

**“BAD CHARACTERS, HISTORY SHEETERS, BUDDING
GOONDAS AND ROWDIES”:
POLICE SURVEILLANCE FILES AND INTELLIGENCE
DATABASES IN INDIA**

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Maintenance of surveillance records and databases is a common practice in India as well as in the U.S. In this paper, the author presents an Indian perspective on the issues raised in Prof. Jacob's piece in Vol. 22(1) of this journal on the same matter in the American context. The author shows how this practice has been in place in India since colonial times and is discriminatory in nature. This paper then analyses the manner in which the records are kept, and how they are used by courts. It also examines the constitutionality of the practice and the implications of continued maintenance of surveillance and arrest records.

I.	INTRODUCTION	134
II.	ARREST DATABASES: THE LONG ARM OF COLONIAL LAW	135
	A. The 'Criminal Tribes'	136
	B. 'Goondas'	139
	C. The 'Bad Characters,' 'Suspicious' Individuals and Suspects	141
III.	IMPACT OF ARREST RECORDS ON SUBSEQUENT ARRESTS, BAIL AND SENTENCING	144
	A. Arrest and Bail	145
	B. Sentencing	147

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IV.	THE INDIAN SUPREME COURT AND ITS JURISPRUDENCE ON SURVEILLANCE	148
A.	<i>The Supreme Court on Surveillance</i>	149
B.	<i>Surveillance and the Constitution: Looking beyond constitutional challenges before the Supreme Court</i>	150
V.	LOOKING AHEAD: THE NATIONAL GRID, CRIME AND CRIMINAL TRACKING NETWORK SYSTEM AND THE UNIQUE ID PROJECT: THE FUTURE OF SURVEILLANCE RECORDS AND THEIR IMPLICATIONS	157
A.	<i>The Unique Identification (UID) project:</i>	158
B.	<i>NATGRID and CCTNS</i>	160

I. INTRODUCTION

In his article, *The Jurisprudence of Police Intelligence Files and Arrest*,¹ Prof. James Jacobs discusses the creation by U.S. law enforcement agencies of criminal and quasi-criminal records for individuals who were detained but ultimately never convicted of any offence. He examines the manner in which people are put on various intelligence and investigative databases and points out that these databases are used not only for subsequent arrests, but also in prosecutorial and judicial decision making. He writes that it has been argued that information in databases of arrest records is not meant to inflict punishment, but to increase the likelihood of solving crimes and to efficiently process criminal cases. He also discusses how the United States Supreme Court has held that the presumption of innocence is an evidentiary standard and argues that it would be a blatant violation of the presumption, if guilt is presumed on the basis of a prior arrest. After analysing reasons for arrests not leading to convictions, Prof. Jacobs makes a case for sealing intelligence records, prohibiting non-criminal justice entities from obtaining and/or using such information, and prohibiting employment discrimination based on information contained in these records.

I was asked by the editors of NLSIR to provide an Indian perspective on the issues raised in Prof. Jacobs' piece. While many issues are not strictly *pari materia*, I believe there are enough points of similarity between the U.S. and Indian practices to warrant such an engagement. Accordingly, in this paper, I will show how, since colonial times, the Indian police have been maintaining

¹ James B. Jacobs, *The Jurisprudence of Police Intelligence Files and Arrest Records*, 22(1) NAT. L. SCH. IND. REV. 135 (2010).

databases of individuals who need to be kept under constant surveillance. These databases are much broader in nature than arrest records. They contain information regarding individuals who the police believe could “disturb the peace in society” and are “likely to commit crimes.” There are no objective criteria (like an arrest) for placing a person on these databases. I will show in this paper how the issues that arise in India are different from those that arise in the U.S. context, yet are as discriminatory. I begin in Part II by looking at the nature of police records maintained in colonial India and those currently maintained by the Indian police; in Part III, I will analyse if, and how, arrest and surveillance records are used by the police and courts; in Part IV, I will examine the constitutionality of maintaining and using surveillance and arrest records; and in Part V, I will examine the implications of continued maintenance of surveillance and arrest records, especially in the context of the Government of India’s plans to maintain databases such as the National Intelligence Grid (NATGRID) and the Crime and Criminal Tracking Network System (CCTNS).

II. ARREST DATABASES: THE LONG ARM OF COLONIAL LAW

There is a common perception about the Indian police that they are unprofessional, unsystematic, and that their performance is largely deficient.² One would not expect a police force which was set up and still works under the archaic Indian Police Act of 1861 to maintain and share information through databases. However, as various cases decided by the Indian Supreme Court involving individuals put on police surveillance lists (“history sheets”) show, this is by no means an unknown practice.³ In this part of the paper, I will examine different types of such databases maintained by the Indian police in colonial India, highlighting how the practice has continued post-independence and post enactment of the Constitution. I will focus on three categories of persons over whom the police in colonial times kept a constant watch: first, the so-called “criminal tribes”; secondly, the so-called *goondas* and thirdly, the so called “bad characters.” I will show how these three categories of persons still continue to be

² See, *Prakash Singh v. Union of India*, (2006) 8 SCC 1, 10–11 (Supreme Court of India). In ¶¶ 17–19 of the judgment, the Supreme Court refers to a letter written by the Union Home Minister to the State Governments, where he speaks about the public’s perception of the Indian police.

³ These cases are discussed in detail in Part IV of the paper.

under constant surveillance by the police and highlight the legal issues that come with such surveillance. To illustrate current practice, I will rely on the Karnataka Police Manual.⁴

A. *The 'Criminal Tribes'*

One of the earliest pieces of legislations enacted by the British in India was the Criminal Tribes Act of 1871. Sumanta Banerjee points out that this was just two years after the Habitual Criminal Act was enacted in England, which had the positivist school of criminology as its normative basis.⁵ This school believed that people were genetically pre-disposed to committing crimes. Its main proponent, Cesare Lombroso based his assessment of people's criminality, *inter alia*, by looking at their physical features.⁶ This approach was used in England, as well as in continental Europe to classify certain groups of people, like gypsies, as being genetically criminal and habitually addicted to crime.⁷ The same theory was applied in India, where the British drew up a list of certain Indian communities and branded them as "criminal tribes."⁸ These tribes were identified on the basis of their occupations at that point of time, as well as their past customs and ancestry. The ideology behind the Act can be seen in the statement of T.V. Stephens, a member of the Viceroy's council, who, while introducing it, stated that the only way to prevent these people from committing crimes would be to exterminate them.⁹

Birinder Pal Singh documents the manner in which the "criminal tribes"

⁴ Article 246(3) of the Constitution of India, read with Entry 2, List II, Schedule VII to the Constitution of India, empowers the States to legislate in matters relating to the police. Consequently, States have their own Police Acts, under which rules are formulated for the day-to-day running of the police. These rules are generally found in the Police Manuals of the individual states. See, COMMONWEALTH HUMAN RIGHTS INITIATIVE, POLICE ORGANISATION IN INDIA 8 (2008). The Karnataka Police Manual gets its legal basis from § 163 of the Karnataka Police Act, 1963 (Karnataka Act 4 of 1964).

⁵ SUMANTA BANERJEE, THE WICKED CITY: CRIME AND PUNISHMENT IN COLONIAL CALCUTTA 13 (2009).

⁶ See generally, Cesare Lombroso, CRIMINAL MAN (Mary Gibson & Nicole Hahn Rafter trans., 2006).

⁷ BANERJEE, *supra*, n. 5, at 13, 16.

⁸ For a description of the procedure to notify a tribe as a "criminal tribe," see, Andrew J. Major, *State and Criminal Tribes in Colonial Punjab*, 33(3) MOD. ASIAN STUD. 657, 668 (July 1999).

⁹ BANERJEE, *supra*, n. 5, at 14.

