177 http://ionnews.mu/wp-content/uploads/2015/05/Biometric-ID-Card_Madhewoo-vs-State.pdf at 32–33.

³²¹ *Aadhaar Judgment*, ¶ 337 of dissent.

INCREASED ATTENTION TO THE RIGHTS OF SEXUAL MINORITIES

75. While designing identity systems, it is important to ensure that the rights of trans persons and gender diverse persons are not violated due to a mismatch between their self-identified gender and their sex as recorded in the identity system. The matching of identity is crucial for the realisation of all rights that are dependent on proving identity.
76. The 2018 report³²² of the UN Independent Expert on protection against violence and discrimination discussed the decisions of courts in Botswana, Kenya, Chile, Colombia, Ecuador, India, Pakistan, and Bangladesh, which held that trans persons must be legally recognised, including their right to have their gender identity and, in some cases, their changed name (if any) reflected in identity documents³²³. The report highlights the human rights violations that occur when the names and sex details of individuals in official documents do not match their gender identity or expression. This includes arrest, harassment, abuse, violence and extortion, exclusion from school and the formal labour market, barriers in access to services such as housing, healthcare, and emergency care, and services in times of crisis.³²⁴ Although acknowledging that the manner in which data regarding identity is recorded is crucial to enjoyment of fundamental rights, the Independent Expert questioned the need for the “pervasive exhibition of gender markers in official and non-official documents” and opines that “States must refrain from

322 UN General Assembly, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, A/73/152 (12 July 2018), https://www.un.org/en/ga/search/view_doc.asp?symbol=A/73/152

323 UN General Assembly, A/73/152 at 18.

324 UN General Assembly, A/73/152 at 12.

gathering and exhibiting data without a legitimate, proportionate and necessary purpose."³²⁵

77. Due to the near impossibility of subsequently altering biometric data recorded during the data collection phase of identity systems, it is important to ensure that other data like recorded sex can nevertheless be altered afterwards so that trans persons are not deprived of their basic rights. As the Independent Expert notes, the question of when information on sex is necessary to collect in the first place is also at issue.

³²⁵ UN General Assembly, A/73/152 at 12.

INCREASED ENGAGEMENT WITH INTERNATIONAL HUMAN RIGHTS LAW

78. While Mauritius, India, and Jamaica are State Parties to the International Covenant on Civil and Political Rights, and therefore have an obligation to fulfil the rights guaranteed under the Convention, including the right to privacy, the Convention does not find a mention in the judgments analysed on the rights implications of identity systems. The Kenyan High Court briefly mentions the Convention, but little consideration is given to its impact beyond the existence of a right to privacy.³²⁶ The Kenyan High Court's most complete engagement with international human rights law is limited to privacy and data protection principles issued by the OECD and the African Union, which the court cites in evaluating the data protection framework in which the Kenyan national identity system operates.³²⁷
79. Although the obligations imposed on State Parties to a treaty have important implications for all national authorities, including the executive and the legislature, the judiciary is a key actor in reviewing the compatibility of domestic legislation with international human rights treaties³²⁸ and assessing whether the state is complying with its international obligations. International human rights law also fills gaps at the domestic level through a reliance on international norms and standards. International human rights law can be understood as "part of a broader set of interrelated, mutually reinforcing processes and institutions—interwoven strands in a rope—that together pull human rights forward, and to which international law makes distinctive

³²⁶ See *Huduma Namba Judgment*, ¶ 747.

³²⁷ See *Huduma Namba Judgment*, ¶¶ 843–846 (comparing the Kenyan data protection framework to established international principles contained in the OECD Privacy Principles and the African Union Convention on Cyber Security and Personal Data Protection).

³²⁸ European Commission for Democracy Through Law (Venice Commission), Draft report on the implementation of international human rights treaties in domestic law and the role of courts, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL\(2014\)046-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2014)046-e)

contributions."³²⁹ It is undoubtedly a single strand of the rope, but nevertheless strengthens the entire rope.³³⁰

80. From the perspective of civil society organisations, international human rights norms and standards can create stronger protection for existing domestic rights and also influence the "development of transformative national-level jurisprudence and law and policy reform."³³¹ Beyond the legal, introducing the ideas of international human rights law also has an educational effect on society by being a process through which the construction of ideas, identities, and interests of social actors is recast into a more "rights-aligned perspective" – a step forward in the protection of human rights.³³²

329. Douglass Cassel, "Does international human rights law make a difference?," *Chicago Journal of International Law* 2 (2001): 121.

330. Cassel, "International human rights law," 121.

331. See Johanna B. Fine, Katherine Mayall, and Lilian Sepúlveda, "The role of international human rights norms in the liberalization of abortion laws globally," *Health and Human Rights Journal*, (2 June 2017), <https://www.hhrjournal.org/2017/06/the-role-of-international-human-rights-norms-in-the-liberalization-of-abortion-laws-globally/> (last visited 20 November 2019).

332. Janet E. Lord and Michael Ashley Stein, *The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities*, (Faculty Publications, 2008), 665.

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