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Making the Chilling Effect a Justiciable Constitutional Fact: Proportionality, Evidentiary Impossibility, and the Necessity for Post-Surveillance Notification in Indian Law

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ABSTRACT

This paper addresses a critical gap in the application of proportionality doctrine to state surveillance in Indian constitutional law. The Puttaswamy decisions of the Supreme Court establish that any state invasion of privacy must satisfy the necessity requirement, meaning that the measures employed must constitute the least restrictive means available to achieve the legitimate constitutional objective. Yet Indian courts have generally treated state assertions of investigative necessity as self-evident once the objective is deemed legitimate, whilst dismissing citizens' claims regarding chilling effects as unsubstantiated rhetoric unsupported by empirical proof. This asymmetry reflects not reasoned constitutional judgment but rather a structural inequality in evidentiary access and burden of proof. The foundational problem is institutional. The Indian surveillance framework, operating under Rule 419A of the Telegraph Rules 1951 and the newly notified Telecommunications (Procedures and Safeguards for Lawful Interception of Messages) Rules, 2024, does not require notification of individuals whose communications are intercepted. A person who does not know that they have been surveilled cannot establish that they have been injured, cannot secure standing for a constitutional challenge, and cannot produce evidence of behavioural inhibition or chilling effects. The evidentiary burden is thus distributed impossibly: the state escapes all obligation to demonstrate necessity whilst citizens face a structural impossibility in proving chill. A substantial empirical literature on surveillance chilling effects exists internationally, with foundational work by Jonathon Penney on Wikipedia use, Elizabeth Stoycheff on social media expression, and Moritz Büchi on the mechanisms through which dataveillance triggers inhibition. Yet virtually no empirical research on chilling effects exists within the Indian context, and Indian courts have not developed mechanisms for admitting social science evidence within proportionality adjudication. Drawing on German constitutional jurisprudence and on the European Court of Human Rights' decisions in Klass and Others

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v. Germany and Roman Zakharov v. Russia, this paper proposes that notification be reconceptualised as an evidentiary precondition of proportionality review, not merely as a remedy. The paper concludes by proposing institutional reforms through which chilling effects might be constituted as justiciable constitutional facts.

Keywords: surveillance, proportionality, chilling effects, notification, evidentiary preconditions, Puttaswamy, German constitutional law, European Court of Human Rights, Rule 419A, Telecommunications Act 2023

I. INTRODUCTION

The proportionality doctrine articulated in the *Justice K.S. Puttaswamy (Retd.) v. Union of India* decisions on privacy (2017) and on Aadhaar (2018)¹ establishes that any state action infringing the fundamental right to privacy must demonstrate necessity by reference to the least restrictive means available to achieve a legitimate constitutional objective. This requirement transforms necessity from a rhetorical assertion into an empirical, comparative claim. Yet Indian courts have generally declined to require the state to furnish evidence substantiating this claim, instead accepting state assertions of investigative necessity as sufficient. Conversely, courts have treated citizens' claims regarding the chilling effects of surveillance as speculative rhetoric, unsupported by evidentiary proof. This asymmetry creates a constitutional crisis of justiciability: the necessity limb of proportionality becomes unfalsifiable, and proportionality itself performs no constraining function.

This gap is not merely doctrinal. A mature empirical literature on surveillance chilling effects exists internationally. Work by Jonathon Penney demonstrates measurable declines in traffic to privacy-sensitive Wikipedia articles following public knowledge of state surveillance.² Elizabeth Stoycheff's research finds that awareness of state monitoring can deepen the spiral of silence, in which individuals who believe their views to be in the minority keep them to themselves.³ Moritz Büchi and his collaborators have developed theoretical models of how dataveillance triggers behavioural inhibition.⁴ Yet almost no empirical research on chilling effects exists within the Indian context, and Indian courts have not engaged with mechanisms for introducing such evidence into constitutional adjudication. This absence is structural, not

¹ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1; *Justice K.S. Puttaswamy (Retd.) v. Union of India* (Aadhaar case), (2019) 1 SCC 1.

² Jonathon W. Penney, *Chilling Effects: Online Surveillance and Wikipedia Use*, 31 BERKELEY TECH. L.J. 117 (2016), https://btjl.org/data/articles2016/vol31/31_1/0117_0182_Penney_ChillingEffects_WEB.pdf.

³ Elizabeth Stoycheff, *Under Surveillance: Examining Facebook's Spiral of Silence Effects in the Wake of NSA Internet Monitoring*, 93 JOURNALISM & MASS COMM. Q. 296 (2016), <https://doi.org/10.1177/1077699016630255>.