¹⁰ BIRINDER PAL SINGH, 'CRIMINAL' TRIBES OF PUNJAB: A SOCIAL-ANTHROPOLOGICAL INQUIRY xiv-xv (2010).

were treated in Punjab.¹⁰ He points out how most of them were nomadic groups and did not fit into the “civilized” mould that the colonial rulers were familiar with.¹¹ To stop their nomadic practices, they were forced to stay in certain settlements, given identity cards which they had to mandatorily carry with them at all times, give a roll call thrice daily and inform the police before they moved out of their settlements. Even when they moved out, they had to give the police details of where they were going and the purpose for which they were going there.¹² Consequently, individuals who belonged to these tribes were under constant surveillance even if they had never committed an offence. The law was amended in 1911 to include measures like taking fingerprints and methodologically registering these communities.¹³ Census records of Punjab indicate the magnitude of the exercise that the British were carrying out. In 1891, there were 10,229 men from eight tribes who were registered as “criminal tribes.” By 1901, the adult population from amongst nine tribes so registered was recorded at 49,061 individuals. In 1912, the number of males registered had risen to 21,215 (from sixteen tribes) and the total number of individuals registered is estimated to have been 63,645.¹⁴

As is evident, the Criminal Tribes Act was a racist and a highly discriminatory piece of legislation. This was anathema in a constitutional democracy. With the Constitution of India coming into force, it was but natural that the Act ought to have been immediately repealed. However, it was only in 1952 that the Act was repealed and the tribes were “de-notified.” Singh points out how these “de-notified” tribes still celebrate August 31, 1952 as their date of independence, rather than August 15, 1947.¹⁵

The repeal of this legislation did not however make any difference to the manner in which these communities were treated by the police. Constant surveillance and persecution continued. Susan Abraham tells the story of Jalan, a woman whose husband was regularly picked up and beaten by the police and who was stripped of her *saree* because she did not have a cash memo.¹⁶ Dilip D’Souza points out how *pardhis* (a de-notified tribe) are routinely picked up by the

¹¹ *Id.* at xiv.

¹² SINGH, *supra*, n. 10, at xv.

¹³ SINGH, *supra*, n. 10, at xv.

¹⁴ MAJOR, *supra*, n. 8, at 670–71.

¹⁵ SINGH, *supra*, n. 10, at xvii.

¹⁶ Susan Abraham, *Steal or I'll call you a Thief: 'Criminal' Tribes of India*, 34(27) ECON.& POL. WKLY. 1751, 1751 (1999).

¹⁷ Dilip D'Souza, *De-Notified Tribes: Still 'Criminal?'* 34(51) ECON.& POL. WKLY. 3577, 3578 (1999).

police every time there is a crime in the area and are beaten up in the police station.¹⁷ He discusses the case of Pinya Hari Kale, who was picked up by the police and beaten to the death in the police station. Kale's wife told the Bombay High Court, how she was not perturbed when he did not return home that night, because she expected him, as always, to be detained for the night and then released.¹⁸ Viswanathan records various instances of police brutality against the "de-notified" tribes in Tamil Nadu, including custodial torture and sexual abuse.¹⁹

I have personally heard stories of persecution as well. In early 2008, I was invited to a "public hearing" in Bhopal, where the members of the *Pardhi* community were narrating the Superintendent of Police of Bhopal stories of their exploitation at the hands of the local police. The group, which consisted mostly of women and children, narrated stories of how the police suspected them in every theft that took place in the area and picked their husbands up if they purchased fresh fish for their family on the suspicion that since they were extremely poor, the fish must have either been stolen or purchased from stolen money; they were beaten up even if they walked around a *respectable* colony, on the ground that they must be loitering around to steal something. When as part of their rag-picking activities, they found an item of any value, they were often detained by the police under the belief that they must have stolen the item. Instead of condemning such action, the police officers present at the meeting justified it saying that the *pardhis* had a reputation for committing crimes and that the "local community" demanded that the police take action against them. The police, in turn, advised the *pardhis* to change their habits, and mend their criminal ways. The attitude of the police was not surprising, given the pervasive nature of stereotyping of the community. For instance, in 1998, the Chief Minister of Madhya Pradesh had described the *pardhis* as "*ethnically criminal*."²⁰ He had lamented how even education had not had any impact on their "*criminal instincts*."²¹

The prevalence of such stereotyping is not limited to Madhya Pradesh. Another instance of this can be found in Rule 1054 (3) of the Karnataka Police Manual, which states: "*History Sheets should be opened for those registered ex-notified tribe members...for whom the Superintendent or Sub-Divisional Officer thinks it is advisable to*

¹⁸ *Id.*

¹⁹ S.Viswanathan, *Suspects Forever*, 19(12) FRONTLINE (June 8-21, 2002), available at <http://www.hinduonnet.com/fline/fl1912/19120450.htm>.

²⁰ D'SOUZA, *supra*, n. 17, at 3577.

²¹ D'SOUZA, *supra*, n. 17, at 3577.

²² Karnataka Police Manual, Rule 1054(3).

do so on account of their active criminality.”²² This is a separate category in the database, distinct from records based on past arrests, suspicion, convictions, etc. It is therefore abundantly clear that surveillance and persecution of the de-notified tribes is still a reality.

Thus, the “*taint of inherent criminality*” continues to shape the interaction of these tribes with the state apparatus, including the police. This was also taken note of by the Delhi High Court in the *Naz Foundation* case, where it noted that the “...*attachment of criminality to the hijra community still continue[d]*” after the repealing of the Criminal Tribes Act.²³ The United Nations Committee on the Elimination of Racial Discrimination, expressing its concern in 2007, noted that tribes which were listed under the Criminal Tribes Act were still being stigmatized in India using the Habitual Offenders Act, 1952 (sic).²⁴ It recommended to India that it partly repeal the Habitual Offenders Act (sic) to ensure that these tribes were removed from the list under that Act (sic).²⁵ The National Human Rights Commission (NHRC) had in its annual report of 1999-2000 also taken note of atrocities against the “de-notified” and nomadic tribes and had made various recommendations to tackle this issue.²⁶

B. ‘Goondas’

Another group of individuals that also faced constant surveillance at the hands of the colonial police were the so-called *goondas*. The word *goonda* is reported to have been first used in the Bengal Goonda Act of 1926, where a *goonda* was defined to include a “hooligan or other rough.”²⁷ The Act required the police to maintain files of *goondas* in their jurisdictions. These *goondas* included people with

²³ *Naz Foundation v. State* (NCT of Delhi), 2010 Cri. L.J. 94 (Del.) [¶ 50] (Delhi High Court).

²⁴ Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties: Concluding observations of the Committee on the Elimination of Racial Discrimination*, ¶ 11, U.N. Doc. CERD/C/IND/CO/19 (2007).

²⁵ *Id.* It is pertinent to note that there is no Habitual Offender Act of 1952. After the ‘Criminal Tribes’ Act was repealed in 1952, various states enacted legislations to deal with ‘habitual offenders.’ Most of these legislations require three convictions over a period of five years, for a person to be designated as a ‘habitual offender.’ See, for instance, the Karnataka Habitual Offenders Act 1961; the Kerala Habitual Offenders Act 1960; the Goa, Daman and Diu Habitual Offenders Act 1976. Since in this paper, I am focussing on individuals who have not been convicted earlier, I will not be discussing these legislations.

²⁶ NATIONAL HUMAN RIGHTS COMMISSION (INDIA), ANNUAL REPORT 1999-2000, Chap X, available at http://nhrc.nic.in/ar99_00.htm#X.

²⁷ Lancelot Graham, *British India*, 16(3) J. COMP. LEGIS. & INT’L L. 131, 138 (1934).

prior convictions, people suspected of committing offences, and also included political activists.²⁸ Other states had Goonda Acts as well, which empowered the executive to extern *goondas* by following a quasi-judicial procedure, with nearly no due process protections.²⁹ Dilip Basu argues that the British attempted to portray an image of a *goonda* as an invisible and peripheral entity, who was expendable, undesirable and not worth protecting.³⁰ Suranjan Das argues, importantly from the point of view of this paper, that the same perception continues with the police in present-day India.³¹ Interestingly, the Preventive Detention Act of 1950, in its initial years, was predominantly used to detain *goondas* and other “bad characters.”³²

If we were to look at current practice, the Karnataka Police Manual provides for maintaining a confidential “Register of Rowdies.”³³ Rule 1059(1) states: “[A]rowdy may be defined as a *goonda* and includes a *hooligan*, *rough*, *vagabond* or any person who is dangerous to the public peace or tranquillity.”³⁴ The latter portion of the definition is vague enough to include within its scope a wide variety of individuals. The Manual also provides for including in the Register, names of “*novices*, who are budding *goondas*.”³⁵ The *safeguard* provided is that the Superintendent of Police or the Sub-Divisional Officer needs to approve the entry of the name of a person into this “Register of Rowdies.” The Manual also states that if a person has a “very bad reputation” as a bully, that person’s name may be included in the Register after a thorough enquiry.³⁶ Once a person’s name has been included in the Register, it provides for maintaining a “running history” of that person and his/her activities.³⁷ The Manual also requires police officers at the station to check on a daily basis whether the entries as regards a *rowdy* in the Station House Diary have also been entered in the “Register of Rowdies.” It also mandates sharing of information between police stations

²⁸ Suranjan Das, *The Goondas: Towards a Reconstruction of the Calcutta Underworld through Police Records*, 29(44) ECON. & POL. WKLY. 2877, 2877 (1994).

