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**IN THE HON'BLE  
SUPREME COURT OF MANDIA  
(2017)**

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**In the Matter Of  
SPECIAL LEAVE PETITION (CIVIL) (\_\_\_\_/2017)  
UNDER ARTICLE 136 OF THE CONSTITUTION OF MANDIA**

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**SATISH DHANKAR**

**.....APPELLANT**

**versus**

**UNION OF MANDIA**

**.....RESPONDENT**

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**MEMORANDUM FOR RESPONDENT**

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**LIST OF ABBREVIATIONS**

AIR	ALL INDIA REPORTER
UIDAI	UNIQUE IDENTIFICATION AUTHORITY OF INDIA
NUIDA	NATIONAL UNIQUE IDENTIFICATION AUTHORITY
SC	SUPREME COURT
UKSC	UNITED KINGDOM SUPREME COURT
SCC	SUPREME COURT CASES
SCJ	SUPREME COURT JOURNAL
SCR	SUPREME COURT REPORTER
Sec.	SECTION
Art.	ARTICLE
ECHR	EUROPEAN CONVENTION ON HUMAN RIGHTS
CFREU	CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION
UDHR	UNIVERSAL DECLARATION OF HUMAN RIGHTS
ICCPR	INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS
U.O.I.	UNION OF INDIA
v.	VERSUS
ILR	INDIAN LAW REPORTS
No.	NUMBER
Anr.	ANOTHER
Ors.	OTHERS
S.A.	SOUTH AFRICA
U.S.	UNITED STATES
N.Y.	NEW YORK
PDS	PUBLIC DISTRIBUTION SYSTEM
IT	INFORMATION TECHNOLOGY
PIL	PUBLIC INTEREST LITIGATION
KYC	KNOW YOUR CUSTOMER
PAN	PERMANENT ACCOUNT NUMBER

**INDEX OF AUTHORITIES**

***I. STATUTES***

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3. THE AADHAAR (TARGETED DELIVERY OF FINANCIAL AND OTHER SUBSIDIES, BENEFITS AND SERVICES) ACT, 2016
4. PEHCHAAN ACT, 2014
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PUCL (Night Shelter Matters) v. Union of India, (2013) 11 SCC 505
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People's Union for Civil Liberties (PDS Matter) v. Union of India & Ors., (2013) 14 SCC 368
Lokniti Foundation v. Union of India & Ors, Writ Petition (C) No. 607 of 2016 decided on February 06, 2017
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No 494 Of 2012
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Unique Identification Auth. of India and anr. v. Central Bureau of Investigation, Special Leave to Appeal (Crl) No(s).2524/2014 in the Supreme Court
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**B. FOREIGN CASES**

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Olmstead v. United States, (1927) 277 US 438 (471)
Schmerber v CA, 384 US 757, 1966
US v Dionisio, 410 US 1, 1973
Supnick v. Amazon.com, Inc., 2000 U.S. Dist. LEXIS 7073
Dwyer v. American Express, 652 N.E.2d 1351

**STATEMENT OF JURISDICTION**

This Hon'ble Supreme Court of Mandia has jurisdiction over the matter under **Article 136 of Constitution of Mandia**<sup>1</sup>. If the Court thinks appropriate to proceed in this matter, we humbly accept your jurisdiction.

THE PRESENT MEMORANDUM SETS FORTH THE FACTS, CONTENTIONS AND ARGUMENTS IN THE PRESENT CASE.

ALL OF WHICH HUMBLY SUBMITTED:

Counsel for the Respondent.

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<sup>1</sup> 136. Special leave to appeal by the Supreme Court

(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of Mandia

**STATEMENT OF FACTS**

- The following developments took place in the Republic of Mandia, which resulted into a Special Leave Petition in the Supreme Court of Mandia:
- That the government of Mandia formulated a policy named '*Pehchaan*' for profiling of its citizens and to provide them a card called Pehchaan. The Pehchaan was meant to identify citizens for various benefits given by the government, to save duplicity of identities and duplicity of election cards, to identify illegal immigrants in the country, to improve tax collection of the government and also to check the leakage in government schemes and to prevent corruption happening in PDS and other subsidy providing schemes of the government.
- That as per government notification issued on 12<sup>th</sup> October, 2009, Pehchaan policy is also aimed at eliminating all forms of terrorism by finishing off sleeping modules and local support base of terrorists in the country. Terror finance will be curbed through Pehchaan and Hawala transactions and foreign contributions to suspect NGOs can be checked by making payments, salaries and other financial transactions online and linking them with Pehchaan system.
- That the government of Mandia constituted National Unique Identification Authority under the Chairmanship of Mr. Rajeev Khanna, IT specialist on 30<sup>th</sup> November, 2009. This Authority started its work of making Pehchaan cards and assigned this task to private entities having expertise in this field. These private entities further outsourced this work to private vendors in every district and block of Mandia to provide Pehchaan cards to the citizens by taking their basic details like finger prints of both the hands, scanning of iris of the eyes, blood group, spouse and child(ren) details, their educational qualifications, number of spouses, the religion to which both spouse belong to, laws under which marriage is solemnized, details of life-threatening diseases like AIDS, Cancer and Hepatitis-B, permanent infertility both in male and female and criminal/civil cases pending in any court and government loan or any other liability on the citizen.
- That the Petitioner, Mr. Satish Dhankar, challenged this policy of mandatory Pehchaan cards in the High Court of Nelhi, one of the states of the Republic of Mandia on 22<sup>nd</sup>

January, 2009 through a Public Interest Litigation (PIL) contending that the Pehchaan policy violates right to life including the right to privacy and right to speech and expression- especially the right to remain silent and not to part with basic information about oneself.

- On this High Court on 27<sup>th</sup> July, 2014 passed an interim order directing the government not to make Pehchaan cards mandatory.
- That the government of Mandia the next day i. e. 28<sup>th</sup> July, 2014 filed an application for the clarification of the interim order and to make a plea that Pehchaan cards be allowed to be made mandatory for non-benefit schemes or programmes of the government like making of PAN Cards, Mobile connections, applying for gas connection and opening of bank accounts. The High Court allowed government's plea permitting it to make Pehchaan cards mandatory for non-benefit schemes, programmes and initiatives of the government.
- In the monsoon session of the Parliament of Mandia on 11<sup>th</sup> August, 2014, the government of Mandia enacted a law called the Pehchaan Act, 2014 making mandatory the Pehchaan cards for all schemes (benefit and non-benefit both). This law also provided a statutory basis to the National Unique Identification Authority. The Act of 2014 also has a whole chapter on data protection and penalties and punishments for data leakage.
- That the Petitioner filed a fresh application in the High Court to amend his petition for including the challenge to the Pehchaan Act, 2014. The High Court allowed his plea to challenge the Pehchaan Act, 2014 along with his original prayers for quashing the whole Pehchaan project of the government of Mandia.
- That on 13<sup>th</sup> January, 2015, the government of Mandia issued a notification making Pehchaan mandatory for every scheme and programme and fixed March, 2016 as the deadline for linking Pehchaan cards with bank accounts and PANS cards and asked every citizen to comply with it and in the absence of compliance penal actions are to be initiated.
- That the Petitioner claimed Pehchaan Act, 2014 as violative of right to privacy guaranteed by the Constitution of Mandia. He contended that data collected by government is not safe and it can be leaked to private entities very easily threatening the life and liberty of the citizens.