⁴ Moritz Büchi, Noemi Festic & Michael Latzer, *The Chilling Effects of Digital Dataveillance: A Theoretical Model and an Empirical Research Agenda*, 9(1) BIG DATA & SOC'Y (2022), <https://doi.org/10.1177/20539517211065368>.

accidental. The Indian surveillance framework, operating under Rule 419A of the Indian Telegraph Rules, 1951⁵ and now the Telecommunications (Procedures and Safeguards for Lawful Interception of Messages) Rules, 2024,⁶ does not notify subjects of surveillance. A person who does not know that they were surveilled cannot demonstrate injury, cannot establish standing, and cannot produce evidence of behavioural chill. The burden of proof is thus distributed impossibly.

This paper develops three interconnected arguments. First, it argues that Indian courts have generally accepted necessity claims without empirical evidence, while dismissing chilling effect claims as unproven. This asymmetry reflects not reasoned constitutional judgment but structural inequality in evidentiary access. Second, it argues that notification is not merely a privacy right or a remedial mechanism, but an evidentiary precondition of proportionality review itself. Without notification, a citizen cannot possess the knowledge necessary to prove injury, establish standing, or produce evidence of chill. Consequently, proportionality becomes an illusory constraint on executive surveillance authority. Third, drawing on German constitutional jurisprudence and the case law of the European Court of Human Rights, it proposes concrete institutional mechanisms through which chilling effects might be constituted as justiciable evidentiary facts within Indian constitutional adjudication. The paper concludes that, absent post-surveillance notification requirements, the necessity limb of *Puttaswamy* proportionality is not merely incompletely applied but structurally incapable of functioning.

II. THE ASYMMETRY IN EVIDENTIARY BURDEN: HOW STATE NECESSITY CLAIMS ESCAPE SCRUTINY WHILE CHILLING EFFECTS ARE TREATED AS RHETORIC

A. The four-prong test and the necessity limb

In *Justice K.S. Puttaswamy (Retd.) v. Union of India*, the Supreme Court held that any interference with the fundamental right to privacy must satisfy the doctrine of proportionality. The plurality opinion of Justice D.Y. Chandrachud required (i) legality, which postulates the existence of a law; (ii) need, defined in terms of a legitimate state aim; and (iii) proportionality, which ensures a rational nexus between the objects and the means adopted to achieve them.⁷

⁵ Indian Telegraph (Amendment) Rules, 2007, G.S.R. 193(E) (Mar. 1, 2007), substituting r. 419A of the Indian Telegraph Rules, 1951 (India).

⁶ DEPARTMENT OF TELECOMMUNICATIONS, MINISTRY OF COMMUNICATIONS, GOVERNMENT OF INDIA, Telecommunications (Procedures and Safeguards for Lawful Interception of Messages) Rules, 2024, G.S.R. 754(E) (notified Dec. 6, 2024).

⁷ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1, ¶¶ 310, 325 (Chandrachud, J., for Khehar, C.J., Agrawal and Abdul Nazeer, JJ., and himself).

Justice Sanjay Kishan Kaul, concurring, adopted a test requiring that the action be sanctioned by law, be necessary in a democratic society for a legitimate aim, and be proportionate to the need for such interference, and added a further element: that there be procedural guarantees against abuse of such interference.⁸ Justice Kaul's requirement of necessity 'in a democratic society' echoes the language of Article 8(2) of the European Convention on Human Rights.⁹ In other decisions the Court has applied a structured four-part test, under which an interference with a right must (i) pursue a legitimate aim; (ii) be suited to its purpose; (iii) be necessary, in that the means employed represent the least restrictive method available to attain the objective; and (iv) strike a proper balance between the benefit gained and the harm to the right.¹⁰

The necessity prong presents an interpretive puzzle. What does it mean to establish necessity? As the Court has since elaborated it, necessity entails a comparative assessment: the measure must be the least restrictive means available to achieve the legitimate objective.¹¹ This formulation mirrors the narrow tailoring requirement in United States constitutional jurisprudence and the necessity (*Erforderlichkeit*) stage of German proportionality analysis, both of which call for a demonstration that no alternative, less rights-restrictive measure could achieve the state's objective with equal or greater effectiveness.¹² In principle, therefore, the necessity inquiry demands evidentiary proof. Yet in practice, Indian courts have treated state assertions of necessity as self-evident once the objective itself is deemed legitimate.

