

The Judicial Role in the Surveillance State

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In their article,¹ Vrinda Bhandari and Karan Lahiri suggest that *KS Puttaswamy v Union of India*² (*Puttaswamy*) and *KS Puttaswamy v Union of India (II)*³ (*Aadhaar*) offer a possible judicial toolkit for challenging the exclusive executive control over surveillance authorisation and the default rule in admitting evidence obtained in breach of privacy rights in India. Throughout their article, Bhandari and Lahiri argue for courts to play a stronger role in supervising state surveillance powers and for the adoption of a perspective that emphasizes the importance of individual liberties. The article fuses doctrinal and theoretical analyses in a way that is informed by both practical and academic perspectives, as well as brings in comparative jurisprudence to shed light on Indian jurisprudence. Its arguments are rigorous, insightful, and elegantly presented. This short commentary will not be able to do justice to the richness of their article; I seek only to make four points in supplementation of or in response to the main arguments.

1. *Legality Requirement*

My first point relates to the legality requirement. This requirement has the potential to be an effective tool for fostering accountability and transparency in surveillance cases, which may seem banal but is worth pointing out because this requirement has received relatively little academic attention, especially as compared to that given to, say, the proportionality test. As developed by the European Court of Human Rights (ECtHR), the legality test provides for at least three limits in the surveillance context. First, restraints on rights must have a basis in

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¹ Vrinda Bhandari and Karan Lahiri, 'The Surveillance State, Privacy and Criminal Investigation in India: Possible Futures in a Post-*Puttaswamy* World' (2020) 3(2) U of OxHRHJ 15.

² (2017) 10 SCC 1.

³ (2019) 10 SCC 1.

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domestic law. Second, the law specifying the restraint must have the quality of law; that is, the law must be accessible and formulated with sufficient precision to enable citizens to reasonably foresee when surveillance may occur. Third, the law must be adequate and must provide checks against abuses of power—a requirement that is akin to the ‘procedural safeguards’ in the *Puttaswamy* framework.⁴ These demands of legality have proved to be particularly pertinent in an age of surveillance, where the State often assumes vague and wide discretionary powers and operates clandestinely. A landmark judgment in Hong Kong demonstrates these three limits at work. In *Leung Kwok Hung v Chief Executive of HKSAR*,⁵ the Hong Kong Court of First Instance held that a scheme for the interception of communications was unconstitutional because the legal provision on which the government relied for the exercise of that power was too broad to be able to adequately regulate that power, and that there was otherwise a lack of legal regulatory framework to constrain that power.⁶ This case is but one of many that demonstrates that the legality test could be a potent tool in limiting what the authors described as ‘widely worded’ powers for surveillance in Indian law.⁷

2. *The Bilchitz Formula*

My second point relates to the proportionality framework ushered in by *Aadhaar*. The Supreme Court adopted David Bilchitz’s formulation⁸ of the framework, which replaces the ‘least injurious means’ enquiry (which asks whether there are other measures that could achieve the same aim equally effectively but intrude upon rights less) at the third stage of the proportionality test with an enquiry that balances the marginal costs and benefits of the various alternatives (borrowing from Tom Hickman’s terminology, I will call the latter enquiry ‘relative balancing’).⁹ This, I argue,

⁴ The ECtHR’s jurisprudence on this point likely inspired the Indian inception of the requirement on procedural safeguards. See Bhandari and Lahiri (n 1) 24. For the legality requirement in ECtHR jurisprudence, see e.g. *Kopp v. Switzerland* [1998] ECHR 18 [55]; *MM v United Kingdom* [2012] ECHR 1906 [195]; His Honour Judge Mark Lucraft, QC (ed), *Archbold: Criminal Pleading, Evidence and Practice 2020* (Sweet & Maxwell 2019) Chapter 16, [146].

⁵ [2006] HKCFI 123. This judgment was confirmed on appeal.

⁶ *ibid* [116]-[132].

⁷ Bhandari and Lahiri (n 1) 17.

⁸ David Bilchitz, ‘Necessity and Proportionality: Towards a Balanced Approach?’ in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart 2014) 41.