- That the Petitioner also contended that 13 crore data of citizens was leaked from Pehchaan database and now this data is in the hands of the private companies, which can use this data for telemarketing, making the life of the consumers/citizens hell by selling all sorts of products to them.
- That the Petitioner also claimed that recently an IIT passed graduate hacked into Pehchaan database to use its data for his online payment App.
- That the Respondent argued in the High Court that there is no right to privacy provided in any provision of the Constitution of Mandia.
- That after hearing the matter in detail and going through the materials and documents submitted by Petitioner and the Respondent, the High Court of Nelhi rejected the PIL and held that Pehchaan Act, 2014 is constitutional and government can make mandatory the making of Pehchaan cards. It further held that right to privacy is a common law right and right to deny information to the government cannot be held to be fundamental right in the light of the necessity to protect the state from terrorism and other security related problems. Since the state of Mandia is surrounded by hostile neighbours it becomes incumbent on the part of the government to provide Pehchaan cards to all its citizens.
- That the High Court of Nelhi also held that making Pehchaan mandatory is essential for the benefits of schemes to reach to citizens as it will eradicate the problem of duplicity of identities. It will further help in making elections free and fair by eliminating double election cards and voting rights at two or more than two places.
- That the High Court of Nelhi also justified the collection of data by private entities for the Pehchaan as government of Mandia is not having adequate resources and staff for this purpose and hence its outsourcing of data collection exercise is justified because of the reasons of lack of resources, expertise and staff with the government.
- That the Petitioner went to the Supreme Court of Mandia assailing the decision of the Hon'ble High Court of Nelhi.
- That the Petitioner came to the Supreme Court of Mandia through a Special Leave Petition under the provision of the Constitution of Mandia. He prayed for quashing the judgment of the Hon'ble High Court of Nelhi and to declare the Pehchaan Act, 2013 and previous policy of providing Pehchaan cards.

**STATEMENT OF ISSUES**

- I. WHETHER THE RIGHT TO PRIVACY IS A FUNDAMENTAL RIGHT GUARANTEED UNDER CONSTITUTION OF MANDIA?
  
- II. WHETHER THE PEHCHAAN ACT, 2014 IS VIOLATIVE OF THE PROVISIONS OF THE CONSTITUTION OF MANDIA

**SUMMARY OF ARGUMENTS**

**I. WHETHER THE RIGHT TO PRIVACY IS A FUNDAMENTAL RIGHT GUARANTEED UNDER CONSTITUTION OF MANDIA?**

Right to privacy has no particular definition. Its various definitions create quite a lot of confusion. Hence, it becomes extremely difficult to talk about the right to privacy as a fundamental right without any explicit mention even in the constitution of Mandia. Yet the Right to Privacy for the longest time had been considered a part of the constitution as being implied from Article 21, but as any other fundamental right, it is not an absolute right as well. The State is entitled to impose restrictions to the right to privacy for state interest. Moreover, the fact that there are other nations too those have like Mandia had not explicitly mentioned the right to Privacy shows that the right to privacy is not guaranteed as a fundamental right.

**II. WHETHER THE PEHCHAAN ACT, 2014 IS VIOLATIVE OF THE PROVISIONS OF THE CONSTITUTION OF MANDIA**

Since right to privacy is not an absolute right, personal liberty can be interfered with by fulfilling the Triple Test: (i) it must prescribe a procedure, (ii) the procedure must withstand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation; (iii) it must withstand the equality test of Article 14. The Pehchaan act is right, just, a fair and non-arbitrary scheme. The Pehchaan scheme helps by providing and protecting the citizens' identities and providing them various benefits and protecting the state by ensuring to curb terrorism and corruption. As no information is divulged to any agency without the consent of the concerned individual, it cannot be construed to violate any privacy. It is questioned in the case that when the people don't have any hesitation before giving away their important private details to various social networking apps or for getting a passport, why then the uproar in giving personal information for the purpose of benefit of the state. The last few years since Pehchaan came into action, it has led to huge amounts of savings of the states. Moreover, legislation passed by Parliament cannot be challenged lightly. The Pehchaan Act has clear restrictions on data sharing and thus is completely secure. Therefore no malafides can be attributed to the scheme.

**ARGUMENTS ADVANCED**

**I. WHETHER THE RIGHT TO PRIVACY IS A FUNDAMENTAL RIGHT GUARANTEED UNDER CONSTITUTION OF MANDIA?**

If only people advocating for a right to privacy could define precisely what they mean by the term Privacy. Privacy is just another fancy word for putting unreasonable restrictions on powers exercisable by the state, powers which are exercised for furtherance of welfare objectives. Privacy as a concept has a broad ambit developed by people having a narrow understanding of how a welfare state functions. There are various definitions of privacy, enough to cause confusion in the mind of a prudent man. Privacy enables us to create barriers and manage boundaries to protect ourselves from unwarranted interference in our lives, which allows us to negotiate who we are and how we want to interact with the world around us. Privacy helps us establish boundaries to limit who has access to our bodies, places and things, as well as our communications and our information. It may be divided into four categories (1) Physical: restriction on others to experience a person or situation through one or more of the human senses; (2) Informational: restriction on searching for or revealing facts that are unknown or unknowable to others; (3) Decisional: restriction on interfering in decisions that are exclusive to an entity; (4) Dispositional: restriction on attempts to know an individual's state of mind.

Conversely, when it comes to defining the term 'privacy' technically, it gets considered as a concept in disarray. Nobody can articulate what it means. It is a sweeping concept, encompassing (among other things) freedom of thought, control over one's body, solitude in one's home, control over personal information, freedom from surveillance, protection of one's reputation, and protection from searches and interrogations. Philosophers, legal theorists, and jurists have frequently lamented the great difficulty in reaching a satisfying conception of

privacy. Legal scholar Arthur Miller<sup>2</sup> has declared that privacy is “difficult to define because it is exasperatingly vague and evanescent.” “On closer examination,” author Jonathan Franzen<sup>3</sup> observes, “privacy proves to be the Cheshire cat of values: not much substance, but a very winning smile.”

In the case of 'X' v. HOSPITAL 'Z'<sup>4</sup> it was concluded by the Supreme Court that right of privacy cannot be treated to be an absolute right and in paragraph 26, the Supreme Court provided the following important guidelines :

*“26. As one of the basic Human Rights, the right of privacy is not treated as absolute and is subject to such action as may be lawfully taken for the prevention of crime or disorder or protection of health or morals or protection of rights and freedoms of others.”*

Similarly in *Mukesh Kumar Ajmera v. State of Rajasthan*<sup>5</sup>, It was observed:

*“Right to privacy and liberty are not absolute rights. A law imposing reasonable restrictions upon it for compelling interest of State must be held to be valid.”*

Similarly in *Sharda v. Dharmpal*<sup>6</sup> the Court held that a matrimonial court has the power to order a person to undergo medical test. Passing of such an order by the court would not be in violation of the right to personal liberty under Article 21 of the Indian Constitution.