B. The evidentiary treatment of state necessity claims in recent surveillance litigation

Consider two decisions of the Madras High Court on orders made under Section 5(2) of the Indian Telegraph Act, 1885 and Rule 419A of the Indian Telegraph Rules, 1951 authorising the Central Bureau of Investigation to intercept telephones in corruption investigations. In *Sanjay Bhandari v. Secretary to Government of India*, decided in 2020, the petitioners, who had been arraigned as accused in the prosecution that followed, contended that no public emergency or threat to public safety existed to justify the interception. The court dismissed the petitions. It

⁸ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1, ¶ 638 (Kaul, J., concurring).

⁹ *Compare id.*, with Convention for the Protection of Human Rights and Fundamental Freedoms art. 8(2), Nov. 4, 1950, 213 U.N.T.S. 221.

¹⁰ Aparna Chandra, *Proportionality in India: A Bridge to Nowhere?*, 3(2) U. OXFORD HUM. RTS. HUB J. 55, 55, 74–76 (2020), <https://ohrh.law.ox.ac.uk/wp-content/uploads/2021/04/U-of-OxHRH-J-Proportionality-in-India-1.pdf> (tracing the Court's adoption of a structured four-part proportionality test from 2016 and its refinement in *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2019) 1 SCC 1).

¹¹ Chandra, *supra* note 10, at 77–79.

¹² *Justice K.S. Puttaswamy (Retd.) v. Union of India* (Aadhaar case), Writ Petition (Civil) No. 494 of 2012, ¶¶ 120, 125 (Sikri, J.) (S.C. Sept. 26, 2018), *reported in* (2019) 1 SCC 1 (describing the test as 'essentially' the version used by the German Federal Constitutional Court, with a necessity stage requiring that there be no 'less restrictive but equally effective alternative'); *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000) (a content-based restriction 'must be narrowly tailored to promote a compelling Government interest. ... If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative.').

accepted that the orders had been passed with application of mind on the materials placed before the authority, reasoned that threats to public safety often arise from hidden factors and that the information behind such orders is sensitive and may not be circulated in the public domain, and held that interception for the detection, prevention, investigation and prosecution of corrupt activities fell within Section 5(2). It also treated the petitions, filed some six years after the orders, as an abuse of process. At no point did the court ask whether a less intrusive investigative measure had been available.¹³ The State's assertion of investigative necessity was, in effect, treated as sufficient. The same court reached the opposite result in 2025. In *P. Kishore v. Secretary to Government*, the State defended the interception order as necessary for detecting and prosecuting corruption and as satisfying the test of proportionality. The court rejected that defence. It held that a covert operation to detect crime was neither a 'public emergency' nor a situation involving 'public safety' within the meaning of Section 5(2), found that the intercepted material had not been placed before the review committee required by Rule 419A, quashed the order, and directed that the intercepted material not be used for any purpose.¹⁴ It declined to follow *Sanjay Bhandari*, observing that the earlier decision had reproduced the contentions in the CBI's counter affidavit, and relied instead on the Bombay High Court's decision in *Vinit Kumar v. Central Bureau of Investigation*, which had quashed interception orders on similar grounds.¹⁵

P. Kishore shows that Indian courts can and do refuse to take the State's word on interception, and it must be acknowledged as a decision against the pattern this paper describes. Two features of it, however, bear on the argument. First, the court decided the case on the statutory preconditions of Section 5(2) and the mandatory procedure of Rule 419A; it had no need to ask whether a less restrictive investigative measure had been available, and it did not do so. Second, the challenge arose out of a criminal prosecution: the petitioner had been arraigned as an accused in the case that followed the interception, and he first challenged the order in criminal proceedings before bringing the writ petition.¹⁶ A person whose communications are intercepted but who is never prosecuted has no comparable occasion to learn of the order, a point developed below in the discussion of notification. At the level of the Supreme Court, the same reluctance to test necessity is visible in the Aadhaar litigation. The Court adopted a necessity test that

¹³ *Sanjay Bhandari v. Secretary to Government of India*, W.P. Nos. 5466 & 5470 of 2020, ¶¶ 10–14 (Mad. HC Nov. 23, 2020).

¹⁴ *P. Kishore v. Secretary to Government*, W.P. No. 143 of 2018, 2025:MHC:1510, ¶¶ 5, 67, 86, 96–98 (Mad. HC July 2, 2025); see also Garv Laroia, *Telephone Tapping, Interception And Surveillance; Thin Line Of Privacy*, LIVE LAW (Sept. 8, 2025), <https://www.livelaw.in/articles/phone-tapping-and-right-to-privacy-analysis-303171>.

¹⁵ *P. Kishore*, 2025:MHC:1510, ¶¶ 79, 84–85 (following *Vinit Kumar v. Central Bureau of Investigation*, Writ Petition No. 2367 of 2019, ¶¶ 18–19, 40 (Bom. HC Oct. 22, 2019), 2019 SCC OnLine Bom 3155).

