

## Did they pay GST on Pegasus?

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**THIS** question is like the one supposed to have been asked by a journalist to a US Senator, **"Have you stopped beating your wife?"** Both the answers would be incriminating.

To know whether GST was paid on the money paid for Pegasus, we should first know whether there was a supply at all. And that is what the Supreme Court is trying to find out. In its order dated 27.10.2021 in the now famous Pegasus case, the Apex Court appointed a Committee to enquire, investigate and determine:

- i. Whether the Pegasus suite of spyware was used on phones or other devices of the citizens of India to access stored data, eavesdrop on conversations, intercept information and/or for any other purposes not explicitly stated herein?
- ii. The details of the victims and/or persons affected by such a spyware attack.
- iii. What steps/actions have been taken by the Respondent - Union of India after reports were published in the year 2019 about hacking of WhatsApp accounts of Indian citizens, using the Pegasus suite of spyware.
- iv. Whether any Pegasus suite of spyware was acquired by the Respondent - Union of India, or any State Government, or any central or state agency for use against the citizens of India?
- v. If any governmental agency has used the Pegasus suite of spyware on the citizens of this country, under what law, rule, guideline, protocol or lawful procedure was such deployment made?
- vi. If any domestic entity/person has used the spyware on the citizens of this country, then is such a use authorised?
- vii. Any other matter or aspect which may be connected, ancillary or incidental to the above terms of reference, which the Committee may deem fit and proper to investigate.

Of course, the question whether GST was paid or payable was not one of the reference points. With or without GST, the Supreme Court decision is a landmark judgement which will be cited in many future cases. Rarely has the Supreme Court said so much in so few words. The judgement in about 9000 words is a classic treatise for all students of law. Let's look into some important parts.

The very opening sentence of the judgement is dramatically impressive - **"If you want to keep a secret, you must also hide it from yourself."** - George Orwell, 1984

### Privacy Rights:

Historically, privacy rights have been 'property centric' rather than people centric. In 1604, in the historical Semayne's case, 77 ER 194 (KB) it was famously held that **"every man's house is his castle"**

. This marked the beginning of the development of the law protecting people against unlawful warrants and searches.

As William Pitt, the Earl of Chatham stated in March 1763:

***"The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail-its roof may shake-the wind may blow through it-the storm may enter; the rain may enter-but the King of England cannot enter! -all his force dares not cross the threshold of the ruined tenement!"***

However, unlike the 'property centric' origin of privacy rights in England and under the Fourth Amendment in the Constitution of the United States of America, in India, privacy rights may be traced to the 'right to life' enshrined under Article 21 of the Constitution. When this Court expounded on the meaning of **"life"**

under Article 21, it did not restrict the same in a pedantic manner. An expanded meaning has been given to the right to life in India, which accepts that **"life"** does not refer to mere animal existence but encapsulates a certain assured quality.

We live in the era of information revolution, where the entire lives of individuals are stored in the cloud or in a digital dossier. We must recognize that while technology is a useful tool for improving the lives of the people, at the same time, it can also be used to breach that sacred private space of an individual.

Members of a civilized democratic society have a reasonable expectation of privacy. Privacy is not the singular concern of journalists or social activists. Every citizen of India ought to be protected against violations of privacy. It is this expectation which enables us to exercise our choices, liberties, and freedom.

Privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in Article 21 of the Constitution. Elements of privacy also arise in varying contexts from the other facets of freedom and dignity recognised and guaranteed by the fundamental rights contained in Part III.

Like other rights which form part of the fundamental freedoms protected by Part III, including the right to life and personal liberty under Article 21, privacy is 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 also 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 threefold requirement of

- (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.

Although declared to be inalienable, the right to privacy of course cannot be said to be an absolute, as the Indian Constitution does not provide for such a right without reasonable restrictions. As with all the other fundamental rights, this Court therefore must recognize that certain limitations exist when it comes to the right to privacy as well. However, any restrictions imposed must necessarily pass constitutional scrutiny.

The right to privacy is directly infringed when there is surveillance or spying done on an individual, either by the State or by any external agency .

Of course, if done by the State, the same must be justified on constitutional grounds. This Court is cognizant of the State's interest to ensure that life and liberty is preserved and must balance the same. For instance, in today's world, information gathered by intelligence agencies through surveillance is essential for the fight against violence and terror.

## **FREEDOM OF THE PRESS**

Somewhat allied to the concerns of privacy, is the freedom of the press. Certain observations made by this Court in the case of *Indian Express Newspapers (Bombay) Private Limited v. Union of India*, (1985) 1 SCC 641 - [2002-TIOL-1912-SC-CUS-LB](#) may be extracted:

***"25. The freedom of press, as one of the members of the Constituent Assembly said, is one of the items around which the greatest and the bitterest of constitutional struggles have been waged in all countries where liberal constitutions prevail. The said freedom is attained at considerable sacrifice and suffering and ultimately it has come to be incorporated in the various written constitutions"***

It is undeniable that surveillance and the knowledge that one is under the threat of being spied on can affect the way an individual decides to exercise his or her rights. Such a scenario might result in self-censorship. This is of particular concern when it relates to the freedom of the press, which is an important pillar of democracy. Such chilling effect on the freedom of speech is an assault on the vital public-watchdog role of the press, which may undermine the ability of the press to provide accurate and reliable information.

An important and necessary corollary of such a right is to ensure the protection of sources of information. Protection of journalistic sources is one of the basic conditions for the freedom of the press. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest.

**In the task of upholding of fundamental rights, the State cannot be an adversary.** The State has the duty, generally, to reveal all the facts and information in its possession to the Court, and also provide the same to the petitioners. This is so, because the petitioners would also then be enabled to bring to light facts and the law that may be relevant for the Court in rendering its decision. In proceedings such as those under Article 32, both the petitioner and the State, have to necessarily be the eyes and ears of the Court. Blinding the petitioner would substantially detract from the integrity of the process of judicial decision-making in Article 32 proceedings, especially where the issue is of upholding of fundamental rights.

This free flow of information from the Petitioners and the State, in a writ proceeding before the Court, is an important step towards Governmental transparency and openness, which are celebrated values under our Constitution, as recognized by this Court recently in the Anuradha Bhasin (supra) judgment.

The compelling circumstances that have weighed with the Supreme Court to pass the order are as follows:

- i. Right to privacy and freedom of speech are alleged to be impacted, which needs to be examined.
- ii. The entire citizenry is affected by such allegations due to the potential chilling effect.
- iii. No clear stand taken by the Respondent - Union of India regarding actions taken by it.
- iv. Seriousness accorded to the allegations by foreign countries and involvement of foreign parties.
- v. Possibility that some foreign authority, agency or private entity is involved in placing citizens of this country under surveillance.
- vi. Allegations that the Union or State Governments are party to the rights' deprivations of the citizens.
- vii. Limitation under writ jurisdiction to delve into factual aspects. For instance, even the question of usage of the technology on citizens, which is the jurisdictional fact, is disputed and requires further factual examination.

**Until Next Week.**