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**TURNING A BLIND EYE ON EVIDENTIARY VALUE OF  
PHONE TAPPING IN INDIA**

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**ABSTRACT**

This paper is based on the admissibility of phone tapping in the court of law with reference to right to privacy. So the tapping of the private conversations made by people cannot be taped without showing reasonable ground. Telephone surveillance has been a controversial issue for a long time, and it has been the subject of an ongoing controversy between law enforcement authorities and civil liberties advocates. In order to develop appropriate guidance in relation to the unsettled issue of admissibility of proof gathered through this process, Indian courts have looked into the ethical aspects of telephone tapping. The paper also calls attention to the right to privacy, which in our new age of hidden cameras, cyber bugging of houses, wiretapping, and expanded monitoring of e-mail and the Internet seems to have little significance. This paper primarily relies on secondary data collected from books, National Journals, official accounts, publications, and numerous blogs that focus on various aspects of mobile interception as well as the right to privacy. It may be concluded that phone tapping would not violate the right of privacy whether it is performed in the public interest or in the event of an emergency. The ability to decrypt telephone calls is restricted, and it can only be achieved with the government's approval. This paper would include useful information's on interception of telephone with respect to right to privacy.

**Keywords:** Admissibility, telephone tapping, interception, right to privacy.

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## INTRODUCTION

Communication monitoring is universally regarded as a necessary evil that any human civilization must provide for state protection as well as crime prevention and investigation. Human rights and personal liberties must, however, be balanced against state-sponsored surveillance. As we all know, technology has evolved into an integral part of human existence, progressing in every way in response to societal needs, but no one ever considered the implications of this technical development, which leads to phone tapping practises. It may also result in an individual's right to privacy being violated. The Indian Telegraph Act of 1885 describes telegraph as "any appliance, tool, substance, or equipment used or capable of use for transmitting or receiving of signs, messages, writing, pictures, sounds, or knowledge of any kind by cable, optical or other electromagnetic emissions, Radio waves, or Hertzian waves, etc." In India, there is currently no formal regulatory data security regime that will regulate the secret recording of a phone call. Because of this gaping legal vacuum, the legislation governing cases like secretly filming a phone call is often not clear or thoroughly checked by judicial interpretation. Indian Telegraph Act of 1885 – In the absence of a specific legislation covering the subject, the law most commonly applicable to such cases is a relic of a law the 1885 Indian Telegraph Act (hereinafter, "Telegraph Act"). Section 25 of the Telegraph Act makes destroying or tampering with a telegraph a crime.<sup>2</sup> The act of interfering with a telegraph or operating a telegraph with the intent of intercepting or familiarising itself with the contents of any communication is included in the offense<sup>3</sup>. However, history shows that this clause has often been used to prosecute third parties who intercept a call, rather than the parties to the chat. The tone of the segment also tends to imply that criminality is only attached to a third person who inadvertently enters the dialogue. The terms 'interception' and 'acquainting oneself with the contents of a call do not seem to cover a situation in which a

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2. Section 25 – Intentionally damaging or tampering with telegraphs If any person, intending–

- (a) to prevent or obstruct the transmission or delivery of any message, or
- (b) to intercept or to acquaint himself with the contents of any message, or
- (c) to commit mischief,

damages, removes, tampers with or touches any battery, machinery, telegraph lines, post or other thing whatever, being part of or used in or about any telegraph or in the working thereof,

he shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both."

3. NOTE also, the definition of "message" under the Telegraph Act, provided in Section 3(3) as follows:

"Section 3 – Definitions (...)

- (3) "message" means any communication sent by telegraph, or given to a telegraph officer to be sent by telegraph or to be delivered";

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person records their own phone contact with another. A individual who records his or her own communication with another cannot be said to have 'intercepted' his or her own conversation or damaged/tampered with a computer in order to 'acquaint himself with the contents of (his or her own) message/conversation'. As a result, an act of secretly recording one's own interaction with another does not seem to be punishable under this clause.

## **ADMISSIBILITY OF AUDIO TAPES IN COURT OF LAW**

In the current world, technology become part of our lives and the world has been transferred into a global village where our life has become more connected through the technology. It is more obvious that with the development of the technology and the social media accessibility our lives has become less private. As a result, this leakage of our private conversation and many other documents is common in the country or the entire world, one among that is tapping of phone call. Such tapped call has been used for many purpose which even include as an evidences material in court. Under the Indian Evidences Act 1972, there are two classifications of evidences- oral and documentary evidence. In section 3 of the act, "evidence" means -

- The statement which a witness is making in from of the court of law can be considered as an evidence, which is known as oral evidence.<sup>4</sup>
- All the evidences which has been submitted under the court of law as computerised material or any electrical material which will be considered as documentary evidences.<sup>5</sup>

However, it is nowhere mention in the Indian Evidences Act about electronic records. A phone audio recording is coming under the bounds of an electronic record. In the current technical age, these kinds of devices are being used almost everywhere. There is certain case coming up in front of the court where electronic records mainly voice recording are brought up in court as evidences. The admissibility of these evidences is not discussed under the Indian Evidences Act, 1972. Law in connection with the admissibility of these electronic records has been left down under section 65B of Indian Evidence Act 1972, there are certain conditions laid down in the act and upon the ratification of these condition the electronic evidences can be produced in the court and is admissible by the law. The computer source

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4. Section 3, Indian Evidences Act 1972.