¹⁶ *P. Kishore*, 2025:MHC:1510, ¶ 3.

requires the possible alternatives to be identified and compared, yet it upheld the core of the scheme without examining alternatives to the impugned measure at all, placed the burden of suggesting alternatives on the petitioners, and did not ask the government to explain how it had conducted its own necessity analysis, even as it struck down certain linking provisions.¹⁷ The necessity prong, though textually present in proportionality doctrine, is thus rarely put to an evidentiary test: where courts have intervened against interception, as in *P. Kishore* and *Vinit Kumar*, they have done so because a statutory precondition was absent or a mandatory procedure was not followed, not because the State failed to show that no less restrictive measure was available.

C. The contrasting treatment of chilling effect claims

Indian courts have explicitly recognised the chilling effect doctrine. In *M.K. Sharma v. Sangeeta Gupta*, the Delhi High Court observed that the possibility of a person depositing before a sexual harassment complaints committee being prosecuted for criminal defamation would inevitably have a chilling effect, deterring aggrieved persons from availing of the remedy provided by the Supreme Court.¹⁸ The Bombay High Court, in *Kunal Kamra v. Union of India*, struck down the 2023 amendment to Rule 3(1)(b)(v) of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, which provided for a government fact check unit, holding, on the opinion of the third judge to whom the case was referred, that the rule was vague and overbroad and that it resulted in a chilling effect on intermediaries.¹⁹ Yet where a chilling effect has been pleaded against State action, the Supreme Court has demanded evidence of it. In *Anuradha Bhasin v. Union of India*, a challenge to restrictions on movement and on internet and telecommunication services, the Court relied on *Laird v. Tatum*, a challenge to the surveillance of civilian political activity, for the proposition that ‘Allegations of a subjective “chill” are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm’. It held that a claim of chilling effect on the press was ‘purely speculative, unless evidence is brought before the Court’, proposed a test of comparative harm, and declined to find a chilling effect because no evidence had been placed on record that similarly placed persons had been restricted.²⁰ No comparable demand for evidence was made of the State in *Sanjay Bhandari*, discussed above.

¹⁷ *Justice K.S. Puttaswamy (Retd.) v. Union of India* (Aadhaar case), (2019) 1 SCC 1; see also Chandra, *supra* note 10, at 77–79.

¹⁸ *M.K. Sharma v. Sangeeta Gupta*, CrI. M.C. Nos. 7834–35 of 2006, ¶ 36 (Del. HC Mar. 20, 2009).

¹⁹ *Kunal Kamra v. Union of India*, W.P. (L) No. 9792 of 2023, 2024:BHC-OS:14371-DB, ¶ 56 (Bom. HC Sept. 20, 2024) (opinion of Chandurkar, J., on reference); see also *Kunal Kamra v. Union of India*, W.P. (L) No. 9792 of 2023, 2024:BHC-OS:14750-DB, ¶¶ 6, 8 (Bom. HC Sept. 26, 2024) (final judgment striking down the amendment).

²⁰ *Anuradha Bhasin v. Union of India*, Writ Petition (Civil) No. 1031 of 2019, ¶¶ 150–51 (S.C. Jan. 10, 2020), reported in (2020) 3 SCC 637 (quoting *Laird v. Tatum*, 408 U.S. 1 (1972)).

In *Manohar Lal Sharma v. Union of India*, the Pegasus spyware case, a three-judge Bench of the Supreme Court acknowledged that ‘the entire citizenry is affected by such allegations due to the potential chilling effect’ and recognised that the ‘Right to privacy and freedom of speech are alleged to be impacted’.²¹ The decision is, in one respect, a counter-example to the pattern of deference described above: the Court refused to accept the Union’s bare reliance on national security, holding that the State does not get ‘a free pass every time the spectre of “national security” is raised’ and that it must plead and prove the facts that justify keeping information secret.²² Yet having recognised the chilling effect concern, the Court did not itself examine evidence of behavioural chill or treat chilling effects as justiciable facts. Instead, it entrusted the inquiry to a technical committee whose functioning was overseen by Justice R.V. Raveendran, a former judge of the Supreme Court. The committee’s terms of reference were directed to whether Pegasus spyware had been used on the phones or other devices of Indian citizens, by whom and under what authority, and to recommendations on law, cyber security and grievance mechanisms; they did not extend to an empirical examination of chilling effects.²³ Although the committee publicly invited persons who suspected that their devices had been infected to come forward,²⁴ nothing in its terms of reference asked it to receive evidence that surveillance had altered anyone’s behaviour.

