VOLUME 2 | ISSUE 1 | ISSN 2456-9704

PHONE TAPPING: A VIOLATION OF RIGHT TO PRIVACY?

ByAkash Chatterjee & Sahil Raina
From: Amity Law School, Noida

Abstract

This research paper talks about the interception of telephone with reference to right to privacy. This prologue of interception of telephone is very restricted as it can only be done by showing some reasonable grounds. The aspects discussed primarily are Indian perspective on phone taping, preventive measures against interception of telephone, authenticity of an intercepted conversation, new aspect of the interception of telephone, right to privacy and right to privacy with respect to interception of telephone. This research draws upon mainly secondary data gathered from various books, National Journals, government reports, newspapers and different websites which pay attention on different facets of interception of telephone as well as right to privacy. It may be concluded that phone taping is not in violation of right to privacy only if it is done for the interest of public or in case of any emergency. The right to intercept telephone is restricted and cannot be done without the permission of the government. This research will endow with valuable information on interception of telephone with respect to right to privacy.

Key Words: Privacy, Interception, Taping, Right and India

History of Phone Tapping

"There is nothing we like to communicate to others as much as the seal of secrecy together with what lies under it."

- Friedrich Nietzsche

The term 'phone tapping' also means wire tapping or interception of phone. It was first started in U.S.A in 1890s after the invention of telephone recorder. Although, the Supreme Court of U.S.A. didn't become a valid law until 1928, at the height of Prohibition. Roy Olmstead, a Seattle bootlegger, was convicted on the basis of evidence congregated by tapping a phone in his home. He then stated that, the authorities had violated his fundamental rights but the court upheld his conviction, stating that tapping somebody's phone is not a physical incursion of privacy. Prior to the attack on Pearl Harbor and the ensuing ingress of the United States into World War II, the U.S. House of Representatives held hearings on the legitimacy of interception of telephone for national defense. Important legislation and judicial decisions on the validity and constitutionality of wiretapping had taken place years before World War II.Conversely, it took on new urgency at that time of national crisis. In the case "**Katz v. United States**"[1], Supreme Court of U.S. stated that wiretapping requires a warrant. In 1978, the Foreign Intelligence Surveillance Act (FISA) was created for issuing wiretap warrants in national security cases.

Indian Perspective on Phone Tapping

In India, Phone Tapping can only be done in an authorized manner with permission from the department concerned. However, if it is undertaken in an unauthorized manner then

[1]389 U.S. 347 (1967)

it is illegal and will result in prosecution of the person responsible for breach of privacy.

Telephones along with other communication devices are mentioned under Entry 31 of the Union List of the Indian Constitution and it is based on Entry 7 in the Federal List of the Government of India Act 1935.[2] As explained by Seervai, the Government of India Act itself had taken the necessary measures for the advancement of Science in Entry 7, List I, which resulted as "Posts and telegraphs; telephones, wireless, broadcasting and other like forms of communication" and Entry 31[3], List I of the Indian Constitution preserved the entry, hence the requirement to construe the word 'telegraphs' lithely to consist of telephones, wireless, broadcasting etc. did not arise.[4]

The Central Government as well as the State Governments, both of them are provided with the right to intercept telephones under **Section 5(2) of Indian Telegraphic Act, 1885**. There are instances when an investigating authority/agency needs to record the phone conversations of the person who is under suspicion.[5] Such authorities are required to seek acquiescence from the Home Ministry before moving forward with such an act. In the application to seek permission, particular reasons need to be mentioned. Additionally, the need for interception of telephone must be proved. Then only the ministry will consider the application and grant permission upon estimating the merits of the application for interception.

Every agency fills out an authorization slip before placing a phone under surveillance. For the States, it is the State Home Secretary who signs this. Telephones of politicians cannot be tapped officially[6]-a qualifier on the slip states that the inspected person is not an elected representative. Now days, every cellular service provider has an aggregation station which is a clasp of servers called mediation servers as they intercede by linking the cellular operators and the law enforcement agencies to tap phones. There are two types of telephone tapping services obtainable these days i.e. Integrated Services Digital Network (ISDN) and the leased line. In ISDN service, an intercession server taps a call and then conveys it via Primary Rate Interface (PRI) line to the office of a government agency. Furthermore, the police will also be able to eavesdrop to the phone on their PRI line and store the recording of the intercepted call to linked computers. A sound file of the intercepted call can also be recorded and kept in the mediation server, concurrently.