⁹ Hickman used the terminology of ‘relative proportionality’ to describe such an enquiry. See Tom Hickman, ‘The Substance and Structure of Proportionality’ (2008) Public Law 694, 712.

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is a wrong turn. Whilst the Bilchitz formula provides ideas for refining the least injurious means test, it need not and should not be adopted in full.

The imperatives for adopting the Bilchitz formula are four-fold. I am unconvinced by all four. I believe that the first imperative is unsound, the second and third need not be addressed through the full adoption of the Bilchitz formula, and the fourth cannot be addressed by it. The first imperative says that if courts require the government to adopt the least injurious means test, they will be overstepping the proper boundaries of their power, usurping the role of law and policy-makers.¹⁰ However, given the importance of constitutional rights, if there are measures that are less intrusive—and there may be more than one measure that is equally non-intrusive of a right in question—it is unclear why the government should not be required to adopt them, and why it would be illegitimate for courts, as guardians of rights, to require the government to adopt them.

The second imperative says that in many cases it will not be difficult to think of alternatives that are less intrusive: a health warning on tobacco packaging that is 1 mm smaller than the required dimensions, a curfew on terrorist suspects that is one minute shorter than that of the chosen duration, or a residency requirement for welfare benefits that is one day shorter.¹¹ If the least injurious means test is adhered to, it will sometimes be impossible for the government to defend even justified measures.¹²

The third imperative is the reverse of the second: if the alternatives must be equally effective in attaining the aim, then it will be very difficult to find true alternatives.¹³ These are valid concerns, but they need not be tackled through adopting the Bilchitz formula in a wholesale manner. The concerns can be alleviated by lowering the level of preciseness at which the legal standard aims. Rather than ask that alternatives be equally effective, courts could instead require that they be more or less equally effective, or, according to McLachlin CJ, they achieve the goal in a ‘real and substantial manner’ (a formulation that Bilchitz adopts).¹⁴ Similarly, in exploring alternatives that are less intrusive, courts could rule out alternatives whose reductions in intrusiveness are negligible. The ECtHR and courts in Canada, Hong Kong, and the UK seem generally to have applied the least injurious means test with this element of sense and judgment, as

¹⁰ Bilchitz (n 8) 45.

¹¹ For an analysis of such situations of Sorites paradoxes, see Julian Rivers, ‘The Presumption of Proportionality’ (2014) 77(3) *Modern Law Review* 409, 429; Bilchitz (n 8) 45.

¹² Bilchitz (n 8) 44.

¹³ *ibid* 49-51.

¹⁴ *Alberta v Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567 [55], discussed in Bilchitz (n 8) 54-5.

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exemplified in the formula of ‘reasonable necessity’ that they sometimes apply.¹⁵

The fourth imperative relates to the difficulties of proof on the part of the government. It is often difficult for the government to prove with great certainty that the means used is the least injurious.¹⁶ Again, this is a valid concern, but it will not abate even with the adoption of the Bilchitz formula: the government will still face similar problems of proof in conducting relative balancing. The more suitable juridical tool for dealing with this problem is that of judicial deference, a theme to which I will return. Given that the level of epistemic uncertainty faced by the government varies across context, an approach that adjusts the epistemic standards (manifested in, say, the burden or standard of proof¹⁷) required of the government according to context would be a more appropriate response than diluting the legal test itself across the board.

Moreover, there are reasons of principle for distinguishing the legal test (for example, the proportionality formula) from the epistemic standards required of the government. The former reflects the standard of good governance with which the government is expected to comply. That the government may be unable to demonstrate that, or that the courts may not be in a position to assess whether such standard has been achieved, should not be a reason to lower the standard itself. The epistemic standards, however, represent the thresholds according to which the government is expected to prove, and the courts to assess, the fulfilment of a legal test in a particular case. These thresholds should be adjusted by the government’s and the courts’ abilities to prove and assess, respectively, the realisation of a legal test in a given case.¹⁸

The full adoption of the Bilchitz formula is not only unnecessary but is in fact undesirable for the protection of rights. It is important to discern what is lost and gained by adopting this formula. According to Bilchitz’s formula (a similar formula of which had previously been suggested by Hickman¹⁹), courts should conduct relative balancing at the third stage of the proportionality test, before proceeding to conduct, at the fourth stage, balancing of the chosen measure’s overall harm to the right and benefits

¹⁵ I reserve my views here on whether the ‘reasonable necessity’ formulation is a good one.

