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STATE SURVEILLANCE IN INDIA: A CONSTITUTIONAL TEST OF PRIVACY, POWER, AND PROPORTIONALITY

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“Arguing that you don't care about the right to privacy because you have nothing to hide is no different than saying you don't care about free speech because you have nothing to say.” —

Edward Snowden

INTRODUCTION

Privacy is one of the most highly discussed constitutional issue in the country in the electronic era. Nowadays governments have advanced technologies they have never had before that enables them to monitor everything, from telephony and social media to internet usage, even movement and biometrics. India has been challenged by the increasing surveillance technology under the guise of maintaining public order and security, with serious legal concerns regarding the limits of state authority and individual freedom.

The State might be able to deter and prevent terrorism, cybercrime and attacks on their security if it does its job in monitoring, but without limitations, monitoring can also be abused of power. The key issue is not if but whether, surveillance is conducted within constitutional limits. The rule of law is the guiding principle of a democratic system, and in such a system a State's power should not be unlimited. In particular, the Indian Constitution requires that any limitation upon freedom must meet the testes of legality, necessity and proportionality.

However, with the landmark verdict in Justice K.S. Puttaswamy v. Union of India¹, the issue of surveillance gained even greater importance due to the Supreme Court's inclusion of Right to Privacy as a Fundamental Right guaranteed by Article 21 of the Indian Constitution.

¹ Justice K.S. Puttaswamy v. Union of India, (2017) 10 S.C.C. 1

UNDERSTANDING PRIVACY AND SURVEILLANCE

The concept of privacy is generally seen as the “right to be let alone.” It has been defined as the right of every person to control his or her own information and to prevent unnecessary intrusion into his or her private information. Privacy is not explicitly mentioned in the Constitution as a Fundamental Right, but the concept of privacy is prevalent in India for centuries. One of the values ancient Indian texts and traditions instilled in humans is respecting their personal autonomy and their right to privacy.

Surveillance by the state means using spyware, facial recognition and CCTV, going through internet traffic and telephones and tapping them. It is not only for the sake of public security and national security that such mechanisms are legitimate, but because they can also lead to too much government control over lives of its citizens.

The risk with surveillance is that it goes unnoticed. They may not even be aware that their data is being collected, stored and analyzed. It cannot be seen and one of the most important instruments in the hands of the modern State is surveillance.

EVOLUTION OF THE RIGHT TO PRIVACY IN INDIA

In India, the evolution of privacy has been progressive and judgemade. In the beginning, Indian courts did not consider privacy to be a constitutional right. In *M.P. Sharma v. Satish Chandra*², the Supreme Court stated that there was no explicit mention of the right to privacy in the constitution. Likewise, in *Kharak Singh v. State of Uttar Pradesh*³, the Court did not accord the protection of a Fundamental Right to privacy and Justice Subba Rao in his dissent noted that privacy was a core component of personal liberty.

As time passed, judicial minds changed their way of thinking. In *Govind v. State of Madhya Pradesh*⁴, the Court held that the freedoms under Part III of the Constitution can give rise to privacy too. The Supreme Court explicitly acknowledged the people's “right to be let alone” later in the case of *R. Rajagopal v. State of Tamil Nadu*⁵.

Finally, the status of constitutionalism was resolved in *K.S. Puttaswamy's case versus the Union of India*. The 9-member bench unanimously observed that privacy is an integral part of human dignity, autonomy and liberty. The court also laid down a new constitutional bar:

² *M.P. Sharma v. Satish Chandra*, A.I.R. 1954 S.C. 300

³ *Kharak Singh v. State of Uttar Pradesh*, A.I.R. 1963 S.C. 1295

⁴ *Govind v. State of Madhya Pradesh*, (1975) 2 S.C.C. 148

⁵ *R. Rajagopal v. State of Tamil Nadu*, (1994) 6 S.C.C. 632

Restrictions on privacy can only be supported by law, serve a legitimate State interest and comply with the principle of proportionality.

SURVEILLANCE LAWS AND CONSTITUTIONAL CONCERNS

The primary laws relating to surveillance in India are the Security Laws which are largely enforced under the Indian Telegraph Act⁶ and the Information Technology Act⁷. Phone tapping can be allowed under Section 5(2) of the Telegraph Act and interception and monitoring of electronic communication is allowed under Section 69 of the IT Act.

The difficulty is that these laws give a great deal of authority to the executive, which is not have considerable independent control. In the case of *People's Union for Civil Liberties v. Union of India*⁸, the Supreme Court recognised that the conscription and assessment of telephone tapping violates privacy and gave guidelines on the proper procedure to be followed to defend against any such arbitrary acts of police surveillance. However, issues of transparency and accountability remain.

The issue became more poignant when it came to Pegasus spy software. Journalists, activists, lawyers and politicians were reported as victims of spyware. Pegasus may have been able to listen to the user's conversations, videos, and microphones, without them knowing it. This kind of surveillance inflicts fear on people, deter them from exercising their freedom of expression as guaranteed by Article 19(1)(a)⁹ of the Universal Declaration of Human Rights and Citizenship, and impacts on their democratic participation.

The use of such mass surveillance also gives rise to concerns under Article 14 due to the possible arbitrary nature of the use of the executive powers without any restriction. If the surveillance is not monitored by a judge or there is no proper procedure to safeguard the constitutional value of rule of law is at stake.

PROPORTIONALITY: THE CONSTITUTIONAL TEST

The principle of proportionality has emerged as the core principle in the Constitution when it comes to curbing over-intrusive surveillance. Justice K.S. Puttaswamy in his famous judgement in *Puttaswamy v Union India* has held that the State has the burden of demonstrating

⁶ Indian Telegraph Act, No. 13 of 1885, § 5(2), India Code (1885)

⁷ Information Technology Act, No. 21 of 2000, § 69, India Code (2000)

⁸ *People's Union for Civil Liberties v. Union of India*, (1997) 1 S.C.C. 301

⁹ The Constitution of India

the necessity and proportionality of surveillance measures when it aims to achieve a specific end.

If a state's aim is national security then the state cannot take the step of being unrestrained or arbitrary. There should be a rational relationship between the "surveillance mechanism" and the purpose; and of course, the State should employ the least restrictive mechanism possible.

However, India has no legislated data protection laws and limits the discussions on the topic to two committees. In India, however, there are concerns on the lack of comprehensive data protection laws, the lack of Parliamentary oversight and the centralisation of surveillance powers in the Executive. Having independent review mechanisms is important as the potential for misuse cannot be ruled out.

CONCLUSION

One of the most challenging constitutional issues in the digital age is subject matter of state surveillance. Of course there is a valid role for the government to keep national security and public order, but in order for democratic governance, there must be limits in its governance. Privacy is a matter of preference, but is also closely related to dignity, autonomy and freedom.

A democratic state should allow them to be protected, but shouldn't make all citizens its subjects of constant scrutiny. We see that the essence of a constitutional democracy is the careful balancing of State power and liberty, and not unlimited State power. The emerging technology based environment in India calls for the preservation of the important constitutional principles of privacy, accountability and proportionality in the governance.