Preventive Measures Against Interception of Telephone

1. Procedural Safeguards

In the last few years, various scandals came in notice with respect to the subject of phone tapping. This issue became so concentrated

[2] See HM Seervai, *Constitutional Law of India*, vol 3, 4th edn, NM Tripathi, 1996, pg 2332.

[3] Entry 31, Schedule VII, Constitution of India: *Posts and telegraphs; telephones, wireless, broadcasting and other like forms of communication.*.

[4] Vikram Raghavan, Communications Law in India,1st Edn., 2007, pg 109

[5] Pandey J.N, ,(Faridabad) Allahabad Law Agency,Ed:IX,2003, pg.no.207

[6] Report of Standing Committee on Home Affairs

that it was twisted into a political agenda. The opposition parties and the party in power started blaming each other. It was suspected that phones were intercepted by the government on command of the ruling party. It was the time when the Peoples Union of Civil Liberties [PUCL] filed a PIL[7] to the Supreme Court of India requesting them to clarify the law on the point of electronic tapping and interception.[8]The petitioners contended that the arbitrary power provided under Section 5 (2) of the Indian Telegraphic Act, 1885 should be regulated. They also argued that the amendment which was made to Section 5 (2) in 1971 was tremendously treacherous as it allowed interception not only in the times of emergencies and for public order and safety, but also for agitation of offenses.

The Apex Court was of the view that intercepting of telephones or wiretaps as a whole is a staid incursion of privacy of an individual, and it was also acknowledged that right to privacy falls under Article 21 of the Indian Constitution. But Section 5 (2) was held to be Constitutional by the Court. Right to privacy is also enshrined in Article 17[9]of the International Covenant on Civil and Political Rights (ICCPR), to which India is a party. When a person makes a telephonic call and communicates with another person, that person also exercises his right to freedom of speech and expression, which is provided under Article 19 (1) (a) of the Indian Constitution. Hence, interception of the call would infringe this provision, until and unless it falls under reasonable restriction provided under Article 19 (2). The main point which is a matter of concern here is that the Apex Court did not want to entirely morsel the system of phone tapping as the Hon'ble Supreme Court that in some cases it is very necessary to take some important steps like this for the security of the nation. But the Court did mandate the setting up of high-level committee to review the tapping of phones and ascertain whether the taping was legal or not.

After the PUCL case, the Union Government bought some amendment in the Indian Telegraphic Rules, 1951 and inserted Rule 491-A to regulate the tapping of phones.[10] But this amendment also did not bring any major change in the circumstances.

2. Substantive safeguards

In 1997, the Apex Court, in reply to a petition filed by Justice Sachar in the PUCL case, stated that Right to Privacy guaranteed under Article 21 is subject to some reasonable restrictions which might be made obligatory by the State. Reasonable restrictions can be imposed by the state in - the *interests of national sovereignty and integrity, state security, friendly relations with foreign states, public order or for*

[7]PUCL v/s Union of India [(1997) 3 SCC 433]

[8]http://www.lawctopus.com/academike/law-phone-tapping-india/ (as accessed on 9.10.2017)

[9]1.No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

[10]http://cis-india.org/internet-governance/resources/rule-419-a-indian-telegraph-rules-1951 (as accessed on 9.10.2017)

preventing incitement to the commission of an offence.

Supreme Court while perpetuating the constitutionality of Section 5(2) in *P.U.C.L. case*, acknowledged the nonexistence of procedural preventions for the substantive provisions of the above mentioned Section and referred *Maneka Gandhi case* and took the significance of procedural patronage to any substantive provision which deals with the fundamental right of individual, into consideration, where it was opined: "*Procedure which deals with the modalities of regulating, restricting or even rejecting a fundamental right falling within Article 21 has to be fair, not foolish, carefully designed to effectuate, not to subvert, the substantive right itself."* Thus, the requirement of procedural safeguards for the provisions of Section 5(2) becomes significant in the light of 'right to privacy' guaranteed by Article 21, Constitution of India, 1950. Interception of private conversation, void of just and fair procedure, would infringe an individual's right to privacy assured under Article 21, which might render the substantive provision, allowing interception, as unconstitutional.