²⁹ Taylor C. Sherman, STATE VIOLENCE AND PUNISHMENT IN INDIA 87 (2010).

³⁰ DAS, *supra*, n. 28, at 2882 n. 7.

³¹ DAS, *supra*, n. 28, at 2877.

³² See, David H. Bayley, *The Indian Experience with Preventive Detention*, 35(2) PAC. AFF. 99, 108 (1962).

³³ Karnataka Police Manual, Rule 1059(3).

³⁴ Karnataka Police Manual, Rule 1059(1).

³⁵ Karnataka Police Manual, Rule 1059(4)(c).

³⁶ Karnataka Police Manual, Rule 1059(7).

³⁷ Karnataka Police Manual, Rule 1059 (8).

regarding "non-resident rowdies" or "resident rowdies"³⁸ entering into their respective jurisdictions.³⁹ In terms of surveillance, the Manual states that the Station House Officer should show recent photographs of *rowdies* to his/her subordinate officers every day during roll call, and instruct them to watch their movements and record information about them.⁴⁰

C. THE 'BAD CHARACTERS,' 'SUSPICIOUS' INDIVIDUALS AND SUSPECTS.

The third category of persons who were kept under surveillance by the British were the 'bad characters.' A glimpse of this can be seen in a fascinating account by Das and Chattopadhyay, of the manner in which police records were compiled and used in colonial India. They rely on Village Crime Note Books, maintained by the police station in Gazole in Malda District of West Bengal between 1900 and 1971.⁴¹ They point out how police maintained lists of people they termed "*bad characters*," and profiled people according to their appearance.⁴² The "*bad characters*" did not have to be convicted to make their way into the police list. Mere suspicion or apprehension that the individual would commit a crime or be an inconvenience to the police was sufficient to warrant an entry. Every stereotype that the British had sought to reinforce about people being born criminal was put to practice in making the list. "*bad characters*" were described as people with dark complexion, "*strong built, broad chins, deep-set eyes, broad forehead, short hair, scanty or goatee beard, marks on face, moustache, blunt nose, white teeth and monkey-face.*"⁴³ Footprints were also taken in some cases. People from the family of a convicted person automatically found themselves on the list. Individuals on these lists were kept under surveillance to ensure that they did not commit crimes.⁴⁴ We see some of this stereotyping continuing in present-day police practices as well.

³⁸ The classification of "Resident" and "Non Resident" rowdy, as the terms indicate, depends on whether the "rowdy" is resident within the jurisdiction of the police station. There is also a category for "homeless rowdies."

³⁹ Karnataka Police Manual, Rule 1059(11).

⁴⁰ Karnataka Police Manual, Rule 1059(17).

⁴¹ Surjan Das & Basudeb Chattopadhyay, *Rural Crime in Police Perception: A Study of Village Crime Note Books*, 26(3) ECON.& POL. WKLY. 129, 129 (1991).

⁴² *Id.* at 133.

⁴³ *Id.* at 133.

⁴⁴ *Id.* at 133.

The Karnataka Police Manual calls for the maintenance of a "Village Crime Register," in which the police station is required to maintain a list of all individuals against whom there is a suspicion of their having committed an offence.⁴⁵ A serial number is allotted to that person and if he/she moves from one village to another, the corresponding police station is required to be informed about the fact that the person has moved into its jurisdiction.⁴⁶ The police station is also required to maintain records of suspects as well as suspicious individuals visiting the village.⁴⁷ The Manual reiterates the need to maintain records of unconvicted persons against whom "reasonable suspicion" exists.⁴⁸ It provides a safeguard in this case stating that the permission of a superior police officer needs to be taken before adding a person's name to this list. It also states that the name should be retained on the list only till "reasonable suspicion" exists.⁴⁹ In contrast, in cases of convicted persons, whose names also find place in this "history list," the Manual states that their names should be removed ten years from the expiry of their last sentence. This can be done even earlier if a "superior police officer" authorises it.⁵⁰

In terms of surveillance, the Manual states that whenever anyone from the police station visits the village, police officers should "enquire about" these persons.⁵¹ This should be done atleast once every quarter.⁵² Rule 1052(1) of the Manual states that the "History Sheet" should contain the names of all persons permanently or temporarily resident within the limits of the police station "*who are known or are believe to be addicted to or aid or abet, the commission of crime,*"⁵³ irrespective of whether they have been convicted or not.⁵⁴ "Habitual receivers" also find themselves in this list. The Manual does not specify what "addiction to commission of crime" means. The language is disturbingly similar to police records maintained of "criminal tribes" by police in colonial India. It also provides for classification of a person as a "professional criminal."⁵⁵ Rule 1062 (1) states that if a first offender belongs to a family of criminals, he/she should automatically be designated as a "professional criminal."

⁴⁵ Karnataka Police Manual, Rule 1036.

⁴⁶ *Id.*

⁴⁷ Karnataka Police Manual, Rule 1037.

⁴⁸ Karnataka Police Manual, Rule 1045.

⁴⁹ *Id.*

⁵⁰ Karnataka Police Manual, Rule 1049(3).

⁵¹ Karnataka Police Manual, Rule 1049(4).

⁵² *Id.*

⁵³ Emphasis mine.

⁵⁴ Karnataka Police Manual, Rule 1052(1).

⁵⁵ Karnataka Police Manual, Rule 1062.

“Bad Characters, History Sheeters, Budding Goondas and Rowdies”

Rule 1052(2) is as interesting. It says that entries should be made by the Police Inspector or any officer subordinate to him/her as regards the activities of “close watch bad-characters” and “non-close watch bad-characters.” If anything of interest comes up with respect to these “bad characters,” a note is required to be immediately made in the “History Sheet.”⁵⁶ Rule 1063(4) states that on opening a “history sheet” for a “bad character” for the first time, he/she should be designated as a “close-watch bad-character.”⁵⁷

The Manual also has a separate section devoted to suspects. It defines suspects *inter alia* as people who have not been convicted of a crime, but are believed to be *addicted* to crime.⁵⁸ Two safeguards are provided: *first*, that “history sheets” for such persons can only be opened at the discretion of the Superintendent of Police,⁵⁹ and *secondly*, such sheets should be opened only for those individuals who are likely to turn into habitual criminals and hence need to be watched.⁶⁰ It however states that the fact that a “history sheet” has been opened for a suspect other than an ordinary criminal should be kept confidential.⁶¹

Surveillance and maintenance of “history sheets” does not end if a person shifts from one state to another. The Manual states that if a “history sheeted bad character” moves from one state to another, information about that person should be sent to the Superintendent of the Police of the district to which that person has moved to.⁶² There is also provision for a mutual exchange of information between states as well.⁶³

Hence, as is evident, the police maintain a complex web of records on people, based completely on suspicion. Though this does not appear to be computerised yet,⁶⁴ there are manual systems already in place for the exchange of information between stations across the district, state and even across the country.

⁵⁶ Karnataka Police Manual, Rule 1052(2).

⁵⁷ Karnataka Police Manual, Rule 1063(4).

⁵⁸ Karnataka Police Manual, Rule 1058(1)(b).

⁵⁹ Karnataka Police Manual, Rule 1058(1).

⁶⁰ Karnataka Police Manual, Rule 1058(2).

⁶¹ Karnataka Police Manual, Rule 1058(3).

⁶² Karnataka Police Manual, Rule 1061(1).

⁶³ Karnataka Police Manual, Rule 1061(2).

⁶⁴ The Crime and Criminal Network Tracking System (CCTNS) aims to computerise these records to facilitate sharing of data. *See, infra* Part V, for a discussion on this.

