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

In the Matter Of

SPECIAL LEAVE PETITION (CIVIL) (____/2017)

UNDER ARTICLE 136 OF THE CONSTITUTION OF MANDIA

SATISH DHANKAR **……APPELLANT**

versus

UNION OF MANDIA **……..RESPONDENT**

MEMORANDUM FOR APPELLANT

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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

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STATEMENT OF JURISDICTION

This Hon'ble Supreme Court of Mandia has jurisdiction over the matter under **Article 136 of Constitution of Mandia**[1]. 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 Appellant.

[1] 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 12th 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 30th 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 22nd 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 27th 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. 28th 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 11th 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 13th 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 he 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 is the fundamental right enshrined within the right to life and liberty. This right is so crucial that it becomes dangerous not to put such a right into the fundamental rights. The right of privacy gets ample amount of attention as well as due weight from the foreign courts, making it stand in the category of fundamental rights. Countries such as the U.S.A, U.K among others, with it's various judgements, have considered it a fundamental right. Constitution of Mandia, it's commitment under various international laws and the stand of Indian judiciary altogether prove, cogently, that right to privacy is a fundamental right.

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

The pehchaan Act fails to fulfill both the tests which are indispensable for the correct application of the Act forming the very ground for it to be a success. The twin test classification puts forth two conditions to be complied with. These are: (I) Reasonable classification; (ii) The presence of a Nexus of this reasonable classification to the basic objective to be achieved.

In the instant case the second condition is, clearly, ignored. The state has failed to show that mandatory Linking of pehchaan card with its accompanying consequences will make the state their goal. Putting an individual's privacy at stake, without a reasonable condition, is the biggest danger the state can throw itself into. There is a possibility of misuse of personal information parted with by an individual in the form of biometrics.

Various native and foreign laws/precedents emphasized time and time again, on the importance of privacy. It ought not to be taken away by unconstitutional conditions. The petitioner has this right as a fundamental right for which the provision of invoking writs is also a remedy.

ARGUMENTS ADVANCED

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

Any meaningful human existence requires independence in thought and action which is protected by privacy.

The legal definition of privacy has evolved over a period of time. In an 1890 article by Samuel Warren and Louis Brandeis[2] who were concerned about the invasion of privacy by the photographic images, argued for the creation of a general right of privacy that would give an individual a right to prevent the unauthorized use of private matters by the press. The authors foresaw that new technologies, such as the telephone and photographs, would lead to violation of the right to be let alone, and they concluded that privacy protection required better legal protection.

In 1967, a more modern definition of the Right to Privacy[3] was propounded by Alan Westin, which has also been accepted by the US Supreme Court. According to this definition, the Right to Privacy is the "claim of individual, groups and institutions to determine for themselves when, how and to what extent information about them is communicated to others". Although privacy may be a value common to most societies, its recognition as an enforceable right in various legal systems has been relatively recent.

The French Declaration of Rights of Man[4] and the American Bill of Rights[5] both have fairly specific declarations on the freedom of expression, but no equivalent general statement of the Right to Privacy. It is heartening to see that the US courts did a good job in protecting Right to Privacy.

VIEW ON PRIVACY BY FOREIGN COURTS AND FOREIGN CONSTITUTIONS:

In an English case of *Douglas v Hello Ltd*[6], it was held that:

[2] The Right to Privacy, Samuel D. Warren; Louis D. Brandeis Harvard Law Review, Vol. 4, No. 5. (Dec. 15, 1890), pp. 193-220

[3] Alan F. Westin, Privacy and Freedom, 25 Wash. & Lee L. Rev. 166 (1968)

[4] Declaration of Human and Civic Rights, 1789, France

[5] "The Charters of Freedom: The Bill of Rights". Washington D.C.: National Archives and Records Administration.

[6] Douglas v Hello Ltd [2001] QB 967

"*What the House [in Campbell] agreed upon was that the knowledge, actual or imputed, that information is private will normally impose on anyone publishing that information the duty to justify what, in the absence of justification, will be a wrongful invasion of privacy*."

It was further argued that reliance must be placed upon the judgment of Sedley LJ[7] in Douglas case, where it was said that:

"What a concept of privacy does, however, is accord recognition to the fact that the law has to protect not only those people whose trust has been abused but those who simply find themselves subjected to an unwanted intrusion into their personal lives. The law no longer needs to construct an artificial relationship of confidentiality between intruder and victim: it can recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy."

In another English case *R v The Commissioner of Police of the Metropolis*[8] was a case concerning the extent of the police's power (under guidelines issued by the Association of Chief Police Officers- the ACPO guidelines) to indefinitely retain biometric data associated with individuals who are no longer suspected of a criminal offence. The UK Supreme Court, by a majority held that the police force's policy of retaining DNA evidence in the absence of 'exceptional circumstances' was unlawful and a violation of Article 8 of the European Convention on Human Rights. Lord Dyson, on behalf of the majority, held that:

"T*he present ACPO guidelines are unlawful because they are incompatible with article 8 of the ECHR. I would grant no other relief*."

Griswold v. Connecticut[9] was the first leading case of United States where the Supreme Court quashed a Connecticut law prohibiting the use of contraceptives by a married couple. By a 7-2 majority, the court ruled that the government measure was against the right of marital privacy. In 1969, in *Stanley v. Georgia*[10], the attempt of the Georgia government to convict the possessor of an obscene film in his house was frustrated. The Supreme Court ruled that along with the idea of fundamental right to receive information there is also "the right to be

[7] Ibid.
[8] R v The Commissioner of Police of the Metropolis (2011) UKSC 21
[9] Griswold v. Connecticut 381 US 479 (1965)
[10] Stanley v. Georgia 394 U.S. 557 (1969)

free except in very limited circumstances from unwarranted governmental intrusions into one's privacy".

