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Case Analysis: Supreme Court's Order on Pegasus Spyware & Right to Privacy

“Everyone has three lives: a public life, a private life and a secret life”¹

In the month of July, 2021, [The Wire](#) conducted an investigation and reported that there were around 300 verified Indian phone numbers, including those of ministers, opposition leaders, human rights defenders, lawyers, social activists, businessmen, government officials, scientists, in the leaked list of 50,000 numbers. Pegasus spyware was first developed in the year 2016 and ever since its inception, it has been in radar of privacy violations across the globe. The 2019 version of this virus was condemned and WhatsApp sued the NSO group alleging that an exploit was detected in the application's code for hacking over [1400 devices](#). Even [Apple](#) has filed a lawsuit seeking injunction and damages against NSO.

Nuances of the Information Technology Act

In the leading pronouncement of *People's Union for Civil Liberties (PUCL) v Union of India*, the Supreme Court of India held that telephonic tapping infringed the fundamental right to privacy.² A nine-judge bench was established to give legality to the 'right to privacy' under the Constitution of India and thus make its non-adherence subject to highest level of judicial scrutiny. The principle on which it is premised is that *“Privacy is the ultimate expression of the sanctity of the individual”*.

In furtherance, it laid down guidelines for interception which have been incorporated in Rule 419A of the Telegraph Rules followed by the Information Technology Rules in 2009. With the advent of technology and its related advancements, there have been massive interpretations around the Pegasus surveillance, none of which support the stance of the spyware. Slipping into the Indian law context, the existing laws applicable to such mechanism are only the Information Technology Act,

¹ Gabriel Garcia Marquez.

² (2017) 10 SCC 1.

2000 and its allied rules, namely, the Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009. The spyware is deemed illegal under the garb of section 66 read with section 42 of the Information Technology Act, 2000.

Illegality of Hacking

Section 43 of the Information Technology Act, 2000 marks damage to a computer, computer system etc. as a punishable offence. As per the said section:

If any person without permission of the owner or any other person who is in-charge of a computer, computer system or computer network-...

(c) Introduces or causes to be introduced any computer contaminant or computer virus into any computer, computer system or computer network;

(d) damages or causes to be damaged any computer, computer system or computer network, data, computer data base or any other programmes residing in such computer, computer system or computer network;

(e) disrupts or causes disruption of any computer, computer system or computer network;

...

he shall be liable to pay damages by way of compensation to the person so affected.

Installation of the Pegasus spyware on a targeted person's phone is illegal and falls within the purview of the IT Act, 2000. Hacking, per se, is a criminal offence and no exception has been carved out for [national security reasons](#). Like any other fundamental right enshrined in the Constitution of India, protected under Part III, privacy is also not an absolute right:

A law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights. In the context of Article 21 an invasion of privacy must be justified on the basis of a law which stipulates a procedure which is fair, just and reasonable. The law must be valid with reference to the encroachment on life and personal liberty under Article 21. An invasion of life or personal liberty must meet the threshold requirement of (i) legality, which postulates 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 [emphasis added].³

³ *KS Puttaswamy (Privacy 9-J) v Union of India* (2017) 10 SCC 1.

Impact of Pegasus Spyware on the Nation

The interplay between privacy and public domain ought to have a stark line of demarcation. A personal attack on the privacy of an individual, even an ordinary man, as a matter of fact cannot be substantiated by the use of a snooping spyware. It is unjustified not just for the reason of violation of laws but also exploitation of a vulnerable target user to extract information from its system or to compromise with it.

The Government has, time and again, sliced its way out whenever questioned about deploying the Pegasus software to spy on the citizens. On being asked to submit a detailed affidavit contesting against the charges pressed on it as to whether it used the Israeli- based software to spy on the citizens, it responded stating that the presentment of such an affidavit in the Hon'ble Court would make it a public discourse and would nonetheless compromise with the national security.⁴ Despite having allowed a reasonable duration of time for filing of this affidavit and being asked by the Hon'ble bench to not beat about the bush, the Solicitor General of India, Mr. Tushar Mehta, firmly stood against filing of any such document, in the interest of the case.⁵

Issuance of Probe by Supreme Court: Constitution and Functioning of Expert Committee

The three-judge bench of the Supreme Court, in the case of *Manohar Lal Sharma v Union of India* ordered a probe into the Pegasus surveillance scandal.⁶ It was not a simple task to constitute a Committee, independent of biases and prejudices since reliance could not be placed on the Government to appoint a Committee, considering there is issuance of a probe against it. While a few of the shortlisted prospects politely declined this assignment, others were juggling with a dilemma of conflict of interests.

A Technical Committee has been established constituting of three experts namely;

- i. Dr. Naveen Kumar Chaudhary- Dean, National Forensic Sciences University, Gandhinagar, Gujarat;

⁴ *Manohar Lal Sharma v Union of India* WP (Crl) 314/2021 in the Supreme Court.

⁵ *Manohar Lal Sharma v Union of India* WP (Crl) 314/2021 in the Supreme Court.

⁶ WP (Crl) 314/2021

- ii. Dr. Prabakaran P.- Professor (School of Engineering), Amrita Vishwa Vidyapeetham, Amritapuri, Kerala
- iii. Dr. Ashwin Anil Gumaste- Institute Chair Associate Professor (Computer Science and Engineering), IIT Bombay, Maharashtra.

These experts have diverse and immense experience in the field of digital forensics, cyber security, networks and hardware. The functioning of the Committee will be scrutinized and overseen by Justice R.V. Raveendran, former Supreme Court judge. He will be assisted by two eminent luminaries namely Mr. Alok Joshi (former IPS Officer) and Mr. Sundeep Oberoi (Chairman, (International Organisation of Standardization/ International Electrotechnical Commission/Joint Technical Committee).⁷ The Committee so constituted enjoys the right to devise a mechanism of its own and hold any enquiry in this matter. It is the responsibility of the Committee to prepare the required report and submit it before the Court expeditiously.

Investigative Journalism: A Way Forward

The widespread of the Pegasus spyware at a national level suggests nothing more than a disgrace to the democratic set up of our nation. It presses the right nerves by curtailing the freedom of speech and free journalism. Pressing privacy is directly about [pressing democracy](#).

While a few remain silent to express their stance on the order of the Supreme Court, many have considered this as a win since the court was keen to consider that media freedom is extremely sacrosanct and should remain untouched by [spy agencies](#). The fact that many journalists were on radar of the spyware and were targeted goes to show that not only their freedom of speech and expression as a fundamental right was violated but it also resulted in a chilling effect on their freedom to report as a journalists.

Conclusion

It is too soon to display contentment over the order passed by the Supreme Court and not much can be scrutinized till the judgment is passed. If the Pegasus hacking is not investigated meticulously, it

⁷ *Manohar Lal Sharma v Union of India* WP (Crl) 314/2021 in the Supreme Court.

could lead to placing accountability for this outrageous breach of trust and privacy on the wrong shoulders. If justice is not deliberated and dispensed in the right spirit, it would result in nothing but strangulation of democracy in open streets. Hence, this hesitant yet binding order of the Supreme Court has paved way to reach the light at the end of the tunnel.