

TEAM CODE: T-47 A

BEFORE THE HON'BLE SC OF MANDIA

IN THE MATTER OF:

MR. SATISH DHANKAR

... PETITIONER

v.

THE UNION OF MANDIA

... RESPONDENT

SPECIAL LEAVE PETITION NO. ***/2017**

ON SUBMISSION TO THE HON'BLE SC OF MANDIA

UNDER ART. 136 OF THE CONST. OF MANDIA

WRITTEN SUBMISSIONS ON BEHALF OF THE PETITIONER

COUNSEL APPEARING ON BEHALF OF THE PETITIONER

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LIST OF ABBREVIATIONS

¶	:	Paragraph
AIR	:	All India Report
All	:	Allahabad
AP	:	Andhra Pradesh
Art.	:	Article
Bom	:	Bombay
Cal	:	Calcutta
Del	:	Delhi
DPSP	:	Directive Principles of State Policy
HC	:	High Court
IT Act	:	Information Technology Act
Kar	:	Karnataka
PIL	:	Public Interest Litigation
PDS	:	Public Distribution System
SC	:	Supreme Court
SCC	:	Supreme Court Cases
SLP	:	Special Leave Petition
u/s	:	Under Section
UOI	:	Union of India
US	:	United States
UK	:	United Kingdom

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STATEMENT OF JURISDICTION

The petitioner herein is Mr. Satish Dhankar. Under Art. 136 of the Constitution of India, 1950, this Hon'ble Court has been vested, in its discretion, to 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 India. In this case, the petitioner has preferred an appeal against the impugned orders of the Hon'ble High Court of Delhi.

The present memorandum sets forth the facts, contentions and arguments in the present case.

STATEMENT OF FACTS

BACKGROUND

The Republic of Mandia has a democratic parliamentary form of government with a federal structure based on principles of free and fair elections, equality, liberty, fraternity, transparency, accountability of state, freedom of religion, independent and autonomous judiciary and election commission, *inter alia* as its core values. The Constitution of Mandia also provides for an independent judiciary.

INTRODUCTION OF PEHCHAAN POLICY

The government of Mandia formulated 'Pehchaan Policy' for profiling of its citizens for making of Pehchaan cards. This policy aimed at saving duplicity of identities, identifying illegal immigrants, checking the leakage in the government schemes and preventing corruption happening in PDS and other subsidy providing schemes of the government.

PRIVATE BODIES AND REQUIREMENTS FOR MAKING OF PEHCHAAN CARDS

National Unique Identification Authority was constituted on 30th November, 2009 which assigned the task of making Pehchaan cards to private entities who further outsourced the task to private vendors. For this purpose, they took citizen's details like finger prints of both hands, scanning of iris, blood group, spouse and children details, educational qualification, number of spouses and their religion, details of life-threatening diseases like AIDS, cancer, hepatitis-B, permanent infertility, criminal/civil cases pending and government loan or any other liability.

PIL FILED BY MR. SATISH DHANKAR

Petitioner, Mr. Satish Dhankar, challenged the policy of mandatory Pehchaan cards in the HC of Nelhi on 22nd January, 2009 through PIL contending Pehchaan policy violates right to privacy and right to speech and expression; especially the right to remain silent and not to part with intimate information about oneself. He contended making it mandatory to provide information that is very intimate and integral to one's personality is unconstitutional and violative of fundamental rights. Meanwhile, the govt. made Pehchaan card compulsory for seeking benefits under social welfare schemes. Subsequently, on clarification of interim order

passed by HC, issued on petitioner's plea, the govt. could make it mandatory only for non-benefit schemes.

AMENDMENT OF PETITION

On 11th August, 2014, the govt. enacted the Pehchaan Act, 2014 which made Pehchaan cards mandatory for all benefit and non-benefit schemes, and it gave statutory basis to the National Unique Identification Authority. This Act provided for data protection and penalties and punishments for data leakages. The petitioner, thereby requested for amendment of Petition to challenge the Pehchaan Act, 2014 as well, which was accepted by HC. Subsequently, the petitioner contended that data collected by the govt. is not safe and it can be leaked to private entities threatening life and liberty of people. He also claimed that this data could be used by private companies for telemarketing or by majoritarian governments for communal profiling of the communities and also, that the database has already been hacked by an IIT graduate. The respondents responded to this by arguing that there is no right to privacy provided in any provision of Constitution of Mandia and promised to bring soon a substantive law for data protection.

REJECTION OF PIL BY HC

The HC rejected the PIL after hearing the matter in detail and held that Pehchaan Act, 2014 is constitutional and Pehchaan cards can be made mandatory. It further held that the right to deny information to the govt. cannot be held to be fundamental right in the light of necessity to protect the state from terrorism and other security related problems.

SLP FILED BY PETITIONER IN SC

The petitioner has approached the SC of Mandia through a Special Leave Petition and has prayed for quashing the judgment of Hon'ble HC of Nelhi and to declare the Pehchaan Act, 2014 and the whole Pehchaan project of the govt. of Mandia to be unconstitutional.

ISSUES PRESENTED

ISSUE 1

WHETHER THE SPECIAL LEAVE PETITION IS MAINTAINABLE?

ISSUE 2

WHETHER THE PEHCHAAN POLICY AND THE PEHCHAAN ACT, 2014 BROUGHT BY THE GOVERNMENT OF MANDIA ARE CONSTITUTIONAL?

ISSUE 3

WHETHER THE PEHCHAAN PROJECT OF THE GOVERNMENT OF MANDIA IS VIOLATIVE OF THE FUNDAMENTAL RIGHTS OF THE PEOPLE PROVIDED BY THE CONSTITUTION?

ISSUE 4

WHETHER THE GOVERNMENT HAS TAKEN ADEQUATE MEASURES TO SECURE THE DATA COLLECTED FOR THE PURPOSE OF MAKING PEHCHAAN CARDS?

SUMMARY OF ARGUMENTS

[1]. WHETHER THE SPECIAL LEAVE PETITION IS MAINTAINABLE?

It is humbly submitted before the Hon'ble SC that, the Special Leave Petition filed by the petitioner, Mr. Satish Dhankar is maintainable, as the matter involves a substantial question of law of general public importance. The arbitrary and hasty judgment of the HC declaring, right to privacy as a common law right and the Pehchaan Policy and the Pehchaan Act, 2014 of the government as Constitutional has resulted in miscarriage of justice and if the SC does not intervene, it will result in gross injustice. The Hon'ble SC should therefore, applying its wide jurisdiction conferred under Art. 136 of the Constitution of India, use corrective measures to correct the wrong done by the decision of the HC of Nelhi.

[2]. WHETHER THE PEHCHAAN POLICY AND THE PEHCHAAN ACT, 2014 BROUGHT BY THE GOVERNMENT OF MANDIA ARE CONSTITUTIONAL?

It is humbly submitted before the Hon'ble SC that the Pehchaan Policy and the Pehchaan Act, 2014 brought by the government of Mandia are unconstitutional as they are in violation of fundamental rights guaranteed under Part III of the Constitution of India. Therefore, even though the Policy and the Act have been brought by the legislature, which comes under the definition of state as per Art. 12 of the Constitution of India, they are in contravention of Art. 13(2) of the Constitution, thus making them void.

[3]. WHETHER THE PEHCHAAN PROJECT OF THE GOVERNMENT IS VIOLATIVE OF THE FUNDAMENTAL RIGHTS OF THE PEOPLE PROVIDED BY THE CONSTITUTION?