*“The right to privacy in terms of Article 21 of the Constitution is not an absolute right.”*

The court went on to say that:

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<sup>2</sup> Arthur R. Miller, The assault on privacy: Computer, Data Banks, And Dossiers 25 (1971)

<sup>3</sup> The Corrections, Frazen., Jonathan

<sup>4</sup> 'X' v. HOSPITAL 'Z', (1998) 8 SCC 296

<sup>5</sup> Mukesh Kumar Ajmera v. State of Rajasthan, AIR 1997 RAJ 250

<sup>6</sup> Sharda v. Dharmpal, (2003) 4 SCC 493

*“If there were a conflict between the Fundamental Rights of two parties that right which advances public morality would prevail.”<sup>7</sup>*

In *Govind v State of Madhya Pradesh*<sup>8</sup>, Mathew, J. stated that, however, the 'right to privacy was not absolute' and that the makers of our Constitution wanted to ensure conditions favourable to the pursuit of happiness as explained in *Olmstead v. United States*<sup>9</sup>; Mathew, J. speaking for himself, Krishna Iyer and Goswami, JJ, said that the right to privacy should be denied only when in an event when countervailing interest is proven to be superior to the right or where a compelling State interest was shown:

*“privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior. If the Court does find that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling State interest test. Then the question would be whether a state interest is of such paramount importance as would justify an infringement of the right. Obviously, if the enforcement of morality were held to be a compelling as well as a permissible state interest, the characterization of a claimed right as a fundamental privacy right would be of far less significance.”<sup>10</sup>*

It was further said that,

*“Too broad a definition of privacy will raise serious questions about the propriety of judicial reliance on a right that is not explicit in the Constitution...privacy primarily concerns the individual. It therefore relates to and overlaps with the concept of liberty. The most serious advocate of privacy must confess that there are serious problems of*

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<sup>7</sup> Ibid.

<sup>8</sup> *Govind v State of Madhya Pradesh*, 1975 AIR 1378

<sup>9</sup> *Olmstead v. United States*, (1927) 277 US 438 (471)

<sup>10</sup> *Govind v State of Madhya Pradesh*, 1975 AIR 1378

*defining the essence and scope of the right. Privacy interest in autonomy must also be placed in the context of other rights and values.”<sup>11</sup>*

In *Justice K. S. Puttaswamy (Retd.) vs Union Of India And Ors*<sup>12</sup>. as well, it was held:

*“33)“right to privacy” has multiple facets and though such right can be classified as a part of fundamental right emanating from Article 19(1)(a) and (d) and Article 21, yet it is not absolute and secondly, it is always subject to certain reasonable restrictions on the basis of compelling social, moral and public interest and lastly, any such right when asserted by the citizen in the Court of law then it has to go through a process of case-to-case development.”*

Privacy debates are some of the most contentious in information law. Similarly in *Mr.K.J.Doraisamy vs The Assistant General Manager*<sup>13</sup>, the case of *Shankarlal Agarwalla vs State Bank of India*<sup>14</sup> was referred where it was observed that an individual’s right to privacy is not absolute and even in cases of fiduciary relationships like the bank and its customers, larger public interest will supersede the duty to maintain secrecy.

In *M.P Sharma Singh & others v. Satish Chandra & Others*<sup>15</sup>,

*“A power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. When the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction”.*

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<sup>11</sup> Ibid.

<sup>12</sup> Justice K S Puttaswamy (Retd.) And Anr V. Union Of India, Writ Petition (Civil) No 494 Of 2012

<sup>13</sup> Mr.K.J.Doraisamy vs The Assistant General Manage, Writ Petition No.17761 Of 2006

<sup>14</sup> Shankarlal Agarwalla vs State Bank of India, AIR 1987 Calcutta 29

<sup>15</sup> M.P Sharma Singh & others v. Satish Chandra & Others, 1954 AIR 300

In reference to *Kharak Singh*<sup>16</sup> case, the above court stated in Supra “... *nor do we consider that Art. 21 has any relevance in the context as was sought to be suggested by learned counsel for the petitioner. As already pointed out, the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movement of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III.*”

It is also a fact that an eight-judge and six-judge bench of the Supreme Court had clearly come to the conclusion that the right to privacy is not fundamental. What these two judgments had stated was that there was no fundamental right to privacy in the Constitution, which as the written text of the Constitution will show, is a matter of fact.

The eight-judge bench<sup>17</sup> in 1954 had all the Supreme Court judges and the six judges<sup>18</sup> in 1962 represented nearly 50 per cent of the total strength. It is worth contemplating whether a bench with about 33 per cent strength should consider superseding earlier judgments given by judge strengths of 100 per cent and 50 per cent of the court<sup>19</sup>.

When the first judgment was given, most of the members of the Constituent Assembly were also around. It appears that the clear and conscious decision of Constitution-makers and 100 per cent of the Supreme Court was that privacy should not be a fundamental right<sup>20</sup>.

#### CRITICISM TO THE DOCTRINE OF PRIVACY

We have to be critical of the recognition being given to a general right of privacy. The submission has several facets, among them being:

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<sup>16</sup> *Kharak Singh v. The of U.P & others*, 1963 AIR 1925

<sup>17</sup> *M.P Sharma Singh & others v. Satish Chandra & Others*,

<sup>18</sup> *Kharak Singh v. The of U.P & others*, 1963 AIR 1925

<sup>19</sup> Gandhi., Shailesh., *Why Right to Privacy Shoudn't be Fundamental Right.*, DailyO

<sup>20</sup> *Ibid.*

(i) there is no general or fundamental right to privacy under the Constitution;(ii) no blanket right to privacy can be read as part of the fundamental rights and where some of the constituent facets of privacy are already covered by the nenumerated guarantees in Part III, those facets will be protected in any case;(iii) where specific species of privacy are governed by the protection of liberty in Part III of the Constitution, they are subject to reasonable restrictions in the public interest as recognized in several decisions of this Court ; (iv) privacy is a concept which does not have any specific meaning or definition and the expression is inchoate; and (v) the draftsmen of the Constitution specifically did not include such a right as part of the chapter on fundamental rights and even the ambit of the expression liberty which was originally sought to be used in the draft Constitution was pruned to personal liberty.

Criticism and critique lie at the core of democratic governance. Tolerance of dissent is equally a cherished value. In deciding a case of such significant dimensions, the Court must factor in the criticisms voiced both domestically and internationally. These, as we notice, are based on academic, philosophical and practical considerations<sup>21</sup>.

