

Monu Malhan, Advocate, High Court of Punjab and Haryana

Abstract

The dawn of technology and internet of things has significantly altered the way we interact with each other and pursue our transactions with rest of the world. The relationship between state and citizens has not remained unaffected by the same. The spread and magnanimous increase of technology has caused the problem of state surveillance through the deployment of spywares like Pegasus. The paper analyses such state practise as antithetical to rights of privacy and freedom of expression and tantamount to the concept of limited government. The paper studies the interplay of the concepts of privacy, freedom and state control.

Keyword: Right to privacy, Spyware, Privacy, Pegasus, Surveillance

I. Review of Literature

1. Freedom of Expression Challenged: Scientists' Perspectives on Hidden Forms of Suppression and Self-censorship¹ by Esa Valiveronen

This paper talks about the new secret types of concealment and self-control seeing researchers' jobs as open specialists. It depends on two web overviews directed among Finnish analysts in 2015 and 2017.

2. 'Freedom of Speech and Expression' as a Fundamental Right in India and the Test of Constitutional Regulations: The Constitutional Perspective² by Aqa Raza

The specialists in this paper try to examine the idea of the right to speak freely and articulation as an essential right ensured by the Constitution of India with an accentuation on the trial of established guideline.

3. Analysis of the Obstacles to the Freedom and Independence of the Media in the World and Turkey³ by Dr. Mustafa ÖZTUNÇ

This paper analyzes the deterrents to the opportunity and freedom of the media on the planet overall and Turkey specifically. The basic political economy of the media was utilized as the hypothetical structure for the review and, with respect to the strategy, a subjective investigation of optional information was performed.

4. Freedom and control: A state of balance in public space⁴ by Kin Wai Michael Siu

The motivation behind this study is to decide how to accomplish a harmony among freedom and control openly space. It investigates the connection among freedom and control to distinguish peculiarities and deal clients and policymakers directions for accomplishing that equilibrium.

5. The Autonomous Mind: The Right to Freedom of Thought in the Twenty-First Century by Simon McCarthy-Jones

The paper contends that the space of the right to Freedom of thought ought to be stretched out to incorporate outside activities that are seemingly constitutive of thought, including web searches and journals, consequently safeguarding them with outright security. It is focused on that regulation should shield us from dangers to freedom of thought from the two states and organizations, with legislatures expecting to act under the positive part of the option to guarantee social orders are organized to work with mental independence.

¹ *Science, Technology, & Human Values*, 46(6), 1172–1200

² *The Constitutional Perspective*. XLIII. 87-110.

³ *The Turkish Online Journal of Educational Technology* – January 2021, volume 20 issue 1

⁴ *European Journal of Marketing*

II. Research Question

Legal Ramifications of spyware state surveillance vis-a-vis right to privacy & freedom of expression.

The research paper studies the interplay of individual liberty and state control in new dynamics of technological interface. The paper analyses the ramifications and legal aspects of state surveillance on individual activities via spyware as infringing upon right to privacy, right to freedom of speech and expression.

III. Hypothesis

After a careful review of existent literature available on this subject, the author hypothesises that such encroachment, surveillance and control of individual liberty by state is against constitutional rights guaranteed to citizens of India.

In pursuance to the study, the paper tests the hypothesis against provisions of the constitution of India and several judicial precedents.

Introduction

In the 21st century, we are connected more than ever before. The world has shrunk to the very screens of our phones and other devices. Every person on this earth is now just a call away from us. This is exciting, astonishing as well as daunting. Our lives remain no longer private and the term 'privacy' seems to be archaic now with the dawn of unchecked state surveillance.

The basis of state surveillance

The work of surveillance framework has been a basic piece of the statecraft⁵. Since the absolute starting point of human civilization, spies or different means have been conveyed to gather data relating to material interests of the state. This methodology has been appropriated to numerous realms which have administered India too.

The surveillance in India has been done to check any data about potential fear of terror assaults or coordinated violations of laws or organized crimes. The use of state surveillance has been to stop any activity that could hurt national interests of the country.