¹⁶ See Bilchitz (n 8) 46-49.

¹⁷ Cora Chan, ‘A Preliminary Framework for Measuring Deference in Rights Reasoning’ (2016) 14(4) *International Journal of Constitutional Law* 851.

¹⁸ See Mark Elliott, ‘From Bifurcation to Calibration: Twin-Track Deference and the Culture of Justification’ in Hanna Wilberg and Mark Elliott (eds), *The Scope and Intensity of Substantive Review* (Hart 2015) 76-81; Ernest Lim and Cora Chan, ‘Problems with Wednesbury Unreasonableness in Contract Law: Lessons from Public Law’ (2019) 135 *Law Quarterly Review* 88, 108-09.

¹⁹ Hickman (n 9).

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to society (borrowing from Hickman’s terminology, I will call the latter type of balancing ‘overall balancing’²⁰). This gives rise to two problems. First, according to this, a measure will not be struck down simply because a less intrusive alternative can be found. However, if constitutional rights are to be given the importance they deserve, why should the government not be required to adopt the least restrictive means? Second, the fourth stage of the proportionality test will become superfluous if relative balancing is conducted at the third stage. To comprehend this, we must understand that a proper interpretation of the fourth stage requires relative balancing. The costs and benefits of a chosen measure, which are weighed at the fourth stage, ought to be considered in light of the alternatives to the measure, and there are always alternatives available for comparison purposes; even if there is no other solution to a problem, there would still be an alternative for comparison purposes—it would simply be the adoption of the status quo. In other words, as Aharon Barak argues, the fourth stage, properly understood, *is* a test of relative balancing.²¹ This means that the Bilchitz formula removes the protection to rights offered by the least injurious means test, and replaces it with a test that is already a requirement of the fourth stage, properly understood.

Bhandari and Lahiri’s analysis of the alternatives to exclusive executive supervision over surveillance authorisation offers a perfect illustration of what is lost with the adoption of Bilchitz’s formula. They argue (rightly) that a scheme of judicial supervision would be able to achieve the aim to a substantial degree and would be less intrusive to constitutional rights.²² Under the least injurious means test, the government’s framework would be struck down once this less intrusive means is identified. There would be no need to conduct any balancing, be it relative or overall. Under Bilchitz’s formula, however, courts must conduct both relative and overall balancing before deciding whether the government’s framework is constitutional. In addition, the example also shows the redundancy of the fourth stage, properly understood. If courts have already conducted relative balancing at the third stage, there would be no need to conduct it again at the fourth.

²⁰ Hickman used the terminology of ‘overall proportionality’ to describe such type of balancing. See Hickman (n 9) 711-12.

²¹ Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (CUP 2012) 352-57.

²² Bhandari and Lahiri (n 1) 30-1.

