

**PEGAGUS SPYWARE-MANO HAR LAL SHARMA V.
UNION OF INDIA: STATE HEGEMONY OR
MISCONCEPTION 2021 SCC ONLINE SC 985**

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*If you want to keep a secret, you must also hide it from
yourself.¹*

Introduction

Now, we are living in digital age where our daily life is intrinsically connected with the digital world. This interrelationship of human existence and virtual world is acknowledged by many as 'data is the new oil' due to its commercial value as well as political significance. The freedom of political parties and people are essential for effective functioning of any democratic system. So, any kind of secret surveillance on the liberty of political expression will affect our cherished constitutional values. Modern technologies can be used for surveillance on anyone due to easy access to mobile and internet.

In this case, the allegation is that the Union Government uses Pegasus software of Israeli origin to conduct surveillance on targeted people. This alleged surveillance will have huge political repercussion. The tapping of telephone and mobile of political opponent was a storm few years before due to the abusive use of the Indian Telegraph Act, 1885.² Thus, this case is strongly intertwined in political rhetoric and the Court need to avoid entering political thicket. The Court need to focus only on constitutional values and rule of law to uphold what is right and

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¹ George Orwell, 1984, 280 (Amazing Reads 2014).

² People's Union for Civil Liberty v. Union of India, (1997) 1 SCC 301.

strike down what is wrong. Any surveillance will infringe the right of privacy and other fundamental rights including human dignity.³ Human dignity is the foundation of human rights.

To note, government transparency and openness is a celebrated principle of our Constitution.⁴ The Court quoted the opinion of Judge Khanna that “Judicial review is not intended to create what is sometimes called as Judicial Oligarchy, the Aristocracy of the Robes, Covert Legislation or Judge made law”.⁵ The best place to judge misuse or abuse of legislative function is through public opinion and elections. The Judges need to keep themselves away from the din and controversies in politically sensitive cases. The primary duty of Judges is to uphold the Constitution and other laws without any fear or favour.

Background of the Case

In September 2018, the Citizen Lab of University of Toronto, Canada published a detailed report stating the capabilities of a software i.e. spyware suite called ‘Pegasus’. It is produced by an Israeli company, NSO Group. This report alleged 45 countries were affected by this Spyware. This software infects the Digital devices of the targets by ‘zero click vulnerabilities’ i.e. there is no need for any actions from the target like opening an email, link, attachment file etcetera. Once the device is infiltrated the software allegedly has the capacity to take control of entire data storage, real time access to multiple functions in the device and can remotely operate the device like switching on and off different functions of the infested device. It is claimed in the NSO website that this powerful software is solely sold to the government agencies.

In May 2019, the global giant WhatsApp found out infiltration of Pegasus due to some software vulnerability of WhatsApp. The

³ K.S. Puttuswamy v. Union of India, (2017) 10 SCC 1, AIR 2017 SC 4161.

⁴ Anuradha Bhasin v. Union of India, 2020 SC 1308.

⁵ Keshavananda Bharathi v. State of Kerala, (1973) 4 SCC 225, p. 503, para. 1596.

Minister of Law and Electronics acknowledged the impact of Pegasus over certain Indians. Consequently, the Citizen Lab along with Amnesty International discovered the spyware campaign on nine Indians. On July 18, 2021, the global consortium of Journalist alleged the use of Pegasus over 50,000 people including nearly 300 Indians. The Minister refuted the allegation of Pegasus use on Indians and said there is no factual basis over these allegations. He stated that the law of surveillance and communication interception is extremely rigid in India and cannot be abused. So, there can be no illegal surveillance. Many applicants raised the issue of cyber-attack on Indians by its own Government as well as by some foreign government because NSO claimed that it sold this software exclusively to the Governments. Thus, the petitioners pleaded for independent investigation on Pegasus issue.