The era of spyware

After the matter of Pegasus spyware surfaced, the opposition, media outlets, social activists etc took to various means to signify their apprehension, disapproval and sensitivity of the matter.

Spywares like Pegasus are designed to break into high end security systems and transfer the data from the device to the host server. The deployment of such spywares is generally carried out by the government to track and get access to sensitive data of noted personalities, journalists, activists etc. In addition, state surveillance also helps the intelligence authorities to fight proxy wars or stop any acts of espionage against the state.

Methodology

The spywares can be installed in any system by spear phishing, which involves deceiving an individual into committing an action on fraudulent message. Advanced Spywares like Pegasus use have an updated technology of 'zero-click installation' which enables the malware to attack the system even without user's intervention. Once the spyware gets access to system, it can create, transfer or destroy data there, this without user's information or consent.

Unchecked state surveillance

The major threat arising out of the usage of unchecked and unaccounted state surveillance is targeted surveillance of individuals to satisfy the political motivations of the government in power. The spywares can be implanted by the intelligence agencies into the devices of journalists, opposition leaders, social activists, individual dissidents. Their private information like call recordings, physical location, contacts, and financial transactions can be traced by the government.

⁵ Anthony Zurcher, Roman Empire to the NSA: A world history of government spying, Nov. 1, 2013, available at <https://www.bbc.com/news/magazine-24749166> (Last visited Sep. 22, 2022).

The state surveillance which was based on national interests can also be used or is used for political motivations. Government can use the private data of the individuals to target them and plan its actions accordingly so that it enjoys political supremacy over them.

Another serious misuse of the spywares can be the false implantation of the evidence against an individual. Since host has complete access to remote device, any information can be added in infected device which evidences the individual's involvement in crime or illegal transaction. This practise will allow government to threaten its adversaries and stifle dissident.

The greed and lust for power of the government may result in it controlling lives. To say the least, we are being watched. Hypothetically, the strings of our lives are in the hands of the government leaders before they are in the hands of God. Such is Pegasus, a blemish on democracy, originally designed to spy on terrorists but now being used to spy on civilians.

Case study- Pegasus spyware

Privacy is not something that we as humans have made it up. It is our constitutional right to have a certain barrier separating us from the rest of the world. It is the "Right to Privacy" that differentiates democracies and Free State from a police state. But with the advent of snooping software such as Pegasus, democracies remain no more democracies rather they have transitioned to Surveillance States the likes of which we could hardly imagine. In countries like North Korea, people know that they are being watched and controlled but in "democracies" people are being watched secretly.

Pegasus, the fabled winged horse from Greek mythology, is said to have let Bellerophon, the Corinthian hero, ride him to fight the terrible Chimera before flinging off to the sky, where he was converted into the eponymous constellation by Zeus. In the form of software created to combat terrorism, criminality, and national security, he has now returned to Earth.

Pegasus becomes a symbol of lyrical inspiration in contemporary times, despite being understood as a metaphor of the soul's immortality, only to be converted into a despicable cyber weapon in the hands of tyrants and bigots with the goal of putting down opposition and destroying critical thought. The constellation still shines brightly in the sky, but it no longer conjures the same ancient mystical feelings for humans.

The charges of governments eavesdropping on their own citizens, queries being deflected by prevarications, and a private company's exaggerated self-aggrandizement are all very James Bond-esque. In case there was any question, the NSO-Pegasus exposé has made it abundantly evident that in the twenty-first century, it's not only about money or ammo; it's about the true weapon, one with boundless potential but much greater potential for evil — knowledge. Information is a powerful tool. Neither the Indian government nor the NSO have said categorically that the Indian government is a client or utilises the Pegasus programme. The NSO has said that its clientele are exclusively governments, primarily law enforcement and intelligence agencies, and not private companies. The programme, on the other hand, is intended to be sneaky. It does not employ the older spear-phishing technique, which needed a prospective victim to click on a malicious link in order to download infected malware.