Justice Kuldip Singh concisely stated[11]:

"The first step under Section 5(2) of the Act, therefore, is the occurrence of any public emergency or the existence of a public-safety interest. Thereafter the competent authority under Section 5(2) of the Act is empowered to pass an order of interception after recording its satisfaction that it is necessary or expedient so to do in the interest of (i) sovereignty and integrity of India, (ii) the security of the State, (iii) friendly relations with foreign States, (iv) public order or (v) for preventing incitement to the commission of an offence."[12]

In the case of ***K.L.D Nagasree* v. *Government of India*[13]**, while referring the observation of the Court in *P.U.C.L. case*, it was held that:

"A bare reading of the above provision shows that for the purpose of making an order for interception of messages in exercise of powers under Sub-Section (1) or Sub-Section (2) of Section 5 of the Telegraph Act, 1885, the occurrence of any pubic emergency or the existence of a public safety interest is the sine qua non."

The Act also provides safeguards against illegal and gratuitous interference in the telegraph and telephone mechanisms. According to Section 25, *"any person intending to intercept or to acquaint himself with the contents of any message damages, remove, tampers, with or touches any battery, machinery, telegraph line, post or other thing whatever, being part of or used in the working thereof shall be punished with imprisonment for a term which may extend to three years or with a fine, or both."*

3. Remedies

- Unlawful interception infringes the right to privacy and the aggrieved person can file a

[11]PUCL v/s Union of India [(1997) 3 SCC 433]

[12]paragraph 23

[13]AIR 2007 AP 102

complaint in the Human Rights Commission.

- An FIR can be lodged in the nearest Police Station when illicit phone interception comes into the knowledge of the person.
- Moreover, the aggrieved person can approach the Court against the person/company doing the Act in an unauthorized comportment under Section 26 (b) of the Indian Telegraphic Act which provides for the imprisonment of 3 years for persons held for unlawful interception. An individual can also be prosecuted for authorized interception of telephone but sharing of the data of the same in an explicit manner.

Authenticity of an Intercepted Conversation as Evidence

Controversial Judgment in the Malkani Case

In the case of **R.M. Malkani v. State of Maharashtra**[14]there was an issue that, whether criminal prosecution could be initiated against a person on the basis of certain incriminating portions of a telephone conversation that he had with another individual. In this case, the Appellant was a public official of Mumbai and he was trying to acquire illegal indulgence of Rs. 15,000 from a doctor, from whom he intended to incriminate in a case involving the death of a patient, negligently. The doctor was not concerned in paying the bribe and instead approached the Anti-Corruption Bureau of the Police. The doctor then, on the instructions of the police officials, continued to have a telephonic conversation with the Appellant where they had a discussion regarding the amount of money which was to be paid, and also the location of delivery of money, etc. This conversation was traced and the Malkani had no intimation regarding the same. After tracing the call, the charges were filed against Malkani on account of the statements made by him during the phone call.

The Supreme Court was of the view, that having another person listening in on a conversation was a technical process and that there was no element of compulsion or coercion drawn in which would have otherwise violated the Act. With respect to the admissibility issue, the Court treasured the way, stating it a mechanical eavesdropping device". However, then conceivably realizing that it was wrong, the court quickly added that -it should be used *sparingly, under proper direction and with circumspection*. The intercepted evidence was contrasted with a photograph of a pertinent event and on the basis of this assumption, it was determined that Sections 7 and 8 of the Evidence Act [1872] would not bar the admission of inappropriately acquired evidence. Furthermore, what the Apex Court did was to hold that *illegally obtained evidence would be admitted in Court since the eavesdropper neither subjects the person to duress nor interferes with his privacy*. While passing the order, Ray, J., was inclined by the American judgment on the subject. Reliance was placed on the judgment of the US Supreme Court in the case of **Roy Olmstead v. United States of America**[15], which had by then been overruled by the Berger and Katz

[14]AIR 1973 SC 157

[15]277 U.S. 438 (1928)

cases. In the Olmstead case the doctrine adopted, was that observation without encroachment and without the convulsion of any material fell outside the constitutional realm. Hence, Ray, J. was of the opinion that the interception of the conversation would not be hideous to Articles 20(3) and 21 of the Indian Constitution.