Then in 1973 in *Roe v. Wade*[11], the US Supreme Court disallowed a Texas Statute forbidding abortion except to save the life of the mother. The court found the measure violative of a mother's Right to Privacy. In this case, thus an unmarried pregnant woman was allowed abortion, as the court found no compelling state interest in such a measure.

In 1992, a landmark decision was given involving the names and home addresses of returned Haitian refugees. In *Department of State v. Ray*[12], the US Supreme Court overturned a lower court order that would have required disclosure of personal identifying information for possible use in pending immigration proceedings. Writing for the court, Justice John Paul Stevens first determined that release of the Haitian interviewees identities "would be a significant invasion of their privacy because it would subject them to possible embarrassment and retaliatory action". Disclosure under the circumstances of the case could be regarded as "a special affront" to their privacy interests.

In United States, in *Kyllo v. United States*[13], the U.S. Supreme Court found that the use of a thermal imaging device, aimed at a private home from a public street, to detect relative amounts of heat within the private home would be an invasion of the privacy of the individual.

Also in, *United States v Jones*[14], it was held unanimously that installing a Global Positioning System (GPS) tracking device on a vehicle and using the device to monitor the vehicle's movements constitutes a search under the Fourth Amendment.

In *South Africa*, the right to privacy has been enshrined in Section 14 of the Bill of Rights[15]. Section 14 provides that:

"Privacy- Everyone has the right to privacy, which includes the right not to have-
(a) their person or home searched;(b) their property searched; (c) their possessions seized; or
(d) the privacy of their communications infringed."

[11] Roe v. Wade, 410 US 113 (1973)
[12] Department of State v. Ray. 502 U.S. 164 (1991)
[13] Kyllo v. United States 533 US 27 (2001)
[14]United States v Jones 565 US 400 (2012)
[15] 1996 Constitution of South Africa

In South African case of *National Media Ltd v Jooste*[16], Justice Harms defined privacy in the following terms:

> "*Privacy is an individual condition of life characterized by exclusion from the public and publicity. The condition embraces all those personal facts which a person concerned has determined him to be excluded from the knowledge of outsiders and in respect of which he has the will that they be kept private*"

On the ambit of the right to privacy, the Court held that: "*A right to privacy encompasses the competence to determine the destiny of private facts...the individual concerned is entitled to dictate the ambit of disclosure ...the purpose and method [of] the disclosure... when and under what conditions private facts may be made public. A contrary view will place undue constraints upon the individual's so-called "absolute rights of personality"... It will also mean that rights of personality are of a lower order than real or personal rights*".

In another South African Case, *NM and Others v Smith and Others*[17] (2007) Court Stated,

> "*.... The more intimate that information, the more important it is in fostering privacy, dignity and autonomy that an individual makes the primary decision whether to release the information....Secondly, we value privacy as a necessary part of a democratic society and as a constraint on the power of the state... In authoritarian societies, the state generally does not afford such protection…*"

On the inter-relationship between the right to privacy, liberty and dignity, the Court observed that: "*The right to privacy recognises… it highlights the inter-relationship between privacy, liberty and dignity as the key constitutional rights which construct our understanding of what it means to be a human being. All these rights are therefore inter-dependent and mutually reinforcing. We value privacy for this reason at least – that the constitutional conception of being ….*"

Although the Canadian Charter of Rights and Freedoms of 1982[18] ("the Charter") does not explicitly provide for a right to privacy, certain sections of the Charter have been relied on by

[16] National Media Ltd v Jooste, 1996 (3) SA 262 (A)
[17] NM and Others v Smith and Others, 2007 (5) SA 250 (CC)

[18] Bill of rights entrenched in the Constitution of Canada

the Supreme Court of Canada to recognize a right to privacy. Most notably, Section 8[19] (Provides as follows: "Everyone has the right to be secure against unreasonable search or seizure.") (the Canadian version of the Fourth Amendment of the US Constitution) has been employed in this respect.

In Canadian landmark case, *Her Majesty, The Queen v Brandon Roy Dyment*[20] (1988)

> *"Privacy is at the heart of liberty in a modern state...Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order. The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state.*"

On the importance of informational privacy, it was held:

> "*This notion of privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit... In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected*."

In Europe, there are two distinct but related frameworks to ensure the protection of the right of privacy. The first is the European Convention on Human Rights (ECHR)[21] and The second is the Charter of Fundamental Rights of the European Union (CFREU)[22].

Article 8[23] of the ECHR provides that: "*Right to respect for private and family life"*Under the Charter, the relevant provisions are: *Article 7*[24]: *Respect for private and family life and Article 8: Protection of personal data*

[19] Canadian Charter, Section 8
[20] Her Majesty, The Queen v Brandon Roy Dyment [1988] 2 SCR 417
[21] An international agreement to protect human rights and fundamental freedoms in Europe
[22] A treaty enshrining certain political, social, and economic rights for the European Union.
[23] European Convention on Human Rights
[24] Charter of Fundamental Rights of the European Union

MANDIA'S COMMITMENTS UNDER INTERNATIONAL LAW

The recognition of privacy as a fundamental constitutional value is part of Mandia's commitment to a global human rights regime. Article 51[25] of the Constitution, which forms part of the Directive Principles, requires the state to endeavor to "foster respect for international law and treaty obligations in the dealings of organized peoples with one another.