What is the implication of being on one of these databases? As is evident from the Karnataka Police Manual, a person who is on one of these surveillance lists is constantly under supervision. In addition to privacy concerns that it raises, this type of profiling often leads to selective application of laws against these individuals. Studies in the United States with respect to racial profiling have clearly exhibited this trend.⁶⁵ Similar concerns have been brought before the Indian Supreme Court. For instance in *Malak Singh*,⁶⁶ the petitioner complained that after being put on a surveillance list he was considered a suspect in every case being investigated by the police in that area. As I have discussed earlier, such selective application of criminal laws is also a constant reality in the interaction of “de-notified” tribes and the police. Hence, just on the basis of suspicion, which is sometimes based on the person’s socio-economic status and caste, a person is presumed guilty by the police and no due process rights are provided in the entry and removal of one’s name from the database. Most of these cases never reach court and the person continues to be marked out and he remains under surveillance for the rest of his/her life.

It appears that independence from the British made no difference to the working of the Indian police, at least with respect to maintenance of surveillance databases. They continue to work under the Indian Police Act of 1861, the mandate of which appears to have been to create and run an Orwellian state to further colonial interests.⁶⁷ The same surveillance based system appears to be continuing in India, despite the coming into force of the Constitution of India in 1950.

III. IMPACT OF ARREST RECORDS ON SUBSEQUENT ARRESTS, BAIL AND SENTENCING

After having looked at the types of surveillance databases that exist and are used regularly by the police, in this part I will examine whether, and if so how, surveillance and arrest records impact subsequent arrests, bail and sentencing decisions.

⁶⁵ See, Angela J. Davis, *Benign Neglect of Racism in the Criminal Justice System*, 94 MICH.L.REV. 1660 (1996); Samuel R. Gross & Debra Livingston, *Racial Profiling under Attack*, 102 COLUM. L. REV. 1413 (2002); Amber A. Hawk, *The Dangers of Racial Profiling*, 2 LAW & SOC’Y REV. 35 (2002–03); Al Baker & Ray Rivera, *Thousands of Street Stops by New York Police were Legally Unjustified, a Study Finds*, N. Y. TIMES, October 27, 2010, at A22.

⁶⁶ *Malak Singh v. State of Punjab*, AIR 1981 SC 760 (Supreme Court of India).

⁶⁷ COMMONWEALTH HUMAN RIGHTS INITIATIVE, FEUDAL FORCES: DEMOCRATIC NATIONS 6 (2007).

A. Arrest and Bail

Does the existence of a database of arrest records or the “history sheet” impact a person’s subsequent interaction with the criminal justice system? This is an important issue that needs consideration. As per the existing legal provision for arrest,⁶⁸ a police officer can arrest a person without warrant if a reasonable complaint has been made or credible information exists as regards his/her having committed a cognizable offence. Though this provision is widely worded, it has been strictly interpreted to confine its use to specific situations.⁶⁹ The more draconian provisions, which are generally used against “history sheeters” are contained in Chapter VIII of the (Indian) Code of Criminal Procedure-1973 [hereinafter “Cr.P.C.”].⁷⁰

Various provisions in Chapter VIII empower executive magistrates to require a person to show cause why he/she should not be ordered to execute a bond with or without sureties, to ensure that he/she does not indulge in certain activities. *First*, s. 107 of the Cr.P.C empowers the magistrate to seek execution of a bond for “keeping the peace.” The magistrate may do so on receiving information that the person is likely to commit a breach of peace or disturb the public tranquillity or that the person is likely to do any wrongful act that may probably occasion a breach of peace or disturb the public tranquillity. *Secondly*, s. 109 and 110 authorise magistrates to seek execution of bonds for good behaviour. This can be done if the magistrate receives information that a person within the jurisdiction is taking precautions to conceal his/her presence and that there is reason to believe that the person is doing so with a view to committing a cognizable offence.⁷¹ Such action can also be taken if the magistrate receives information that a person within his/her jurisdiction is a habitual offender or is “so desperate and dangerous as to render his being at large without security, hazardous to the community.”⁷² This being a question of fact, the Cr.P.C. states that it may be proved by evidence of “general repute or otherwise.”⁷³ The Cr.P.C. also provides for an inquiry to be conducted to determine the truth of the information received by the magistrate.⁷⁴ This inquiry

⁶⁸ ss. 41(a)-(b), Code of Criminal Procedure 1973.

⁶⁹ *Joginder Kumar v. State of U.P.*, (1994) 4 SCC 260 (Supreme Court of India), *D.K.Basu v. State of West Bengal*, (1997) 11 SCC 416 (Supreme Court of India)

⁷⁰ Chapter VIII of the Code of Criminal Procedure, 1973 (2 of 1974), deals with “Security for keeping the peace and for good behaviour.”

⁷¹ s. 109, Code of Criminal Procedure 1973.

⁷² s. 110(g), Code of Criminal Procedure 1973.

⁷³ s. 116(4), Code of Criminal Procedure 1973.

⁷⁴ s. 116(2), Code of Criminal Procedure 1973.

has to be completed within six months. However, the person can be detained pending inquiry and up to a maximum of six months.⁷⁵ If after the inquiry, a determination is made that the person ought to give security, and the person fails to give such security, he/she may be detained for a maximum period of three years.⁷⁶

Hence, though prior arrest and/or surveillance records might strictly not be of relevance in arresting a person, they become crucial when preventive detention is the issue.⁷⁷ It is clear from the broad wording of Chapter VIII of the Cr.P.C. that the determination of whether a person will breach public tranquillity is completely fact-based. With the law expressly stating that general repute is relevant, surveillance records become important in arriving at a conclusion of whether the person is “dangerous” or not. An individual designated as a “bad character,” *goonda* or *rowdy* is more likely to come within the purview of Chapter VIII. This is also borne out through regular reports of the rounding up and detaining of “anti-social elements” by the police before elections, festivals and important political events.⁷⁸ It is also pertinent to note that there is no question of granting bail to such individuals, since these situations are not covered by the bail laws.

When it does come to bail in other situations, one of the relevant factors that a court has to consider is whether the person is likely to re-offend when out on bail.⁷⁹ To be able to arrive at a conclusion on this issue, the antecedents of the person are considered.⁸⁰ If a person has a prior record of arrest, it can be used as

⁷⁵ s. 116(6), Code of Criminal Procedure 1973.

⁷⁶ ss. 122(2)-(3), Code of Criminal Procedure 1973.

⁷⁷ For the manner in which preventive detention is used as a tool to detain “goondas,” see, R. Rajaram, *Preventive Detention, A Regular Feature*, THE HINDU, May 20, 2006, available at <http://www.hindu.com/2006/05/20/stories/2006052023010300.htm>.

⁷⁸ See, for instance *Cops Tightening Noose around Anti Social Elements*, THE TIMES OF INDIA, October 7, 2010, available at <http://timesofindia.indiatimes.com/city/varanasi/Cops-tightening-noose-around-anti-social-elements/articleshow/6708884.cms>; *Ban Orders to Maintain Peace*, THE HINDU, September 30, 2010, available at <http://www.hindu.com/2010/09/30/stories/2010093059080300.htm>; *8000 anti-socials arrested ahead of Ayodhya verdict*, THE HINDUSTAN TIMES, September 27, 2010, available at <http://www.hindustantimes.com/8-000-anti-socials-arrested-ahead-of-Ayodhya-verdict/Article1-605286.aspx>; R. Rajaram, *Efforts Pay off: Criminals fall into City Police Dragnet*, THE HINDU, September 4, 2010, available at <http://www.hindu.com/2010/09/04/stories/2010090461360300.htm>.

⁷⁹ See, for instance, *Gudikanti Narasimhalu v. State of Andhra Pradesh*, AIR 1978 SC 429 (Supreme Court of India).

⁸⁰ *Gudikanti Narasimhalu v. State of Andhra Pradesh*, AIR 1978 SC 429, 433 (Supreme Court of India).

a ground to oppose bail. However, whether a court will accept prior arrests as indication that the person will re-offend when released on bail will depend on the facts and circumstances of each case.

B. Sentencing

The Cr.P.C. clearly demarcates the trial into two parts – the guilt determination phase and the sentencing phase. The previous “bad character” of a person is not relevant in the guilt determination phase in a criminal proceeding unless the person leads evidence to show that he/she is of “good character.”⁸¹ In such a case, to show evidence of “bad character,” the Indian Evidence Act expressly provides that a prior conviction can be cited.⁸² However, it is silent on whether a prior arrest or other intelligence records can be used for this purpose. This remains a theoretical possibility.