It is humbly submitted by the Appellant that Right to Privacy has been accepted by the SC in the case of *K.S. Puttaswamy*, as a constitutionally protected fundamental right. It is an integral part of Right to life and Personal liberty, and any restriction imposed on it should be in accordance with procedure established by law, i.e., it must satisfy the requirements of Art. 14 and 19. Also, the law imposing such restrictions should be just, fair and reasonable. As per the facts and circumstances of the case, the restrictions imposed by the government on the exercise of right to privacy of people, is arbitrary and unreasonable, as there exists no reasonable classification, and there is no nexus between such classification and the objective of the Act. Information sought from the people, severely violates the bodily and mental integrity of the people, in addition to having no relation to the objective of the Act. Also, classification based on religion is not only discriminatory but compelling the people to

disclose their religion is in violation of Art. 25 of the Constitution of India, 1950. It is also pertinent to note that the restrictions imposed are not in proportion to the objective of the Act. Further, making Pehchaan Cards mandatory for the purposes of benefit and non- benefit schemes deprives the people of their choice; while putting them under constant surveillance of the state. This is a grave violation of right to life as it infringes upon the dignity of the individual, which is the basic element of the Constitution.

Also, it is humbly submitted before the Hon'ble Court that, the Right to remain silent is contained within the meaning of Freedom of Speech and Expression, and can only be restricted in accordance with the explicit provisions provided under Art. 19(2) of the Constitution of India. Further, no law can be made to give effect to Directive Principles of State Policy, which gives absolute primacy to the principles, infringing the fundamental rights of the people.

[4]. WHETHER THE GOVERNMENT HAS TAKEN ADEQUATE MEASURES TO SECURE THE DATA COLLECTED FOR THE PURPOSE OF MAKING PEHCHAAN CARDS?

It is humbly submitted before the Hon'ble Court that the government has not taken adequate measures to secure the data collected under the Pehchaan Project. While, penalties have been imposed for breach of data protection and leakage of data, there is lack of adequate measures at the preventive stage itself, which makes it susceptible to identity theft and other like offences. Further, the National Identification Authority established by the government has delegated the task of data collection to private entities who have further outsourced the task to private vendors, on whom binding rules as to maintaining adequate safety measures do not apply.

ARGUMENTS ADVANCED

[1]. THAT THE SPECIAL LEAVE PETITION IS MAINTAINABLE

1. It is humbly submitted before this Hon'ble Court that, the Special Leave Petition filed by the petitioner, Mr. Satish Dhankar is maintainable, as the matter involves a **substantial question of law of general public importance**. If the SC does not intervene, it will result in gross injustice and that, **miscarriage of justice has already occurred**, by the erring judgment of the HC of Nelhi, which declared the Pehchaan Project as constitutional,¹ with complete disregard for the fundamental right of privacy of the people. Therefore, the special leave petition of the petitioner must be accepted, so that the Hon'ble Court can use its wide jurisdiction conferred under Art. 136,² to correct the wrong done by the decision given by the HC of Nelhi.

[1.1]. THE MATTER INVOLVES QUESTION OF LAW OF GENERAL PUBLIC IMPORTANCE

2. It is humbly submitted before the Hon'ble Court that the jurisdiction conferred under Art. 136 on the SC is corrective one and not a restrictive one³ and can be invoked when a question of law of general public importance arises,⁴ by filing Special Leave Petition. It is well-settled that **illegality must not be allowed to be perpetrated** and failure by the SC to interfere with the same would amount to allowing the illegality to be perpetuated,⁵ therefore a duty is enjoined upon the SC to exercise its power by setting right the illegality in the judgments.

3. Art. 136 provides residuary power to the SC to do justice where the court is satisfied that injustice has been done.⁶ Illegality should not be allowed to be perpetrated merely for the sake of upholding technicalities.⁷

¹ Moot Proposition, ¶ 24.

² Art. 136, The Constitution of India, 1950.

³ Haryana State Industrial Corp. v. Cork Mfg. Co., (2007) 8 SCC 359.

⁴ Sir Chunilal Mehta and Sons, Ltd. v. Century Spinning and Manufacturing Co. Ltd., AIR 1962 SC 1314.

⁵ Pawan Kumar v. State of Haryana, (2003)11 SCC 241; See also, H.M. Seervai, Constitutional Law of India, Vol. 1, 832 (4th ed., Universal Law Publishing, New Delhi, 2010); See also, Halsbury's Laws of India, Vol. 35, 564 (2nd ed., Lexis-Nexis Butterworth Wadhwa, Nagpur, 2007).

⁶ C.C.E v. Standard Motor Products, AIR 1989 SC 1298; See also, H.M. Seervai, Constitutional Law of India, Vol. 2, 845 (4th ed., Universal Law Publishing, New Delhi, 2010).

⁷ Janshed Hormusji Wadia v. Board of Trustees, Port of Mumbai, (2004) 3 SCC 214.

4. In the instant matter, the right to privacy, which is an integral part of the right to life of people,⁸ is violated by the state and their personal sensitive information has leaked,⁹ which is a matter of general public importance and therefore, calls for intervention by the SC.

[1.2] THE MATTER INVOLVES SUBSTANTIAL QUESTION OF LAW AND GROSS INJUSTICE HAS BEEN DONE

5. It is humbly submitted by the petitioner before this Hon'ble Court that, the matter involves substantial question of law as it concerns the **violation of fundamental right of privacy of the people** of Mandia and gross injustice has already been meted out by the decision of HC of Nelhi, which has hastily and arbitrarily declared it as a common law right, and held the Pehchaan Policy and the Pehchaan Act, 2014 brought by the government of Mandia as constitutional.

[1.2.1] SUBSTANTIAL QUESTION OF LAW IS INVOLVED

6. It is humbly submitted that where findings are entered without considering relevant materials and without following proper legal procedure, interference of SC is called for.¹⁰ In the instant case, the Hon'ble HC has erred in deciding a very substantial question of law, related to right to life of the people.

7. Whether a matter involves substantial question of law, depends on whether it is of general public importance, which directly or substantially affects the rights of the parties, or it has already been decided by the highest Court.¹¹ It will, therefore, depend on the facts and circumstance of each case whether a substantial question of law is involved in the case.¹²

8. It is submitted that, the present case involves a matter of general public importance as it directly and **substantially affects the rights of the parties** as the order is erroneous and prejudicial to the interest of people and also the HC had erred in dismissing the PIL stating that Right to privacy is not a fundamental right of citizen under Art. 21.

⁸ Justice K.S. Puttaswamy (Retd.), and Anr. v. Union of India and Ors, AIR 2015 SC 3081.

⁹ Moot Proposition, ¶ 24.

¹⁰ Dale & Carrington Invt. Ltd. v. P.K. Prathapan, (2005) 1 SCC 212.

¹¹ Sir Chunilal Mehta and Sons, Ltd. v. Century Spinning and Manufacturing Co. Ltd., AIR 1962 SC 1314.

¹² Sumati Dayal v. CIT, (1995) 214 ITR 801.

[1.2.2] GROSS INJUSTICE HAS BEEN DONE

9. The judgment of HC of Nelhi is bad in the eyes of law as it did not recognize the right to privacy of people which is an intrinsic part of right to life as fundamental right rather as a common law right.¹³ Grave miscarriage of justice has occurred because of this serious and flagrant violation of law has been committed by the HC¹⁴ for which interference of the SC is required.

10. The requirement of personal details for making of Pehchaan Cards, like finger print, iris scan, motherhood, procreation and other like information constitute grave violation of right to privacy of the people, and grave injustice has been meted out by the judgment of the HC by declaring the Pehchaan Act which makes Pehchaan Cards mandatory, as constitutional.