Article 12[26] of the UDHR, recognizes the right to privacy: *"Article 12: No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks"*

Similarly, Article 17[27] the ICCPR provides: *"Article 17: The obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of the right."*

The ICCPR[28] casts an obligation on states to respect, protect and fulfil its norms. The duty of a State to respect the right mandates that it must not violate the right. The duty to protect the right mandates that the government must protect it against any interference, even by private parties. The duty to fulfil norms postulates that government must take steps towards realization of a right. While elaborating the rights under Article 17[29], general comment specifically stipulates that:

> "*..there is universal recognition of the fundamental importance, and enduring relevance, of the right to privacy and of the need to ensure that it is safeguarded, in law and practice*."

Significantly, while acceding to the ICCPR[30], Mandia did not file any reservation or declaration to Article 17. Therefore, we are mandated to recognize right to privacy and safeguard it.

[25] Constitution of India, 1950
[26] Universal Declaration of Human Rights, 1948
[27] International Covenant on Civil and Political Rights, 1966
[28] Ibid.
[29] Ibid.
[30] Ibid.

In the present case, there is no contradiction between the international obligations assumed by state of Mandia and the Constitution. There is no such inconsistency between Indian laws which would make courts not to readily presume Privacy to be fundamental. Our constitutional provisions must be read and interpreted in a manner which would enhance their conformity with the global human rights regime[31].

MANDIAN JUDICIAL RESPONSE TO PRIVACY

The law on the Right to Privacy was almost well settled and the current controversy was unnecessary. The case in which the issue of Right to Privacy was indirectly raised was *M.P Sharma*[32] (1954), where the central question was about the state power of search and seizure. The court strangely pointed out the lack of specific provisions on the Right to Privacy in the Constitution like the Fourth Amendment of the US Constitution providing for the right of the people to be secure in their persons, houses, papers, and other effects against unreasonable search and seizure under the Mandian Constitution and concluded in just one sentence that in such a situation we could not import a Right to Privacy in Mandia.

In *Kharak Singh*[33] case, The six judges conceded the common law maxim that 'everyman's home is his castle' and held the regulations as unconstitutional but yet again in one small sentence judgement said that there was no fundamental Right to Privacy in India. But then there was a powerful dissenting judgement of Justice Subba Rao who argued that even though the Right to Privacy was not specifically mentioned yet it was a necessary ingredient of the right to personal liberty.

In *Gobind*[34] this minority opinion of *Kharak Singh*[35] case became the majority opinion. Justices Matthew, Krishna Iyer and Goswami, JJ accepted the view that there does exit a Right to Privacy in India.

They certainly realized as Brandies, J. said in his dissent in *Olmstead v. United States*[36], the significance of man's spiritual nature, of his feelings and his intellect and that only a part of the pain, pleasure, satisfaction of life can be found in material things and, therefore, they must be deemed to have conferred upon the individuals as against the government, a sphere in which he should be left alone. The court without being hampered by precedent

[31] Justice K S Puttaswamy (Retd.), And Anr. v, Union Of India And Ors., Part K Pg 130, (Writ Petition (Civil) No 494 Of 2012
[32] M.P. Sharma & Others v. Satish Chandra & Others, AIR 1954 SC 300
[33] Kharak Singh v. State of U.P. & Others, AIR 1963 SC 1295
[34] Gobind v State of Madhya Pradesh, (1975) 2 SCC 148
[35] Iboid
[36] Olmstead v United States, 277 US 438 (1928)

consciousness held the Right to Privacy as an independent fundamental right, emanating from the rights to personal liberty, freedom of speech and the freedom of movement. (the US Court reviewed whether the use of evidence disclosed in wiretapped private telephone conversations by federal agents, without judicial approval violated privacy) Then in *Malak Singh*[37], the court went a step ahead and held that surveillance was intrusive and seriously encroached on the Right to Privacy guaranteed by Article 21[38] and 19(1) (d).

In *Madhu Kumar Narain*[39], the ambit of the Right to Privacy was further enlarged when the court rightly held that even woman of easy virtue had a Right to Privacy and no one was entitled to invade her privacy.

In *Neera*[40], where a probationer with the Life Insurance Corporation during medical examination had given a false declaration about her last menstruation period, the court found clauses such as regularity of menstrual cycle and number of conceptions, etc. as violation of the Right to Privacy and ordered deletion of such columns.

In *Raja Gopal*[41], the apex court declared that even a person condemned to death by the court had the Right to Privacy which was a fundamental right under Article 21.

In *People's Union of Civil Liberties vs Union of India and Anr*[42], after referring to the cases of *Gobind v state of Madhya Pradesh*[43] and *Kharak Singh vs State of UP*[44], it was finally stated that privacy as a right is imbibed within the meaning of "life" and "personal liberty" under Article 21. Court in the present case observed in para 18:

> "*18. We have, therefore, no hesitation in holding that right to privacy is a part of the right to "life" and "personal liberty" enshrined under Article 21 of the Constitution. Once the facts in a given case constitute a right to privacy, Article 21 is attracted*."

The apex court declared that telephone tapping did violate the Right to Privacy which was an integral part of not only the right to personal liberty but also freedom of speech and expression.

Then in *Hinsa Virodhak Sangh*[45] laid down that food preferences i.e. vegetarian or non-vegetarian are included within the Right to Privacy. In case the court observed:

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[37] Malak Singh v State of Punjab and Haryana, (1981) 1 SCC 420
[38] Constitution of India,1950
[39] State of Maharashtra v Madhukar Narayan Mardikar, (1991) 1 SCC 57
[40] Mrs. Neera Mathur Vs. Life Insurance Corporation of India and Anr, AIR 1992 SC 392
[41] R. Rajagopal vs State Of T.N, 1995 AIR 264
[42] PUCL v. Union of India, (1997) 1 SCC 301
[43] Gobind v State of Madhya Pradesh, (1975) 2 SCC 148
[44] Kharak Singh vs. The State of U.P. and Ors. 1962 (1) SCR 332
[45] Hinsa Virodhak Sangh v Mirzapur Moti Kuresh Jamat, (2008) 5 SCC 33

"What one eats is one's personal affair and it is a part of his right to privacy which is included in Article 21 of our Constitution as held by several decisions of this Court."