The Stanford Encyclopaedia of Philosophy<sup>22</sup> adverts to “several sceptical and critical accounts of privacy”. The criticism is set out thus: “There are several sceptical and critical accounts of privacy. According to one well known argument there is no right to privacy and there is nothing special about privacy, because any interest protected as private can be equally well explained and protected by other interests or rights, most notably right Other critiques argue that privacy interests are not distinctive because the personal interests they protect are economically inefficient<sup>23</sup> or that they are not grounded in any adequate legal doctrine<sup>24</sup>.

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<sup>21</sup> JUSTICE K S PUTTASWAMY (RETD.) AND ANR V. Union of India, WRIT PETITION (CIVIL) NO 494 OF 2012

<sup>22</sup> “Privacy”, Stanford Encyclopaedia of Philosophy (2002), available at <https://plato.stanford.edu/entries/privacy/>

<sup>23</sup> Posner, 1981

In a 2013 article published in the Harvard Law Review<sup>25</sup>, a professor of law at Georgetown Law Center, Georgetown University, described privacy as having an “image problem”. Privacy, as she notes, has been cast as “old-fashioned at best and downright harmful at worst - anti-progressive, overly costly, and inimical to the welfare of the body politic”. The consequences in her view are predictable:

*“...when privacy and its purportedly outdated values must be balanced against the cutting-edge imperatives of national security, efficiency, and entrepreneurship, privacy comes up the loser. The list of privacy counterweights is long and growing. The recent additions of social media, mobile platforms, cloud computing, data mining, and predictive analytics now threaten to tip the scales entirely, placing privacy in permanent opposition to the progress of knowledge.”<sup>26</sup>*

Our nation aspires to move to a knowledge based economy. Information is the basis of knowledge. The scales must, according to this critique, tip in favour of the paramount national need for knowledge, innovation and development. These concerns cannot be discarded and must be factored in. They are based on the need to provide economic growth and social welfare to large swathes of an impoverished society.

Moreover, it is not just the Mandian constitution that had not explicitly mentioned the Right to Privacy. But in other nations as well where there is no specific provision clearly and explicitly protecting the right to Privacy. In the US Constitution for instance there has been an absence in the constitution itself regarding the Right to privacy. The First, Fourth & Fourteenth Amendments<sup>27</sup> of bill of Rights interprets to include the Right to Privacy from unwarranted

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<sup>24</sup> Bork, 1990

<sup>25</sup> Julie E Cohen, “What Privacy Is For”, Harvard Law Review (2013), Vol. 126

<sup>26</sup> Ibid.

<sup>27</sup> Amendment to American Bill of Rights, U.S Constitution

search or seizure and due process right for protecting right to privacy of person within family, marriage, motherhood, procreation etc. No express provision about the Right to Privacy Law has been mentioned in UK as well<sup>28</sup>. The Human Rights Act 1998 (the “Act”) incorporated European Convention on Human Rights into UK law & Data protection Act, 1998<sup>29</sup>. It regulates receiving, processing, retention etc., of the personal data. Similarly in the Canadian Charter of Rights and Freedoms, ‘everyone has the right to be secure against unreasonable search and seizure.’ The point to be noted is that here as well the term ‘Privacy’ hasn’t been mentioned. Sec. 21 of the New Zealand Bill of Rights<sup>30</sup> says that “everyone has the right to be secure against the unreasonable search or seizure, whether of the person, property or correspondence or otherwise.” Here again, the term ‘Privacy’ is missing. The above pattern observed from these different nations hence substantially shows that the respective states have purposefully avoided mentioning about any right to Privacy and has infact left it to the other provisions for the right to be incorporated from.

Right to privacy is a vague argument. Privacy is in fact so wide a concept that it rightly so qualifies as a hoax in an attempt to restrain the exercise of powers by the state. Such restraints in reality can be equated to stripping a welfare state of its essential powers. And one does not need a seasoned judicial sense to understand the implications of such stripping of powers of a welfare state. It would lead to a scenario where a welfare state has powers which are as good as having no powers at all. We need to understand the working of a welfare state and then respond to the current needs and circumstances of the people. In this modern world of technological advancement, the requirement of a welfare state in place is way more important than having a

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<sup>28</sup> Nappinai, N.,S., PRIVACY & THE CONSTITUTION, retrieved from <https://cis-india.org/internet-governance/privacy-and-the-constitution>

<sup>29</sup> Ibid.

<sup>30</sup> New Zealand Constitution

right to privacy. Unless we want to destabilize working welfare state machinery, unless we are to compromise the collective development and welfare of the state subjects, we will have to let go of the vague idea of unquantifiable right to privacy.

## II. WHETHER THE PEHCHAAN ACT, 2014 IS VIOLATIVE OF THE PROVISIONS OF THE CONSTITUTION OF MANDIA

Pehchaan card serves as a unique identifier for Mandian citizens and residents. It was introduced by the government with the following objectives:

- To save duplicity of identities.
- To identify illegal immigrants in the country and to deport them to their respective countries.
- To check leakage in government schemes and prevent corruption in PDS and other subsidy providing scheme.
- Linking of Pehchaan cards with PAN and bank accounts which would result in increased tax collection by the government.
- To eliminate all forms of terrorism by finishing off sleeping modules and to curb terror finance through Pehchaan

### PECHAAN SCHEME AND PRIVACY

Although Right to privacy Exist in the Constitution of Mandia, Right to Privacy/Personal Autonomy is not absolute<sup>31</sup>. Thus, one cannot have an absolute right over his or her body under Art 21<sup>32</sup>; ‘absolute’ being the key word here. Personal liberty in Article 21, in the post-*Maneka Gandhi*<sup>33</sup> jurisprudence covers a variety of rights and some of these rights have the status of fundamental rights and have an additional layer of protection under Article 19<sup>34</sup>. Triple test<sup>35</sup> for any law interfering with personal liberty is that, (i) it must prescribe a procedure, (ii) the procedure must withstand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation; (iii) it must withstand the equality test of

<sup>31</sup> Justice K S Puttaswamy (Retd.), And Anr. v, Union Of India And Ors., Writ Petition (Civil) No 494 Of 2012

<sup>32</sup> Article 21, Constitution of Mandia

<sup>33</sup> *Maneka Gandhi v. Union of India*, 1978 AIR 597

<sup>34</sup> Article 19, Constitution of Mandia

<sup>35</sup> *Maneka Gandhi v. Union of India*, 1978 AIR 597

Article 14<sup>36</sup>. This is very much the reading for the law and procedure authorising interference with personal liberty and right of privacy – that it should be right, just and fair and not arbitrary, fanciful or oppressive. In case of Pehchaan act, however, this does not hold place as there is an entire procedure laid down about how the Pehchaan act comes in force and how it functions with clear rules and regulations being mentioned. Also, the government of Mandia guarantees it to be right, just and a fair and non-arbitrary scheme. The act in fact is specifically advantageous for the public as it is providing them the various benefits, being offered by the government. Thus no right is being violated under the Pehchaan Act<sup>37</sup>.

