
NATIONAL SECURITY AND PRIVACY - WHICH SIDE WILL THE DEBATE MOVE?

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ABSTRACT

The recent Pegasus malware controversy has erupted some very strong debates in the country. At one hand, the privacy concerns in the country have sprung up as any kind of state sponsored surveillance is a sharp violation of that dignity ambit of the citizen, while on the other hand it is imperative to address national security issues at a technologically advanced and vulnerable age when propaganda and war types have metamorphosed significantly. The authors in this paper have attempted to analyse the arguments put forward by the State to defend itself in the Pegasus controversy and this paper also tries to provide for a food for thought to advance the debates on the age old proverb – “Is the state or the state more powerful?”

Keywords: State, Pegasus, Individual, Surveillance, Privacy, Security

ABSOLUTISM OF A FUNDAMENTAL RIGHT

Privacy is comprehensively understood as the “right to be let alone; the right of a person to be free from unwarranted publicity; and the right to live without unwarranted interference by the public in matters with which the public is not necessarily concerned.”¹ To the contrary, the Supreme Court had held in the case of *Ritesh Sinha v. State of Uttar Pradesh*² that the fundamental right to privacy “must bow down to compelling public interest”. Further, in the case of *Rohit Shekhar v. Narayan Dutt Tiwari, 2011*³ it was stated that “forced interventions with an individual’s privacy under human rights law in certain contingencies has been found justifiable when the same is founded on a legal provision; serves a legitimate aim; is proportional; fulfils a pressing social need; and, most importantly, on the basis that there is no alternative, less intrusive, means available to get a comparable result”.

Additionally, in the case of *State of Maharashtra v. Bharat Shanti Lal Shah & Ors*⁴ was a constitutional challenge to Sections 13 – 16 of the Maharashtra Control of Organized Crime Act that involved provisions for interception of telephone (and other wireless) communications, wherein the court dismissed the contention stating that “the object of the MCOCA is to prevent the organized crime and a perusal of the provisions of act under challenge would indicate that the said law authorizes the interception of wire, electronic or oral communication only if it is intended to prevent the commission of an organized crime or if it is intended to collect the evidence to [sic] the commission of such an organized crime”. Therefore, it can be comprehended from the aforementioned precedents that reasonable restrictions on fundamental rights are not only justified but also accepted in the wake of safety and integrity of the country.

It has been observed in numerous occasions that rights are not absolute, in one such landmark judgement of the nine-judge bench given by the Hon’ble Supreme Court in the case of *Justice K.S. Puttaswamy (Retd.), and Anr v. Union of India and Ors*⁵ it was held that the right to privacy is a fundamental right protected under the articles 14, 19 and 21 of the Constitution. Concededly, the above-mentioned judgement states that “fundamental rights are not absolute” and that the Constitution itself permits state to impose reasonable restrictions on the rights

¹ “Privacy” Black’s Law Dictionary.

² Criminal Appeal No. 2003 of 2012

³ SCC OnLine Del 4076

⁴ (2008) 13 SCC 5

⁵ (2017) 10 SCC 1

under certain circumstances. It was also observed that when it will come to the restrictions of this right, the drill of various articles to which the right relates must be scrupulously followed.⁶ Subsequently in the case of *Govind v. State of Madhya Pradesh & Anr*⁷ the right to privacy was accepted as an emanation from Art. 19(a), (d) and 21. However, the court stated that the right to privacy is not absolute in its entirety. “Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right must be subject to restriction on the basis of compelling public interest” and that the right to privacy deals with ‘persons not place’s’. 1.6.3 Further, the court observed that; “If there is a conflict between fundamental rights of two parties that right which advances public morality would prevail.”

The Hon’ble Supreme Court in the case of *Modern Dental College and Research Centre v. State of Madhya Pradesh*⁸ opined that private unaided minority and non-minority institutions have a right to occupation under Article 19(1), the said right is not absolute and subject to reasonable restriction in larger public interest. Thus, through these differing precedents it can be predominantly acknowledged that rights are not absolute whereby reasonable restrictions can be imposed in certain occurrence.

NATIONAL SECURITY CONCERNS – HOW POWERFUL A GROUND

National Security is the most important consideration that drives the government of any State. If a state is Sovereign, then it has to be vigilant and careful enough to maintain that status as well. India is also undergoing strategic transformation from a Third World non-aligned state to one in which she must stand on her own two feet in the international community in the midst of a range of complex security issues. India faces major national security challenges from a resurgent China and the unstable Islamic state of Pakistan. Combined with continuing political instability in Central Asia to the north and the fear of regional Islamization, India’s land borders face both active and potentially hostile opponents, at least two equipped with nuclear weapons. From the seas to the east, west and south, it is anticipated that Chinese nuclear-armed submarines may patrol at will in the future, within striking distance of the Indian land mass. It is expected that conventionally-powered Pakistani nuclear submarines will also ply these waters, and be equipped with nuclear-tipped cruise missiles. US naval forces, although

⁶ Para 87 of Justice K.S. Puttaswamy v. Union of India, Writ Petition (Civil) No 494 of 2012; (2017) 10 SCC 1; AIR 2017 SC 4161

⁷ AIR 1975 SC 1378

⁸ (2016) 7 SCC 353

considered less a threat than China and Pakistan, also patrol these waters, both on the surface and in its depths.⁹

Under Section 5(2) of the Telegraph law, the government can intercept calls only in certain situations:

- a. Interests of the sovereignty and integrity of India,
- b. Security of the state,
- c. Friendly relations with foreign states or public order,
- d. Preventing incitement to the commission of an offence.