In *District Registrar and Collector, Hyderabad v Canara Bank*[46], a judgement by 2 judge bench reaffirmed the fact that right to privacy emanates from liberties under Article 19 and from protection of life and personal liberty under Article 21. Secondly, the right to privacy is construed as a right which attaches to the person. In the view of the Court, even if the documents cease to be at a place other than in the custody and control of the customer, privacy attaches to persons and not places and hence the protection of privacy is not diluted. Thirdly, information provided by an individual to a third party (in that case a bank) carries with it a reasonable expectation that it will be utilized only for the purpose for which it is provided. Parting with information (to the bank) does not deprive the individual of the privacy interest. The reasonable expectation is allied to the purpose for which information is provided. The decision in *Canara Bank*[47] has thus important consequences for recognizing informational privacy.

PRIVACY FROM THE LENSES OF CONSTITUENT ASSEMBLY

It has been widely stated that by not explicitly putting notion of privacy in part 3 of the constitution, they intended to keep it out from the fundamental rights altogether, is not right. Therefore, it would be outside the realm of constitutional adjudication for the Court to declare a fundamental right to privacy[48]. The argument merits close consideration. The debates of the Constituent Assembly indicate that the proposed inclusion (which was eventually dropped) was in two specific areas namely correspondence and searches and seizures. From this, it cannot be concluded that the Constituent Assembly had expressly resolved to reject the notion of the right to privacy as an integral element of the liberty and freedoms guaranteed by the fundamental rights.

In conclusion a significant point to note is that it was a unanimous judgement of the nine-judges bench. It must not have been an easy task to speak in a "one voice" on this complex issue of privacy. The learned Judges must have debated among themselves a lot and looked at the issue from all the angles. It was clear that they had kept in mind the consistent and sound

[46] District Registrar and Collector, Hyderabad v Canara Bank, (2005) 1 SCC 496
[47] Ibid.
[48] B. Shiva Rao, The Framing of India's Constitution, Indian Institute of Public Administration (1967), Vol. 2

judicial interpretations. Unanimously, the court did not permit dilution of civil liberties[49]. The court saved the country "from the neo-colonialism" where private foreign companies have got the monopoly in storing personal information of more than 110 crore Mandians.

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

Pehchaan act is violation of Art. 14[50] on the application of the twin-test of classification, which is there should be a reasonable classification and that this classification should have rational nexus with the objective sought to be achieved[51]

First test is met as individual assesses form a separate class and, to this extent, there is a rational differentiation between individuals and other categories of assesses.

But the second limb of the twin-test of classification is not satisfied because there is no rational nexus with the object sought to be achieved.

Objectives of the pehchaan act are as follows:

- It is also meant to save duplicity of identities such as election cards, PAN cards
- The Pehchaan is meant to identify citizens for various benefits given by the government and to check the leakage in government schemes and to prevent corruption happening in PDS and other subsidy providing schemes of the government. Basically, the philosophy behind this policy is 'Zero Tolerance for corruption'.

Even if the State succeeds in showing a proper purpose and a rational connection with the purpose, thereby meeting the test of Article 14[52], the impugned law clearly fails on clauses (iii) (narrow tailoring) and (iv) (balancing) of the proportionality test[53] of the above decision.

The State has failed to show that mandatory Linking of pehchan card with its accompanying consequences for the life of an individual is narrowly tailored to achieving its goal.

In accordance with the arguments advanced above, the State's own data[54] shows that the problem of duplicate PANs or Election cards was minuscule, and the gap between the tax payer base and the PAN Card holding population can be explained by plausible factors other

[49] Justice K S Puttaswamy (Retd.), And Anr. v, Union Of India And Ors., Writ Petition (Civil) No 494 Of 2012
[50] Article 14, Constitution of Mandia, 1950
[51] R.K. Dalmia v. Justice S.R. Tendolkar, (1959) SCR 279
[52] Article 14, Constitution of Mandia, 1950
[53] R.K. Dalmia v. Justice S.R. Tendolkar, (1959) SCR 279 also in Modern Dental College and Research Centre & Ors. v. State of Madhya Pradesh, (2016) 7 SCC 353
[54] Binoy Viswam v. Union of India, Writ Petition(Civil) No.247 Of 2017, Supreme Court of India

than duplicates and forgeries. There is no wisdom compelling 99.6% of the taxpaying citizenry to enroll for Pehchaan (with the further prospect of seeding) in order to weed out the 0.4% of duplicate PAN Cards, as it fails the proportionality test entirely.

On the principle of proportionality, it is submitted that this principle was applied in the *R.K. Dalmia*[55] case as per the following passage:

> *"11 ... (d) that the Legislature is free to recognize degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest; (e) that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation;..."*

The affected persons by the objectives are individuals including people who are professionals like lawyers, doctors, architects etc. and lakhs of businessmen having small or micro enterprises. If the linking of Pehchaan to PAN and bank account is made mandatory then there is a direct infringement to Art. 19(1)(g)[56]. Once it is shown that the right under Art. 19(1)(g)[57] has been infringed, the burden shifts to the State to show that the restriction is reasonable, and in the interests of the public, under Art. 19(6)[58] of the Constitution. The correct test to apply in the context of Art. 19(6)[59] was the test of proportionality[60]