[1.2.3] FINDING OF FACTS MAY GIVE RISE TO SUBSTANTIAL QUESTION OF LAW.

11. The SC is not precluded from going into the question of facts under Art. 136, if it considers it necessary to do so.¹⁵ Art. 136 uses the words '*in any cause or matter*'. This gives **widest power to this court to deal with any cause or matter**.¹⁶ It is plain that when the SC reaches the conclusion that a person has been dealt with arbitrarily or that a court or tribunal has not given a fair deal to a litigant, then no technical hurdles of any kind like the finality of finding of facts, or otherwise can stand in the way of the exercise of this power.¹⁷

12. In the instant case, the HC, in haste, reached the conclusion that right to deny information to the government cannot be held to be fundamental right as a matter of national security is involved,¹⁸ and that the Pehchaan would be beneficial in making further beneficial government schemes. Thus, on the above grounds, it is humbly submitted that the petition is maintainable before the Hon'ble SC of Mandia.

¹³ Justice K.S. Puttaswamy (Retd.), and Anr. v. Union of India and Ors, AIR 2015 SC 3081.

¹⁴ Ram Piari v. Bhagwant, AIR 1990 SC 1742.

¹⁵ Kathi Ranning Rawat v. The State of Saurashtra, AIR 1952 SC 123, See also, Achyut Adhichary v. West Bengal, AIR 1963 SC 1039.

¹⁶ Pritam Singh v. The State, AIR 1950 SC 169.

¹⁷ Sripur Paper Mills v. Comm. of Wealth Tax, AIR 1970 SC 1520; See also, Om Prakash Sood v. Union of India, Civil Appeal No. 9169 of 1996

¹⁸ Moot Proposition, ¶ 24.

[2]. THAT THE PEHCHAAN POLICY AND THE PEHCHAAN ACT, 2014 BROUGHT BY THE GOVERNMENT ARE NOT CONSTITUTIONAL

13. It is humbly submitted before the Hon'ble Court that the Pehchaan Policy and the Pehchaan Act, 2014 enacted by the government of Mandia are unconstitutional as though the Act was passed by the legislature of the state, they are in violation of Part III of the Constitution of India, which guarantees the people certain fundamental rights and therefore, they are void, being in contravention with Art. 13(2) of the Constitution.

[2.1] THE ACT WAS BROUGHT BY THE LEGISLATURE OF THE STATE

14. It is most humbly submitted that the government of Mandia which comes within the definition of state under Art. 12,¹⁹ formulated a policy named Pehchaan²⁰ which was later converted into a legislative enactment.

15. It is humbly submitted that the term 'law' includes any ordinances, order, bye-laws, rule, regulation, notification, custom or usages having in the territory of Mandia, the force of law.²¹ Therefore it is clear that not only law made by legislature but also an order or notification which takes away or abridges the fundamental rights conferred by Part III of the Constitution would be void.²² In this particular case, at first instance, the govt. of Mandia formed a policy named as Pehchaan and later it was enacted, as a statute to be known as 'The Pehchaan Act, 2014', in the Monsoon session of parliament.²³ Hence the law clearly falls within the ambit of Art. 13 (3)(a) of the Constitution.

[2.2] THE PEHCHAAN POLICY AND THE PEHCHAAN ACT, 2014 BROUGHT BY THE GOVERNMENT VIOLATE THE FUNDAMENTAL RIGHTS OF THE PEOPLE

16. The main objective of Art. 13 is to secure the paramountcy of the constitution especially with regards to fundamental rights.²⁴ The state is prohibited from making any law which

¹⁹ Art. 12, The Constitution of India, 1950.

²⁰ Moot Proposition, ¶ 1.

²¹ Art. 13(3)(a), The Constitution of India, 1950.

²² Union of India v. Col. L.S.N. Murthy, (2012) 1 SCC 718.

²³ Moot Proposition, ¶ 12.

²⁴ Renu v. District and Session Judge, Tis Hazari, AIR 2014 SC 2175.

takes away or abridges rights conferred by Part III of the Constitution.²⁵ If the state makes such a law then, it would be ‘**still born law**’ and void to the extent of such contravention.²⁶

17. Though post-constitutional laws inconsistent with fundamental rights are void from their very inception yet a declaration by the court of their validity will be necessary.²⁷ Therefore, the Pehchaan Act, 2014 enacted by the government of Mandia is void, and a declaration of the same by the SC is necessary.

[3]. THAT THE PEHCHAAN PROJECT OF THE GOVERNMENT IS VIOLATIVE OF THE FUNDAMENTAL RIGHTS OF THE PEOPLE PROVIDED BY THE CONSTITUTION

18. It is humbly submitted before this Hon’ble Court that the Right to Privacy has been recognized as a fundamental right and the ‘Pehchaan Policy and the Pehchaan Act, 2014’ brought by the respondent is in violation of Arts. 14, 19, 21 and 25 of the Constitution of India.

[3.1] VIOLATION OF THE FUNDAMENTAL RIGHT TO PRIVACY OF THE PEOPLE

19. It is humbly submitted before the Hon’ble Court that **right to Privacy is the basic inalienable right of an individual**²⁸ concomitant of his right to exercise control over his personality and is essential for his development as a human being. The liberty of an individual is a matter of fundamental natural law, a private preserve and must be safeguarded from unnecessary interference.²⁹

20. **Right to privacy has been held to be constitutionally protected fundamental right.**³⁰ Right to privacy is vested within right to life and personal liberty under Art. 21 of Constitution of Mandia.³¹ A citizen under this right has the right to protect and safeguard the liberty of his own, his family, marriage, procreation, motherhood, childbearing and education among other matters.³²

²⁵ Art. 13(2), The Constitution of India, 1950.

²⁶ Deep Chand v. State of U.P., AIR 1959 SC 648.

²⁷ Md. Ishaq v. State, AIR 1961 All 532.

²⁸ Justice K.S. Puttaswamy (Retd.), and Anr. v. Union of India and Ors., AIR 2015 SC 3081.

²⁹ Gobind v. State of Madhya Pradesh and Ors., (1975) 2 SCC 148.

³⁰ Gobind v. State of Madhya Pradesh and Ors., (1975) 2 SCC 148; See also, R. Rajagopal v. State of Tamil Nadu, (1994) 6 SCC 632; People’s Union for Civil Liberties v. Union of India, (1997) 1 SCC 301; Kharak Singh v. State of UP, AIR 1963 SC 1295; Ramlila Maidan Incident v. Home Secretary, Union of India, (2012) 5 SCC 1, 119-120, ¶ 312.

³¹ Kharak Singh v. State of UP, AIR 1963 SC 1295; See also, Gobind v. State of Madhya Pradesh, AIR 1975 SC 1378; PUCL v. Union of India, AIR 1991 SC 207.

³² Unni Krishnan v. State of A.P. (1964) 1 SCR 332.

According to Black's Law Dictionary, Privacy has been defined as, "**right to be left alone**"³³; right of a person to be free from any unwarranted publicity; right to live freely from any unwarranted interference by the public in matter with which public is not necessarily concerned". **It is on the desire of people to choose freely under what circumstances and to what extent they will expose themselves, their attitude and their behaviour to others.**³⁴

21. The scope of Art. 21 is very broad and it covers every aspect of life which is required for an individual to live a healthy and secured life. Art. 21 takes all those aspects of life which go to make a person's life meaningful and even State can't violate it.³⁵ **Art. 21 protects** the dignity of human life, one's personal autonomy, **one's right to privacy**, etc. Right to dignity has been recognised to be an essential part of the right to life and accrues to all persons on account of being humans. If we talk of right to privacy then it also contains a broad scope in it like tapping of telephonic conversation, disclosure of dreadful disease³⁶, subjecting to medical tests.³⁷ Here in the present case, the information sought under Pehchaan Scheme is very intimate and integral to one's personality and hence making it mandatory to provide basic and intimate information³⁸ is unconstitutional and violative of Fundamental Right to privacy.