Now, since right to privacy is not an absolute right, it is subject to restrictions<sup>38</sup>. Dealing with the duty of the Bank to maintain secrecy qua its customer, it was held in *Shankarlal Agarwalla vs State Bank of India*<sup>39</sup>, as follows:-

*“29. The above discussion makes it clear that from the point of view of the individual, his right to privacy is not absolute and from the point of view of the Bank, the duty to maintain secrecy is superseded by a larger public interest as well as by the Bank’s own interest under certain circumstances.”*

Now, in the words of Mathew J, in *Gobind Vs. State of M.P*<sup>40</sup> the “*important countervailing interest*” being talked about is the Pehchaan Act itself.

Hence, it is quite evident from above illustration that a scheme like Pehchaan Act which is all about helping the people by providing them identities and protecting the state by ensuring to curb terrorism and corruption, satisfies the compelling state interest test.

The above situation paves way for the citizen, to attract Doctrine of Waiver<sup>41</sup>. It is the voluntary surrender of a known right; conduct supporting an inference that a particular right has been relinquished. The term waiver is used in many legal contexts. A waiver is essentially a unilateral act of one person that results in the surrender of a legal right.

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<sup>36</sup> Article 14, Constitution of Mandia

<sup>37</sup> The Pehchaan Act, 2014

<sup>38</sup> R. Rajagopal & Anr. v. State of Tamil Nadu & Ors, 1994 SCC (6) 632

<sup>39</sup> Shankarlal Agarwalla vs State Bank of India<sup>39</sup>, AIR 1987 Calcutta 29

<sup>40</sup> Gobind v State of Madhya Pradesh, (1975) 2 SCC 148

<sup>41</sup> Doctrine of Waiver : The voluntary relinquishment or abandonment (express or implied) of a legal right or advantage

In *Basheshar Nath vs. the Commissioner Of Income-tax, Delhi & Rajasthan & another*<sup>42</sup>. Reference was also made by the learned Attorney General to the decision of a Single Judge of the Allahabad High Court in *Subedar v. State*<sup>43</sup> where it was held that Art. 20(3)<sup>44</sup> conferred merely a privilege and that such privilege could always be waived. It was overlooked that if a person voluntarily answered any question then there was no breach of his fundamental right at all, for the fundamental right is that a person shall not be compelled to incriminate himself. That case, therefore, is not a case of waiver at all. As no information is divulged to any agency without the consent of the concerned individual, it cannot be construed to violate any privacy. A poor person is not concerned with privacy when compared to his daily living need.

Earlier Identity proof such as PAN<sup>45</sup> cards, Driving licence etc. that consisted of few personal information were used to open a bank account. These bits of personal information of PAN were protected by our government. Pehchaan card is similar to PAN and, even Pehchaan cards will be protected by our government (like PAN) in future days. But there are certain instances where people have more than 1 PAN Card. So, linking Pehchaan card to PAN will assure 'One Person, One PAN'.

Also, Pehchaan act<sup>46</sup> would help in detecting any illegal activities, if any. The act does not specifically prohibit law enforcement and intelligence agencies from using the Pehchaan number as a link across various datasets (such as telephone records, air travel records, etc.) in order to recognise patterns of behaviour. Therefore, techniques such as running computer programmes across datasets for pattern recognition can be used for various purposes such as detecting potential illegal activities. Pehchaan information is stored at a Central Repository considered to be a secured place. Mandia's security mechanism towards Pehchaan is fool proof mechanism.

According to Pehchaan Act, there is restriction imposed on access to personal information of an individual through Pehchaan card. Any person getting private information of any other individual through whatever illegal means would be liable for jail term and would be fined.<sup>47</sup> The act has an entire chapter on data protection and penalties and punishments for data leakage.

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<sup>42</sup> *Basheshar Nath vs. the Commissioner Of Income-tax, Delhi & Rajasthan & another* 1959 AIR 149

<sup>43</sup> *Subedar v. State* AIR 1956 All 529

<sup>44</sup> Article 20(3)-No person accused of any offence shall be compelled to be a witness against himself

<sup>45</sup> Permanent Account Number

<sup>46</sup> The Pehchaan Act, 2014

<sup>47</sup> National Unique Identification Authority

Moreover NUIDA<sup>48</sup> introduced new features known as ‘locking’ and ‘unlocking’ of a Pehchaan Card. A person can restrict undesirable access by locking his Pehchaan card.

#### ADVANTAGES OF PEHCHAAN SCHEME

Pehchaan scheme has given people an identity, since especially a huge amount number of people in rural areas don't have an identity proof. It has therefore helped the people in opening bank accounts as well.

This Court in the case of *PUCL v. Union of India*<sup>49</sup> has approved the recommendations of the High Powered Committee<sup>50</sup> headed by Justice D.P. Wadhwa, which recommended linking of Aadhaar with PDS and encouraged State Governments to adopt the same. For instance, by Linking Pehchaan card to mid-day meal scheme, where free meals are provided to rural children at lunch provided they make admission in schools would prevent the corrupted cooks, volunteers and teachers exchanging good quality of ration with poor quality of ration. Therefore, many students falling ill which then gets blamed on central government can be avoided in the future. Similarly this Court in *State of Kerala & others vs. President, Parents Teachers Association, SNVUP and Others*<sup>51</sup> has directed use of a UID<sup>52</sup> for checking bogus admissions in schools

While monitoring the PILs<sup>53</sup> relating to night shelters<sup>54</sup> for the homeless and the right to food through the public distribution system, the Court has lauded and complimented the efforts of the State Governments for inter alia carrying out bio-metric identification of the head of family of each household to eliminate fictitious, bogus and ineligible BPL/AAY<sup>55</sup> household cards.

In the case of *People's Union for Civil Liberties v. Union of India & Ors.*<sup>56</sup> this Court has also endorsed bio-metric identification of homeless persons so that the benefits like supply of food and kerosene oil available to persons who are below poverty line can be extended to the correct beneficiaries.

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<sup>48</sup> National Unique Identification Authority

<sup>49</sup> *PUCL v. Union of India*, (2011) 14 SCC 331

<sup>50</sup> Justice Wadhwa Committee On Public Distribution System (PDS)

<sup>51</sup> *State of Kerala & others vs. President, Parents Teachers Association, SNVUP and Others*, (2013) 2 SCC 705

<sup>52</sup> Unique Identity Card

<sup>53</sup> Public Interest Litigation

<sup>54</sup> *PUCL (Night Shelter Matters) v. Union of India*, (2013) 11 SCC 505

<sup>55</sup> Below Power Line/Antyodaya Anna Yojana

<sup>56</sup> *People's Union for Civil Liberties v. Union of India & Ors.*, WRIT PETITION (C) NO.196 OF 2001

A two Judge Bench of this court in *People's Union for Civil Liberties (PDS Matter) v. Union of India & Ors.*<sup>57</sup> has held that computerisation is going to help the public distribution system in the country in a big way and encouraged and endorsed the digitisation of database including biometric identification of the beneficiaries.