The right to life extends to allowing a person to preserve and protect his or her finger prints and iris scan. Thus every individual or citizen in this country has complete control over his/her body and State cannot insist any person for giving his/her finger tips or iris of eyes, as a condition precedent to enjoy certain rights. Whenever a person voluntarily entrusts his finger prints and iris scan to the state, the 'property' and entitlement is retained with that individual throughout his life but the state merely acts as a trustee or fiduciary. The trustee or fiduciary cannot compel the "beneficiary" to part with such sensitive person information. According to John Locke, "Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person," and Salmond reminds us that he speaks "of a man's right to preserve his own property i.e. his life, liberty and estate."[61]

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[55] R.K. Dalmia v. Justice S.R. Tendolkar, (1959) SCR 279

[56] Article 19(1)(g), The Constitution Of Mandia 1950 - to practise any profession, or to carry on any occupation, trade or business

[57] ibid

[58] Article 19(6), The Constitution Of Mandia 1950

[59] ibid

[60] Modern Dental College and Research Centre & Ors. v. State of Madhya Pradesh, (2016) 7 SCC 353

[61] Benson Peter, Philosophy of Property Law, Oxford University Press

With today's technology, there is every possibility of copying the fingerprint and even the iris images. Various cases of fake Pehchaan Card had come to light and even as per the Government's statement, 3.48 lakh bogus Pehchaan Cards were cancelled.[62]. There were instances of Pehchan leak as well. Even hacking is possible[63]**.**

Hence,

The impugned provision coerces the individuals to part with their private information which was a part of human dignity[64] and, thus, the said provision was violative of Art. 21 of the Constitution as it offended human dignity.

In *Maneka Gandhi v. Union of India*[65], it was stated:

> *"procedure which deals with the modalities of regulating, restricting or even rejecting a fundamental right falling within Art. 21 has to be fair, not foolish, carefully designed to effectuate, not to subvert, the substantive right itself".*

Republic of Mandia is a sovereign country, its governance is controlled by the provisions of the Constitution which sets parameters within which three wings of the State, namely, Legislature, Executive and Judiciary has to function. Thus, no wing of the State can breach the limitations provided in the Constitution which employs an array of checks and balances to ensure open, accountable government where each wing of the State performs its actions for the benefit of the people and within its sphere of responsibility. The checks and balances are many and amongst them are the respective roles assigned by the Constitution to the legislature, the executive and the judiciary. Provisions in the Constitution such as the fundamental rights chapter (Part III) and the chapter relating to inter-state trade (Part XIII) also circumscribe the authority of the State. These limitations on the power of the State support the notion of 'limited government'[66]. In this sense, the expression 'limited government' would mean that each wing of the State is restricted by provisions of the Constitution and other laws and is required to operate within its legitimate sphere. Exceeding these limits would render the action of the State ultra vires the Constitution or a particular law.

This notion of a limited government is qua the citizenry as a whole. There are certain things that the State simply cannot do, because the action fundamentally alters the relationship between the citizens and the State. The wholesale collection of biometric data including

[62] Binoy Viswam v. Union of India, Writ Petition(Civil) No.247 Of 2017, Supreme Court of India
[63] Paras 18 and 19 moot proposition
[64] Justice K S Puttaswamy (Retd.), And Anr. v, Union Of India And Ors.)(Writ Petition (Civil) No 494 Of 2012
[65] Maneka Gandhi v. Union of India, 1978 AIR 597
[66] State of Madhya Pradesh & Anr. v. Thakur Bharat Singh, AIR 1967 SC 1170

finger prints and storing it at a central depository per se puts the State in an extremely dominant position in relation to the individual citizen. Biometric data belongs to the concerned individual and the State cannot collect or retain it to be used against the individual or to his or her prejudice in the future. Further the State cannot put itself in a position where it can track an individual and engage in surveillance. The State cannot deprive or withhold the enjoyment of rights and entitlements by an individual or makes such entitlements conditional on a citizen parting with her biometrics.

The distinction between an individual or person and the State is the single most important factor that distinguishes a totalitarian State from one that respects individuals and recognizes their special identity and entitlement to dignity. The Constitution[67] does not establish a totalitarian State but creates a State that is respectful of individual liberty and constitutionally guaranteed freedoms. The Constitution[68] is not a charter of servitude.

There can be no question of free consent in situations where an individual is being coerced to part with its biometric information (a) to be eligible for welfare schemes of the State; and/or (b) under the threat of penal consequences. In other words, the State cannot compel a person to part with biometrics as a condition precedent for discharge of the State's constitutional and statutory obligations, it has to be voluntary

Art. 21[69], guarantees the protection of "personal autonomy" of an individual personal autonomy includes both the negative right of not to be subject to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in.[70]

In Sunil Batra & Anr. v. Delhi Administration & Ors[71].

> *"55. And what is "life" in Art. 21? In Kharak Singh case[72] Subba Rao, J. quoted Field, J. in Munn v. Illinois[73] to emphasise the quality of life covered by Art. 21 "Something more than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed." A dynamic meaning must attach to life and liberty."*

[67] The Constitution of Mandia, 1950
[68] ibid
[69] Article 21, The Constitution of Mandia,1950
[70] Anuj Garg v. Hotel Assn. of India, (2008) 3 SCC 1
[71] Sunil Batra & Anr. v. Delhi Administration & Ors, 1980 AIR 1579
[72] Kharak Singh v The State Of U. P. & Others, 1963 AIR 1295
[73] Munn v. Illinois, 94 US 113 (1877)

In general, in common law it is the right of every individual to have the control of his own person free from all restraints or interferences of others[74]

In the United States this right is reinforced by a constitutional right of privacy. This is known as the principle of self-determination or informed consent. the informed consent doctrine has become firmly entrenched in American Tort Law. The logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment[75]

Hence, the right to life and liberty and personal liberty under Art. 21[76] covers and extends to a person's right to protect his or her body and identity from harm. The right to life extends to allowing a person to preserve and protect his or her finger prints and iris scan.