3. Use of Evidence Obtained in Violation of Privacy Rights

My third point relates to the authors’ suggestion to introduce an exclusionary rule against evidence obtained in violation of privacy rights. The authors are certainly correct that the current default rule in favour of admissibility gives privacy rights too little protection. Yet, one cannot rule out situations where the imperative for admissibility is extremely strong. Hence, an absolute bar against admission would also be inappropriate. The authors’ position that courts should restore the status quo ante to enforce the right to privacy is by no means uncontroversial. Remedies in judicial review are discretionary for good reason. The court must take into account the impact on other rights and on the public interest in deciding whether and how to rectify illegal or unconstitutional government decisions. The approach in the UK and Hong Kong is one of balancing—the court will admit evidence obtained in breach of privacy rights if the considerations for admission outweigh those against. The Hong Kong Court of Final Appeal laid down a test for guiding the balancing exercise:²³ evidence can be admitted if admission ‘(i) is conducive to a fair trial, (ii) is reconcilable with the respect due to the right or rights concerned (iii) appears unlikely to encourage any future breaches of that, those or other rights.’²⁴ The factors to be considered in applying this test and the weight given to them will vary with context.²⁵ A balancing approach is sensible, although it does not guarantee that privacy rights will be given the weight they deserve. My tentative suggestion is to structure the balancing exercise with the four-stage proportionality framework, and to ensure a built-in bias in favour of the enforcement of privacy rights in two ways. First, an insistence that the burden of demonstrating that the admission of evidence is proportionate is vested with the government (so, effectively, the default position is non-admissibility). Second, ample weight should be given to the fact that the constitutional right to privacy has been infringed and an acknowledgement that every admission of evidence obtained in breach of such right will inevitably encourage further breaches of this or other rights, hence impeding the growth of a rights culture. The express recognition of the harms of surveillance²⁶ by the court in *Puttaswamy* and the *Aadhaar* judgment paves the way for a rigorous proportionality analysis that gives due weight to privacy and other rights impacted by surveillance.

²³ I understand this test as a structure that guides, rather than as a substitute of, the balancing approach.

²⁴ *HKSAR v Muhammad Riaz Khan* (2012) 15 HKCFAR 232 [20]. See also *HKSAR v Chan Kau Tai* [2006] 1 HKLRD 400.

²⁵ *HKSAR* (n 24) [20].

²⁶ Bhandari and Lahiri (n 1)19-22

4. *A Proper Approach to Deference*

Finally, I wish to highlight the risks of an overdose of judicial deference. Adopting the doctrinal tools that *Puttaswamy* and *Aadhaar* offer would, indeed, as the authors argue, lay the foundation for the courts acting as a counterweight to the executive’s potent powers of surveillance. However, no matter how demanding a doctrinal test is, if courts are unwilling to apply it with due rigour, its potential to check abuses cannot be fully realised. Indeed, courts that have developed robust doctrinal tests to check State powers have sometimes deferred in a wholesale manner in applying those tests on grounds of secrecy, security, and sensitivity—themes that recur in surveillance cases. Bilchitz is right when he highlights the danger of deference weakening the ‘supposedly strict protection’ that proportionality could offer.²⁷ However, contrary to Bilchitz’s view, I do not think that this risk is a reason to abandon the juridical tool of deference, which is a suitable response to epistemic uncertainty.²⁸ Rather, what is needed is a clearer and more nuanced approach to deference that allows courts to fulfil their responsibility to check against abuses of power while taking into account the epistemic abilities of the government and the courts.

5. *Conclusion*

Bhandari and Lahiri’s article reminds us of the threats to privacy and other rights posed by State surveillance as well as the court’s potential to curb such threats—reminders that are more timely than ever as State surveillance becomes more pervasive in a technological age. The authors’ central message that a re-orientation in judicial mentality from adopting the public order perspective to adopting the liberty perspective is needed²⁹ speaks not only to India, but also to other jurisdictions where demanding doctrinal tests have been well established for surveillance cases but whose application has at times been less rigorous than it should have been. Such

²⁷ Bilchitz (n 8) 48.

²⁸ I offer a more elaborate defence of this argument elsewhere. See Cora Chan, ‘Deference, Expertise and Information-Gathering Powers’ (2013) 33(4) *Legal Studies* 598. See also Murray Hunt, ‘Sovereignty’s Blight: Why Public Law Needs “Due Deference”’ in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart 2003) 337; Aileen Kavanagh, ‘Defending Deference in Public Law and Constitutional Theory’ (2010) 126 *Law Quarterly Review* 222; Alison Young, ‘In Defence of Due Deference’ (2009) 72(4) *Modern Law Review* 554; Jeff King, *Judging Social Rights* (CUP 2012) Part II; Julian Rivers, ‘Proportionality and Variable Intensity of Review’ (2006) *Cambridge Law Journal* 174.

²⁹ Bhandari and Lahiri (n 1)

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re-orientation would require, *inter alia*, a recognition that the courts' responsibility to check abuses of power is heightened in a context where secrecy reigns.