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## Wiretapping Trade-Off between Security and Privacy

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*Wiretapping, wherein telephonic conversations are secretly listened to using a mechanical apparatus creates a need for balance between two situations of Privacy and Security. When on one hand, Wiretapping is a sheer violation of one's privacy considering that even when performed by authorities, it can go on for a while and violate an individual's right to Privacy. On the other hand, Wiretapping is used as a weapon to catch big rackets, prevent terrorism, etc in the light of controlling actions against national security. Also, if hiding of microphone and a disguised police officer is permitted in the name of national security, then why not a mechanical apparatus that does something similar to that is considered a violation of privacy? This article aims at comparing it at both ends of privacy and security in a search for balance, analysing the existing Indian laws, and seeing whether such conversations are admissible as evidence or not. Apart from this, the article provides recommendations on the issue of finding a balance between the two.*

**Keywords:** *wiretapping, privacy, security, national security, evidence, telegraph.*

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### INTRODUCTION

Wiretapping, a method wherein the conversations are secretly listened to with the help of any mechanical apparatus is something around which people usually form two opinions and debate around it. Few call it a sheer violation of an individual's right to privacy as under Art. 21 of the

Indian Constitution<sup>1</sup>. Others are of the view that it should not be considered a violation of privacy as it is important keeping in mind national security. The whole attack on Wiretapping is the Right to privacy only.

In a few states, if the possession of these apparatus is not limited, then it might be a gross violation of privacy and may even lead to blackmailing, business espionage, etc. Even if this equipment is only for police officers, still it would be a danger to privacy. It is rightly said by Kuldip Singh, J., "With the growth of highly sophisticated communication technology, the right to hold telephone conversation, in the privacy of one's home or office without interference, is increasingly susceptible to abuse. It is no doubt correct that every Government, howsoever democratic, exercises some degree of sub-rosa operation as a part of its intelligence outfit but at the same time citizen's right to privacy has to be protected from being abused by the authorities of the day."<sup>2</sup>

The wiretapping business is not for a day, it can go long for weeks and months. Usually, it helps capture big rackets and control actions against national security like terrorism, etc. "Thus wiretapping is said to be a "dirty business" and a "disclosure in court of what is whispered in the closet."<sup>3</sup> Now let's also look into the other side of the picture, the arguments that it is not any violation of privacy and that it is important for national security. In the states in which Criminal Law is considered to be more important than the violation of privacy, there wiretapping has been made permitted. They argue that using a telephone does not guarantee your right to privacy. There is an assumed risk of interception and also susceptibility to wiretapping. Also, if a disguised police officer, hiding of microphone in a room of possible suspects, is very much permitted, then why just not allow one apparatus in case of security threats? Now that we have analyzed both sides of the coin, a few questions need to be answered

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<sup>1</sup> Constitution of India 1950, art 21

<sup>2</sup> Puneet Dhanoa, 'An Analysis of Telephone Tapping as an Investigation' (*SCC online*, 08 April 2022) <<https://www.sconline.com/blog/post/2022/04/08/telephone-tapping-as-an-investigation/>> accessed 24 July 2022

<sup>3</sup> Ferdinand J Jr Zeni, 'Wiretapping--The Right of Privacy versus the Public Interest' (1950) 40(4) *Journal of Criminal Law and Criminology* <<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=3703&context=jclc>> accessed 24 July 2022

such as, what exactly needs to be done? What constitutional safeguards protect it? What do Indian laws say? Is it admissible as evidence in court? We must also keep in mind that,

*“When it comes to privacy and accountability, people always demand the former for themselves and the latter for everyone else.”<sup>4</sup>*

— David Brin

## WIRETAPPING- INDIAN PERSPECTIVE AND EXISTING LAWS

Wiretapping is of two types, first is Passive wiretapping which is completely legal because it can only be done by the government by following proper procedure and the second one is Active wiretapping/illegal interception where the attachment is made to an unauthorized device to gain every single access to data for instance by generating false messages or controlling signals or altering the communications, in this respect section 25 of Telegraph Act, 1885<sup>5</sup> states 3 years of imprisonment for illegal and unwarranted interference in the telegraph and telephone mechanisms.<sup>6</sup>

We must understand that the ‘Right to Privacy’ is not absolute and is subject to the procedure established by law. As a result of this, Section 5 of the Telegram Act<sup>7</sup> does permit phone tapping and authorizes the government to make use of licensed telegrams and to order interception of messages.<sup>8</sup> Any person explicitly empowered by the central government or state government, the state government, or the central government can be granted the temporary possession of a telegraph on the satisfaction that it is mandatory to do, there exists a situation of public emergency or in the interests of public safety.