Contention of the Parties

The Respondent Indian Government denied the allegations and claimed it lacks any veracity because the captioned petition is based on conjectures and surmises without any substantial evidence. Further, the deponent assured that they will constitute a Committee of Field Experts to thoroughly investigate the issue at hand. The deponent filed 'limited affidavit' due to paucity of time and also claimed threat to national security and defence of the State. The Court directed to declare non-sensitive facts before it.

The learned Solicitor General submitted that the certain information cannot be placed for public debate due to its sensitive character and it may be used by terrorist groups for anti-national activities. He assured that unauthorised or illegal surveillance cannot be taken place in India. However, Senior Advocate Kabil Sibal argued that the respondent State cannot escape from submitting necessary documents to the Court for rendering justices to the claimants for the alleged infringement of their fundamental rights. He claimed a completely independent investigation which should be supervised by the Supreme Court Judge like *Jain Hawala case*. The petitioners

claim inaction from the Union Government for the allegation of Pegasus attack on Indians. This inaction of the Union Government is a grave concern. It rises doubt that whether Indian government itself used Pegasus to spy its own people.

Senior Counsel Shyam Diwan claimed that he was one of the affected persons by Pegasus software. He elaborated that using this software implantation of false documents and evidences can be made in any device. He argued about the nature and function of the software. So, it is the supreme responsibility of the State to take immediate action of the alleged surveillance because it can be used by foreign States too including Pakistan and China due to their hostile relation with India. Therefore, it is essential to constitute Special Committee or Special Investigation Team to investigate the spying allegations. Further, there is no credible statement from the Union about the non-use of Pegasus by it. Also, the establishment of committee by the Union can raise a credibility question because the Union itself a respondent in this case. Otherwise, it will violate the Principle of Natural Justice i.e. no person cannot be a judge in its own case and “justice must not only be done, but also be seen to be done”.⁶ It is expressed in the maxim *nemo judex in propria causa sua*.

The Union Government indirectly supported the use of such software due to the presence of legal mechanism on surveillance and communication interception.⁷ Any attack on the journalist infringes two cherished fundamental right i.e. right to privacy and right to freedom of free speech and expression including freedom of press. This freedom of speech is also recognised by the Universal Declaration of Human Rights, 1948.⁸

⁶ Manohar Lal Sharma v. Union of India, 2021 SCC OnLine SC 985, p.38, para. 57.

⁷ *Id*, p.16, para. 25.

⁸ Universal Declaration of Human Rights, Preambular Recital 2.

Article 13 of the UDHR states that:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attack upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.⁹

Character of Privacy:

The right to privacy has become an intrinsic part of right to life and personal liberty under Article 21.¹⁰ The Court noted the historical evolution of the right of privacy. It observed that the right to privacy was 'property centric' rather than 'people centric'.¹¹ Also, the Court observed that the citizens' privacy shall not be invaded by the State. In India, the right to privacy was judicial invention under Article 21 of the Constitution of India, 1950. The term 'privacy' derives its meaning from other rights relating to dignity and freedom.

The term 'life' in Article 21 is subjected to numerous interpretations by the Honourable Supreme Court and High Courts, the expounded jurisprudence enriched the meaning of life to have certain qualities for cheerful existence and not mere animal existence.¹² The right to privacy is not the singular concern of journalist or social activist.¹³ The privacy relates to the choices, liberty and freedom of the concerned individuals which in turn mould their personality. In the *K. S. Puttuswamy v. Union of India*, the SC recognised the sacrosanct nature of privacy for human existence.¹⁴ Also, it is inseparable aspect of human dignity and autonomy. Though, the right of privacy is not an absolute right, it can be reasonable restricted, if the law

⁹ *Supra* Note at 8, art. 13.

¹⁰ *K.S. Puttuswamy v. Union of India*, (2017) 10 SCC 1, AIR 2017 SC 4161.

¹¹ *Semayne*, 77 ER 194 (KB). The Court noted in this case that "every man's house is his castle".