This asymmetry exposes a fundamental crisis. Except where, as in *P. Kishore*, a statutory precondition is plainly absent, or where, as in the Pegasus matter, the State declines to place any facts before the court, State necessity claims have encountered little evidentiary burden, and the executive’s assertion has generally sufficed. Citizens’ claims regarding chilling effects, by contrast, are treated as rhetorical unless supported by empirical proof. Yet the very structure of the surveillance system prevents citizens from gathering such proof.

III. THE INTERNATIONAL EMPIRICAL LITERATURE ON CHILLING EFFECTS

A. Empirical findings and methodological foundations

Jonathon Penney’s foundational study examined Wikipedia use following the public disclosure, in June 2013, of the NSA’s PRISM surveillance programme by Edward Snowden. Penney selected forty-eight Wikipedia articles corresponding to terrorism-related keywords on a list that the United States Department of Homeland Security uses to monitor social media, on the

²¹ *Manohar Lal Sharma v. Union of India*, Writ Petition (Criminal) No. 314 of 2021, ¶ 56 (S.C. Oct. 27, 2021).

²² *Id.* ¶¶ 49–51, 54.

²³ *Id.* ¶¶ 61–62.

²⁴ *Pegasus Snooping: SC-Appointed Technical Committee Seeks Details From Persons Suspecting Hacking Of Their Devices*, LIVE LAW (Jan. 2, 2022), <https://www.livelaw.in/top-stories/pegasus-snooping-sc-appointed-technical-committee-seeks-details-from-persons-suspecting-hacking-of-their-devices-188607>.

premise that viewing such articles is likely to raise privacy concerns for users fearful of government surveillance. He employed an interrupted time series analysis of monthly traffic to these articles over a thirty-two month period, from January 2012 to August 2014. His findings revealed a statistically significant immediate decline in traffic of over 30 percent after June 2013, together with a change in the longer-term trend, suggesting both immediate and sustained chilling effects.²⁵ Penney's methodology was rigorous. The interrupted time series design permitted him to isolate the temporal coincidence with the Snowden disclosures. He controlled for secular trends, examined both the level change and the slope change in traffic, and compared the results with comparator groups of security-related and highly popular Wikipedia articles. Critically, Penney used publicly available data to which surveillance did not create access barriers.

Elizabeth Stoycheff's experimental research approached chilling effects through the methodology of social psychology. In an online experiment involving 255 participants from the United States, participants were shown a Facebook post reporting on United States military action against ISIS, and those in the treatment group were reminded that their online activity could be subject to government surveillance. Participants then indicated their willingness to express opinions on the topic. The surveillance prime had no significant direct effect on willingness to speak out. It did, however, interact with participants' views on whether surveillance was justified: among those who regarded government surveillance as justified, who formed the majority of the sample, being reminded of surveillance significantly strengthened the tendency of those who perceived their opinions to be in the minority to stay silent, while those who regarded surveillance as unjustified were unaffected by the prime. Stoycheff read this as adding a new layer of chilling effect to the 'spiral of silence', in which people who believe their views are in the minority withhold them, so that surveillance may 'threaten the disclosure of minority views and contribute to the reinforcement of majority opinion'.²⁶

Marthews and Tucker analysed changes in Google search behaviour following the Snowden revelations, comparing search volumes before and after the disclosures. They examined search terms that users rated as likely to get them into trouble with the United States government, including terms drawn from the Department of Homeland Security's monitoring list, and found a statistically significant decline in searches for such terms following public knowledge of NSA activities.²⁷ Büchi, Festic and Latzer developed a mechanism-based model, grounded in the

²⁵ Penney, *supra* note 2, at 117, 139–40, 143–44, 147–56.

²⁶ Stoycheff, *supra* note 3.

²⁷ Alex Marthews & Catherine E. Tucker, *Government Surveillance and Internet Search Behavior* (SSRN Working Paper, rev. Feb. 17, 2017), <https://doi.org/10.2139/ssrn.2412564>; see also Penney, *supra* note 2, at 131.

theory of planned behaviour, in which an individual's heightened sense of dataveillance raises the perceived probability that digital communication will have negative consequences and so reduces the intention to engage in it. They define chilling effects as the self-inhibition of legitimate behaviour, such as expressing one's opinion online or searching for sensitive information, and they treat such self-inhibition as a form of self-censorship that may in aggregate increase conformity.²⁸

B. Absence of research in the Indian context

There appears to be virtually no published empirical research on chilling effects within India specifically. In particular, there appears to be no published study measuring whether knowledge of Central Monitoring System activities, interception operations, or facial recognition deployments has altered the behaviour of Indian journalists, student organisers, RTI activists, or other groups whose work may make them more conscious of the possibility of surveillance. The gap has received little attention in policy literature or academic scholarship. It creates a peculiar epistemic asymmetry: the state operates interception and monitoring systems with no empirical baseline of their effects; citizens alleging chill are required to prove what little research in India has examined; and a court that requires chill to be demonstrated, as the Supreme Court did in *Anuradha Bhasin*, in effect makes the petitioner bear the cost of that gap in research infrastructure.

