The Court's Order on Pegasus Still Falls Short

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Far too many cases have been diluted with the appointment of external panels, in turn compromising civil liberties

On October 27, the Supreme Court of India appointed an independent committee to inquire into charges that the Union government had used the mobile phone spyware Pegasus to invade, access, and snoop into devices used by India's citizens. The Court's direction has been met with adulation. But the time to sing our paeans is not yet here. Much as the Court's declarations of law brim with brio, its order still falls short of delivering justice.

No guarantee still

Faced with the Government's resolute refusal to file a proper affidavit, either confirming or denying the use of Pegasus, the Court, one might have thought, would have issued a writ compelling the state to adduce evidence. Instead, it left the fact finding to a committee of experts. There is no guarantee that a government that chose to remain silent before the Court will now somehow come clean before an external panel. The question then is this: should the Government fail to cooperate, how must the Court respond?

The petitioners before the Supreme Court relied on an investigation conducted by a consortium of global media. These reports revealed that hundreds of phone numbers from India had appeared on a global list of more than 50,000 numbers that were selected for surveillance by clients of the Israeli firm, the NSO Group. The NSO has since confirmed that its spyware is sold only to governments, chiefly for the purposes of fighting terrorism. The petitioners said that forensic analysis had confirmed the presence of Pegasus on the devices of at least 10 Indians, including some of those before the Court.

Time-tested strategy

But the cases presented a set of familiar challenges. In response to the allegations made against it, the Government invoked its most-beloved bogey: national security. It effectively claimed that the interests of the country's safety meant that it was under no obligation to tell the Court whether it in fact used the software or not. What is more, according to it, the very adoption of this argument virtually forbade the Court from probing further. This is a strategy that has worked well in the past. In matters purportedly involving national security, the Court has shown an extraordinary level of deference to the executive.

The cases also posed another hurdle: a contest over facts. The petitioners were asserting the occurrence of illegal surveillance. The Government was offering no explicit response to their claims. How then was the Court to unravel the truth? Again, in recent times, the Court has invariably veered towards rejecting claims made against the state on the basis that it cannot decide the veracity of a pleading without conducting a full-fledged trial, the conduct of which is beyond the bailiwick of constitutional courts.

Now, to some degree, in its order appointing a committee, the Court has bucked the trend of absolute deference. The Court has held that there is no magic formula to the Government's incantation of national security, that its power of judicial review is not denuded merely because the state asserts that the country's safety is at stake.

A clear path of accountability

The order recognises, correctly, that spying on an individual, whether by the state or by an outside agency, amounts to an infraction of privacy. This is not to suggest that all surveillance is illegal. But, as the order concludes, any limitation on a fundamental right must be proportional and based on evidence. "In a democratic country governed by the rule of law," the judges hold, "indiscriminate spying on individuals cannot be allowed except with sufficient statutory safeguards, by following the procedure established by law under the Constitution."

In holding thus, the Court has effectively recognised that an act of surveillance must be tested on four grounds: first, the action must be supported by legislation; second, the state must show the Court that the restriction made is aimed at a legitimate governmental end; third, the state must demonstrate that there are no less intrusive means available to it to achieve the same objective; and, finally, the state must establish that there is a rational nexus between the limitation imposed and the aims underlying the measure.

The test provides a clear path to holding the Government accountable. But for a coherent application of these standards the Court must arrive at a conclusion on facts. Ordinarily, in prerogative proceedings, evidence is taken on affidavit. In other words, the parties before the Court present their version of the facts through a sworn, written statement. The Court then appreciates the evidence to arrive at a deduction.

In the cases concerning Pegasus, each of the petitioners affirmed a set of facts, claiming that mobile phones of Indian citizens — from journalists and activists to politicians — had been subject to intrusion. In response, the Government refused to file anything more than what it described as a "limited affidavit". Apart from a general denial of the petitioners' case, this affidavit, the Court found, did not "provide any clarity as to the facts of the matter at hand."

For the Court

The absence of a categorical denial from the Government, the order holds, ought to lead to a prima facie belief, if nothing else, that there is truth in the petitioners' claims. Having held thus, one might have expected the Court to frame a set of specific questions demanding answers from the state. These might have included the following: did the Government purchase Pegasus? Did it use the software on the phones of Indian citizens? If so, was such use backed by law? What were the reasons for which the use was authorised?

If answers to these questions were still not forthcoming, elementary principles of evidence law allow the Court to draw what is known as an "adverse inference". A party that fails to answer questions put to it will only risk the Court drawing a conclusion of fact against it. If, on this basis, the petitioners' case is taken as true, there can be little doubt that there has been an illegitimate violation of a fundamental right. The Court then can grant any number of remedies: it can make a declaration that the Government was in the wrong; and it can issue a writ compelling the Government to disclose all materials relevant to the purchase and use of Pegasus.

It is, therefore, unclear why we need a committee at all. Surely, the Court possesses the power to gather evidence on its own, to even allow, in exceptional cases, for cross-examination of important witnesses. A committee might well be necessary where the task of collecting evidence is somehow beyond the Court's remit. But that is not the case here.

Ultimately, in the future, the Court must think more carefully about questions of proof and rules of evidence. Ad hoc committees — sterling as their members might be — cannot be the solution. Far too many cases are consigned to the back burner on the appointment of external panels, and, in the process, civil liberties are compromised.

For now, it is encouraging that the Court has kept these cases on its docket. If it finds in eight weeks' time, when the cases are next scheduled to be listed, that the Government has been delaying or obstructing the committee, it must proceed to use its prerogative powers to both provide a declaration of illegality and issue a mandatory order to the state compelling it to perform its constitutional duties. Only then will the Court's various eulogies to the values of privacy have any true meaning.

Expected Question (Prelims Exams)

Q. Pegasus is the spyware of which of the following country?

(a) India

(b) Israel

(c) China

(d) Russia

Expected Question (Mains Exams)

Q. How has the privacy of citizens been violated in India through the Pegasus case? If the government does not cooperate with the court's investigation in this matter, then what are the options available before the court?

(250 Words)

Note: - The question of the main examination given for practice is designed keeping in mind the upcoming UPSC main examination. Therefore, to get an answer to this question, you can take the help of this source as well as other sources related to this topic.