[3.2] MANDIA'S COMMITMENT UNDER INTERNATIONAL LAW

22. The recognition of privacy as a fundamental constitutional value is a part of Mandia's commitment to a global human rights regime. The state is required to endeavour to "foster respect for international law and treaty obligations in the dealings of organized peoples with one another".³⁹

23. The Universal Declaration of Human Rights of which India is a party recognises that **everyone has the protection of law against interference with his privacy**, family, home or correspondence, or attack upon his honour and reputation.⁴⁰ Similarly, the International Covenant on Civil and Political Rights casts an obligation on states to respect, protect and fulfil its norms. Art. 17 of the ICCPR casts a duty upon the states to adopt and enact measures to prohibit undue interferences with the exercise of right to privacy of people. The

³³ Rajgopal v. State of Tamil Nadu, 1994 6 SCC 632; See also, Warren and Brandeis, "The Right to Privacy", Vol.4 (5), Harvard Law Review, 195-196 (1890).

³⁴ Alan Westin, Privacy and Freedom (1967) in Justice K.S. Puttaswamy (Retd.), and Anr. v. Union of India and Ors., AIR 2015 SC 3081.

³⁵ Justice K.S. Puttaswamy (Retd.), and Anr. v. Union of India and Ors., AIR 2015 SC 3081.

³⁶ Mr. X v. Hospital Z, AIR (1995) SC 95.

³⁷ Sharda v. Dharmpal, AIR (2003) SC 3450.

³⁸ Moot Proposition, ¶ 7.

³⁹ Art. 51(C), The Constitution of India, 1950.

⁴⁰ Art. 12, Universal Declaration of Human Rights, 1947 (Adopted on December 10, 1948).

government in order to give effect to these provisions of ICCPR has enacted the Protection of Human Right Act, 1993 which includes liberty as the basic human rights guaranteed to the people.⁴¹

24. The obligations assumed by India in International Conventions and Treaties, must reflect in the legislations enacted by the government.⁴² Also, in absence of any provision of domestic law, the provisions of the Conventions of which the country is a party shall be applicable.⁴³

25. Where there is a contradiction between international law and a domestic statute, the Court would give effect to the latter.⁴⁴ In the present case, there is no contradiction between the international obligations which have been assumed by India and the Constitution. The Court should not readily presume any inconsistency. India being a responsible member of the international community, the Court must adopt an interpretation which abides by the international commitments made by the country and recognise right to privacy as fundamental right.

26. The decision of the HC of Delhi that right to privacy is a common law right,⁴⁵ holds no ground as it has been clearly observed in the recent case of *K. S. Puttaswamy*,⁴⁶ that;

“The fact that a right may have been afforded protection at common law does not constitute a bar to the constitutional recognition of the right. The central theme is that privacy is an intrinsic part of life, personal liberty and of the freedoms guaranteed by Part III which entitles it to protection as a core of constitutional doctrine. The protection of privacy by the Constitution liberates it, as it were, from the uncertainties of statutory law which, as we have noted, is subject to the range of legislative annulments open to a majoritarian government.”

27. Thus, the options canvassed for limiting the right to privacy include an **Art. 14 type reasonableness enquiry**;⁴⁷ **limitation as per the express provisions of Art. 19**; a just, fair and reasonable basis (that is, substantive due process) for limitation per Art. 21; and finally, a

⁴¹ Section 2(1)(d), Protection of Human Rights Act, 1993.

⁴² *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684; See also, *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241.

⁴³ *Vishaka v State of Rajasthan*, (1997) 6 SCC 241.

⁴⁴ *Justice K.S. Puttaswamy (Retd.), and Anr. v. Union of India and Ors.*, AIR 2015 SC 3081.

⁴⁵ Moot Proposition, ¶ 24.

⁴⁶ *Justice K. S. Puttaswamy (Retd.), and Anr. v. Union of India and Ors.*, AIR 2015 SC 3081.

⁴⁷ *E.P. Royappa v. State of Tamil Nadu*, AIR 1974 SC 555.

just, fair and reasonable standard per Art. 21 plus the amorphous **standard of ‘compelling state interest’**. The last of these four options is the highest standard of scrutiny,⁴⁸ which a court can adopt. It is from this menu that a standard of review for limiting the right of privacy needs to be chosen.⁴⁹

[3.1.1] PEHCHAAN PROJECT OF THE GOVERNMENT IS NOT IN ACCORDANCE WITH THE
PROCEDURE ESTABLISHED BY LAW AS PER ART. 21 OF THE CONSTITUTION

28. Right to Privacy has been culled from Art. 21 of the Constitution of India,⁵⁰ as the concept of privacy overlaps with that of liberty.⁵¹ Right to Privacy is an integral part of Right to life and Personal Liberty,⁵² and it can be curtailed only in accordance with the “Procedure established by Law”, as provided under Art. 21 of the Constitution of India.⁵³

29. International Convention on Civil and Political Rights of which India is a signatory also provides that it is **duty of the state to protect the liberty of the people** and it can be restricted, only in accordance with such procedure as are established by law.⁵⁴

30. The SC in *Maneka Gandhi*,⁵⁵ has laid down a triple test for any law to be considered to be in accordance with the ‘Procedure established by law’: (1) The law must prescribe a procedure (2) the procedure must satisfy the requirements of Arts. 14 and 19 (3) And, it should be just, fair and reasonable.

31. The Pehchaan Act, 2014 enacted by the government which makes making of Pehchaan Cards mandatory for all schemes (benefit and non-benefit both), is not in accordance with procedure established by law, i.e., it is neither just, fair and reasonable nor does it satisfy the requirements of Art. 14, 19 and 21 of the Constitution and therefore it is arbitrary and unreasonable amounting to infringement of right to privacy as no such circumstances exist that justify the restrictions imposed by the government on the exercise of right to privacy of people.

⁴⁸ United States v. Carolene Products, 304 U.S. 144 (1938).

⁴⁹ Justice K.S. Puttaswamy (Retd.), and Anr. v. Union of India and Ors., AIR 2015 SC 3081.

⁵⁰ Mr. X v. Hospital Z, (1998) 8 SCC 296.

⁵¹ Gobind v. State of Madhya Pradesh, (1975) 2 SCC 148; See also, D.D. Basu Commentary on The Constitution of India, Vol. 3, 3138 (8th ed., Lexis Nexis Butterworth Wadhwa Publications, Nagpur, 2008).

⁵² Ramlila Maidan Incident v. Home Secretary, Union of India, (2012) 5 SCC 1.

⁵³ People’s Union for Civil Liberties v. Union of India, AIR 1991 SC 207.

⁵⁴ Art. 9, International Convention on Civil and Political Rights (Adopted by United Nations General Assembly on December 16, 1966).

⁵⁵ Maneka Gandhi v. Union of India, AIR 1978 SC 597.