These are the same restrictions imposed on free speech under Article 19(2) of the Constitution. However, these restrictions can be imposed only when there is a condition precedent - the occurrence of any public emergency, or in the interest of public safety. Further, the grounds of selecting a person for surveillance and extent of information gathering has to be recorded in writing.

Rule 419A states that a Secretary to the Government of India (not below the rank of a Joint Secretary) in the Ministry of Home Affairs can pass orders of interception in the case of Centre, and similar provisions exist at the state level. Surveillance is an exercise that is directed with a purpose and it is duly undertaken in wider mass interests – to protect the State itself which grants the rights to its citizens. As in the Justice AP Shah principles of Purpose Limitation and Collection Limitation¹⁰ and in the Necessary and Proportionate principle of Safeguards Against Illegitimate Access¹¹, it is recommended that:

⁹ David Beachley,

India: Transformation Strategies for War Into the 21st Century, Science Applications International Corporation, SAIC-99/6006&FSRC, Denver, March 22, 1999; Jasjit Singh, “Defending India in the 21st Century: Issues of Affordability and Credibility,” Strategic Analysis, October 1996; K. Sundarji, General, Former Chief of Army Staff India, “India in the World of 2025 AD,” U.S.I. Journal, October–December 1997; B.D. Jayal, Air Marshal (ret.)

¹⁰ Justice Ajit Prakash Shah, Former Chief Justice, High Court of Delhi, “Report of the Group of Experts on Privacy”, Planning Commission (CIT&I Division), Government of India, 16 October 2012, http://planningcommission.nic.in/reports/genrep/rep_privacy.pdf

¹¹ 4Electronic Frontier Foundation, Privacy International & Access, “International Principles on the Application of Human Rights to Communications Surveillance”, Necessary & Proportionate, 10 July 2013, <https://www EFF.org/files/necessaryandproportionatefinal.pdf>

- Law enforcement may only collect information relevant to the purpose, as specified in the lawful order
- Information that is collected that does not relate to the purpose stated in the lawful order should be destroyed or new authorization should be obtained to use the information
- Information may be used only for the purpose as stated in the lawful order.

The State surveillance duly follows existing laws and enactments that are required and needed in any country.

It is noteworthy that the Information Technology (Amendment) Act, 2008, removed the preconditions of “public emergency” and “public safety” which are grounded in the Indian Telegraph Act, 1885, and expanded the power of the Government to order the interception of communications for the “investigation of any offense”.¹²

“however, mean that Official Secrets Act, 1923, or any similar enactment or provision having the force of law does not bind the press or media.” Was added as a saving direction or clause to the flurry of directions that was given by the Court in the case of **R. Rajagopal v. State of T.N. (1994) 6 SCC 632**. This is clearly a prominent direction that has been given making state superiority more important than the freedom of press.

In the case of **Rohit Shekhar v. Narayan Dutt Tiwar 2011 SCC OnLine Del 4076 (Delhi High Court)**

"forced interventions with an individual's privacy under human rights law in certain contingencies has been found justifiable when the same is founded on a legal provision ; serves a legitimate aim ; is proportional ; fulfils a pressing social need ; and, most importantly, on the basis that there is no alternative, less intrusive, means available to get a comparable result."

Hence the excuse of defense is in itself a very powerful consideration that justifies the state actions of monitoring and vigilance.

¹² Electronic Frontier Foundation, Privacy International & Access, “International Principles on the Application of Human Rights to Communications Surveillance”, Necessary & Proportionate, 10 July 2013, <https://www.eff.org/files/necessaryandproportionatefinal.pdf>

We live in a technology-driven world; new technologies such as the Internet and digitization are enabling powerful tools for states to enhance national security but also creating new and serious vulnerabilities and security risks. Cyber security has become a major concern and it is only through developing advanced technological capabilities that a state has a chance of defending itself against cyber attacks. The NSS would enable the identification of critical infrastructure that may be vulnerable to cyber attacks, and the development of human resources capable of identifying attacks and protecting and restoring critical systems. Anticipating cyber attacks and hardening systems against them become ever more necessary as economic and governance activities increasingly rely on digital technologies. Ad hoc responses would be grossly inadequate. A critical aspect is that in a democracy like India, the state's use of advanced digital technologies for surveillance and intelligence gathering must not violate the citizens' right to privacy and freedom of expression. There is a trade-off between enhanced security and the citizens' rights guaranteed by the Constitution, and this must be clearly spelt out for the people of the country and well-considered solutions put forward. National security must not become a justification for a surveillance state. The danger of relying on ad hoc responses is that they may cumulatively lead to a predatory and authoritarian state that limits the exercise of democratic rights. The NSS must deal with this dilemma upfront¹³

GOVERNMENT PRIVILEGE IN EVIDENCE ACT - A NECESSARY STATE DEFENCE

In the law of evidence, the governmental privilege to withhold documents from producing them in the courts is claimed under Sections 123¹⁴ and 124¹⁵ of the Indian Evidence Act, 1872. There are certain subject matters that are privileged and such privileged information's are not subject to disclosure, the secrecy of governmental functions are to be maintained wherever deemed necessary. It was observed by the Hon'ble Supreme Court in the case of *Mardia Chemicals Ltd v. Union of India*¹⁶ that wherever public interest to a large extent is involved, it may become necessary to achieve an object which serves the public purposes, individual rights may have to give way.