¹² *Kharak Singh v. The State of Uttar Pradesh*, 1963 AIR 1295.

¹³ *Supra* Note at 6, p.18, para. 32.

¹⁴ (2017) 10 SCC 1

is able to withstand threefold conditions laid in *Puttuswamy case*. They are as follow:

- a) legality or the existence of law,
- b) need or legitimate aim of the State, and
- c) proportionality or a rational relation between the objects sought and deployed means to achieve it.¹⁵

Firstly, there shall be an existing legislation that allows surveillance. This is the essential mandate of Article 21 i.e “No person shall be deprived of his life and personal liberty except according to a procedure established by law”.¹⁶ Therefore, to deprive personal liberty, there shall be an authorising act for surveillance or spying. However, there is a limitation prescribed by the Court that it should follow ‘due process of law’ for violating life or personal liberty. Secondly, the legitimate aim of the State must not be arbitrary and unreasonable in restriction, in order not to offend Article 14. Thirdly, the law should be proportionate to the legislative objectives. This test is a safety valve against the excessive arbitrary power of the State. Therefore, there is an inverse relationship between fundamental guarantee on non-arbitrariness and right to life and personal liberty.

The Court rightly pointed out the need for balancing the legitimate State interest *vis-a-vis* the rights of the individuals. The need to counter violence, crime, corruption, and terrorist activities through surveillance cannot be questioned but indiscriminate use of such technology for political and critique silencing is dangerous for any democratic functioning. The renowned scholar Daniel Solove is of the view that privacy can be protected without compromising the security needs of the State. For mere mentioning of security threat to State, the Court should not keep silence on this issue. Without privacy, the

¹⁵ *Supra* Note at 10.

¹⁶ The Constitution of India, art. 21.

individuality of the person may be killed and power may be effectively concentrated in the hands of few people. They will become masters as well as monsters for our democratic values and purposes which we cherished for long time.

The biggest threat to privacy and surveillance are from the government. Due to its immense money power, muscle power and authority it wields. The modern digital age converts humans to mere data generating source which can be used to create digital footprints. These data can be analysed to know every details about the individuals like their preferences and political behaviour. This potential abusive character of the State is known as 'governmental eavesdropping'.

This illegal governmental eavesdropping may create a chilling atmosphere on the minds of the people not to criticise its own government due to potential harm from pro-governmental actors. Thus, it will affect the behaviour of people in exercising their choices in every aspect of their life. Also, it will affect the way of functioning of the press and its role as a watch dog of our democracy. So, there is an ultimate duty on every responsible citizen to support for safeguarding the freedom of press from potential destruction from illegal surveillance and spying. The Court touches upon an important aspect of freedom of press i.e. protection of informational source. The snooping technique can compromise the anonymous identity of informational source and may threaten their life and liberty for disclosing certain information about the government or private persons.

In the case of *Anuradha Bhasin v. Union of India*, the SC stressed the importance of free press for disseminating information to all people, particularly during disturbed times. It noted that "Journalist are to be accommodated in reporting and there is no justification for allowing a Sword of Damocles to hang over the press indefinitely".¹⁷ The Court is wholly aware that the filling of Writ Petitions is based on newspaper reports and other international agencies reporting. The jurisprudence

¹⁷ (2020) 3 SCC 637.

of this Court is not to take cognisance wholly based on newspaper reporting without any due diligent work done by the Petitioners to prove the credentials of the case.¹⁸

As held in the *Case of Ram Jethmalani v. Union of India*, adversarial stand must not be taken by the Union government, if fundamental rights are threatened.¹⁹ It is a well-established principle to prove the case with evidences on the party who claims it. Albeit in most of the cases, requisite materials and documents of the case are with Union Government. So, the Union Government is duty bound to submit all documents pertaining to the case at hand. However, if any limitation is invoked by the State, it is duty of the State to expressly cite the constitutional principles or prohibited grounds of disclosure. To note, the ultimate duty to protect the fundamental rights of the people is vested on the State. So technically, the State cannot hinder the process of administration of justice by non-submission of case details before the Court.²⁰

