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The Issue of Phone Tapping and Recent Developments in Light of Right to Privacy

Ashwin Singh

Symbiosis Law School, Pune

Sakshi Dutta

Symbiosis Law School, Pune

Introduction

Listening to telephone conversations by third parties is a contentious issue, which has remained with us for a very long time, and has been the topic of a never-ending debate between law enforcement officials and civil liberties activists. Indian Courts have examined the ethical aspect of telephone tapping while attempting to evolve suitable guidelines concerning the vexed question of the admissibility of evidence obtained through this method. This also brings into focus the right to privacy- a term that seems to hold very little meaning in our modern world of hidden cameras, telephone tapping, and increased surveillance of e-mail and the Internet.

The early common law position concerning the admissibility of evidence highlighted the relevance of the evidence rather than how it was obtained, while, human rights activists on the other hand, state that it constitutes a blatant invasion of a person's right to privacy and the right to live peacefully. This debate has been persistent, where the human rights groups seek clarification, while POTA has its implications. The argument which is generally presented by human rights activists is that of infringement of Articles 21 and 19 through phone tapping. The reasoning behind this is, that talking to someone freely is one's right to freedom, and intercepting that communication curbs both these fundamental rights.

Phone tapping in the light of *PUCL v. Union of India*

The judgment in the *PUCL* case was important as it made the discussion on the right to privacy and section 5(2) of the Telegraph Act more structured, it tried to fill the void called arbitrariness in the use of power by the central government in intercepting the communication to a large extent, it also provided with guidelines for surveillance power of the executive.⁵

Section 5(2) of the Telegraph Act clearly states the situation and conditions of the power of interception and when it can be exercised, but along with substantive law, it needed procedural backing so that the act could be implemented reasonably.⁶ In *Maneka Gandhi v. Union of India*,⁷ the court made clear that any procedure regulating any fundamental right that comes in the ambit of Article 21 is to be drafted with clarity and not foolishly, it should increase the efficiency of the substantive law.⁸ Keeping the above-mentioned things in mind, the court in the *PUCL* case made certain surveillance guidelines for temporary purposes until any rule is passed by the central government under section 7(2)(b), which grants power to the government to make any rule against any interception of messages.⁹

The following guidelines were provided in the *PUCL* case by the court to prevent the use of arbitrary power by the executive: -

- An order for law interception can only be made by the Home Secretary to the Government of India and home secretaries of state governments.¹⁰ In urgent situations, the power may be delegated to an officer of the Home Department of the Government of India and state governments and such officer should not be below the rank of joint secretary.¹¹
- A copy of the order must be received by the review committee within one week of issuance of such order.¹²
- The authority which issues the order should also record the following information:
 - a) the intercepted communications;¹³
 - b) the extent to which the material is disclosed;¹⁴
 - c) the number of persons and their identity to whom any of the material is disclosed;¹⁵
 - d) the extent to which the material is copied; and¹⁶
 - e) the number of copies made of any of the materials.¹⁷
- The intercepted material can be used only for purposes mentioned under the wire-tapping clause.¹⁸
- The interception will be valid for two months unless it is renewed. However,

the total period of interception should not exceed six months.¹⁹

The second issue, that is of privacy was discussed concerning the decision in *Kharak Singh v. the State of U.P.* ²⁰ In this case, Justice Subbarao's dissenting opinion made this point, that our constitution does not expressly include the right to privacy but is an essential part of personal liberty.²¹

The telephonic conversation which takes place between two people also involves one's freedom of speech and expression. Hence, the issue of phone tapping also violates the right of free speech and expression ²² unless it falls under Article 19(2), i.e., reasonable restrictions.²³

India being the signatory of the International Covenant on Civil and Political Rights, 1966, shall show respect to the international laws and treaties ²⁴ as Article 17 of the above-mentioned covenant states that:

Article 17:

1. No one shall be subject to arbitrary or unlawful interference with his privacy, family, human or correspondence, nor to lawful attacks on his honor and reputation.²⁶
2. Everyone has the right to the protection of the law against such interference or attacks²⁷

Evolution of Right to Privacy through *Puttaswamy v. UOI*

The nine-judge bench in the landmark privacy judgment of *K.S. Puttaswamy v. Union of India* ²⁸ tried to analyze the extent of Article 21 of the Indian Constitution. The bench has referred to the judgment of the cases of phone tapping to observe the scope of the right to privacy and how it evolved. The decisions in the cases of *M.P. Sharma* and *Kharak Singh* were discussed at length. The court also referred to Gopalan doctrine and the cases of *Maneka* and *Cooper* to study the inter-relationship between rights.

There have been various cases protecting the right to privacy as a fundamental right such as *Gobind v. State of Madhya Pradesh* ²⁹, *R. Rajagopal v. State of Tamil Nadu*, ³⁰ and *People's Union for Civil Liberties v. Union of India* ³¹. However, all these judgments were delivered by smaller benches, hence, to check the appropriateness and correctness of the judgment, the decision in *M.P. Sharma* and *Kharak Singh* are referred to as delivered by a constitutional bench of eight and six judges respectively.