Following the aphorism laid down in the Malkani case, many judgments have been passed by the Courts accepting unlawfully acquired evidence for the intention of conviction. In the case of **S. Pratap Singh v. State of Punjab**[16], the Supreme Court permitted the recording of a intercepted telephonic conversation between the Chief Minister's wife and a doctor to be divulged as evidence to substantiate the evidence of witnesses who had mentioned in his statement, that such a conversation had taken place. Further, in **Yusufalli Esmail Nagree v. State of Maharashtra**[17], a conversation was recorded via a tape recorder placed in a room and the same was admitted as evidence. In this case, the Appellant had made an offer to bribe a municipal clerk Munir Ahmed Sheikh. The clerk Sheikh intimated the police who then laid a trap at his house and obscured a voice recording equipment in the room where the bribe money was to be paid. After that, this recording was accepted as evidence by the Court to substantiate the Sheikh's testimony. The Court observed that if a photograph is taken without the knowledge of the person being photographed, following the same standard to the case of an interception of a conversation that is unnoticed by the talkers, will also be held significant and admissible. The Supreme Court at the time of delivering the judgment was highly influenced by an English Precedent, **R v. Maqsud Ali**[18]. In that case, two persons suspected of murder went voluntarily with the Police Officers and entered into a room which was unknown to them. There was a microphone attached with a tape recorder in another room. Afterward, when the suspected persons were left alone, the accused persons had a conversation during which various incriminating annotations were made. The Court decided that the tape-recording of the incriminating evidence had to be admitted as evidence as it was admissible evidence which proved the suspected persons guilty. In **N. Sri Rama Reddy v. V.V.Giri**[19], better recognized as the 'Presidential Election case' the Petitioner had alleged that a person Jagat Narain, had attempted to deter him from contesting the election. Then, their intercepted telephone conversation was presented in Court to disprove Narain's allegations that the event by no means, took place. Here, the Court used the conversation to demonstrate that a *"witness might be contradicted when he denies any question tending to impeach his impartiality"* [Section 153 of the Indian Evidence Act] and thus observed that the intercepted recording itself would become the primary and direct evidence.

New Aspects of Interception of Phone in India

Even a privacy was introduces in India in the year 2011, which stated that ""every

[16]AIR 1964 SC 72
[17]AIR 1968 SC 147
[18][1965] All. ER. 464
[19]AIR 1971 SC 1162

VOLUME 2 | ISSUE 1 | ISSN 2456-9704

individual shall have a right to his privacy — confidentiality of communication made to, or, by him — including his personal correspondence, telephone conversations, telegraph messages, postal, electronic mail and other modes of communication; confidentiality of his private or his family life; protection of his honour and good name; protection from search, detention or exposure of lawful communication between and among individuals; privacy from surveillance; confidentiality of his banking and financial transactions, medical and legal information and protection of data relating to individual."

"The Union government has announced a fresh set of procedures for interception of telephones. The "Standard Operating Procedures (SOP) for Lawful Interception and Monitoring of Telecom Service Providers (TSP)", bearing No.5- 4/2011/S-II and dated January 2, 2014, have been accessed by *The Hindu* . Significantly, this comes two weeks after the Central government set up a commission to inquire into the Gujarat-based snooping scandal, allegedly involving BJP's prime ministerial candidate Narendra Modi. According to the norms, requests would include interception and monitoring under the Indian Telegraph Act, 1885, for voice, SMS, GPRS, MMS, Video and VoIP calls. Additionally, authorized security agencies can seek information under Section 92 of the Criminal Procedure Code (CrPC) of call records (CDRs), home and roaming network, CDR by tower location and by calling/called number, location details of target number within home or roaming network, and so on. One specification detailed in the section "Validation of Interception Request" is that only the Chief Nodal Officer of a telecom company can provide interception if the order is issued by the "Secretary to the Government of India in the Home Ministry, in case of Government of India, or a Secretary to the State Government in charge of Home Department, in case of State Government." In unavoidable circumstances, such orders can be issued by an officer "not below the rank of Joint Secretary to the GOI who has been fully authorized by the Union Home Secretary or the State Home Secretary." Interception is subject to eight checks before monitoring is allowed. These include receiving the request "in a sealed envelope", ensuring the delivery of interception by "an officer not below the rank of sub-inspector of police or equivalent." Any inquiry process could, under the new SOP, check "whether the request was in original and addressed to the Nodal Officer" and from which "designated security agency" it came from. The SOP mandates that, any "request received by telephone, SMS and fax, should not be accepted under any circumstances." This would mean that the government concerned would have to produce an original copy of its request that bears "the Union/State Secretary's order number with date", or an order and date by an officer of the rank of "Joint Secretary who has been duly authorized". Non-compliance with the provisions can result in prosecution "as per the law of the land". The SOP document is 45 pages long and divided into 11 sections. The sections include the operational structure, types of request, validation of interception request, legal intercept under number portability, reconciliation and pruning processes, consequences, list of 10 law enforcement agencies authorized to