In conclusion

The basic structure test propounded by the apex court[77], if any law encroaches upon the fundamental rights guaranteed under part III of the constitution, then such law would be against basic structure of the constitution and would be void. This test was reaffirmed in *Minerva Mills Ltd. & Ors v Union Of India & Ors*[78] and *I.R. Coelho (Dead) v State Of Tamil Nadu & Ors*[79]

PEHCHAAN ACT AND PRIVATE ENTITIES

Furthermore, the main objective of the Pehchaan confines itself only to governmental entities. However, the Act also allows private persons to use Pehchaan as a proof of identity for any purpose. Thus allowing private agencies to use Pehchaan contradicts statement of objects and reasons of the Bill.

There is a possibility of misuse of personal information parted with by the citizenry in the form of biometrics i.e. finger prints and iris scan. The requirement of enrolment for Pehchaan is designed to facilitate and encourage private sector operators to create applications that depend upon the Pehchaan data base for the purposes of authentication/verification. This would mean that non-governmental, private sector entities such as banks, employers, any point of payment, taxi services, airlines, colleges, schools, movie theatres, clubs, service

[74] Aruna Ramachandra Shanbaug v. Union of India & Ors, (2011) 4 SCC 454
[75] Schloendorff v. Society of New York Hospital 211 NY 125 : 105 NE 92 (1914)
[76] Article 21 in The Constitution Of Mandia 1950- Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law
[77] Kesavananda Bharati v State Of Kerala And Anr, (1973) 4 SCC 225
[78] Minerva Mills Ltd. & Ors v Union Of India & Ors, 1981 SCR (1) 206
[79] I.R. Coelho (Dead) By Lrs v State Of Tamil Nadu & Ors, AIR 2007 SC 861

providers, travel companies, etc. will all utilize the Pehchaan data base and may also insist upon an Pehchaan number or Pehchaan authentication. This would mean that at every stage in an individual's daily activity his or her presence could be traced to a location in real time. One of the purposes of Pehchaan is that it will be a single point verification for KYC[80]. This is permissible and indeed contemplated by the impugned Act. Given the very poor quality of scrutiny of documents by private enrollers and enrolment agencies (without any governmental supervision) means that the more rigorous KYC process at present being employed by banks and other financial institutions will yield to a system which depends on a much weaker data base. This would eventually imperil the integrity of the financial system and also threaten the economic sovereignty of the nation.

The provision by laying down Mandatory enrolment of Pehchaan becomes discriminatory qua that class and, therefore, is violative of Art. 14[81] of the Constitution. Thus it enforces conformity as it fails to satify the two test.[82]

In the case of *Subramanian Swamy v. Director, Central Bureau of Investigation & Anr*[83].:

> *"58. The Constitution permits the State to determine, by the process of classification, what should be regarded as a class for purposes of legislation and in relation to law enacted on a particular subject. The basis of classification must be sound and must have reasonable relation to the object of the legislation. If the object itself is discriminatory, then explanation that classification is reasonable having rational relation to the object sought to be achieved is immaterial."*

Pehchaan by its very design and by its statute is "voluntary"[84] and creates a right in favour of a resident without imposing any duty. There is no compulsion under the Pehchaan Act to enroll or obtain a number. If a person chooses not to enroll, at the highest, in terms of the Pehchaan Act, he or she may be denied access to certain benefits and services funded through the Consolidated Fund of Mandia.

Sec. 3 of the Pehchaan Act spells out that enrollment of Pehchaan is voluntarily and consensual and not compulsory or by way of executive action. Whereas there was a total

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[80] Know Your Customer

[81] Article 14 in The Constitution Of Mandia 1950 -Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

[82] Nagpur Improvement Trust & Anr. v. Vithal Rao & Ors, 1973 AIR 689

[83] Subramanian Swamy v. Director, Central Bureau of Investigation & Anr, (2014) 8 SCC 682

[84] Binoy Viswam v. Union of India, Writ Petition(Civil) No.247 Of 2017, Supreme Court of India

reversal of the aforesaid approach by the high court of Nelhi. This mandating was unconstitutional.

The Pehchaan Act came into force on August 11, 2014. The Parliament continued to maintain Pehchaan as a voluntary scheme vide Sec. 3 of the said Act. If Parliament so desired, it could have removed the basis of this Court's order by: (i) Amending Sec. 3 so that Pehchaan is made compulsory for every resident of Mandia; or (ii) Introducing either a proviso or adding a sub-section in Sec. 3 to the following effect:

> *"Notwithstanding anything contained in sub-section (1), the Central Government may notify specific purposes for which obtaining Pehchaan numbers may be made mandatory in public interest."*

As long as the Pehchaan enactment holds the field, there is an implied limitation on the power of Parliament not to pass a contrary law.

Also, there was no compelling state interest in having introducing compulsive element and depriving from erstwhile voluntary nature of Pehchaan scheme. The 'proportionality of means' concept[85] is an essential one since integrating data beyond what is really necessary for the stated purpose is clearly unconstitutional.

In light of the decision in the case of *Gobind v. State of Madhya Pradesh*[86], which has been the position of this Court since the past forty-two years and has been cited with approval often, the State has the onerous burden of justifying the impugned mandatory provision. The 'compelling state interest' justification is only one aspect of the broader 'strict scrutiny' test[87]

The other essential facet is to demonstrate 'narrow tailoring', i.e., that the State must demonstrate that even if a compelling interest exists, it has adopted a method that will infringe in the narrowest possible manner upon individual rights. There is no compelling State interest warranting such a mandatory provision.