Once a person has been convicted for a crime, both the prosecution and the convicted person are given an opportunity to argue on the issue of sentence.⁸³ The Cr.P.C provides for limited circumstances in which a prior conviction can be cited before the court and lays down the procedure for doing so.⁸⁴ However, it is again silent on whether prior arrest or other intelligence records can be used for seeking an enhanced sentence. Courts do appear to be considering such information in sentencing.

In *Gurmukh Singh*,⁸⁵ the Supreme Court ruled that the criminal background and adverse history of the accused, so also the number of criminal cases pending against him/her are relevant factors in determining the sentence to be imposed.⁸⁶ This was reiterated by the Court in *Jameel v. State of U.P.*⁸⁷ It is also interesting (and disturbing) to note that the Bombay High Court recently sentenced a man to death for the rape and murder of a fourteen year old girl, *inter alia* upon the consideration that there were two other cases pending against him. This, according to the Court, brought the case within the “rarest of rare case” doctrine,

⁸¹ s. 54, Indian Evidence Act 1872.

⁸² s. 54, Indian Evidence Act 1872, Explanation 2 to s. 54.

⁸³ Code of Criminal Procedure 1973 (2 of 1974), ss. 235(2), 248(2) and 254(1).

⁸⁴ Code of Criminal Procedure 1973 (2 of 1974), s. 211 (7).

⁸⁵ *Gurmukh Singh v. State of Haryana* (2009) 15 SCC 635 (Supreme Court of India).

⁸⁶ *Gurmukh Singh v. State of Haryana* (2009) 15 SCC 635, 642 [¶ 23] (Supreme Court of India).

⁸⁷ *Jameel v. State of U.P.*, 2009 (13) SCALE 578 [¶¶ 9–11] (Supreme Court of India).

justifying the imposition of the death penalty.⁸⁸ These few cases show that arrest, and other non-conviction records have an adverse impact on the sentence from the point of the view of the accused.

Thus we see that not only do surveillance and arrest databases exist, but that the information that they contain is used as well, both by the police and the courts. Moving on, I will now analyse the Supreme Court's jurisprudence on the issue of whether such the existence and use of these databases violates fundamental rights guaranteed under the Indian Constitution.

IV. THE INDIAN SUPREME COURT AND ITS JURISPRUDENCE ON SURVEILLANCE

In the previous parts of this paper, I have showed that surveillance databases exist and are regularly used by the Indian police. I have also shown the effect that these databases have on individuals named therein. In this part of the paper, I will examine the constitutional issues that arise in this context.

It is evident that classifying a person as a criminal just on the basis of his/her caste is a violation of the right to equality enshrined in Art. 14 of the Constitution of India and the right against being discriminated solely on the basis of one's caste, which is prohibited by Art. 15(1) of the Constitution. Hence, classifying certain castes as being criminal and rules in police manuals which call for regular surveillance of people from these castes are clearly unconstitutional. Tougher questions have arisen in the context of surveillance. These are: first, does constant surveillance lead to invasion of privacy and is such invasion of privacy a violation of a fundamental right? Secondly, is constant supervision a violation of the right to life and personal liberty guaranteed by Art. 21 of the Constitution? Thirdly, does constant supervision violate the right of a citizen to move freely within the territory of India, guaranteed by Art. 19(1)(d) of the Constitution? Fourthly, does an individual have a right to be heard before his/her name is put on a surveillance list? These are questions that the Supreme Court has had to grapple with. The Court has always found it difficult to adjudicate on the right to privacy, especially in the context of crime prevention. It has consistently upheld the constitutionality of provisions dealing with surveillance, after laying down guidelines to ensure that they remain constitutional. I will examine these cases

⁸⁸ State of Maharashtra v. Shankar Kisanrao Khade, 2009 Cri L.J. 73 (Bom.) (Bombay High Court).

below. In addition, it is pertinent to ask whether placing a person on a surveillance database and using that information to take criminal action against that person violates the presumption of innocence.

A. The Supreme Court on Surveillance

One of the first challenges to the constitutionality of surveillance related provisions arose in *Kharak Singh*.⁸⁹ The appellant Kharak Singh had been "charge-sheeted" for committing dacoity. However, the case was dropped as no evidence was found against him. However, he alleged that his name had been put on a "history sheet" on the basis of this proceeding, and that he had been put on surveillance, which entailed policemen frequently knocking at his door, entering his house and waking him up at night (including taking him to the police station at night to report his presence). He could not travel without informing the police and when he travelled, he was subjected to surveillance at his destination as well. In a petition before the Supreme Court, Kharak Singh impugned the constitutionality of Chapter XX of the U.P. Police Regulations, under which these actions were taken, *inter alia* for being violative of Arts. 19(1)(d) (freedom of movement) and 21(right to life and personal liberty) of the Constitution of India. The State argued that its actions did not violate the Fundamental Rights of the petitioner. It also argued that it kept a confidential watch on his movements "*in the interests of the general public and for the maintenance of public order,*" and therefore even if the Regulations violated fundamental rights of the petitioner, they were constitutional, since they fell within the reasonable restrictions provided for in Art. 19.⁹⁰

In the context of Art. 19, the Supreme Court ruled that neither surveillance nor knocking on a person's door and waking him/her up in the night amounts to a violation of Art. 19(1)(d). The reasoning was that the fact of a person being watched does not hamper his/her freedom of movement, even if he/she is cognizant of the surveillance. It ruled that informing a person that he/she is being kept under surveillance would defeat the very purpose of surveillance.⁹¹

On the other hand, the court agreed that the right to liberty of the individual was violated, when the police knocked on his/her door at night to satisfy

⁸⁹ *Kharak Singh v. State of U.P.*, AIR 1963 SC 1295 (Supreme Court of India).

⁹⁰ *Ibid*, at 1299.

⁹¹ *Ibid*, at 1300-1.

themselves that he/she was at home. The Court held that the right to liberty under Art. 21 could be taken away only by “procedure established by law.” Since the Regulations were merely executive orders and were not statutory in nature, they did not meet this criteria; hence the Court struck them down as unconstitutional.⁹² Although it was argued so, the majority refused to recognize that the right to privacy was a Fundamental Right guaranteed by the Constitution, on a finding that the doctrine’s acceptance in U.S. jurisprudence could not be transplanted into India, because of textual differences between the two constitutions.⁹³

Regulations in *parimateria* with the ones challenged in *Kharak Singh* were impugned in *Gobind*.⁹⁴ These Regulations had been framed by the state of Madhya Pradesh under its Police Act. Here, the Court held that since “personal liberty” was being deprived by procedure established by a validly enacted law, the Regulations did not fall foul of Art. 21.⁹⁵ On the issue of whether surveillance and knocking on a person’s door as a part of such surveillance violates the right to privacy, it held that even if the right to personal liberty, free movement throughout the territory of India and the freedom of speech were to create an independent Fundamental Right to privacy, it would not be absolute. The Court ruled that if it were to recognise the right to privacy as a Fundamental Right, a law could infringe upon the right in “compelling state interest.”

In the context of Art. 19(1)(d), the Court held that even if it were to read the right to privacy into the said article, the Regulations would be reasonable restrictions, and would be saved by Art. 19(5). It however warned the State that the Regulations were “verging perilously near unconstitutionality,” and advised it to revise them.⁹⁶

The next challenge to surveillance arose in *Malak Singh*.⁹⁷ The petitioners in this case had been added to a surveillance list as a result of various cases filed against them, allegedly by their political adversaries. They had not been convicted in any of the cases and had either been discharged or acquitted.⁹⁸ The consequence

⁹² *Ibid*, at 1303 [¶ 19].

⁹³ *Ibid*, at 1303 [¶20].

⁹⁴ *Gobind v. State of M.P.*, AIR 1975 SC 1378 (Supreme Court of India).

⁹⁵ *Ibid*, at 1386 [¶31].

⁹⁶ *Ibid*, 1386 [¶ 33].

⁹⁷ *Malak Singh v. State of Punjab*, AIR 1981 SC 760 (Supreme Court of India).