The SIT<sup>58</sup> in its Third Report has recommended the establishment of a Central KYC<sup>59</sup> Registry. The rationale for the SIT recommendations was to prove a verifiable and authenticable identity for all individuals and Pehchaan provides a mechanism to serve that purpose in a federated architecture without aggregating all the information at one place. The Committee headed by the Chairman, CBDT<sup>60</sup> on 'Measures to tackle black money in India and abroad'<sup>61</sup> reveals that various authorities are dealing with the menace of money laundering being done to evade taxes under the garb of shell companies by the persons who hold multiple bogus PAN<sup>62</sup> numbers under different names or variations of their names, providing accommodation entries to various companies and persons to evade taxes and introduce undisclosed and unaccounted income of those persons into their companies as share applications or loans and advances or booking fake expenses. These are tax frauds and devices which are causing loss to the revenue to the tune of thousands of crores.

Also, In the case of *Lokniti Foundation v. Union of India & Ors.*<sup>63</sup>, this Court has disposed of the writ petition while approving the Aadhaar based verification of existing and new mobile number subscribers and upon being satisfied that an effective process has been evolved to ensure identity verification.

Many US Supreme Court findings (eg *Schmerber v CA*<sup>64</sup>; *US v Dionisio*<sup>65</sup>) had implied that the use of biometrics does not invade an individual's civil liberties or privacy.

Even the Supreme Court of India has instituted a committee under the chairmanship of a former judge to look at PDS<sup>66</sup>. The Justice Wadhwa report has suggested a computer-based information system as well as the use of biometric smart cards to reduce leakages. The committee was, in

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<sup>57</sup> *People's Union for Civil Liberties (PDS Matter) v. Union of India & Ors.*, (2013) 14 SCC 368

<sup>58</sup> Special Investigation Team

<sup>59</sup> Know Your Customer

<sup>60</sup> Central Board of Direct Taxes

<sup>61</sup> Report of the Committee, Headed by Chairman, CBDT, Parts I & II

<sup>62</sup> Permanent Account Number

<sup>63</sup> *Lokniti Foundation v. Union of India & Ors*, Writ Petition (C) No. 607 of 2016 decided on February 06, 2017

<sup>64</sup> *Schmerber v CA*, 384 US 757, 1966

<sup>65</sup> *US v Dionisio*, 410 US 1, 1973

<sup>66</sup> Justice Wadhwa Committee On Public Distribution System (PDS)

fact, recommending an Pehchaan type programme (which is exactly similar to the dimensions of the Pehchaan Act) even before it was implemented. At the suggestion of the Planning Commission, a few states introduced a smart card system to streamline PDS<sup>67</sup> kerosene.

Voters' lists, provided to anyone who asks for it, also have quite lot information on citizens. Private agencies which help Mandian embassies to process passports too handle quite lot information. No one raised privacy questions regarding these, then why the hue and cry over Pehchaan? Ration Card is not mandatory today. However, for those who want subsidized food items or PDS kerosene it is mandatory. Hence, there is nothing wrong in imposing Pehchaan on the beneficiaries to ensure there is no leakage.

Pehchaan card basically consists of information like name, date of birth, communication address and few more. These information we ourselves reveal happily and almost most of the time, voluntarily on social media like Facebook, Quora, Twitter<sup>68</sup> etc

In *Supnick v. Amazon.com, Inc.*<sup>69</sup> A class action lawsuit against Amazon and Alexa alleged that Alexa, whose software program monitors surfing habits and then suggests related Web pages, stored and transmitted this information to third parties (including Amazon) without informing users of the practice or obtaining users' consent.

In *Dwyer v. American Express*<sup>70</sup>, class action plaintiffs alleged, inter alia, that American Express unreasonably intruded on the seclusion of cardholders by analyzing their behavioral characteristics and spending histories. It would then offer to create a list of cardholders' names and addresses who would most likely shop in a particular store and rent that list to a merchant.

While hearing a challenge to the government's massive biometric or "Pehchaan" database, the Supreme Court said that companies like Apple<sup>71</sup> already have access to the personal data of users. It was pointed out that 99% of people are not only unaware but also unconcerned about purpose for data collection. As examples, one of the judges said iPhones and iPads are accessed by users' thumbprints and if an individual book a train ticket, emails or ads pop up offering

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<sup>67</sup> Public Distribution System

<sup>68</sup> Social media sites ([www.facebook.com](http://www.facebook.com)), ([www.quora.com](http://www.quora.com)), ([www.twitter.com](http://www.twitter.com))

<sup>69</sup> *Supnick v. Amazon.com, Inc.*, 2000 U.S. Dist. LEXIS 7073

<sup>70</sup> *Dwyer v. American Express*, 652 N.E.2d 1351

<sup>71</sup> Apple Inc., Headquartered in Cupertino, California

alternative flights for the same travel<sup>72</sup>. He said this proves that citizens are already disclosing vast amounts of information online about their private habits and personal lives.

Thus the safety of privacy under the Pehchaan Act in comparison to the above would become relevant in the light of the following remark by the nine-member constitution bench:

*“Mere collection of data by the state to identify those who can benefit out of a socio-economic programme may not amount to impinging someone’s privacy<sup>73</sup>”*

Justice DY Chandrachud<sup>74</sup>, a member of the bench, said all depends on whether the data were used for legitimate or illegal purposes.

He illustrated his point with queries, *“Can a man say I want a passport but would not furnish details of my parents or spouse in the form prescribed? How far a citizen can say I will remain anonymous, especially when the state conducts census, surveys, etc. and collate all information?”*

There are many similarities between the social security number system in the United States and Pehchaan system in Mandia. A country like the US where privacy issues, human rights, etc are high on the agendas has not found any problem and Pehchaan is really a more sophisticated concept of SSN<sup>75</sup> of the US. If the US were to implement SSN now, more than likely they would have also developed a scheme like Mandia’s Pehchaan. SSN is given to any legal resident of the US and so also Pehchaan.

In some countries there are proposals to use biometric data bases to monitor the movement of terrorists. By being creative and through building enough safety features Pehchaan could make it very difficult for anyone to access its data while it can serve the national security purpose by identifying terrorists.

Former Prime Minister Rajiv Gandhi<sup>76</sup> who said that out of every rupee spent by the Indian government, barely 15 paise reaches its citizens. A Planning Commission study done six years

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<sup>72</sup> Justice K S Puttaswamy (Retd.), And Anr. v, Union Of India And Ors., Writ Petition (Civil) No 494 Of 2012

<sup>73</sup> ibid

<sup>74</sup> ibid

<sup>75</sup> Social Security Number

<sup>76</sup> Former prime minister Rajiv Gandhi, 1985

ago on the Public Distribution System found 27 paise reaching the citizens. The remaining 73 paise went on payments of salaries, administrative costs and corruption. It was invariably discovered that the district authorities are faced with large number of fake names or fake roll numbers, either for PDS or the mid-day meal scheme. That's where Pehchaan can help.