C. The evidentiary translation problem

This international literature poses a distinct problem for Indian constitutional litigation. How can evidence generated through social science methodologies be introduced into adjudicative processes? Courts operate under evidentiary rules designed for testimonial and documentary proof. Empirical research produces probabilistic evidence of group-level effects. Evidence rules rarely contemplate the admission of social science research as direct proof of individual harm. An interrupted time series analysis documenting changes in Wikipedia traffic cannot prove that a specific journalist altered her behaviour. Stoycheff's experimental findings demonstrate effects under controlled conditions; they do not prove that surveillance awareness in field conditions produces identical behavioural changes. The gap between what empirical research can establish and what adjudication requires is not closed by better research design; it is a structural problem of evidentiary translation.

Indian constitutional adjudication has on occasion looked beyond conventional testimonial and documentary proof. In *Vishaka v. State of Rajasthan*, the Supreme Court, in the absence of

²⁸ Büchi, Festic & Latzer, *supra* note 4.

domestic legislation, drew on the Convention on the Elimination of All Forms of Discrimination against Women and other international norms to frame binding guidelines and remedial frameworks on sexual harassment at the workplace.²⁹ Yet no framework exists specifically for admitting evidence regarding the structural effects of surveillance on populations, nor any methodology for constitutional courts to weigh evidence of aggregate effects when assessing proportionality.

IV. THE STRUCTURAL BARRIER: ABSENCE OF NOTIFICATION AS EVIDENTIARY IMPOSSIBILITY

A. The notification requirement and its constitutional foundations in comparative law

German law imposes a *post facto* notification requirement: once surveillance measures terminate, the authorities must notify the subject. Section 12 of the G 10 Act (*Gesetz zur Beschränkung des Brief-, Post- und Fernmeldegeheimnisses*, the Act Restricting the Privacy of Correspondence, Posts and Telecommunications) requires that persons subjected to individual surveillance measures be notified once the measure has been discontinued.³⁰ Notification is deferred for as long as it cannot be ruled out that it would jeopardise the purpose of the measure, or for as long as overriding detriment to the welfare of the Federation or of a Land is foreseeable. Further deferral beyond twelve months requires the consent of the G 10 Commission, and notification may be dispensed with altogether only where the Commission unanimously finds, five years after the measure ended, that the grounds for deferral persist and will almost certainly continue to do so. Permanent non-notification is thus exceptional and subject to independent oversight. The rationale is that an effective remedy requires that a person know that they have been subject to state action affecting their rights. Without knowledge, a person cannot challenge the legality of that action, cannot seek judicial review, and cannot adduce evidence of harm.

The European Court of Human Rights has built on this principle across multiple decisions. In *Klass and Others v. Germany*, the Court held unanimously that there had been no breach of Article 8 of the European Convention on Human Rights, but it acknowledged the importance of subsequent notification as a safeguard. The applicants in *Klass* were a public prosecutor, a judge and three lawyers who complained that German surveillance legislation permitted secret monitoring without notification. The Court accepted that not informing the individual once surveillance has ceased cannot itself be incompatible with Article 8, since it is this very fact

²⁹ *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241.

³⁰ Gesetz zur Beschränkung des Brief-, Post- und Fernmeldegeheimnisses [Artikel 10-Gesetz] [G 10] [Act Restricting the Privacy of Correspondence, Posts and Telecommunications], June 26, 2001, BGBl. I at 1254, § 12 (Ger.).

which ensures the efficacy of the interference. It observed, however, that there is ‘in principle little scope for recourse to the courts’ unless the individual is advised of the measures taken, and noted that, following the Federal Constitutional Court’s judgment of 15 December 1970, the person concerned must be informed as soon as notification can be made without jeopardising the purpose of the restriction.³¹ Subsequently, in *Weber and Saravia v. Germany*, the Court moved to a firmer position. While declaring the application inadmissible, it stated that, as soon as notification can be carried out without jeopardising the purpose of the restriction after the surveillance measure has terminated, information should be provided to the persons concerned.³²