[3.1.2] THE PEHCHAAN PROJECT OF THE GOVERNMENT IS IN VIOLATION OF ART. 19 OF THE
CONSTITUTION

32. It is humbly submitted before the Hon'ble Court that the Pehchaan project violates the Right to remain silent enunciated under Art. 19(1)(a) of the Constitution. The ambit of freedom of speech and expression provided under Art. 19(1)(a) of the Constitution is very wide.⁵⁶ **Right to remain silent is included within the definition of freedom of speech and expression** as has been recognized by the SC in the case of *Bijoe Emmanuel v. State of Kerala*.⁵⁷ The right includes by necessary implication, freedom not to listen and/or to remain silent.⁵⁸ Silence postulates a realm of privacy. The privacy of the individual recognises an inviolable right to determine how freedom shall be exercised. An individual may perceive that the best form of expression is to remain silent.⁵⁹ **An important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say.**⁶⁰ The right of freedom of thought as guaranteed by the Constitution against state action includes both right to speak freely and the right to refrain from speaking at all.⁶¹ As such every citizen is entitled to exercise the right except when restrictions are imposed on its exercise in accordance with Art. 19(2) of the Constitution.⁶²

33. In the present case, the Government has made Pehchaan Cards mandatory for seeking benefits under different social welfare schemes of the government and also for issuing PAN Cards, Driving Licence, Passports, Opening bank accounts, etc.⁶³ The state by making Pehchaan Cards mandatory for variety of schemes has compelled the citizens to part with their demographic and biometric information in clear violation of their right to remain silent. Further, there exists no reasonable ground to restrict the right to remain silent of the people.

⁵⁶ D. D. Basu Commentary on The Constitution of India, Vol. 2, 2078 (8th ed., Lexis Nexis Butterworth Wadhwa Publications, Nagpur, 2008).

⁵⁷ *Bijoe Emmanuel v. State of Kerala*, AIR 1987 SC 748; See also, *P.A. Jacob v. Superintendent of Police, Kottayam*, AIR 1993 Ker 1; *Maruti Shripati Dubal vs. State of Maharashtra*, (1986) 88 BOMLR 589.

⁵⁸ *Moulana Mufti Syed Md. Noorur v. State Of West Bengal and Ors.*, AIR 1999 Cal 15.

⁵⁹ *Justice K.S. Puttaswamy (Retd.), and Anr. v. Union of India and Ors.*, AIR 2015 SC 3081 ¶ 169.

⁶⁰ *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557 (1995).

⁶¹ *Bamette*, 319 U.S at 645 (Murphy J, concurring).

⁶² *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27; See also, *Collector of Malabar v. Erimal Ebrahim Hajee*, AIR 1957 SC 688.

⁶³ Moot Proposition, ¶ 14.

[3.1.2.1] RESTRICTION ON THE RIGHT TO REMAIN SILENT BY THE GOVERNMENT DOES NOT FALL
WITHIN THE AMBIT OF SECURITY OF STATE

34. In the present context, the HC has opined that the restriction on the Right to Speech falls within the ambit of Security of State provided under Art. 19, which does not hold true. The term “**security of state**” refers only to serious and **aggravated forms of public order e.g. rebellion, waging war against the State, insurrection** and not ordinary breaches of public order and public safety, e.g. unlawful assembly, riot, affray.⁶⁴ Thus speeches or expression on the part of an individual, which incite or encourage the commission of violent crimes, such as, murder are matters, which would undermine the security of State.⁶⁵ The present case does not fall under any of the criteria of the restrictions laid down above. On the contrary, the security of the citizens is hampered on the leakage of their personal data in the public.

35. Further, it has been observed by the Court in *People’s Union for Civil Liberties v. Union of India*,⁶⁶ that any restriction on fundamental right to personal liberty can be imposed, when there is grave danger to ‘public safety’ arising due to sudden circumstances. In the present case, though there are instances of terrorism and illegal immigrants, there has been no report of increase, or sudden threat. Even though, the respondent contends at elimination of these issues, through solving the problem of duplicity of identities, **the nexus between the restriction and public order, etc., is farfetched, then the restriction cannot be sustained** as being in the interests of public order or security of the state⁶⁷ and the same is not possible as instances of many fake Aadhaar cards which use the same biometric information have surfaced till date.⁶⁸

[3.1.3] THE PEHCHAAN PROJECT OF THE GOVERNMENT IS IN VIOLATION OF ART. 14 OF THE
CONSTITUTION

36. It is humbly submitted that Art. 14 provides for equality before the laws and equal protection of the laws. Two tests have been provided by the SC overtime, which any law passed by the government is required to satisfy, in order to fulfil the requirements of Art. 14

⁶⁴ Ranjit v. State of Maharashtra, AIR1965 SC 881.

⁶⁵ Express Newspapers (Private) Ltd. v. Union of India, (1959) 1 SCR 12; See also, State of Bihar v. Shaila Bala, AIR 1952 SC 329.

⁶⁶ People’s Union for Civil Liberties v. Union of India, (1997) 1 SCC 301.

⁶⁷ V.K Javali v. State of Mysore, AIR 1966 SC 1387.

⁶⁸ Omar Rashid, Fake Aadhaar card network busted in Kanpur, The Hindu September 11, 2017 available at <http://www.thehindu.com/news/national/uttar-pradesh-police-busts-fake-aadhaar-card-network/article19660140.ece> (Last visited on September 14, 2017).

of the Constitution, and the Pehchaan Project is unable to satisfy the requirements so laid down.

[3.1.3.1] TEST OF REASONABLE CLASSIFICATION

37. While Art. 14 allows reasonable classification for the purposes of legislation it **forbids any sort of class legislation.**⁶⁹ The test of reasonable classification was laid down by SC in *Budhan Chaudhary v. State of Bihar*,⁷⁰ which provides that: (1) the classification proposed in the legislation must be founded on intelligible differentia and that, (2) there must be close nexus between the classification and the object of the Act.

Principle of Intelligible Differentia

38. The expression intelligible differentia means difference capable of being understood and should be reasonable and not arbitrary.⁷¹ In the present case, the government seeks to profile and classify people based on educational qualification, religion, etc., which is arbitrary and unreasonable.

There should be Rational Nexus between Classification and Objective Sought

39. It is contended that the law can only make and set apart the classes according to the needs and exigencies of the society.⁷² **The legislative policy should be clear and definite and an effective method of carrying out that policy should be vested by the statute upon a body of administrators or officers to make selective application of the law to certain classes or groups of persons.**⁷³

40. In the present case, the government of Mandia seeks information relating to education, religion, etc. from the people for the purpose of making Pehchaan Cards which does not have any relation with the object of the Act, and therefore the classification is not only unreasonable but also promotes class legislation.

⁶⁹ *Budhan Chaudhary v. State of Bihar*, AIR 1955 SC 191; See also, *Ameronissa v. Mehboob*, AIR 1953 SC 71; *Kedar Nath Bajoria v. State of West Bengal*, AIR 1953 SC 404; *Vajravellu Mudaliar v. Special Deputy Collector for Land Acquisition*, AIR 1965 SC 1017.

⁷⁰ *Budhan Chaudhary v. State of Bihar*, AIR 1955 SC 191.

⁷¹ M.P. Jain, *Indian Constitutional Law*, 876 (7th ed., Lexis-Nexis Butterworth Wadhwa Publications, Nagpur, 2016).

⁷² *Suresh Kumar Koushal v. Naz Foundation* (2014) 1 SCC 1.

⁷³ M P Jain, *Indian Constitutional Law*, 917 (7th ed., Lexis-Nexis Butterworth Wadhwa Publications, Nagpur, 2016).