Pehchaan's benefits outweigh its costs. The total budget request of NUIDA is for about Rs. 12,000 crores for three phases. The savings generated by using Pehchaan to better distribute welfare measures can more than compensate its cost. The avoidance of black money generation from the diversion of PDS kerosene and residential LPG<sup>77</sup> alone of Rs 45,000 crore per year can easily pay for Pehchaan project. It has also helped in elimination of middlemen and ghost beneficiary. In addition there is the additional money savings from improved welfare delivery systems like food, fertilizer, MNREGA<sup>78</sup> etc for which Pehchaan can be used.

Also the recent step of the government making it mandatory quoting of Pehchaan card for PAN card has effectively helped till now to trace 1 million fake cards. Pehchaan Act therefore has been able to save the government 50,000 crores in just 3 years

It was pointed out<sup>79</sup> that more than 113 crore people have registered themselves under Aadhaar. Adults coverage of Aadhaar is more than 99%. Aadhaar being a unique identification, the problem of bogus or duplicate PANs can be dealt with in a more systematic and foolproof manner. In fact, it has already shown results as Pehchaan has led to weeding out duplicate and fakes in many welfare programmes such as PDS, MGNREGS<sup>80</sup>, LPG Pahal, Old Age pension, scholarships etc. during the last two years and it has led to savings of approximately Rs.49,000 crores.

While undertaking this exercise of judicial review, let us first keep in mind the width and extent of power of judicial review of a legislative action. The Court cannot question the wisdom of the Legislature in enacting a particular law. It is required to act within the domain available to it.

#### **SCOPE OF JUDICIAL REVIEW OF LEGISLATIVE ACT**

Under the Constitution, Supreme Court as well as High Courts are vested with the power of judicial review of not only administrative acts of the executive but legislative enactments passed by the legislature as well. A particular law or a provision contained in a statute can be invalidated

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<sup>77</sup> Liquid Petroleum Gas

<sup>78</sup> Mahatma Gandhi National Rural Employment Guarantee Act, 2005

<sup>79</sup> Binoy Viswam v. Union of India, Writ Petition(Civil) No.247 Of 2017, Supreme Court of India

<sup>80</sup> Mahatma Gandhi National Rural Employment Guarantee Scheme

on two grounds, namely: (i) it is not within the competence of the Legislature which passed the law, and/or (ii) it is in contravention of any of the fundamental rights stipulated in Part III of the Constitution or any other right/ provision of the Constitution. These contours of the judicial review are spelled out in the clear terms<sup>81</sup>

In *State of Madhya Pradesh v. Rakesh Kohli & Anr*<sup>82</sup>,

*“16. The statute enacted by Parliament or a State Legislature cannot be declared unconstitutional lightly...”*

*“No enactment can be struck down by just saying that it is arbitrary or unreasonable. Parliament and the legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The court cannot sit in judgment over their wisdom.”*<sup>83</sup>

The above legal position has been reiterated by a Constitution Bench of this Court in *Mahant Moti Das v. S.P. Sahi*<sup>84</sup>.

In *Hamdard Dawakhana v. Union of India*<sup>85</sup>, inter alia, while referring to the earlier two decisions, namely, *Bengal Immunity Co. Ltd. vs State Of Bihar And Ors.*<sup>86</sup> and *Mahant Moti Das*<sup>87</sup>, it was observed in para 8 of the Report as follows:

*“8. Therefore, when the constitutionality of an enactment is challenged on the ground of violation of any of the articles in Part III of the Constitution, the ascertainment of its true nature and character becomes necessary i.e. its subject-matter, the area in which it is intended to operate, its purport and intent have to be determined...”*

In *Hamdard Dawakhana*<sup>88</sup>, the Court also followed the statement of law in *Mahant Moti Das*<sup>89</sup> and the two earlier decisions, namely, *Charanjit Lal Chowdhury v. Union of India*<sup>90</sup> and *State of Bombay v. F.N. Balsara*<sup>91</sup>

<sup>81</sup> *Mc Dowell & Company Limited vs The Commercial Tax Officer*, 1985 154 ITR 148 SC

<sup>82</sup> *State of Madhya Pradesh v. Rakesh Kohli & Anr*, (2012) 6 SCC 312

<sup>83</sup> *Mohd. Hanif Quareshi & Ors. v. State of Bihar*, AIR 1958 SC 731

<sup>84</sup> *Mahant Moti Das v. S.P. Sahi*, 1959 AIR 942

<sup>85</sup> *Hamdard Dawakhana v. Union of India*, 1960 AIR 554

<sup>86</sup> *Bengal Immunity Co. Ltd. vs State Of Bihar And Ors.* AIR 1953 Pat 87

<sup>87</sup> *Mahant Moti Das v. S.P. Sahi*, 1959 AIR 942

<sup>88</sup> *Hamdard Dawakhana v. Union of India*, 1960 AIR 554

<sup>89</sup> *Mahant Moti Das v. S.P. Sahi*, 1959 AIR 942

<sup>90</sup> *Charanjit Lal Chowdhury v. Union of India*, 1951 AIR 41

<sup>91</sup> *State of Bombay v. F.N. Balsara*, 1951 AIR 318

Again in *Ashok Kumar Thakur v. Union of India & Ors*<sup>92</sup>, this Court made the following pertinent observations:

*“219. A legislation passed by Parliament can be challenged only on constitutionally recognised grounds. Ordinarily, grounds of attack of a legislation is whether the legislature has legislative competence or whether the legislation is ultra vires the provisions of the Constitution....”*

This Court in *State of Rajasthan v. Union of India*<sup>93</sup> reaffirmed the above

Another aspect in this context, which needs to be emphasized, is that a legislation cannot be declared unconstitutional on the ground that it is ‘arbitrary’ inasmuch as examining as to whether a particular Act is arbitrary or not implies a value judgment and the courts do not examine the wisdom of legislative choices and, therefore, cannot undertake this exercise<sup>94</sup>.

#### PEHCHAAN SCHEME: AN EVOLVING TECHNOLOGY

It is well known that human nature resists change. But with rapidly changing world and evolving technology, moving forward with time becomes the need of the hour. Hence, in the legal world as well rather than solely and blindly depending on the precedents, the court should also take into consideration the circumstances of the case in hand and decide accordingly.

