

25<sup>th</sup> January, 2019**PUCL STATEMENT:****Going Beyond Telephone tapping to Electronic Communication Surveillance:****What are the safeguards for citizens?****SUPREME COURT ADMITS PUCL PIL CHALLENGING SURVEILLANCE POWERS  
UNDER THE TELEGRAPH ACT AND IT ACT**

The Supreme Court has today issued notice in a PUCL PIL challenging the constitutional validity of Section 5(2) of the Indian Telegraph Act, 1885, read with Rule 419-A of the Indian Telegraph Rules, 1951, as well as Section 69 of the Information Technology Act 2000 together with the Information Technology (Procedure for Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009.

This elaborate PIL has been filed in the background of the controversy over the Central Government notification authorizing 10 Central agencies to initiate electronic surveillance. PUCL highlighted, among others, RTI data that shows that 7500-9000 orders for interception of phone calls and upto 500 orders for interception of emails are passed every month, indicating the rampant and indiscriminate use of surveillance powers.

It is important to point out that the first petition challenging the citizen's right against surveillance by the state was the PUCL PIL challenging telephone tapping filed in 1991, in which a judgment was given in 1997, laying down guidelines with regard to telephone tapping. In the said case, PUCL had argued that any order for telephone tapping *should be sanctioned by judicial authority* to prevent arbitrary and politically motivated decisions to tap telephones of different people. However, considering the fact that there was an absence in Indian law permitting judicial oversight of telephone tapping orders and also the fact that in the parallel UK law, viz., the 'Interception of the Communications Act, 1985' interception did not require judicial oversight, the Supreme Court of India felt that it was sufficient to formulate guidelines to regulate promulgation of orders of telephone tapping and stopped short of ordering judicial overview.

In the decades after the SC decision in the PUCL telephone tapping case (1997) there has been a sea change in communication technology with modern communication systems based on wireless, digital electronic technology transforming the very face of the communications world. This has raised new concerns about the power of states and others to engage in arbitrary and surreptitious electronic surveillance of citizens.

Global discussions on the rights of privacy in the context of digital technology led to the United Nations General Assembly Resolution on 'Privacy in the Digital Age'<sup>1</sup> as well as the UN Human Rights Council's *International Principles on the Application of Human Rights to Communication Surveillance*<sup>2</sup>. The UN Principles now recognize the need to ensure greater accountability in surveillance and checks by independent authorities. This is also recognized by judgments of the European Court of Human Rights.

At this juncture it should be pointed out that the UK Act (law) relied upon in the *PUCL* judgment of 1997 has been repealed in the UK, and the current surveillance regime requires oversight by a Judicial Commissioner, applying the same standards as in case of a judicial review.

As far as the Indian scenario is concerned, there have been several changes in the constitutional landscape. Most significantly, a nine-judge bench of the Supreme Court upheld the right to privacy as a Fundamental Right under Article 21 in *Puttaswamy* and articulated a 'triple test' for permissible restrictions of the said right:

- (i) legality, which postulates the existence of 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.

This was applied in the *Aadhaar judgment* and a provision of the *Aadhaar Act* was struck down due to lack of oversight by a judicial mind, in case of interference with the right to privacy.

In light of the above, PUCL has challenged the surveillance powers of the State, which require further safeguards **as well as judicial oversight**.

Sh. Sanjay Parikh appeared on behalf of PUCL, along with Pukhrambam Ramesh Kumar, Apar Gupta, Prasanna S., Ritwik Parikh and Sanjana Srikumar.

It is worth mentioning that the earlier petitions in which notice was issued by the Supreme Court had challenged the notification dated 20.12.2018 as well as Section 69 of the IT Act. The challenge by PUCL, however, is comprehensive and also includes Section 5(2) of the Indian Telegraph Act, 1885 and Rule 419-A of the Telegraph Rules, 1951.



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<sup>1</sup> <https://www.ohchr.org/en/issues/digitalage/pages/digitalageindex.aspx>

<sup>2</sup> <https://www.eff.org/files/necessaryandproportionatefinal.pdf>