Public interest has always been considered to be above private interest. Interest of an individual may, to some extent, be affected but it cannot have the taking over the public interest having

¹³ <https://cprindia.org/news/7832>

¹⁴ Section 123, The Indian Evidence Act, 1872

¹⁵ Section 124, The Indian Evidence Act, 1872

¹⁶ [2004] 4 SCC 311

an impact in the socio-economic drive of the country. According to the Right to Information Act, 2005, Section 8 (1) (j) mandates disclosure only when larger public interest so justified and must be read in the context of Section 123 of the Indian Evidence Act, which states that nobody shall be permitted to produce any evidence from unpublished official records relating to the affairs of the State, except without the permission of the officer at the head of department concerned who wherefore shall be obliged to give or withhold such permission as he thinks fit.

‘Public interest’¹⁷ means the general interest of the community as opposed to the particular interest of individual. This ‘public interest’ shall be deemed to outweigh the harm to the individual interests of the person where interest of the community or a considerable number of members of society is involved and in such a case the Central or State Public Information Officer, for the interests of the protected persons cannot refuse to disclose the information. Thus, the exempted information can be disclosed if the same is in larger public interest meaning thereby that access to the exempted information can be allowed if public interest is served in providing the information.

In *Union Public Service Commission v R.K. Jain*¹⁸ an analysis was done to understand the ambit of the exemption that can be granted under Section 8(1)(j)¹⁹. The principles that were laid down are as follows:

- i. The information sought must relate to "Personal Information". Therefore, if the information sought does not qualify as personal information, the exemption would not apply;
- ii. Such personal information should relate to a third person, i.e., a person other than the information seeker or the public authority;
 - a. The information sought should not have a relation to any public activity qua such third person, or to public interest. If the information sought relates to public activity of the third party, i.e. to his activities falling within the public domain, the exemption would not apply. Similarly, if the disclosure of the personal information is found justified in public interest, the exemption would be lifted, otherwise not;

¹⁷*Babu Ram Verma v State of Uttar Pradesh* [1971] 2 Serv. L.R. 659.

¹⁸ LNIND 2012 DEL 13910

¹⁹ Section 8(1)(j), The Right to Information Act, 2005

b. The disclosure of the information would cause unwarranted invasion of the privacy of the individual, and that there is no larger public interest involved in such disclosure.

Privilege with respect to the State or Sovereign is an important administrative policy decision. Lord Justice Salmon described the power as "vital to the true administration of justice". It has been held in the case of –

Glasgow Corp. V. Ceniral Land Board, (1956) S.C. 1, 18, 19 (H.L.).

The touchstone by which the doctrine of Crown privilege operates, was felicitously expressed by Lord Rad. cliifein the Scottish--appeal." His Lordship said: "The power reserved to the Court is therefore a power to order production even though the public interest is to some extent affected prejudicially. This amounts to a recognition that more than one aspect of the public interest may have to be surveyed in reviewing the question whether a document which would be available to a party in a civil suit between parties is not to be available to the party engaged in a suit with the Crown. The interests of Govern- ment, for which the Minister should speak with full authority, do not exhaust the public interest. Another aspect of that interest is seen in the need that impartial justice should be done in the courts of law, not least between citizen and Crown, and that a litigant who has a case to maintain should not be deprived of the means of its proper presentation by anything less than a weighty public reason. It does not seem to me unreasonable to expect that the court would be better qualified than the minister to measure the importance of such principles in application to the particular case that is before it." Rule 17 of the Government Servants' Conduct Rules lays down that a Government servant may not communicate directly or indirectly to other Government servants or to non-official persona or to the Press any documents or information which May have come into -his possession in the course of his s public-duties. Retention of such documents or information by a Government servant in his personal custody for use in furtherance of his personal interest, e.g. in making representations to the authorities concerned, is not only objectionable but also constitutes an offence under Section 5 of the Official Secret Act 1923. A person contravening the provisions of the dove Act renders himself -liable to-prosecution. Contravention of the provisions of the Act and of the. Conduct Rules ban also be dealt with departmentally under - the relevant Discipline Rules, land may well justify the imposition of a suitable penalty with reference to the facts and circumstances of each case-

CONCLUSION

It can be hence concluded that National Security is a strong prerequisite for government administrative actions and that is the sole reason why even fundamental rights can get compromised on non-absolute grounds to keep the State safe.