In *People's Union Of Civil Liberties vs Union Of India (Uoi) And Anr*<sup>95</sup> AIR 1997 SC 568, deciding the case on the basis of the evolving and changing times Supreme Court observed that:

*“1. Telephone-Tapping is a serious invasion of an individual's privacy. With the growth of highly sophisticated communication technology, the right to hold telephone conversation, in the privacy of one's home or office without interference, is increasingly susceptible to abuse”.*

Statement of Objects and Reasons also discloses that over a period of time, the use of Pehchaan Number has been increased manifold and, therefore, it is also necessary to take measures relating to ensuring security of the reads as under:

In *Rohit Shekhar vs Shri Narayan Dutt Tiwari & Anr*<sup>96</sup> 2012(12) SCC 554, it was stated that:

<sup>92</sup> *Ashok Kumar Thakur v. Union of India & Ors*, (2008) 6 SCC 1

<sup>93</sup> *State of Rajasthan v. Union of India*, 1977 AIR 1361

<sup>94</sup> *Rajbala & Ors. v. State of Haryana & ors*, (2016) 2 SCC 445

<sup>95</sup> *People's Union Of Civil Liberties vs Union Of India (Uoi) And Anr*, AIR 1997 SC 568

*“78. The level of privacy protection thus may also depend upon the context in which the established standards are applied and the manner in which the right to privacy is challenged.”*

Moreover, the Parliament was competent to pass the law and provide statutory framework to give legislative backing to Pehchaan in the absence of any such law which existed at that time. Thus, there was no question of curing the alleged basis of judgment/interim orders by legislation<sup>97</sup>.

**DATA MAINTAINED BY PEHCHAAN IS SECURE:**

In this new world the data is the new "oil", be it the governments or the companies all want our data. For example, Google keeps all the data about what one has searched on Google, what kind of mails are sending and receiving by them, so that they can show ads on Gmail and in different places accordingly.

Pehchaan followed the principle of incorporating privacy by design, a concept which states that IT projects should be designed with privacy in mind. Collection of biometrics has often been quoted as one of the means of violating privacy. Biometrics are essential to ensure uniqueness, a key requirement for this project. Technology is evolving and it cannot be said what will happen after 20 years, whether it will still be safe. But as of now, biometrics is the safest.

According to UK's National Physical Laboratory<sup>98</sup>, the probability of a false negative (person not being recognized) using biometric is 1 out of 10,000. The probability of false positive is even order of magnitude less (1 out of 1,000,000).

A report published by International Telecommunication Union in 2009<sup>99</sup> should remove any doubt people may have about the use of biometric tool for individual identification. That report has the following conclusions:

*“Within a fairly short period of time, biometric recognition technology has found its way into many areas of everyday life. Citizens of more than 50 countries hold machine-readable passports that store biometric data—a facial image and in most cases a digital*

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<sup>96</sup> Rohit Shekhar vs Shri Narayan Dutt Tiwari & Anr, 2012(12) SCC 554

<sup>97</sup> Goa Foundation & Anr. v. State of Goa & Anr., AIR 2001 Bom. 318

<sup>98</sup> David Moss, “Dematerialised ID”, Business Consultancy Services Ltd (BCSL)

<sup>99</sup> International Telecommunication Union “Biometrics and Standards”, ITU-T Technology Watch Report, December 2009

*representation of fingerprints—on a tiny RFID<sup>100</sup> chip, to verify identity at the border. Law enforcement agencies have assembled biometric databases with fingerprints, voice and DNA<sup>101</sup> samples, which make their work more efficient and manageable.”*

In several countries like Brazil, Australia, US and others where biometric based cards/documents are in use.

As per the NUIDA, apart from the moment of authentication, no other information is recorded and Pehchaan “doesn’t keep anything except the logs of authentication.”

Even in Sec. 29<sup>102</sup>, it is mentioned:

*“29. (1) No core biometric information, collected or created under this Act, shall be— (a) shared with anyone for any reason whatsoever; or (b) used for any purpose other than generation of Pehchaan numbers and authentication under this Act.*

*... (4) No Pehchaan number or core biometric information collected or created under this Act in respect of an Pehchaan number holder shall be published, displayed or posted publicly, except for the purposes as may be specified by regulations.”*

Supreme Court in *Unique Identification Auth. of India and anr. v. Central Bureau of Investigation*<sup>103</sup> passed an interim order where it held that the UIDAI<sup>104</sup> was restrained from transferring anyone’s biometric information with an Aadhaar Number to any other agency without such person’s consent in writing. UIDAI relied on the case of *District Registrar and Collector v. Canara Bank*<sup>105</sup> in which the Supreme Court had laid down the parameters of reasonable searches and seizures to ensure that a party’s fundamental right against self-incrimination is not violated under Article 20 (3)<sup>106</sup>.

Another principle of privacy by design states that you should collect only minimal data. As NUIDA was creating identity infrastructure, it was decided that only a minimal set of data, just sufficient to establish identity, should be collected This irreducible set contained only four elements: name, gender, age and communication address of the resident.

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<sup>100</sup> Radio-frequency identification

<sup>101</sup> Deoxyribonucleic Acid Is A Molecule That Carries The Genetic Instructions Used In The Growth, Development, Functioning And Reproduction Of All Known Living

<sup>102</sup> Section 29, Pehchan Act, 2014

<sup>103</sup> *Unique Identification Auth. of India and anr. v. Central Bureau of Investigation*, Special Leave to Appeal (Crl) No(s).2524/2014 in the Supreme Court

<sup>104</sup> Unique Identification Authority of India

<sup>105</sup> *District Registrar and Collector v. Canara Bank* (2005) 1 SCC 496

<sup>106</sup> Article 20(3)-No person accused of any offence shall be compelled to be a witness against himself

The Pehchaan Act<sup>107</sup> has clear restrictions on data sharing. No data download is permitted, search is not allowed and the only response which NUIDA gives to an authentication request is ‘yes’ or ‘no’. No personal information is divulged. NUIDA has also built a facility wherein one can ‘lock’ the Pehchaan number and disable it from any type of authentication for a period of one’s choice, guarding against any potential misuse. Hence, after locking the Pehchaan card once, no one will be able to read details from the NUIDA server. Its biggest use will is that blocked Biometrics ensures the Pehchaan holder will not be able to use their Biometrics (fingerprints/iris) for authentications thus preventing potential misuse.

It is aimed at securing advantages on different levels. As a welfare and democratic State, it becomes the duty of any responsible Government to come out with welfare schemes for the upliftment of poverty stricken and marginalized sections of the society. This is even the ethos of Mandian Constitution which casts a duty on the State, in the form of ‘Directive Principles of State Policy’<sup>108</sup>, to take adequate and effective steps for betterment of such underprivileged classes. State is bound to take adequate measures to provide education, health care, employment and even cultural opportunities and social standing to these deprived and underprivileged classes. At this juncture, it is only emphasised that malafides cannot be attributed to this scheme.

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<sup>107</sup> Pehchaan Act, 2014

<sup>108</sup> Directive Principles of Our State Policy: Part IV(Articles 36-51) of the Constitution of Mandia

**PRAYER**

IN THE LIGHT OF LAW POINTS PUT FORTH, CASES CITED AND ARGUMENTS  
ADVANCED IT IS MOST HUMBLY PRAYED TO THIS COURT:

1. To set aside the order passed by the Hon'ble Supreme Court declaring Right to Privacy as a Fundamental Right under the Constitution of India.
2. To declare Pehchaan Scheme as an exception to Right to Privacy for which state can impose Reasonable Restrictions.
3. To uphold the order of the High Court of Delhi holding Pehchaan Act, 2014 as constitutional and making Pehchaan mandatory.
4. To give any other order which the court deems fit in the interest of justice.