In *RM Malkani v. State of Maharashtra* ³², it was stated that the phone tapping of the innocent will be protected and safeguarded by the court but the guilty ones will not be provided this protection.

In *A.K. Gopalan v. State of Madras* ³³, Justice Fazl Ali in his dissenting opinion

stated that all the fundamental rights are connected and are aimed to provide liberty and freedom.³⁴ He read Article 19(1)(a) and Article 21 about each other. In the *Cooper* case, Fazl Ali's dissenting opinion was used to overrule the *Gopalan* principle.³⁵

In the *PUCL* case, telephone conversations from the home or workplace were interpreted to be a vital constituent of the privacy of an individual. Therefore, telephone tapping encroaches on one's privacy and ultimately personal liberty and right to life of an individual in Article 21 and also the right to freedom of speech and expression, which is enshrined in Article 19(1)(a).³⁷ Section 5(2) of the Telegraph Act is not expected to keep in mind the privacy issue as the particular act was drafted way back in 1885.

The court in *Puttaswamy*'s judgment laid down a four-step test for proportionality standard that requires the government to show that *firstly*, there is a legitimate aim, *secondly*, there is a rational nexus between the infringing action and aim. *Thirdly*, there should be a necessity, i.e. that it is the least restrictive option to achieve the aim. *Lastly*, the benefits should overshadow the infringement of rights.

Observing decisions in all the cases closely, the Supreme Court of India made the Right to privacy a fundamental right with certain reasonable restrictions like that of national security, public interest, for maintaining balance with other fundamental rights, etc.³⁸

V. Implication of the principle laid down in Puttaswamy Judgment: *Vinit Kumar v. Central Bureau of Investigation*³⁹

A two-judge Bench of Bombay High Court found that the Central Bureau of Investigation's surveillance of a businessman accused of paying bribes was illegal and directed the destruction of call records.⁴⁰ The judgment becomes significant as it extends the meaning of the principle laid down in the *Puttaswamy* judgment. When the privacy judgment came, it was a welcoming step towards a just society, but the difficult part was to apply the ratio of this landmark judgment in sync with the legislation in place. Bombay High Court judgment showed the practicality of privacy judgment and its applicability in cases. The judges in this particular case straightaway went to the two conditions mentioned in Section 5(2) of the Telegraph Act under which telephone interception is permissible. Those two conditions are; the existence of a public emergency, or a threat to public safety. But in the facts of the given case, neither of the two conditions falls. The court relied on the definition of public safety given in the *PUCL* case and concluded that there was no threat to public safety. The judgment also noted that orders for interception do not satisfy the "Principles of proportionality and legitimacy" that were laid down in the privacy judgment.⁴¹

The Bombay High Court in its judgment shows the glimpse of hope that the principles of *Puttaswamy*'s judgment will not be merely theoretical which is for academic purposes, but it will also have a fundamental impact in different factual scenarios immersing in the day-to-day legal framework.

Conclusion

All over the world now countries have become more aware of human rights violations through outdated laws. They have given a special place to the right to privacy under their legal framework. Along with it all the international conventions now acknowledge the need for privacy as a right.

In India, the current status quo of phone tapping is that it is regulated under guidelines provided in the *PUC*L case, it breaches one's right to privacy as decided in numerous cases, as well as it infringes the right to freedom of speech and expression. Still, the status and usage of telephone tapping in India is ambiguous. The famous personalities generally escape from tapping using their influences and connections, as lawful interceptions of calls can be made only by coordinating with telecom service providers.⁴² Niira Radia tried to evade tapping through Tata Docomo, as she was protected by the number provided by her client (Tata).⁴³ The IT and CBI departments both wanted to tap Tony Jesudasan, advisor of Anil Ambani but couldn't as he used Reliance numbers.⁴⁴

Suggestions and Recommendations: An Overview

Majorly tapping is used for preventing criminal and terrorist activities but now intelligence agencies accept that tapping is not yielding the expected results as terrorists have many ways to escape from tapping, mainly Inmarsat-4 satellite phones are now being used for evading phone tapping.⁴⁵

The above-mentioned loopholes and illegal wiretapping make this whole process ineffective and put the privacy of civilians at risk. Therefore, there is an urgent need to evolve comprehensive regulatory mechanisms to restrict the impact of the State's intrusion into our private spaces and to come up with guidelines focusing on the admissibility of different types of evidence in courts of law. Also, if there is substantial evidence to corroborate the case, then courts give priority to that evidence to decide the case, without breaching the privacy of the individual. However, in the absence of substantial evidence to prove the offense beyond reasonable doubt, where phone tapping can amount to sufficient evidence, the courts shouldn't shy off from going ahead with it when that is the need of the circumstances.

Notes

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16. *Id.*
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22. India Const. Article, 19 clause(1)(a).
23. *Supra* note 2.
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26. Article 17, ICCPR, <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.
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43. *Id.*

44. *Id.*

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