⁹⁸ *Ibid*, at 1981 SC 760, 761 [¶ 1].

of being on the list was that their photographs were put up with a list of notorious criminals at the local police station and they were called to the police station along with others whenever a senior officer visited the station. They were also made part of various investigations, even if they had nothing to do with the matter.⁹⁹ The petitioners did not challenge the constitutionality of the Regulations under which their names had been put on the list; they sought an opportunity of being heard before they were put on the list.¹⁰⁰

The Court ruled that surveillance registers and ‘history sheets’ are maintained for the purpose of preventing crime. Since these documents are by nature confidential there was no question of the application of the rule of *audi alteram partem* in this context.¹⁰¹ On the issue of the danger of potential misuse of this unbridled power by the police, the Court ruled that since the responsibility of adding people onto the list was with the Superintendent of Police, this was enough of a safeguard against abuse. The Court was thus imposing faith in the higher echelons of the police hierarchy to prevent abuse. Since the Superintendent of Police heads the police administration in the district,¹⁰² the Court appears to believe that he/she would ensure that his/her subordinates do not abuse their power. It however noted that in the event of abuse, it was always open to an aggrieved person to approach a court, which could then look into the reasons for a person being placed on the list. The aggrieved person himself/herself had no independent right to seek reasons.¹⁰³ On the issue of extent of deprivation of privacy, the Court held that surveillance cannot be of such a nature so as to “squeeze the fundamental freedoms guaranteed to all citizens; nor can the surveillance so intrude as to offend the dignity of the individual.”¹⁰⁴

With technology came newer methods of surveillance, one of which was telephone tapping. The issue of whether telephone tapping violates the right to privacy and consequently, whether Section 5 of the Telegraph Act 1885 was unconstitutional, came up before the Supreme Court in *People’s Union for Civil Liberties v. Union of India*.¹⁰⁵ In this case, the Court recognised that the right to

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*, at 761 [¶ 3].

¹⁰¹ *Ibid.*, at 763 [¶ 8].

¹⁰² *See*, Indian Police Act, 1861 (5 of 1861), § 4.

¹⁰³ *Malak Singh v. State of Punjab*, AIR 1981 SC 760, 763–4 [¶ 9] (Supreme Court of India).

¹⁰⁴ *Ibid.*, at 763 [¶ 9].

¹⁰⁵ *People’s Union for Civil Liberties v. Union of India*, AIR 1997 SC 568 (Supreme Court of India).

privacy is a Fundamental Right, reading it into Art. 21.¹⁰⁶ It observed that the right to hold a telephone conversation in private is a part of the right to privacy. Hence, telephone tapping would be violative of this right, unless it is carried out according to the procedure established by law. It further ruled that telephone tapping will contravene Arts. 19(1)(a) of the Constitution of India, unless it satisfies one of the reasonable restrictions mentioned in Art. 19(2). The Court noted that s. 5(2) of the Telegraph Act, 1885 stated that telephones could be tapped only if a “public emergency” arose or if “public safety” required such tapping. The Court believed that the existence of these conditions “would be apparent to a reasonable person.”¹⁰⁷ The Court however noticed that there was no procedure laid down in the statute for exercising this power and in the absence of such procedure, the law might be rendered unconstitutional. Since the Central Government had not formulated rules for the exercise of the power under s. 5(2), the Court laid down procedural safeguards that ought to be followed before a telephone was tapped. It mandated that the order to authorise such tapping could be made only by the Home Secretary, and could in no circumstances be delegated to an officer lesser in rank than a Joint Secretary. The decision was to be reviewed by a Review Committee, consisting of senior bureaucrats.¹⁰⁸ The Supreme Court believed that if this procedure and the other guidelines that it laid down in the case were strictly followed, there would be no misuse and the exercise of power would be just, fair and reasonable and not arbitrary, which would make the process constitutional.¹⁰⁹ Yet again, we see the Court placing faith in senior officials to ensure that there is no abuse of power.

In *Bhavesh Lakhani*,¹¹⁰ the issue before the Court was whether the consequences of a red-corner notice issued by INTERPOL contravened the right to privacy. Through the notice, INTERPOL requested the Central Bureau of Investigation to

¹⁰⁶ *Ibid*, at 574 [¶ 18].

¹⁰⁷ *Ibid*, at 576 [¶ 28].

¹⁰⁸ *Ibid*, at 578–9 [¶ 35].

¹⁰⁹ *People’s Union for Civil Liberties v. Union of India*, AIR 1997 SC 568, 579 [¶ 36] (Supreme Court of India). *See also*, *State of Maharashtra v. Bharat Shanti Lal Shah*, (2008) 13 SCC 5 (Supreme Court of India), where the Supreme Court held that interception of wire, electronic and oral communication would not violate the right to privacy because there were sufficient safeguards to prevent their misuse.

¹¹⁰ *Bhavesh Jayanti Lakhani v. State of Maharashtra*, (2009) 9 SCC 551 (Supreme Court of India).

keep the petitioner under surveillance and arrest him when the need arose.¹¹¹ Referring to its previous decisions on the right, the Court recognised that the right to privacy had been held to be a Fundamental Right.¹¹² It observed that mere surveillance would not violate the right to privacy. It noted that in *Malak Singh*, the impugned regulations had been upheld as constitutional since they provided for proper procedures for surveillance. In the present case, the Central Government had not formulated guidelines as regards surveillance in pursuance of INTERPOL notices.¹¹³ Hence the Court recommended to the Ministry of External Affairs that it ought to formulate such guidelines.¹¹⁴ Thus, the Court yet again ruled that Regulations authorising surveillance would not contravene Arts. 19 and 21 of the Constitution, if proper procedures were followed.

The jurisprudence of the Supreme Court indicates that the approach of the Court with respect to surveillance and maintaining of “history sheets” has been minimalist.¹¹⁵ As we see from the string of cases, starting from *Kharak Singh* and ending with *Bhavesh Lakhani*, the Supreme Court holds surveillance to be constitutional on substantive grounds and merely seeks to ensure that there are procedural safeguards to prevent misuse. In *Kharak Singh*, the Court advised the Legislature to enact a law, whereas in *Malak Singh*, it warned the Legislature that the enacted law was “perilously close to unconstitutionality,” and advised it to revise the Regulations. At the same time, it observed that the right to privacy can be curtailed if “compelling state interests” exist. In *Gobind*, the Court read non-existent procedural safeguards into the law and also observed that an individual

¹¹¹ *Ibid*, at 581–2 [¶ 90].

¹¹² *Ibid*, at 582–5 [¶¶ 102–105] (Supreme Court of India). It is relevant to note that the Court had recognized the right to privacy as a fundamental right in *R.Rajagopal v. State of Tamil Nadu*, (1994) 6 SCC 632 (Supreme Court of India;) and *State of Maharashtra v. Madhukar Narayan Mardikar*, (1991) 1 SCC 57 (Supreme Court of India).

¹¹³ *Bhavesh Jayanti Lakhani v. State of Maharashtra*, (2009) 9 SCC 551, 585–6 [¶ 107] (Supreme Court of India).

¹¹⁴ *Ibid*, at 586 [¶ 107].

¹¹⁵ Minimalism is a methodology of judicial decision-making where courts decide on the narrowest possible grounds sufficient to resolve the issue, leaving the broader issues of principle for the Legislature or Executive. It also advocates deferring to the other branches of government on the broader issues that it leaves undecided. For a detailed discussion of the concept of minimalism and the Indian Supreme Court’s minimalist approach in terror-related cases, see, Mrinal Satish & Aparna Chandra, *Of Maternal State and Minimalist Judiciary: The Indian Supreme Court’s Approach to Terror Related Adjudication*, 21(1) NAT. L. SCH. IND. R. 51 (2009).

can always approach a court to safeguard his/her rights. In observing so, it failed to consider that most people who are placed under surveillance might not have access to a court. As I have demonstrated earlier, the people placed on surveillance lists are generally those in the lower socio-economic strata of society; individuals who have been exploited since colonial times and individuals who in some situations are not even aware of their rights. Expecting such people to approach a court to seek reasons as to why they were placed on a surveillance list would be unrealistic. The Court appears to have been satisfied that it resolved the minor issues that it had framed for itself, but failed to comprehend the broader implications of its decision a classic minimalist approach.