5. Section 3, Indian Evidences Act 1972.

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comprising the information, which is being made in front of court as evidence, has to be produced by the computer during the period over which it was used frequently to store information for the determinations of any activities regularly carried on and it should be carried on by a person who has the lawful control over the use of that computer. During the time period, it is compulsory that the electronic records which the information was contained has to be regularly fed into the computer in the regular course of these activities. Throughout the time period, the computer which contains the evidentiary records should be maintained properly or, if not, in the respect of that particular time period the computer is not operating well or out of operation, then in that period of time, the truthfulness of the contents of the electronic record must not be effected. The information limited in the electronic record duplicates or is derived from such information nourished into the computer in the ordinary course of the said activities.

If the testimony is adduced during any proceeding before a Court under this act, a certificate specifying any of the following must be given, according to section 65B (4):

- A certificate that identifies the electronic document containing the declaration and describes how it was created or;
- A certificate containing such information about any system used in the processing of the electronic record as might be necessary to demonstrate that the electronic record was created by a computer; or
- It must be signed by an individual in a responsible official capacity in relation to the activity of the relevant device or the management of the relevant activities.

In **RM Malkani vs. State of Maharashtra**<sup>6</sup>, The approval for phone tapping in the Malkani case was granted without considering a judicial framework that might deter the excesses that are often associated with laws in our country that grant the government broad powers. More recently, the shoddy way in which the Delhi police investigated the Parliament assault case has sparked outrage. Which lead Supreme Court specified the conditions, for a recorded conversation to be considered as an evidence. The recorded call must and should be relevant in the matter of issue. The recorded voice should be identified or identifiable by the court.

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6.1973 AIR 157, 1973 SCR (2) 417 <https://www.sci.gov.in/jonew/judis/6708.pdf> (Supreme Court of India)  
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The exactness of the tape-recorded conversation is evidenced by eliminating the possibility of erasing the tape-recorder.

In **Ram Singh vs. Col. Ram Singh**<sup>7</sup>, The Court in this case held that, the proof captured on a tape recorder or other mechanical process is in favour of the admissibility of the comments according to such protections, such as the speaker's speech being correctly recognised by the producer of the record or by those who know his voice. In other words, the identification of the speaker's voice is a logical corollary of the first prerequisite for the admissibility of such an argument. Where the speaker's voice has been refuted by the manufacturer, it would take a lot of evidence to prove that it was the speaker's voice. The authenticity of the tape-recorded argument must be proven by satisfactory testimony, either direct or circumstantial, by the creator of the document. Any chance of tampering with or erasure of a portion of a tape-recorded comment must be ruled out, or the statement would be out of order and thereby inadmissible. According to the laws of Evidence Act, the argument must be true. The tape must be properly secured and stored in a safe or under official custody. The speaker's voice should be distinctly audible and not masked or obscured by any noises or distractions.

In the case of **K. Velusamy vs. N. Palanisamy**<sup>8</sup>, the Supreme Court found telephonic conversation recordings and concluded that, under Section 3 of the Evidence Act and Section 2(t) of the IT Act, a discontinuing recording of telephonic conversation could be considered credible evidence. The Supreme Court has stated that an electronically captured communication is admissible as testimony if the conversation is pertinent to the topic, the voice can be recognised, and the recorded conversation's authenticity can be shown by excluding the risk of erasure, addition, or distortion.

## **INFRINGEMENT OF RIGHT TO PRIVACY BY PHONE TAPPING**

The Right to privacy is safeguarded as an intrinsic a part of the right to life and personal liberty under Article 21, its meaning and scope of private liberty was recognized for the primary time in **Kharak Singh's case (1962)**. It is guaranteed not only by the Indian Constitution, but also by Article 17 of the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights (UDHR). While the right to privacy is

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7.1986 AIR 3 1985 SCR Supl. (2) 399 1985 SCC Supl. 611 1985 SCALE (2)1142

8.1968 AIR 147, 1967 SCR (3) 72 <https://www.sci.gov.in/jonew/judis/2376.pdf> (Supreme Court of India)

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not clearly stated in the Constitution, dialogue is an important aspect of a man's personal life. Telephone conversations in the privacy of one's home or office are unquestionably obscured by the right to privacy. Telephone tapping will therefore be a violation of Article 21 of the Constitution unless approved by statute. Now, the Supreme Court has ruled in several cases that the right to have a telephone conversation without interruption is part of the right to privacy. The Indian Telegraph Act 1885 governs phone tapping in India. Section 5 (2) of the Indian Telegraph Act gives the state and central governments the authority to intercept telephone calls. Evidently, the "Right to Privacy" is not absolute and is subject to legal procedures. Section 5 of the Telegraph Act, as amended, allows for telephone tapping and permits the government to seize licenced telegraphs and order message interception. In the event of a public emergency or in the interest of public safety, the State government or Union government, or any person explicitly empowered by the Central or State governments, may temporarily take possession of any telegraph created, maintained, or worked by any person licenced under the said provision of Indian Telegraph Accreditation Act, if satisfied that it is necessary or expedient to do so.