Sec. 29[88] puts a blanket embargo on using the core biometric information, collected or created under the Pehchaan Act for any purpose other than generation of Pehchaan numbers and authentication under the Pehchaan Act. The impugned provision further confirms voluntary in nature, there was no question of making this very provision mandatory.

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[85] R. v. Oakes, (1986) 1 S.C.R. 103
[86] Gobind v. State of Madhya Pradesh, (1975) 2 SCC 148
[87] Anuj Garg v. Hotel Association of India, (2008) 3 SCC 1
[88] Section 29, Pehchaan Act, 2014

In Olga Tellis & Ors. V.Bombay Municipal Corporation & Ors. Etc[89].

> *"It is far too well-settled to admit of any argument that the procedure prescribed by law for the deprivation of the right conferred by Art. 21*[90] *must be fair, just and reasonable."*

The government has argued that access to benefits can only occur upon the surrendering of privacy. The real issue is not whether, in the abstract, citizens can surrender their fundamental rights if they so choose. It is whether the government can impose waiver of fundamental rights as a condition for accessing certain benefits. With respect to Pehchaan, the the debate has been framed around the needs of poorer citizens to access government benefits. For many of these citizens, the choice between accessing benefits and losing privacy is a false choice, because it requires them to choose between a privilege that is essential for their livelihood, and a fundamental right.

After the Right to Privacy Judgement in *KS Puttaswamy v Union of India*[91]

The right to privacy is a fundamental right. The question is can it then be waived voluntarily? The Supreme Court in *Behram v State of Maharashtra*[92] examined this question and stated that fundamental rights were not kept in the Constitution merely for individual benefits. Fundamental rights were a matter of public policy and thus, the doctrine of waiver does not apply in case of fundamental rights. In other words, a citizen cannot 'give up' his fundamental rights. Later, in the *Basheshar Nath case*[93] limiting their decision to Art. 14, held that the right conferred by the article, could not be waived.

DOCTRINE OF UNCONSTITUTIONAL CONDITIONS

The Supreme Court in 1974 elaborated the doctrine of unconstitutional condition In *Ahmedabad St Xavier's College v State of Gujarat*[94] as

> "*any stipulation imposed upon the grant of a governmental privilege which in effect requires the recipient of the privilege to relinquish some constitutional right."*

'The doctrine of unconstitutional condition' means any stipulation imposed upon the grant of a governmental privilege which in effect requires the recipient of the privilege to relinquish

[89] Olga Tellis & Ors. v.Bombay Municipal Corporation & Ors. Etc, 1986 AIR 180
[90] Article 21, Constitution of Mandia, 1950
[91] Justice K S Puttaswamy (Retd.), And Anr. v, Union Of India And Ors., Writ Petition (Civil) No 494 Of 2012
[92] Behram v State of Maharashtra, AIR 1955 SC 123
[93] Basheshar Nath vs. the Commissioner Of Income-tax, Delhi & Rajasthan, 1959 AIR 149
[94] Ahmedabad St Xavier's College v State of Gujarat, 1975 SCR (1) 173

some constitutional right. This doctrine emphasizes the right he is conceded to possess by reason of an explicit provision of the Constitution,

Justice Sutherland of the US Supreme Court had spelt out how an unconstitutional condition, in the garb of voluntariness, gives the carrier no choice "*except a choice between the rock and the whirlpool – an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden*."[95]

This is much the same as what Das, C.J. said:" *No educational institutions can in actual practice be carried on without aid from the State and if they will not get it unless they surrender their rights, they will, by compulsion of financial necessities, be compelled to give up their rights under Art. 30(1)* "[96].

This doctrine posits that a condition attached to the grant of a governmental benefit is unconstitutional if it requires the relinquishment of a constitutional right[97]. Unconstitutional condition on the receipt of a public benefit and came within the rule of cases like *Perry v. Sindermann*[98]

The government may not deny a benefit to a person on a basis that infringes his constitutionally protected interests-especially.[99]

In Re Kerala Education Bill[100] and *Ahmedabad St Xavier's College*[101] make it clear that by putting citizens in a position where they have to make a choice between a necessity and the waiver of fundamental rights, the government is effectively giving them no choice at all, and is restricting their fundamental rights indirectly, by providing an illusion of choice and waiver.

The power of the state is not unlimited; and one of the limitations is that it may not impose conditions which require relinquishment of constitutional rights. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.

In chapter 7 of the Pehchaan regulations, there is a provision for a grievance redressal mechanism whereby a person can approach a call centre through phone or email which will provide residents with a tracking number till the matter is closed. But this is not enough.

[95] Frost & Frost Trucking Co. v. Railroad Commission, 271 U.S. 583, 594 (1926)
[96] In RE: The Kerala Education Bill, 1959 1 SCR 995
[97] Hale, Unconstitutional Conditions and Constitutional Rights, 35 COLU m. L. REV. 321 (1935)
[98] Perry v. Sindermann., 408 U.S. 593 (1972)
[99] Speiser v. Randall, 357 U.S. 513, 526 (1958)
[100] In RE: The Kerala Education Bill, 1959 1 SCR 995
[101] Ahmedabad St Xavier's College v State of Gujarat, 1975 SCR (1) 173

There is no requirement for the call centre to give you a reasoned order like a public authority does. The regulations are also weak on grievance redressal, and are completely absent on authentication and data security. decision.