[3.1.3.1] Information sought from the people of Mandia for the of making Pehchaan Cards is unreasonable

41. Matters concerning family, motherhood and procreation are **intimate to one's person** and should not be subject to intervention by state.⁷⁴ Similarly, matters concerning education, communications and conversations, sexuality, marriage, procreation, individual beliefs, thoughts and emotions, political and other social groups, etc., are some of the private aspects of a person's life, included within the realm of right to privacy as recognized by the American jurisprudence.⁷⁵

In the present case, any of the details sought by the government for the purpose of making Pehchaan Cards like, number of spouses and children, laws under which marriage was solemnized, educational qualification, disorders like permanent infertility, religion to which both the spouses belong, are not only intimate to one's person, but also cannot be treated as a class of their own as these do not adequately differentiate between the so called class of people and the rest. And, the classification so done has no relation with the objective of the Pehchaan Act. The Pehchaan Act has been brought by the government to reduce corruption, strengthen the security of the state and to ensure successful implementation of welfare schemes. There is no nexus between the classification and the objectives of the Act; therefore, it fails the test of reasonable classification.

[3.1.3.2] TEST OF ARBITRARINESS

42. The Pehchaan Policy and the Pehchaan Act, 2014 of the government is arbitrary and unreasonable as there is no reasonable classification in place and the classification howsoever done has **no nexus with the objectives of the law brought by the government** of Mandia. The government asking for religion of the people for the purpose of making Pehchaan Cards is not only unreasonable but also in violation of Art. 25 of the Constitution of India.

43. Further, no proper guidelines have been laid in the Act for its implementation by the executive rendering it arbitrary⁷⁶ which is the antithesis of right to equality guaranteed to the people by the Constitution.⁷⁷

⁷⁴ Gobind v. State of Madhya Pradesh, (1975) 2 SCC 148; See also, Paris Adult Theatre I v Slaton, 413 US 49 (1973).

⁷⁵ Justice K.S. Puttaswamy (Retd.), and Anr. v. Union of India and Ors., AIR 2015 SC 3081, 163.

⁷⁶ Kathi Ranning Rawat v. State of Saurashtra, AIR 1952 SC 123; See also, Re Special Courts Bill Case, AIR 1978 SC 478; Kedar Nath Bajoria v. State of West Bengal, AIR 1953 SC 404.

⁷⁷ E.P. Royappa v. State of Tamil Nadu, AIR 1974 SC 555.

[3.1.3.2.1] *Disclosure of Religion*

44. Among other things the government of Mandia also asks for religion of the person for the purpose of making Pehchaan Cards, which is in violation of Art. 25 of the Constitution of India. **The word ‘religion’, as used in Art. 25 and 26 of the Constitution is personal to the person having faith and belief in the religion.** It is the personal belief of an individual in his relation with the maker or the cosmos⁷⁸ compelling the people to disclose their religion, would infringe their right to privacy. Further, Mandia is a secular state, and therefore, should not seek information as to religion of people for the purpose of making of Pehchaan Cards. The purpose of Pehchaan Cards is to provide for a national identification method, and it does not sit well with the concept of secularism enshrined in the Constitution⁷⁹ that people must be identified by their religion.

45. Furthermore, while caste, sex, place of birth and other factors have been accepted by the SC as relevant in determining social and economic backwardness as such factors pertain to a class of people, but such determination cannot be solely based on religion or other like factors and such would amount to discrimination which has been prohibited under Art. 15(1) of the Constitution of India.⁸⁰ Such discrimination will only promote communalism, which will be detrimental to the integrity of the country,⁸¹ which is goal of our Constitution which the government must strive to promote.

[3.1.4] PEHCHAAN PROJECT OF THE GOVERNMENT OF MANDIA IS NOT JUST, FAIR AND REASONABLE

46. The SC has held in *Maneka Gandhi’s Case*,⁸² that for any law to be valid, it must be in accordance with the procedure established by law, i.e., the law in addition to satisfying the requirements of Arts. 14 and 19, must also be in **conformity with the principles of Natural Justice** which includes, that it must be just, fair and reasonable. Whether a law is just, fair, and reasonable is to be determined by the facts and circumstances of the case.

47. In the present case, according to the respondent it is necessary to introduce Pehchaan Cards mandatorily for the people in the country to implement welfare schemes successfully,

⁷⁸ A. S. Narayan v. State of Andhra Pradesh, AIR 1996 SC 1765.

⁷⁹ Preamble, The Constitution of India, 1950.

⁸⁰ State of Andhra Pradesh v. P. Sagar, 1968 SCR (3) 565; See also, Triloki Nath v. State of Jammu and Kashmir, 1967 SCR (2) 265.

⁸¹ Preamble, The Constitution of India, 1950.

⁸² Maneka Gandhi v. Union of India, AIR 1978 SC 597.

to reduce corruption and to strengthen the security of Mandia, but the same could be done so, with other methods that do not restrict the fundamental right to privacy of the people to such extent. The laws brought by the government grossly violate the dignity of the people⁸³ by depriving them of their choice and keeping them under constant surveillance.

[3.1.4.1] PEHCHAAN PROJECT OF THE GOVERNMENT VIOLATES THE DIGNITY OF THE PEOPLE OF
MANDIA

48. Dignity is an integral part of the Constitution.⁸⁴ Reflections of dignity are found in the guarantee against arbitrariness,⁸⁵ the lamps of freedom⁸⁶ and in the right to life and personal liberty⁸⁷. **The right to privacy is an element of human dignity.**⁸⁸ Privacy ensures that a human being can lead a life of dignity by securing the inner recesses of the human personality from unwanted intrusion.⁸⁹ The term, 'life' in Art. 21 does not mean 'mere animal existence', rather right to live with dignity.⁹⁰ Therefore, **any violation of dignity of an individual is violation of right to life of the individual.**

49. In the present case, the respondent requires various demographic and biometric information which are intimate to one's personality, to be disclosed by the people for the purpose of making Pehchaan Cards. These involve questions relating to family, marriage, procreation and education are all integral to the dignity of the individual.⁹¹ Furthermore, requirement to part with biometric information is a violation of the privacy of the body of an individual, which is a part of the integrity of an individual, enabling him to realize his freedom of thought, belief and self-determination, which are essential components of the dignity of an individual, as has been observed by the SC in *K.S. Puttaswamy*.⁹²

⁸³ Art. 21, The Constitution of India, 1950.

⁸⁴ Francis Coralie v. Union Territory of Delhi, AIR 1981 SC 1746.

⁸⁵ Art. 14, The Constitution of India, 1950.

⁸⁶ Art. 19, The Constitution of India, 1950.

⁸⁷ Art. 21, The Constitution of India, 1950.

⁸⁸ Kesavananda Bharti v. State of Kerala, AIR 1973 SC 1461.

⁸⁹ Justice K.S. Puttaswamy (Retd.), and Anr. v. Union of India and Ors., AIR 2015 SC 3081.

⁹⁰ Kharak Singh v. State of U.P. and Ors., AIR 1963 SC 1295; See also, Francis Coralie v. Union Territory of Delhi, AIR 1981 SC 1746

⁹¹ Justice K.S. Puttaswamy (Retd.), and Anr. v. Union of India and Ors., AIR 2015 SC 3081, ¶ 169.

⁹² Justice K.S. Puttaswamy (Retd.), and Anr. v. Union of India and Ors., AIR 2015 SC 3081

50. Right to live as a human being is secured only when a human being is assured of all facilities to benefit himself,⁹³ which includes privacy. The government by depriving people of their privacy of mind and body is stripping them of their dignity.