intercept and a set of 10 annexures relating to interception. The SOP require that if a request is made on e-mail, unless a "physical copy is not reached to the telecom service provider within 48 hours" the interception should be terminated and an intimation provided "to [the] concerned Home Secretary as a part of the fortnightly report." The SOP require that records pertaining to such interception, such as letter and envelope, intercept form and internal interception request form should be "destroyed within 2 months of discontinuance of interception of such messages." If, however, it is a case of "emergent request where Home Ministry Order for approval was not conveyed to the telecom company, then the telecom company cannot destroy such records until the Home Ministry order is conveyed or a list of such numbers is provided to the concerned Home Secretary intimating this fact."[20]

Right to Privacy in India

Article 21 of the Constitution of India states that **"No person shall be deprived of his life or personal liberty except according to procedure established by law."**

The term '*personal liberty*' also consists of '*right to privacy*'. A citizen has a right to safeguard his personal privacy, plus, that of his family, education, marriage, motherhood, child bearing, and procreation, among other matters.

Right to privacy has been briefly discussed in the recent Supreme Court judgment i.e. **"Justice K.S. Puttaswamy & Anr v/s Union of India & Ors"**[21]. It is very important to discern that previously, right to privacy was considered as a "common law right" before it was briefly discussed in the Puttaswamy case. In the privacy it was stated by the Supreme Court that "Life and personal liberty are not creations of the Constitution. These rights are recognized by the Constitution as inhering in each individual as an intrinsic and inseparable part of the human element which dwells within. 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 recognized and guaranteed by the fundamental rights contained in Part III. Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognizes the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognizes the plurality and diversity of our culture. While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an

[20] http://www.thehindu.com/todays-paper/tp-national/centre-issues-new-guidelines-for-phone-interception/article5560426.ece (as accessed on 9.10.2017)

[21] 2017 (10) SCALE E1

essential facet of the dignity of the human being."[22]

Right to Privacy With Respect To Interception of Telephone

As amended in the recent Supreme Court judgment, right to privacy is an integral part of right to life, which is enshrined under Article 21 of the Indian Constitution. Intercepting a telephone of an individual without any intimation infringes right to privacy of an individual. But the same can be done by the government if any special situation arises. The power is conferred to the government under section 5(2) of Telegraph Act. The provision laid down under section 5(2) gives power to government to intercept a telephone in interest of public or in a case of emergency. The power conferred under section 5(2) to the government is not absolute as it is a matter of privacy of an individual. Nobody can intercept a telephone of a person without taking permission from the government. Government can exercise its rights to intercept an individual's telephone only to a certain extent, by showing reasonable grounds to do so. Government can exercise its right but outside a particular ambit because an individual has a right to privacy and he also has a right to safeguard his right to privacy.

Conclusion

Right to privacy is a part of personal liberty which is provided under Article 21 of the Indian Constitution. A person has also the right to safeguard his privacy. There are some cases when the government has to act contrary to the fundamental rights of a person. One of them is interception of telephone. This is a very major step taken by government and to intercept a telephone of an individual, reasonable grounds to take such a step should be mentioned as it is a matter of someone's privacy.

Interception of telephone is not in violation of right to privacy only if it done for the interest of public or in a case of emergency, as stated under section 5(2) of the Telegraph Act. Interception of telephone cannot be done in any case except the two which are mentioned above. Any evidence acquired through interception of telephone is also not in violation of right to privacy and it is also considered as admissible evidence. Interception of telephone without the permission of government is in violation of right to privacy of a person as a person may talk about his problems, child education, health etc. which he would not like to share it with anyone else. The powers conferred upon the authorities to intercept telephone are not absolute. There are some reasonable restrictions attached to it. Telephone of an individual cannot taped unless and until reasonable grounds are shown to do such act as no person shall be deprived of its personal liberty. Hence, phone taping is not in violation of right to privacy unless and until it is done for the interest of public or in a case of emergency.

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[22]Conclusion of Puttaswamy case.