In *P.U.C.L.*, the Court continued this approach, by laying down guidelines to ensure that the impugned law remained constitutional and in *Bhavesh Lakhani*, it advised the Government to formulate further guidelines. Hence, as long as the guidelines of the Supreme Court are followed, laws providing for surveillance, and consequently surveillance databases, will not run foul of the Constitution as they are permissible intrusions into Fundamental Rights. Under this line of cases therefore, it is perfectly legal for the Indian police to maintain databases of arrest records and put people on these databases under surveillance without violating their Fundamental Rights. In this context, it is also pertinent to note that in other cases on the right to privacy, where the Court held that the right to privacy can be read into the right to life guaranteed by Art. 21, it has always observed that the right is not absolute. For instance, in *Mr. X v. Hospital Z*,¹¹⁶ the Court held that the right is subject to “such action as may be lawfully taken for the prevention of crime or disorder or protection of health or morals or protection of rights and freedom of others.”¹¹⁷

B. Surveillance and the Constitution: Looking beyond constitutional challenges before the Supreme Court

The other constitutional issues that I raised at the beginning of this part have not been expressly addressed by the Supreme Court, especially in the context of surveillance and maintenance of databases. It is interesting to apply the Court’s jurisprudence with respect to some of these issues to the current situation and examine whether databases and contemplated by the Police Manuals are constitutional.

The first issue would be whether police databases violate the right to equality guaranteed under Art. 14 of the Constitution. The Supreme Court of India in

¹¹⁶ *Mr. X v. Hospital Z*, AIR 1999 SC 495 (Supreme Court of India).

*Anwar Ali Sarkar*¹¹⁸ had held that as long as there is an intelligible criteria for making a distinction between groups of individuals and there is a rational nexus between the classification and the purpose of the legislation, such classification would be constitutional. In the context of surveillance databases, an argument can be made that a distinction is being made between people on the basis of their likelihood to commit crime. This argument might be rational with regards to maintaining databases of convicted offenders and treating them differently vis-à-vis individuals who have not been convicted. However, we have seen how the Karnataka Police Manual advocates maintain databases of suspects, “suspicious characters,” “bad characters,” and “budding goondas” to name a few categories. An argument can be made that such categorisation and differential treatment of individuals who have never been convicted of committing a crime is unconstitutional, since there is no intelligible differentia between two sets of people who have not been convicted of committing an offence. Much of the framing of categories like “bad characters” and *rowdies* on the basis of familial characteristics and other vague grounds, might also be deemed arbitrary under the *Royappa* standard for Art. 14.¹¹⁹

The other set of issues in the context of Art. 14 are those raised by Prof. Jacobs in the U.S. context. Prof. Jacobs points out that individuals who find themselves on arrest and surveillance databases are likely to be discriminated against with respect to housing and employment. India does not seem to have similar concerns, mainly because of *Anwar Ali Sarkar*, since it will be unconstitutional for the state to discriminate between two sets of individuals who have never been convicted of a crime. Denying public housing or employment with the government on the ground that a person is on a surveillance database or has been ever arrested is not likely to pass constitutional muster. This does not mean that the state does not facilitate such discrimination in private employment. In light of crimes attributed to domestic servants, police in various cities have begun maintaining “domestic servant databases.” Individuals are required to register their domestic servants with the nearest police station. The police station runs a background check to ensure that a domestic help has given his/her right permanent address. It also checks whether the person has any criminal antecedents. As I have discussed earlier, given the nature of databases maintained by the police, a prior conviction is not a *sine qua non* to be certified as a person with

¹¹⁷ *Ibid*, at 501 [¶ 25].

¹¹⁸ *State of West Bengal v. Anwar Ali Sarkar*, AIR 1952 SC 75 (Supreme Court of India).

¹¹⁹ *E.P. Royappa v. State of Tamil Nadu*, (1974) 4 SCC 3 (Supreme Court of India).

criminal antecedents. In such a circumstance, if the information that the domestic servant has criminal antecedents is relayed to the employer, it is quite likely that the servant would lose his/her job.¹²⁰ Interestingly, the Delhi Police Amendment Bill of 2010 provides for five years of imprisonment if an employer does not register his/her servant with the police.¹²¹

In addition, while denial of public housing might not be possible, the same cannot be said of private enterprises. The horizontal application of fundamental rights has not been recognized by Indian courts. In *Zoroastrian Co-operative Housing Society*,¹²² the Supreme Court refused to intervene where the bye-laws of a registered cooperative housing society discriminated against individuals solely on the ground of religion. The Court refused to apply Fundamental Rights as between non-state entities, holding that it was for the legislature to achieve the constitutional goal of an equal society.¹²³ Such instances of discrimination based on religion have also been reported in the media, with a couple of Bollywood personalities claiming that they could not purchase houses in certain housing cooperative societies, since they were Muslim.¹²⁴ Thus, if bye-laws of a housing society state that shares cannot be sold to anyone who has ever been arrested or to someone whose is on a surveillance database, as per present law, their action will be valid and a constitutional challenge will not succeed.

¹²⁰ See, <http://www.delhipolice.nic.in/home/servant.htm> (Visited on November 5, 2010). For media reports on servant registration, see, Rahul Tripathi, *Now Servants have to give references in verification*, THE TIMES OF INDIA, June 10, 2008, available at <http://timesofindia.indiatimes.com/city/delhi/Now-servants-have-to-give-references-in-verification-form/articleshow/3115498.cms>; Amrita Chaudhary, *Firm roped in to quicken servant registration work*, INDIAN EXPRESS, December 4, 2009, available at <http://www.indianexpress.com/news/firm-roped-in-to-quicken-servant-registratio/549878/>. It is interesting to note that the police in Ludhiana chose to outsource this task of collective sensitive information to a private firm. See also: *Servant-Tenant Registration to restart*, THE TRIBUNE, April 19, 2008, available at <http://www.tribuneindia.com/2008/20080420/ldh1.htm#7>.

¹²¹ See, § 62A, Delhi Police (Amendment) Bill, 2010, available at <http://mha.nic.in/pdfs/DP-AMEND-BIL-1978.pdf>.

¹²² *Zoroastrian Co-operative Housing Society v. District Registrar Co-operative Societies*, (2005) 5 SCC 632 (Supreme Court of India).

¹²³ *Ibid*, at 661–2 [¶ 38].

¹²⁴ See, *EmraanHashmi alleges that he was denied a house as he's Muslim*, DNA, July 31, 2009, available at http://www.dnaindia.com/mumbai/report_emraan-hashmi-alleges-he-was-denied-a-house-as-he-s-muslim_1278715; *Denied house because I am Muslim: EmraanHashmi*, OUTLOOK, July 31, 2009, available at <http://news.outlookindia.com/item.aspx?663649>; Also see: Anupama Katakam, *There is a terrible feeling of Insecurity*, 25(19) FRONTLINE (September 13-26, 2008), available at <http://www.hinduonnet.com/fline/fl2519/stories/20080926251902400.htm>.

It can also be argued that maintaining and using surveillance databases violates the presumption of innocence. Art. 11(1) of the Universal Declaration of Human Rights and Art. 14(2) of the International Covenant on Civil and Political Rights state that a person should be presumed to be innocent until proven guilty by a court of law. The Supreme Court of India has referred to the presumption of innocence as a facet of fair trial,¹²⁵ but has not recognised it as a Fundamental Right.¹²⁶ In *Noor Aga*,¹²⁷ the Supreme Court held that the presumption of innocence was a human right, but not a fundamental right. It held that the presumption cannot be “thrown aside,” but was subject to exceptions.¹²⁸ I have noted earlier how courts have used surveillance records as well as the fact that cases were pending against the accused, as an aggravating factor while sentencing. Using the fact of a pending case against the accused amounts to a violation of the presumption of innocence, since the person has not yet been convicted in that pending case by a court of law.