In *Roman Zakharov v. Russia*, the Grand Chamber of the European Court of Human Rights examined Russian surveillance legislation and practice, in particular the SORM, the system of technical facilities enabling operational-search activities, through which the security services and the police had direct technical access to mobile telephone communications. Although Russian law required judicial authorisation, the Court found that the authorisation procedures were not capable of ensuring that surveillance was ordered only when necessary in a democratic society, that supervision was ineffective, and that the effectiveness of remedies was undermined by the absence of notification at any point. It concluded that the legal provisions did not provide ‘adequate and effective guarantees against arbitrariness and the risk of abuse’ and that there had been a violation of Article 8.³³ Critically, the Court accepted that an applicant need not demonstrate that surveillance had in fact been applied to him in order to claim to be a victim; the existence of a framework permitting secret surveillance without possibility of detection or challenge could itself be examined under the Convention. Notification was identified as a prerequisite to the possibility of challenge.

B. Notification and evidentiary standing in Indian proportionality

Rule 419A of the Indian Telegraph Rules, 1951 did not require notification, and the Telecommunications (Procedures and Safeguards for Lawful Interception of Messages) Rules, 2024, which superseded it in December 2024, contain no such requirement either. Rule 419A established a procedure whereby interception orders were issued by the Union Home Secretary (at the level of the Central Government) or the Secretary in charge of the Home Department (at the level of a State) and transmitted through the nodal officers of telecommunications service

³¹ *Klass and Others v. Germany*, 2 Eur. H.R. Rep. 214, ¶¶ 57–58 (1978).

³² *Weber and Saravia v. Germany* (dec.), App. No. 54934/00, ¶ 135 (Eur. Ct. H.R. June 29, 2006), (2008) 46 EHRR SE5.

³³ *Roman Zakharov v. Russia* [GC], App. No. 47143/06, ¶¶ 171, 302 (Eur. Ct. H.R. Dec. 4, 2015), [2015] ECHR 1065.

providers. The rule contemplated that interception agencies would authenticate orders and that telecommunications entities would acknowledge receipt. Yet neither set of rules mandates that the person whose communications are intercepted be informed once the measure terminates. This absence creates an evidentiary trap with constitutional consequences.

Consider a hypothetical journalist investigating corruption, whose telephone communications and email are lawfully intercepted by State agencies for eighteen months. After the interception ceases, she remains unaware that surveillance occurred. She has no knowledge of the measure and therefore cannot demonstrate injury arising from it. She cannot allege that she altered her reporting, suppressed certain inquiries, or declined to contact sources owing to surveillance awareness, because she was not aware. When she subsequently seeks to challenge the lawfulness of the interception, she cannot establish standing. She cannot contest necessity because she lacks access to the factual record justifying the original order; such records are kept confidential. She cannot produce evidence of chill because she did not know that surveillance had occurred. The structural burden falls entirely and impossibly on the individual.

Under this framework, the necessity limb of proportionality becomes unfalsifiable. The state asserts that the interception was necessary for investigating crime or protecting national security. Without notification, no individual can possess the knowledge required to challenge this assertion. Without standing based on demonstrable injury, courts cannot entertain proportionality review. Proportionality becomes entirely dependent on executive self-assessment and executive assertion. The doctrine performs no actual constraining function.

C. Notification as evidentiary precondition, not merely remedy

Notification should be reconceptualised. It is not merely a remedy that individuals might invoke to obtain redress. Rather, it is an evidentiary precondition of proportionality review. Without notification, the constitutional requirement that state action be necessary cannot be tested through adversarial adjudication. The state cannot be required to produce evidence showing that the means employed were in fact necessary, because no individual can stand in court to demand such evidence. Notification is thus not supplemental to proportionality; it is constitutive of proportionality's justiciability.

V. INSTITUTIONAL PRECONDITIONS FOR CONSTITUTING CHILLING EFFECTS AS JUSTICIABLE FACTS

A. Court-appointed expertise and social science evidence

If notification were implemented, Indian courts would encounter a second difficulty: how to translate empirical research into admissible evidence, and how to weigh group-level effects in proportionality adjudication. Courts in India have not developed standards for the admission and assessment of social science evidence in constitutional contexts. One proposal would be to establish, in appropriately constituted surveillance cases, court-appointed expert committees tasked with conducting or synthesising research on chilling effects within defined populations. Such committees would not be constituted as *post hoc* fact-finding bodies investigating allegations. Rather, they would be established as part of the proportionality review mechanism itself.