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<sup>4</sup> David Brin, ‘Privacy Quotes’ (*Goodreads.com*) <<https://www.goodreads.com/quotes/tag/privacy>> accessed 24 July 2022

<sup>5</sup> Indian Telegraph Act 1885, s 25

<sup>6</sup> Arushi Kulshrestha, ‘Law on Phone Tapping in India in Light on Public Safety’ (*Law Octopus*, 06 October 2020) <<https://www.lawctopus.com/academike/law-on-phone-tapping-in-india-in-light-on-public-safety/>> accessed 25 July 2022

<sup>7</sup> Indian Telegraph Act 1885, s 5

<sup>8</sup> *Ibid*

The case of Chandra Shekhar's phone tapping charges (1990), aroused major controversy. He made a dramatic change in the government that the government was illegally tapping the phones of politicians including his. There were some lapses in the case that politicians could tap phones with proper authorization, imaginary reasons were given and there were no written orders from the competent authority. As a result of this, a CBI investigation revealed the government did take up widespread phone tapping. Later on, a petition was filed in the Hon'ble SC by the People's Union for Civil Liberties, i.e., the *PUCL Case*.<sup>9</sup>

Justice Kuldeep Singh in the case *PUCL v Union of India* (1996) stated that the must happen of certain kind of public emergency or a public safety interest as per S. 5(2) Of the Telegraph Act.<sup>10</sup> After the successful completion of this step only, the competent authority if satisfied, would pass an order of interception after recording its satisfaction that it is mandatory to do in the interest of:

- India's sovereignty and integrity
- Friendly relations with the foreign states
- Security
- Public order
- Preventing incitement or inducement to the commission of an offense.

Safeguards were created against arbitrariness in the exercise of state surveillance in the light of Wiretapping violating the fundamental right to privacy. After this case, some amendments were brought to the Telegraphic Rules, 1951.<sup>11</sup> In the case of *K.L.D Nagasree v Government of India (2006)*<sup>12</sup>, the ruling of the PUCL case<sup>13</sup> was held, that there must be happening of public

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<sup>9</sup> *People's Union of Civil Liberties v Union of India* (1996) AIR 1997 SC 568

<sup>10</sup> Indian Telegraph Act 1885, s 5(2)

<sup>11</sup> Telegraphic Rules 1951

<sup>12</sup> *KLD Nagasree v Government of India* (2006) AIR 2007 AP 102

<sup>13</sup> *People's Union of Civil Liberties* (n 9)

emergency or the existence of public safety interest as per Section 5(1)<sup>14</sup> and (2)<sup>15</sup> of the Telegraph Act, 1885 for making an order for interception of messages.

The same act also gives safeguards against Illegal and gratuitous interference. In the case of *Rayala M. Bhuvaneswari v Nagaphanender Rayala (2008)*<sup>16</sup>, it was held by the AP High Court that if a husband is doing the act of tapping on his wife, to secretly listen to her conversations with others, it would violate the fundamental right of privacy of his wife given under Art 21 of the Indian Constitution<sup>17</sup>.

The Information Technology Rules, 2009<sup>18</sup> is another statute that relates to telephone tapping in India, other than the Telegraph Act<sup>19</sup>. It defines 'Interception'. "Interception means the acquisition of the contents of any information through the use of means, including an interception device to misuse such information and includes<sup>20</sup> –

1. monitoring of information using a monitoring device;
2. viewing the contents of any direct or indirect information; and
3. diversion of any direct or indirect information from its intended destination to any other destination"<sup>21</sup>

## ADMISSIBILITY AS EVIDENCE

Wiretapping done by illegal means cannot be admissible in courts as evidence. It is only admissible if the provision of the Telegraph Act<sup>22</sup> is followed. In the case of *R.M. Malkani v State of Maharashtra*<sup>23</sup>, there was the usage of an eavesdropping device by the police to record a conversation between the accused and the third person. This case was related to the offense of