V. LOOKING AHEAD: THE NATIONAL GRID, CRIME AND CRIMINAL TRACKING NETWORK SYSTEM AND THE UNIQUE ID PROJECT: THE FUTURE OF SURVEILLANCE RECORDS AND THEIR IMPLICATIONS¹²⁹

In the previous parts of this paper, I have highlighted the manner in which surveillance records are maintained and used by the Indian police. I have also pointed out how the Supreme Court of India has held these databases and consequent surveillance that follows, to be constitutional. I have also shown how the presumption of guilt follows (no pun intended) a person who is on such a database and have discussed issues of selective application of the law as well as the discriminatory nature of these databases. Having established that the databases violate an individual’s fundamental rights, I will in this part discuss the Government’s attempts at strengthening databases in the name of national security. I will highlight concerns that arise in the context of three ventures of the Government of India – the Unique Identity project, the National Grid (NATGRID)

¹²⁵ See, *Syed Akbar v. State of Karnataka*, 1979 Cri L.J. 1374 (SC) (Supreme Court of India).

¹²⁶ See, *Noor Aga v. State of Punjab*, (2008) 16 SCC 417 (Supreme Court of India).

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*, at 441 [¶ 33].

¹²⁹ This part of the paper considers draft legislations and other information as of November 7, 2010.

and the Crime and Criminal Tracking Network System (CCTNS). I will discuss the implications that these databases might have on the presumption of innocence, the right to privacy and the right to liberty.

A. *The Unique Identification (UID) project:*

There have been various concerns raised about the Government of India's Unique Identification Project, which seeks to issue identity numbers to every resident of India for authentication of identity and facilitating the distribution of public benefits. There have been various critiques of the Government's attempt. Usha Ramanathan, writing in the *Indian Express*, points out how the UID will lead to "convergence"¹³⁰ of data in the hands of various agencies. She points out that individuals give information to various agencies for services that they need. For instance, information is given to banks, Regional Transport Offices (RTOs), the passport office etc. Presently, these institutions do not share their information with each other, since most of the times these are not relevant. But, once the data is put together at one place, the RTO might be able to know how many bank accounts a person has, the passport office will get to know if the person drives a car, etc. She argues that there is no need for such information to be shared across agencies, and fears that such information can be misused. Referring to the UID Authority of India's working paper, she points out how no mention has been made there of national security concerns and the possibilities of surveillance that the UID might create.¹³¹ She also refers to the Home Minister talking about establishing a DNA bank,¹³² and setting up of NATGRID, using which law-enforcement agencies will be able to access twenty-one databases at the same time.¹³³ Adding the UID to the mix, Ramanathan argues, might give inordinate powers to the State.¹³⁴ Sudhir Krishnaswamy argues that having a single database which contains personal information of all residents and then giving access to it to a single institution raises concerns of creating a "surveillance state."¹³⁵

¹³⁰ Usha Ramanathan, *The Personal is the Personal*, INDIAN EXPRESS, Jan 6, 2010, available at <http://www.indianexpress.com/news/the-personal-is-the-personal/563920/0>.

¹³¹ *Id.*

¹³² *Id.*

¹³³ Usha Ramanathan, *Eyeing IDs*, INDIAN EXPRESS, May 1, 2010, available at <http://www.indianexpress.com/news/eyeing-ids/613701/0>.

¹³⁴ *Id.* For an interesting analysis of critiques against having National IDs, see, AMITAI ETIZONI, HOW PATRIOTIC IS THE PATRIOT ACT? 95–128 (2004).

¹³⁵ Sudhir Krishnaswamy, *Unique Identity Numbers: The Enabler of Policy Reform?*, available at <http://casi.sas.upenn.edu/iit/krishnaswamy>.

In the context of these concerns, it is relevant to examine the National Identification Authority of India (Draft) Bill 2010 (NIAI Bill), which sets up a statutory authority to issue the UID number.¹³⁶ Section 30(5) of the Bill states that the Authority can disclose to the Government information obtained by it from individuals, if such information is sought for reasons of “national security.” This can be done pursuant to a direction to that effect issued by an officer not below the rank of Joint Secretary or equivalent in the Central Government, with the approval of the Minister incharge.¹³⁷ The purpose of the UID, as per the Draft Bill is authentication of identity rather than sharing data and information.¹³⁸ Further, under Section 32, the Authority is required to maintain details for every request for authentication and the response provided, which the number holder will have access to as well. Let me first consider whether the concerns of creating a “surveillance state” are valid or whether as the UIDAI presently claims, the purpose of the UID is only to authenticate. Let us assume that an individual desires to open an account in a public-sector bank. She will be asked for her UID number and on her presenting the same and a photograph, as is required under the Know Your Client regulations. This will then be sought to be authenticated with the NIAI database. When such a request is sent, the fact that a person is opening a bank account is available with the Government. If the person then applies for a credit card, the same process gets repeated. The UIDAI in its strategy overview indicates that the Unique ID can be used to authenticate information required for getting a new mobile connection, a PAN card, a gas connection with Public sector companies, a passport, a life insurance policy, a credit card, to open a bank account, to check-in for a flight etc.¹³⁹ Thus, the NIAI will have information regarding all these transactions that a person carries out. Though this might appear benign and it could be argued that the process for the government to access this information is laborious and there are multiple safeguards against misuse, the prospect of such information being available at one place is in itself a cause for concern. Will this lead to a “surveillance state”? It is premature to comment on the same until Rules which state the manner in which data can be accessed, are formulated under the proposed NIAI Act. Only then can one get a conclusive answer to this question.

¹³⁶ National Identification Authority of India (Draft) Bill 2010, *available at* <http://www.prsindia.org/uploads/media/NIA%20Draft%20Bill.pdf>.

¹³⁷ § 33(b), National Identification Authority of India (Draft) Bill 2010.

¹³⁸ This is also stated in the “UIDAI Strategy Overview”, *available at* http://uidai.gov.in/UID_PDF/Front_Page_Articles/Documents/Strategy_Overveiw-001.pdf.

¹³⁹ *UIDAI Strategy Overview: Creating a Unique Identity Number for Every Resident in India*, UIDAI, April 2010, *available at* <http://uidai.gov.in/images/FrontPageUpdates/tampa/DevelopinganIdentityNumberforEveryIndian.pdf> .

B. NATGRID & CCTNS

On the other hand, sharing data and information is the objective of the proposed National Intelligence Grid (NATGRID). The NATGRID proposes to collect data from twenty one existing databases and make it accessible real time to eleven agencies.¹⁴⁰ The agencies which will have access to the database include the Intelligence Bureau, the Research and Analysis Wing, the Military Intelligence, the National Investigative Agency and the National Security Council. It is reported that these agencies will be hooked up to each other, as also the Indian Railways, Air India, the Income Tax Department, state police departments, banks, insurance companies, telecom service providers and even market regulators like the Securities and the Exchange Board of India, which will feed data available with them into the database.¹⁴¹ Visa and Immigration records, driving licence records, credit card transactions and property records would also be fed into the database.¹⁴²

The other ambitious plan of the Government of India is to create the Crime and Criminal Tracking Network System (CCTNS). This system will link all police stations in the country.¹⁴³ Thus, it can be envisaged that all police stations will have access to each other's "history" and "rowdy" sheets. Thus, if a person is arrested once in any part of the country or designated a "bad character," that data will be shared real-time with all the police stations in the country.

Maintenance of archaic "history sheets" and "rowdy sheets" is an anathema in a constitutional democracy like India, which is based on the rule of law. A system which places people on surveillance based on whether the local police believe they are "bad characters" or based on their caste, familial and social ties is outright unconstitutional. It is imperative that before creating systems like the NATGRID and CCTNS, the Government have a re-look at its policy of record-keeping and dispense with databases of suspects, which are all based on non-objective and arbitrary factors. As technology in maintaining databases moves from the nineteenth to the twenty-first century, it is imperative that policing and mindsets also keep pace and that the arbitrary classifications of "bad characters," "history sheeters," "budding goondas," "roughs" and *rowdies* are consigned to the annals of history.

¹⁴⁰ See, Vinay Kumar, "Big Brother" fears stall Chidambaram Data Plan, THE HINDU, February 14, 2010, available at <http://www.thehindu.com/news/national/article106301.ece>; Sahil Makkar, CCS Approves Natgrid Plan, LIVEMINT, available at <http://www.livemint.com/2010/05/12221213/CCS-approves-Natgrid-plan.html>.

¹⁴¹ See, Sahil Makkar, CCS Approves Natgrid Plan, Livemint, available at <http://www.livemint.com/2010/05/12221213/CCS-approves-Natgrid-plan.html>.

¹⁴² See, KUMAR, *supra*, n. 140.

¹⁴³ Information on CCTNS is available at <http://ncrb.nic.in/cctns.htm>.