The Pegasus incident has reopened the floodgates about privacy and the extent to which the government may misuse privacy rights. While spying has a long history in India, this is the first time that sophisticated equipment intended for defence and national security has been unethically utilised to get access to all anti-government communications. Anyone who defends this will be going down a slippery slope of weakening an individual's basic rights as well as the nation's democratic values.

Violation of the Fundamental rights

The unchecked state surveillance violates two very important fundamental rights of the citizens of India. To start with, the right to free speech and expression as guaranteed by Article 19 of the Indian constitution is seriously comprised in such situation. The right to free speech and free press get restricted to a mere mirage where government can listen, decipher each of the thoughts, actions of the citizens. Such a situation where government can extract critical information about journalists and consequently misuses it will result in deterioration of India as a democracy.

Right to privacy

The Supreme Court of India unanimously recognised the Right to Privacy as a basic right in 2017⁶. The Right to Privacy is protected under Article 21 of the Indian Constitution, which the Puttaswamy Judgment defines as "the right of an individual to exercise control over his personal data and to be able to control his/her own life, which would include his/her right to control his/her own life and existence on the internet." In the case of surveillance, the lack of privacy infringes on the Constitution of India's principles of liberty and dignity, and impedes the individual's development as a citizen of this nation. In these days of digital communication, the concept of privacy has been swallowed by "zero detectable" surveillance.

The judgement also laid certain guidelines to be followed by the government before breaching individual's privacy. The action breaching privacy of the government must comply with following tests

- a. The action must be justified by the law
- b. The action must be necessary and the effect must be proportional to the interest served
- c. The action must serve a legitimate aim
- d. The law must provide procedural safeguards against abuse of authority.

Unfortunately, the action is illegal and in direct conflict with fundamental rights as mentioned in constitution. The action of targeted state surveillance has no connection with protecting national interests of country and is purely sourced from political motivations. In addition, the aim is illegal and is not supported by the authority of law. Further, the citizens are not aware of their data being tracked by the government and they have no recourse for the surveillance they are not aware off.

Accountability of the Security Agencies

Major state agencies involved in targeted surveillance are RAW, IB or CBI. The issue with the involvement of these authorities is that they are not independently accountable and are highly politicised.

The authorities are set up by an executive order and they remain solely responsible to the government. The authorities are not restricted or empowered by any specific statute or legal framework in the scope of their operations. The authorities are not independently accountable to parliament or to judiciary.

Politicisation of the state agencies has been a major issue in proper functioning of the state machinery. The agencies easily become favourable to the political party in power as the major appointments; transfers etc are decided by the party in power. The agencies then act according to the dictum of party leaders and further their political interests.

Without any regulation or oversight, the operations of the agencies remain uncontrolled or unjustified. Upon the order by government, the agencies can target specific individuals and provide their private information to government.

Way forward

- **Intelligence reforms**

A new legal framework must be drawn to limit the unethical operations of the security agencies and also make them accountable. The legal framework must also specify the autonomy of the agents of such agencies, and scope of their operations. The agencies must be made independently accountable to Parliament.

The reform will stop the abuse of powers entrusted upon the security agencies. The Party in power can then no longer use the authorities to spy on particular individuals or groups to further its political interest.

Manish Tewari (Member of Parliament) introduced a private members bill for such reforms but the bill could not make it because of the lack of mandate.

⁶ K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

- **Data Protection Law**

A strong data protection law⁷ can help protect the private interests of the individuals. The law should create adequate safeguards against breach of individuals's privacy of data.

- **Balancing National Interests with Democratic Interests**

The government must not be allowed to walk on application of the defence of protection of national interests. The misuse of the state surveillance system to target individuals and source their private information is unacceptable with respect to Ethical, democratic and constitutional ethos of India.

If the government continues to freehandedly use surveillance system meant for protection of national interests to stifle dissent, it would result in falling of constitutional democracy of India. The 4 point test laid by Puttaswamy judgement must be put forth against any targeted surveillance of individual. The application of state surveillance shall strictly adhere to the 4 point test as discussed above.

