

2023

USE OF SPYWARE: A VIOLATION OF RIGHT TO PRIVACY UNDER INTERNATIONAL HUMAN RIGHTS LAW

Avikalp Mishra

Recommended Citation

Avikalp Mishra, 'Use of Spyware: A Violation of Right to Privacy under International Human Rights Law' (2023) 2 IJHRLR S.I. 60-63.

Available at www.humanrightlawreview.in/vol-2-special-issue/.

This Art. is brought to you for free and open access by the International Journal of Human Rights Law Review by an authorized Lex Assisto Media and Publications administrator. For more information, please contact info@humanrightlawreview.in.

USE OF SPYWARE: A VIOLATION OF RIGHT TO PRIVACY UNDER INTERNATIONAL HUMAN RIGHTS LAW

Avikalp Mishra¹

Recently, it was discovered that the governmental authorities of different countries were availing the services of an Israeli group NSO, to engage in surveillance over around 50,000 phone numbers across the world. These phone numbers included around 300 verified Indian telephone numbers as well. These telephone numbers mainly belonged to journalists, human rights activists, lawyers and opposition leaders. Naturally, this information leads to pertinent questions of privacy violations by the Indian government.

RIGHT TO PRIVACY AS A HUMAN RIGHT

The Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) are the two most important and authoritative instruments under international human rights law. Both of these instruments recognize the right to privacy as a human right. Any unlawful or arbitrary interference with a person's privacy, family, home, or correspondence is prohibited. The General Comment No. 16 to Article 17 of the ICCPR emphasizes the need for proper legal regulation in cases of gathering and holding personal information on digital devices. It is specified that any interference with a person's privacy shall be in accordance with a law, that should itself be in consonance with the covenant. Furthermore, even lawful interferences which do not have any reasonable purpose or ground have been prohibited via the use of the term 'arbitrary'. The Supreme Court of India has also ruled that the right to privacy is a

¹ Law Student, 3rd Year, National Law Institute University, Bhopal.

fundamental right under the Indian Constitution, in the landmark case of *K.S. Puttaswamy v. Union of India*.²

UNLAWFUL AND ARBITRARY NATURE OF THE SURVEILLANCE

In the present scenario, the most fundamental violation of the right to privacy stems from the nature of the spyware itself. The spyware [known as Pegasus] is capable of reading the target's chat messages, listening to their calls, and tracking their email and other online activity. The decision to engage in surveillance did not have any legal or statutory backing. Apart from vague allegations of anti-national activities, the government has not been able to cite any precise legal authority as the source of its action. Hence, the alleged surveillance is interference with not only the target's privacy but also their correspondence (in the form of e-mails and text messages). In the absence of any legal basis, such surveillance definitely amounts to unlawful interference with privacy under Article 17 of the ICCPR. In addition to the absence of any legal consideration, the government has also not been able to demonstrate any compelling or reasonable ground for the alleged surveillance. The sensitive nature of the telephone numbers under surveillance points towards an arbitrary misuse of power to interfere with the target's privacy.

THE WAY FORWARD

In response to multiple petitions filed by eminent activists and journalists, the Supreme Court of India has directed the creation of an independent committee to investigate the Indian government's role in the surveillance which employed the use of Pegasus spyware. The government's arguments pertaining to national security and the creation of a government-appointed committee were rightly rejected by the court. The Supreme Court's direction affirms the international law

² *K.S. Puttaswamy v. Union of India* (2017) 10 SCC 1.

position to establish independent remedial bodies in cases of human rights violations.

Although the allegations pertaining to the Indian Government's surveillance are yet to be conclusively proved, such incidences highlight the need to have adequate remedial and precautionary measures to safeguard fundamental human rights. In an increasingly liberal world, any activity which curbs an individual's human rights needs to be dealt with in a serious manner.