Finally, the Court held that it has *prima facie* case on the allegations raised by the Petitioners and also the Union Government failed to deny these allegations in any concrete terms. So, in any rationality, it is imperative to constitute an independent Committee to find the truth on the issues raised. A huge weightage is given to the potential abuse of such software on large scale surveillance which will violate the fundamental rights of our people.²¹

Conclusion:

The Court rightly agreed to examine the allegation of infringement of the right to privacy and freedom of speech and

¹⁸ Rohit Pandey v. Union of India, (2005) 13 SCC 701.

¹⁹ (2011) 8 SCC 1.

²⁰ *Supra* Note at 6, p. 31-32, para. 77-78.

²¹ Refer, Ram Jethmalani v. Union of India, (2011) 8 SCC 1; Extra Judicial Execution Victim Families Association v. Union of India, (2013) 2 SCC 493 and G. S. Mani v. Union of India, W.P. (CrI) No. 348 of 2019.

expression encompassing freedom of press. It is important to instill confidence of the people that they are free from any surveillance and spying. The involvement by foreign States, foreign authorities and players cannot be ruled out due to the nature of interconnected digital world. Also, this surveillance allegation is made against the Indian Government and State Governments. The Court acknowledges the jurisdictional limitation to deal with factual aspects under Writ jurisdiction.

Finally, the Court appointed Justice R.V. Raveendran to oversee the functioning of the Committee which consists of experts from cyber security, digital forensics, networks and hardware.²² Also, Justice Raveendran is given the power to take assistance from any officers, legal experts and technical experts in discharging his mandate. To note, the honorarium for the Committee members will be fixed after consultation between the supervisory Justice and the members itself. Thus, independency of the Committee is assured. The honorarium shall be paid by the Union with immediate effect. Also, the Government of the Union and States shall provide full facilities for the functioning of the Committee.

The Committee is empowered to make suggestions for amending or enacting new surveillance law in India, to enhance the cyber security infrastructure, to ensure prevention of cyber-attacks, to establish grievance redressal mechanism on illegal surveillance, to create independent institution for investigating, assessing the cybercrimes vulnerability, to suggest any ad-hoc arrangement to fill legislative gaps in surveillance laws as an interim measures and other related ancillary matters. Further, the Committee is empowered to device its own procedure, to conduct enquiry and investigations, to take statement from 'any person' related to enquiry and call for records from 'any authority' or 'individuals'. Thus, the Committee is effectively empowered to act independently and come up with truth on the

²² *Supra* Note at 6, p. 39, para. 59.

allegations of espionage on Indian nationals. The terms of mandate of the Committee are as follow:

1. Whether Pegasus is used against Indian Citizens?
2. If yes, the details of the victims of spyware attack,
3. What are the steps taken by the Union Government for the alleged WhatsApp hacking using Pegasus?
4. Whether Indian governmental agencies used Pegasus and on what lawful basis?
5. Whether any domestic entities or persons used this software on Indian nationals?
6. To report on other ancillary and incidental matters.

To conclude, the Court noted that the Government of India didn't cooperate with the Committee which itself showed a strong presumption that the G.O.I used the software. Otherwise, it would have cooperated with the committee openly and effectively. Also, malwares were found in 5 out of the 29 phones submitted for thorough analysis before the Committee.²³ But they failed to prove that the malware is Pegasus. Finally, the Government should have submitted to openness, transparency and democratic freedom which is a fundamental building block of our Constitution.

²³ Indian Express, <https://indianexpress.com/article/explained/explained-sci-tech/supreme-court-verdict-pegasus-spyware-case-explained-8110710/> (Last Visited on Nov. 15, 2022).