The judiciary must assume an important role here, it must aim for preservation of right to privacy, right to free speech and curb misuse of the state surveillance by the government.

“Limited Government”: origin and scope

A "limited government" is one in which the constitution places limitations on how much the government is allowed to meddle in the affairs of the people. A limited government is one in which the supremacy of the law or the nation's written or unwritten constitution place restrictions on its ability to control the public.

Ending "absolutism" and the concentration of power in the hands of a single person, such as monarchs, dictators, or other such sovereigns, is the main goal. The "Magna Carta," the first document with legal force, was written to limit the king's power and to advance the notion of limited government. Essentially the complete antithesis of absolutism is the ideology of limited government. They both have quite different underlying ideas. It contravenes the Divine Right of Kings, which grants one person unchecked authority over the whole population.

In 1215, the Magna Carta⁸ was utilised for the first time in western civilization, initiating a long tradition of restricted government. Due to this evolution, even though the charter was not definitive and clearly defined and only a tiny portion of English people could profit from it, it allowed the king's barons some powers that were limited in scope but could be utilised in opposition to the king's policies. Following the Magna Carta, numerous similar charters were generated by identical uprisings, strengthening the concept of limited government. The "English Bill of Rights,"⁹ which was established during the "Glorious Revolution" of 1688 and further limited the king's power, is one example. The U.S. Constitution establishes a central government that is then constrained by the document itself and its amendments, as opposed to the Magna Carta and English Bill of Rights, and is also constrained by the system of three branches of government, each of which is given specific powers by the document.

The procedure and other people's power are referred to as the "system of checks and balances." The whole process is referred to as "Separation of powers." Limited government is one of humanity's greatest accomplishments, but only a tiny number of people get the chance to use it, and even then, they do so insufficiently; everywhere it is used, its tenancy is always extremely unstable and prone to disintegration. The previous century's experience has shown that constitutional government is unstable and needs courage to build and constant attention to maintain.

People who favour the concept of limited government are not anti-government, despite what the general public thinks. They are just antagonistic against the expansion of coercive power and the arbitrary use of force in contravention of the law. They are in favour of a constitutionally limited government with delegated powers and tools to protect rights, but not ones that are powerful enough

⁷ The Personal Data Protection Bill, 2019, Bill No. 373 of 2019.

⁸ Magna Carta, UK Parliament, 1215, available at <https://www.parliament.uk/about/living-heritage/evolutionofparliament/originsofparliament/birthofparliament/overview/magnacarta/>.

⁹ Bill of Rights 1689, UK Parliament, available at <https://www.parliament.uk/about/living-heritage/evolutionofparliament/parliamentaryauthority/revolution/collections1/collections-glorious-revolution/billofrights/>.

to nullify or eliminate them. They have a keen understanding of historical lessons and the dangers of unchecked authority.

In India, the legal system serves as the bare minimum of government. In order to secure these rights, governments are established among men, obtaining their equitable powers from the consent of the governed. These truths include that "All Men are Made Equal," that they are endowed by their Creator with certain unalienable Rights, including "Life, Liberty, and the Pursuit of Happiness," and that in order to secure these rights, governments are established throughout history. Any kind of governance that exists must be founded on these realities at all times.

The architects of the welfare state did not merely come up with the standards of the Indian government, nor did they choose these realities at random. They made use of their knowledge of the many, lengthy times in human history when different people groups battled for freedom and limited government. There were achievements and failures during the process.

Conclusion

The amalgamation of political interests with targeted surveillance has resulted in not just a blitzkrieg of information, but also the emergence of governmental institutions aimed at behaviour control, undermining the sanctity of individual privacy and posing a severe threat to democracy. We, therefore move towards a society where the brutal reality of power and its exercise trumps the constitutionally protected rights to privacy and freedom of speech. However, the core motivation remains political dominance through the suppression of any opposition or intellectual divergence from the state. And targeted state surveillance must not become an instrument of such intention.