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Law, Privacy and Data Governance in the Digital Era

(AN EDITED BOOK EXPLORING THE INTERSECTIONS OF JURISPRUDENCE, TECHNOLOGY, AND POLICY)

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Dr. Ashraf Azmi

Dr. Tulika Singh

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CHAPTER - 11

Mass Surveillance and the Constitutional Right to Privacy

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Abstract

The chapter examines the constitutional legitimacy of mass surveillance programmes in the digital era through the lens of the right to privacy as a fundamental right. Studying the landmark Indian Supreme Court decision in Justice K.S. Puttaswamy v. Union of India (2017), as well as European Court of Human Rights jurisprudence and Court of Justice of the European Union decisions such as Digital Rights Ireland, this chapter argues that while the state possesses a legitimate security interest, mass or bulk surveillance can only survive constitutional scrutiny if it strictly satisfies the three-level Doctrine of Proportionality: legality, legitimate aim, and proportionality *stricto sensu*. The chapter further examines how the collection of communications data generates a chilling effect on the fundamental rights of free speech and association. It concludes by proposing a Privacy-by-Design legislative framework that could reconcile the imperatives of national security with the inviolable constitutional core of human dignity.

Keywords: Mass Surveillance; Right to Privacy; Doctrine of Proportionality; Puttaswamy; Digital Personal Data Protection Act, 2023; Privacy-by-Design.

I. INTRODUCTION

In 1890, Samuel Warren and Louis Brandeis said that the right “to be let alone” is the most comprehensive of rights and the right most valued by civilised men.¹ The two lawyers were concerned with the gossip columns of instantaneous photographs even before the age of CCTV cameras or artificial intelligence-assisted facial recognition. Were they writing today, the existential threat to the right of one’s privacy would be of an entirely different extent of magnitude.

The state has acquired an unprecedented capacity to observe, record, and analyse the daily lives of its citizens because of sophisticated instruments of modern surveillance technology like bulk interception cables, real-time facial recognition, geo-location tracking and social media data. The question that arises is not whether the state can do surveillance or not at all as that much is already conceded. The real and pressing question is that how far may it go and on whose authority?

In India, this question was answered by a nine-judge constitutional bench of the Supreme Court in *Justice K.S. Puttaswamy (Retd.) v. Union of India*,² which unanimously held that the right to privacy is a fundamental right protected under Article 21³ and the broader scheme of Part III of the Constitution. However, the judgment did not place privacy beyond the reach of state regulation. It established that any state intrusion into privacy must satisfy a three-pronged test. Firstly, the action must have a legal basis. Secondly, it must serve a legitimate aim and thirdly, the means deployed must be proportionate to that aim. This chapter takes that

¹Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 195 (1890).

²*Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1 [hereinafter *Puttaswamy*].

³CONST. OF INDIA, art. 21.