DATA MAINTAINED BY PEHCHAAN IS SENSITIVE DATA

"Nobody claims it is not a social justice welfare scheme. What they are worried about is that whether information given to the agencies will be safe and for that do you have a robust law. And if you don't then you must have one," Justice Chandrachud[102]

Pointing out that Pehchaan "enrollers", who collect citizens' data and biometrics, are private parties and there is serious threat of misuse or leakage of data "There are cases where such information has been commercially sold. The law says life and body is paramount and if the fingerprints of an individual are stolen, it might end his identity. If we fail here, there is tremendous possibility that state will dilute civil liberties and dominate its citizens. The concept of civil liberties will go then."

In this new world the data is the new "oil", be it the governments or the companies all want your data. Public Distribution System(Ration), Health information, Mobile Number, Financial Details, Purchases, Loans, Violations, Travel information, PAN, Electricity consumption, Water consumption of a person are all linked to the Pehchaan, which is nothing but their detailed profile. Thus, Pehchaan is mass surveillance technology. Unlike, targeted surveillance which is a good thing, and essential for national security and public order — mass surveillance undermines security.

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, viz. 13 crore data of citizens was leaked from Pehchaan. Moreover, recently an IIT passed graduate hacked into Pehchaan database to use its data for his online payment App.**[103]**

Critics say the Pehchaan identity card links enough data to allow profiling because it creates a comprehensive profile of a person's spending habits, their friends and acquaintances, the property they own, and a trove of other information. There are fears the data could be misused by a government.

Many 3rd parties are creating private database with Pehchaan information and interlinking the identity with other sources. Eg: If a company combines Pehchaan information with e-

[102] Justice K S Puttaswamy (Retd.), And Anr. v, Union Of India And Ors.)(Writ Petition (Civil) No 494 Of 2012

[103] Para 19 and 20, Moot Proposition

commerce transactions, it can provide a very detailed profile of an individual. Thus, Pehchaan makes it easier to compare and combine diverse databases. Moreover, when NUIDA started its work of making Pehchaan cards, it 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.[104] This kind of process will lead to misuse of sensitive information in the hands of unauthorised people.

The other issue with binding so much information of a citizen, including their bank accounts, to their Pehchaan card is if another country were to hack to Pehchaan database. Mandia deals with frequent cyber-attacks from China and Pakistan.

Republic of Mandia has no specific legislation focusing on data protection. A few principles of data protection are scattered through IT Act, Guidelines issued by RBI, TRAI etc[105]

The Lok Sabha Standing Committee on Finance report on the Bill had given the United Kingdom's example to raise concerns over Pehchaan's security. (Incidentally, the UK had abandoned its ID project due to "high cost, unsafe, untested technology and the changing relationship between the state and the citizen.")

Field researchers have noted that in Rajasthan, for example, since Aadhaar was made compulsory for buying ration, over 25% ration card holders, or 25 lakh families, have not been able to draw their supplies. During the seeding, over ten lakh pensioners were removed from the government's lists, written off for dead. Many of them were later found to be alive but their pensions had been stopped[106].

This is a major concern as Sec. 29 of the Pehchaan Act states that:

> *"(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."*

[104] Para 5, Moot Proposition
[105] http://www.livelaw.in/data-protection-india/
[106] Binoy Viswam v. Union of India, Writ Petition(Civil) No.247 Of 2017, Supreme Court of India

In February 2017, UIDAI lodged criminal complaints against Axis Bank, Suvidha Infoserve, eMudhra for illegally storing and using Aadhaar data to impersonate people and carry out transactions. Allegedly, Suvidhaa Infoserve and e-sign provider eMudhra had conducted multiple transactions using the same fingerprint, which implied that organisations are illegally storing biometric data on their servers.[107]

Furthermore, there is the question of whether or not the government's bureaucracy is equipped to handle something like the Pehchaan database and this is pertinent as the incapability to do so will only make it easier for hackers to target the Pehchaan system. Just recently

Recently, MS Dhoni's Aadhaar card details had made headlines. It wasn't technology, but a star-struck government official who had made the blunder.

> *Willis on Constitutional Law[108], at page 89 :-"A judicial declaration of the unconstitutionality of a statute neither annuls nor repeals the statute but has the effect of ignoring or disregarding it so fact as the determination of the rights of private parties is concerned. The courts generally say that the effect of an unconstitutional statute is nothing. It is as though it had never been passed.....".*

The Pehchaan Act states that information will not be disclosed except "in interest of national security in pursuance of a direction of an officer not below the rank of Joint Secretary to the Government of Mandia specially authorised in this behalf by an order of the Central Government." But there is no specific definition of 'national security' in the Act. Effectively, the Act gives the government the power to reveal information in the Pehchaan database in the name of 'national security'.

Ms. Pillay's report[109] insisted that known and accessible remedies need to be made available to those whose privacy is violated, the Pehchaan legislation does no such thing. The remedies are supposed to include thorough and impartial investigation and the option of criminal prosecution for gross violation. The Pehchaan Bill excludes courts from taking cognisance of offences under the legislation, requiring that the authority that runs Pehchaan consent to prosecution for any action to be taken under the legislation.

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[107] Axis Bank Limited v. Suvidhaa Infoserve Private Limited & Anr.:(Commercial Suit (Lodg.) No. 108 of 2017)

[108] Willis Huge Evander, Constitutional Law Of United States, 1936, The Principia Press

[109] Navi Pillay(UN High Commissioner for Human Rights), 'The Right to Privacy in the Digital Age', Report UN

PRAYER

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

1. To uphold the order passed by the Hon'ble Supreme Court declaring Right to Privacy as a Fundamental Right under the Constitution of Mandia.
2. To set aside the order of the High Court of Nelhi holding Pehchaan Act, 2014 as constitutional and making Pechchaan mandatory.
3. To declare Pehchaan Act, 2014 and Pehchaan Policy as illegal and violative of constitutional provisions of Mandia.
4. To give any other order which the court deems fit in the interest of justice.