[3.1.4.1.1] Deprivation of choice

51. The claim of the government of Mandia that Pehchaan is voluntary holds no ground as the government has made it necessary to have Pehchaan cards for various benefit and non-benefit schemes. So, if a person does not enrol for Pehchaan Card by disclosing the mandatory information he shall not be able to avail the benefits of various government schemes, which leaves the person with little to no choice but to get Pehchaan card.

52. The Preamble chapter on Fundamental Rights and Directive Principles accords **right to livelihood contained within the meaning of right to life as a meaningful life, social security and disablement benefits are integral schemes of socio-economic justice to the people.**⁹⁴ While, Pehchaan Cards have been made mandatory for non-benefit schemes like linking with gas and mobile connections,⁹⁵ it intends the same with benefit schemes, which will leave people bereft of choice while depriving their right to livelihood, thereby infringing right to life of the people.

53. **The ability of an individual to make choices lies at the core of the human personality.**⁹⁶ By depriving the people of Mandia of their ability to choose, the government of Mandia is severely infringing on the right to life of the people.

[3.1.4.1.2] Constant state surveillance

54. Liberty is among the core values of the Constitution of Mandia. Right to privacy which is an integral part of Right to life ensures **freedom from unwarranted state intervention.**⁹⁷ Usually, various data that is collected is stored across multiple sources, and data required for a particular purpose is being taken from individuals at one time. This leads to the creation of informational silos.⁹⁸ For example, the data required taking a gas connection shall be different from that of opening a bank account. But the Pehchaan project of the government,

⁹³ Chameli Singh v. State of U.P., (1996) 2 SCC 549.

⁹⁴ LIC of India v. Consumer Education and Research Centre, (1995) 5 SCC 482; See also, Olga Tellis v. Bombay Municipal Corporation, (1985) 3 SCC 545.

⁹⁵ Moot Proposition, ¶ 11.

⁹⁶ Justice K.S. Puttaswamy (Retd.), and Anr. v. Union of India and Ors., AIR 2015 SC 3081.

⁹⁷ Anna Jonsson Cornell, "Right To Privacy", Max Planck Encyclopedia of Comparative Constitutional Law (2015).

⁹⁸ Usha Ramanthan, A Unique Identity Bill, Vol. 45(30) Economic and Political Weekly, 10-14 (2010).

which aims to be used as a multipurpose identification system, all the data pertaining to an individual could be accessed at one time. This situation severely compromises with the individual's autonomy, which is a well enshrined concept in human rights philosophy by the great philosophers such as Emanuel Kant.⁹⁹ In other words, every decision made by a person in Mandia could be under state surveillance. This could potentially lead to the denial of, and access to, many important social opportunities and other facilities for a particular section of people, who could be discriminated against by the state, using the information gathered from the Pehchaan Project.¹⁰⁰

55. Such action is only justified in case where the person is accused of some offence, **otherwise regular surveillance of day to day transaction by government of general public is not just and fair** in any manner and constitutes a violation of right to life of the people.¹⁰¹ With regard to telephone tapping, the SC observed in *Kharak Singh*,¹⁰² that, while telephone interception of guilty person by the police through lawful means is justified in larger public interest, the same is not justified when an innocent citizen is involved and will amount to violation of right to privacy, of the person.

56. Further, the government has also provided that, if the Pehchaan card thus made is not linked with bank accounts, penal actions shall be taken,¹⁰³ which is not only unjust and unreasonable, but also limits severely the autonomy of the individual, who is left with no choice but to comply.

[3.1.4.2] THE RESTRICTIONS IMPOSED BY THE GOVERNMENT ON THE FUNDAMENTAL RIGHT OF PRIVACY OF THE PEOPLE IS NOT PROPORTIONAL TO OBJECTIVES OF THE ACT.

57. It is humbly submitted before this Hon'ble court that, the Principle of Proportionality envisages that a government ought to **maintain a sense of proportion between its particular goals and the measure it takes to achieve those goals**, so that its action impinges on the individual rights to the minimum extent so as to preserve public

⁹⁹ Immanuel Kant, *The Moral Law: Groundwork of the Metaphysic of Morals*, 42 (Herbert James Paton eds., Psychology Press, London, UK, 2005).

¹⁰⁰ Sheetal Asrani Dann, *The Right to Privacy in the Era of Smart Governance: Concerns Raised By the Introduction of Biometric-Enabled National ID Cards in India*, 47(1) *The Journal of India Law Institute*, 53-95, 67 (2005).

¹⁰¹ *Gobind v. State of Madhya Pradesh*, (1975)2 SCC 148; See also, *Kharak Singh v. State of U.P. and Ors.*, AIR 1963 SC 1295.

¹⁰² *Kharak Singh v. State of U.P. and Ors.*, AIR 1963 SC 1295.

¹⁰³ Moot Proposition, ¶ 15.

interest.¹⁰⁴The government requires the people to part with basic information about oneself, which is integral to one's personality, as well as core biometric information, which could have as well been handled through other methods, given the facts and circumstances. For instance, the highly successful SSN Programme of the U.S government involves issuing of SSN cards to the residents which does not require disclosure of basic details like, marriage, infertility disorder, educational qualification *inter alia*, nor does it require parting with biometric information; and yet the programme has been successful so far in providing welfare entitlements to the needy.¹⁰⁵

[3.1.4.2.1] *Narrow Tailoring Test*

58. The counsel further submits that, the measures taken by the government were not the least restrictive measures, The *compelling state interest*¹⁰⁶ of the government i.e. to fulfil the objectives through collection of personal information should undergo great scrutiny that is one right should not suffer from another that is there must be a balance should be stricken between public right and individual right and the **measures so taken should be tailored in a manner that infringes the right in narrowest manner** i.e. it should satisfy *narrow tailoring test*¹⁰⁷ to achieve its goals with minimal interception.¹⁰⁸

[3.3] CONFLICT BETWEEN FUNDAMENTAL RIGHTS AND DIRECTIVE PRINCIPLES OF STATE

POLICY

59. As per the respondent the main aim of the Pehchaan project is to prevent corruption and to ensure welfare entitlements provided by the government adequately reach the needy. The Pehchaan Policy and the Pehchaan Act, 2014 has been brought to give effect to Directive Principles of State Policy. Though, Directive Principles of State Policy are important in

¹⁰⁴ Ajoy P.B., Administrative Action and the Doctrine of Proportionality in India, Vol. 1(6) International Organization of Scientific Research Journal of Humanities and Social Science, 16-23 (2012) available at www.iosrjournals.org; See also, M.R.F Ltd. v. Inspector of Kerala Govt., (1998) 8 SCC 227.

¹⁰⁵ R. RamaKumar, Aadhaar: on a platform of Myths, The Hindu November 12, 2016 available at <http://www.thehindu.com/opinion/lead/Aadhaar-on-a-platform-of-myths/article13673159.ece> (Last visited on September 17, 2017).

¹⁰⁶ Gobind v. State of Madhya Pradesh, (1975) 2 SCC 148; See also, Metro Broadcasting, Inc. v. Federal Communications Commission, 497 U.S. 547 (1990).

¹⁰⁷ Grutter v. Bollinger, 539 U.S. 306 (2003).