A court-appointed expert committee might, for example, be instructed to: (i) identify, through literature review and consultation with researchers, empirical evidence regarding the chilling effects of surveillance in democratic societies with comparable legal protections; (ii) design or oversee survey or experimental methodology to measure whether persons subject to surveillance (once notified) report behavioural changes; (iii) examine available data on changes in patterns of information seeking, political expression, or civil society engagement in populations exposed to surveillance, as distinct from control populations; and (iv) translate these findings into assessments of whether the state's necessity claim is supported by evidence that interception was the least restrictive means available. The committee would not make final determinations but would produce an evidentiary record that could be contested and tested through cross-examination.

B. Standing and disclosure requirements

Notification creates the possibility of standing. Once an individual becomes aware of surveillance, she can petition for review of the legality of the order under which she was surveilled. Indian courts have permitted expansive standing in public interest litigation, particularly where fundamental rights are at issue. Courts should extend this approach to surveillance cases. An individual notified of surveillance should have standing to challenge the order, independently of whether she can prove concrete injury. The reasonable possibility that knowledge of surveillance affected her behaviour should suffice to establish injury for the purposes of standing.

Standing must be coupled with disclosure requirements. When an individual challenges an interception order, disclosure of the factual basis for the order becomes necessary. The state cannot maintain indefinitely that disclosure would jeopardise ongoing investigations; at a minimum, the factual justification must be revealed in some form that permits judicial assessment of proportionality. Courts should apply *in camera* review procedures (examination of documents outside the public record) to balance security and transparency, but non-disclosure in perpetuity cannot coexist with proportionality review. A framework might permit disclosure to judicial officers and appointed experts while maintaining confidentiality from the broader public.

C. An empirical protocol for necessity assessment

Courts should establish an evidentiary protocol for how necessity must be demonstrated. A proposed framework would require the state to establish that: (i) the objective is legitimate within constitutional bounds; (ii) the measure is suited to achieve that objective; (iii) no alternative measure, less restrictive of privacy rights, could achieve the same objective with comparable effectiveness; and (iv) the scope of the interception is proportionate to the legitimate objective, avoiding excessive breadth. This protocol should displace the current pattern wherein state assertion suffices.

For requirement (iii), the state should be required to produce evidence (or to articulate reasons for its inability to produce evidence) regarding the alternative investigative methods available to it. Has the state exhausted traditional investigative techniques before resorting to interception? Are less invasive monitoring methods available and, if so, why were they deemed insufficient? Courts should not accept necessity claims resting on abstract assertions. Similarly, for requirement (iv), courts should examine whether the scope of interception was tailored to its objective. Interception of all communications to and from a specific telephone number is broader than necessary if the state's objective could be achieved by monitoring communications with specific identified persons. Mass collection of metadata is broader than targeted monitoring of identified individuals.

VI. CONCLUSION: CONSTITUTING NECESSITY AS A JUSTICIABLE CONSTITUTIONAL FACT

Indian constitutional jurisprudence has articulated proportionality as a constraint on state surveillance authority. The *Puttaswamy* decisions establish that invasions of privacy must demonstrate necessity through the least restrictive means available. Yet this doctrine has not been translated into justiciable practice. Courts have generally accepted state necessity claims

without evidentiary proof. Citizens alleging chilling effects are told that their claims are unproven. This asymmetry reflects not a reasoned balancing of security and rights but a structural inequality in access to evidence and in epistemic authority.

Constituting chilling effects as justiciable facts requires three institutional innovations. First, the implementation of post-surveillance notification requirements modelled on German practice and recognised by the European Court of Human Rights. Without notification, individuals cannot know that they were surveilled, cannot demonstrate injury, and cannot establish standing for a proportionality challenge. Notification is not merely remedial; it is an evidentiary precondition of judicial review. Second, the integration of social science evidence into proportionality assessment through court-appointed expertise and evolving evidentiary standards. The empirical literature on chilling effects, though largely absent from India, can be generated through research methodologies suited to Indian contexts and populations. Courts need frameworks for admitting such evidence and for weighing group-level findings in individual proportionality challenges. Third, the establishment of disclosure requirements and evidentiary protocols through which state necessity claims must be substantiated by evidence rather than assertion.

Without these reforms, the *Puttaswamy* proportionality doctrine remains a statement of principle unsupported by practice. Necessity remains unfalsifiable. The executive's surveillance authority expands while the constraint theoretically imposed by proportionality performs no work. The chilling effect, real and measurable in international contexts, is dismissed as rhetoric. If privacy is indeed a fundamental right, and if proportionality is indeed its constitutional guardian, then necessity must be constituted as a justiciable fact, subject to evidentiary proof and adversarial challenge. The path lies through notification, expertise, disclosure, and the courage to demand that state power justify itself empirically.