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<sup>14</sup> Indian Telegraph Act 1885, s 5(1)

<sup>15</sup> Indian Telegraph Act 1885, s 5(2)

<sup>16</sup> *Rayala M Bhuvaneswari v Nagaphanender Rayala (2008)* AIR 2008 AP 98

<sup>17</sup> Constitution of India 1950, art 21

<sup>18</sup> Information Technology Act 2000: IT (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules 2009

<sup>19</sup> Indian Telegraph Act 1885

<sup>20</sup> *Ibid*

<sup>21</sup> Puneet Dhanoa (n 2)

<sup>22</sup> Indian Telegraph Act 1885

<sup>23</sup> *RM Malkani v the State of Maharashtra (1973)* AIR 157

bribery. Here, the accused was not charged with corruption as the evidence was illegally obtained. The court did allow the evidence but mentioned that this evidence has to be dealt with caution and care.<sup>24</sup>

In another case, *Bai Radha v State of Gujarat*<sup>25</sup>, it was held that illegally obtained evidence can be admissible provided it does not prejudice the accused. It also stated that such evidence must be viewed with care and caution. To sum up, it is at the Court's discretion to consider or exclude evidence under Section 5 of the Evidence Act<sup>26</sup> by keeping in mind Article 21<sup>27</sup>, which is the right to privacy, and Article 20(3)<sup>28</sup> which is the right against self-incrimination of the constitution. A similar position is that of America, where also the evidence can be excluded based on judicial discretion and principles of discipline, protection, integrity, and reliability.<sup>29</sup>

If one damages or tampers the telegraphs intentionally, they can be criminalized under Section 25 of the Telegraph Act<sup>30</sup>. The provision also mentions a punishment for a term which can extend to three years or with a fine or both if any person is intercepting any message, touching any machinery, damages, removes, commits mischief with battery, machinery, telegraph line, post, etc.

## RECOMMENDATIONS

The major concern we see is the misuse of power so far as this phone tapping is concerned. There exists a law that is not enforced properly and that is what is becoming a hurdle to the Right to privacy of innocents. It is recommended to restrict the wiretapping only to situations where there is an imminent threat to national security and if anyone is found violating this, a proper investigation should be done and even charges could be imposed on such person or body.

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<sup>24</sup> *Ibid*

<sup>25</sup> *Bai Radha v the State of Gujarat* (1970) AIR 1396

<sup>26</sup> Indian Evidence Act 1872, s 5

<sup>27</sup> Constitution of India 1950, art 21

<sup>28</sup> Constitution of India 1950, art 20(3)

<sup>29</sup> *Ibid*

<sup>30</sup> Telegraph Act 1885, s 25

Furthermore, if these should be admissible as evidence or not should be left not just at the discretion of the judge but also if it is produced illegally, then the privacy of the individual should be upheld and the evidence should not be admissible.

## CONCLUSION

We must understand that the trade-offs between privacy and security are everywhere. A trade-off is balancing two equally opposing and desirable situations, here Privacy and Security. Sometimes, few solutions are focused more on security rather than the privacy of an individual. In an ideal scenario, systems should be built in such a way that they do not compromise the privacy of an individual in the course of providing security.

The battle between privacy and security may end if we consider the role of technology in it. Presently, we can say that India does have legislation in place relating to intercepting and phone tapping. The issue is that it should not be misused. However, if it is used for the state's integrity, security and sovereignty, then it is not unconstitutional. A lot of judgments have come up regarding this, and the outcome was that phone tapping has to be carried out by proper guidelines stated in the *PUCL Case*,<sup>31</sup> the Information Act, 2000,<sup>32</sup> and the Telegraph Act.<sup>33</sup>

India is now aware of the possible privacy violations that can happen and they know that for the state's security, and their interests, phone tapping can be pursued to get clues and evidence of a crime or scandal. Lastly, if the interception is done in unauthorized ways, then it is illegal and against the right to privacy, but if it needs to be done, where there is proper suspicion, and there is a danger to the state's security, there it is not illegal, provided proper procedure is used following the acts and laws in place as discussed above.

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<sup>31</sup> *People's Union of Civil Liberties* (n 9)

<sup>32</sup> Information Technology Act 2000: IT (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules 2009

<sup>33</sup> Indian Telegraph Act 1885