¹⁰⁸ Gautam Bhatia, "State Surveillance and the Right to Privacy in India: A Constitutional Biography", Vol. 26(2) National Law School of India Review, 148 (2014).

realizing the goals of the Constitution, the same should not override the fundamental rights guaranteed to the people.¹⁰⁹

60. Art. 37 of the Constitution of India provides that though directive principles are fundamental in governance of the country, they are expressly made non-justiciable. On the other hand, **fundamental rights are enforceable by the Courts**,¹¹⁰ and the courts are bound to declare as void any law that is inconsistent with the fundamental rights. **The Directive Principles has to conform and run as a subsidiary to the chapter on fundamental rights** and in case of any conflict between fundamental rights and directive principles, fundamental rights would prevail.¹¹¹

61. The Constitution is founded on the bedrock of the balance between Part III and Part IV,¹¹² but one should not be given absolute primacy over the other. The goals set out in the Part IV have to be achieved without the abrogation of the means provided for by Part III. **To destroy the guarantees given by Part III in order to achieve the goals of Part IV is plainly to subvert the Constitution.**¹¹³ Therefore, it is the responsibility of the government to come up with a scheme which adequately preserves the fundamental rights of the people.

62. Moreover, many identity card schemes based on biometric information have failed across the globe. In India itself, Aadhaar Card scheme has failed to show any success, while the risks involved are several.¹¹⁴

[4]. THAT THE GOVERNMENT HAS NOT TAKEN ADEQUATE MEASURES TO SECURE THE DATA COLLECTED FOR THE PURPOSE OF MAKING PEHCHAAN CARDS

63. The Pehchaan Project of the government of Mandia is devoid of adequate security measures to guarantee the security of data collected for the purpose of making Pehchaan Cards. The respondent is yet to bring substantive law for the protection of data.¹¹⁵ Though, there are penal provisions for offences relating to data leakage in the Pehchaan Act, but there

¹⁰⁹ R K Dalmia v. Justice Tendulkar, AIR 1958 SC 538.

¹¹⁰ Art. 32, The Constitution of India, 1950.

¹¹¹ State of Madras v. Champakam Dorairajan, AIR 1951 SC 228.

¹¹² Granville Austin, Cornerstone of a Nation (Indian Constitution) 75 Oxford India (1999).

¹¹³ Minerva Mills v. Union of India, AIR 1980 SC 1789.

¹¹⁴ Jean Dreze, Aadhaar Coup, The Hindu March 15, 2016 available at <http://www.thehindu.com/opinion/lead/jean-dreze-on-aadhaar-mass-surveillance-data-collection/article8352912.ece> (Last Visited on September 12, 2017).

¹¹⁵ Moot Proposition, ¶ 23.

are no security measures in place to ensure the protection of data; thereby, giving rise to grave violation of the privacy of the people as the large database of the Pehchaan Project remains largely unprotected.

[4.1] LACK OF SECURITY MEASURES TO PREVENT LEAKAGE OF DATA

64. It is contended in this regard that mere presence of a full chapter on data protection and penalties for leakage,¹¹⁶ is not enough, to further such data protection; in the present case even an IIT graduate could hack into the data base,¹¹⁷ which would compel any prudent individual to think how prepared such security measures are, to face real time cyber threats. Also, the principle of *res ipsa loquitur* tells that “*the thing speaks for itself*” i.e., the contention of the government that they will bring a substantive law for the protection of data is in itself tells that the present law to protect data is not sufficient.¹¹⁸

[4.1.1] PREVALENCE OF IDENTITY THEFT

65. Scheme of Pehchaan Cards brought by the government is susceptible to identity theft. There have been many instances in several countries of information being stolen from the government database of national identification programmes and recreation of such information by illegal means. For instance, in Turkey, Personal details i.e. First and last names, National identifier numbers Gender, City of birth, Date of birth, Full address, ID registration city, district etc. of nearly fifty Million Turkish citizens, including the country’s President Recep Tayyip Erdogan, have been compromised and posted online in a massive security breach which is supposed to be the biggest public breaches of its kind, effectively putting two-thirds of the Nation's population at risk of identity theft and fraud.¹¹⁹

[4.1.2] DE- DUPLICATION OF IDENTITIES

66. There is consensus among scientists and legal experts regarding the limitations of biometrics in proving identity. **No accurate information exists on whether the errors of**

¹¹⁶ Moot Proposition, ¶ 12.

¹¹⁷ Moot Proposition, ¶ 19.

¹¹⁸ Moot Proposition, ¶ 23.

¹¹⁹ Robert Tait, Personal details of 50 million Turkish citizens leaked online, The Telegraph April 4, 2016 available at <http://www.telegraph.co.uk/news/2016/04/04/personal-details-of-50-million-turkish-citizens-leaked-online-ha/> (Last visited on August 31, 2017).

matching fingerprints are negligible or non-existent. A small percentage of users would always be either falsely matched or not matched at all against the database.¹²⁰

[4.2] THERE ARE NO ADEQUATE SAFEGUARDS AGAINST MISUSE OF PEHCHAAN DATABASE

67. Chapter VI and Chapter VII of the Aadhaar Act, 2016 deal with Protection of data and offences and penalties for breach of any such data. The National Unique Identification Authority is required to adopt and implement appropriate technical and organisational security measures to ensure that the information in the possession or control of the Authority is secured and protected against **access, use or disclosure not permitted under this Act** or regulations made thereunder, and against accidental or intentional destruction, loss or damage.¹²¹ But, there is **no provision of security against misuse by the government itself.** And, there is a possibility that such information could be misused by government which is communalist in nature, as the Act lacks in adequate safeguards which the Pehchaan Act lacks in. For instance, in the Rwandan genocide it was by using identity cards that the demarcation of the Tutsis and Hutus could be done.¹²²

[4.3] DELEGATION OF AUTHORITY TO PRIVATE ENTITIES AND PRIVATE VENDORS

68. Furthermore, the enrolling agencies are the private entities who further outsource the work to private vendors in each district and block in Mandia which means the data being collected reaches first in the hands of the private vendors, which makes the data even more vulnerable to misuse and leakage, which is a grave threat of a citizen's privacy.¹²³ Furthermore, **while the National Identification Authority which is established by statute is obliged to maintain adequate security measures, the same does not go for private vendors,** which raises doubts as to the protection of data, which can act as a gateway for identity theft.¹²⁴

¹²⁰ R. Rama Kumar, Aadhaar: on a platform of Myths, The Hindu November 12, 2016 *available at* <http://www.thehindu.com/opinion/lead/Aadhaar-on-a-platform-of-myths/article13673159.ece> (Last visited on September 17, 2017).

¹²¹ Section 28(2), Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016.

¹²² Anonymous, History, Human Rights Watch *available at* <https://www.hrw.org/reports/1999/rwanda/Geno1-3-09.htm> (Last visited on September 14, 2017).

¹²³ Moot Proposition, ¶ 5.

¹²⁴ Combating Identity Theft: A Strategic Plan, The President's Identity Theft Task Force, 1-72, 56 *available at* <https://www.ftc.gov/sites/default/files/documents/reports/combating-identity-theft-strategic-plan/strategicplan.pdf> (Last Visited on September 26, 2017).

PRAYER FOR RELIEF

Wherefore in light of the issues raised, arguments advanced, and authorities cited, it is prayed that this Hon'ble SC may be pleased to **hold that**:

1. the Special Leave Petition is maintainable.
2. the Hon'ble High Court of Nelhi err in rejecting the Public Interest Litigation against the Pehchaan policy.
3. the 'Pehchaan Policy and The Pehchaan Act, 2014' brought by the government of Mandia is unconstitutional and violates fundamental rights of the people of Mandia.

And Pass any other Order, Direction, or Relief that it may deem fit in the Best Interests of Justice, Fairness, Equity and Good Conscience.

For This Act of Kindness, the Shall Forever Pray.

Sd/-

(Counsel for the Petitioner)