Chandra Shekhar's phone tapping charges, which sparked a big controversy, were a significant case on phone tapping. Chandra Shekhar, a Janata Dal gadfly at the time, made the sensational claim that the government was secretly tapping the phones of 27 politicians, including his own. The following were the significant flaws found in this case:

- Politicians were wiretapped without their knowledge or consent.
- Without any written instructions from the responsible authority, parallel lines were extended to the police headquarters.
- The tapping of phones was ordered for fictitious purposes.

After, a CBI report found that the government had engaged in systematic phone tapping. The case was brought to the Supreme Court by a public interest petition submitted by the **People's Union for Civil Liberties, known as the PUCL case<sup>9</sup> (1996)**.

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9. AIR 1997 SC 568, JT 1997 (1) SC 288, 1996 (9) SCALE 318, (1997) 1 SCC 301, 1996 Supp 10 SCR 321, 1997 (1) UJ 187 SC

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Justice Kuldip Singh claimed succinctly in **PUCL vs. UOI (2017)** that the 1<sup>st</sup> step under section 5(2) of the telegraph act is the occurrence of some public emergency or the existence of a public safety concern.

After that, the competent and concerned authority can pass an order of interception under section 5(2) of the Telegraph Act after documenting its satisfaction that it is necessary or expedient to do so in the interest of:

- India's sovereignty and integrity.
- State security is paramount.
- Foreign countries have friendly ties with the United States.
- Public order is essential.
- Defending against incitement or inducement to commit a crime."

As a result, it was determined that telephone tapping infringed on the constitutional right to privacy and provided defence or protections against arbitrariness in the use of the state's surveillance forces. The Centre brought some amendments to the Indian Telegraphic Rules, 1951, after the PUCL situation.

In the case of **K.L.D Nagasree vs. Government of India<sup>10</sup> (2006)**, it was held that "intended for the purpose of making an order for interference of messages in the exercise of powers under Section 5(1) and (2) of the Telegraph Act, 1885.

The Telegraph Act also provided protections against unlawful and gratuitous intervention in the telegraph and telephone mechanisms, and the AP High Court held in **Rayala M. Bhuvanewari vs. Nagaphanender Rayala<sup>11</sup> (2007)** that the act of tapping by the husband of his wife's communication with others was illegal and violated the wife's right to privacy.

## **ILLEGALLY GATHERING OF SOURCE OF EVIDENCE**

In **Nardone vs. United States (1939)<sup>12</sup>**, Justice Frankfurter<sup>13</sup> coined the phrase "fruits of the poisonous tree." This applies not only to intercepted/taped communications, but also to

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10. IR 2007 AP 102, 2007 (1) ALD 553, 2007 (1) ALT 473

11. AIR 2008 AP 98, 2008 (2) ALD 311, 2008 (1) ALT 613

12. 308 U.S. 338, (1939), the Supreme Court of United States of America held that facts illegally obtained from a wiretap under the Communications Act, 1934 could not be used at trial and hence inadmissible.

13. Renowned judge of United States of America

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information obtained by using details extracted from such conversations. The doctrine is centered on the defence provided by the United States Constitution's Fourth Amendment<sup>14</sup>. In India, this doctrine is approached with flexibility. Even though the source of the evidence is illegal, Indian courts have the discretion to admit it.

When opposed to the United States, Indian courts have a different approach to this theory. In the United States, judicial decisions have declared that obtaining evidence by means is "illegal," since the Fourth Amendment's right to privacy is strictly enforced. As of now, the doctrine is not strictly enforceable under Indian law. As the Indian Evidence Act is exhaustive, Indian courts have the discretionary power to admit evidence collected through wiretapping, fraud, wrongful arrest, sting operations, and so on, and the relevance of any fact is such if such fact is largely important. The United Kingdom has a rule called "The Unfair Operation Rule"<sup>15</sup> Proof obtained by being unfair to the accused by using unethical and unfair means may be omitted. In certain cases, applying this doctrine can result in the release of the guilty. However, the balance of accused rights versus public protection rights is critical.

Even the first law commission report<sup>16</sup> noted that the police were grossly misusing their authority to seize confessions or facts, activities that continue to this day. People in India are unaware of their civil rights, and as a result, they are subjected to police brutality and arbitrary detention. As a result, it is much more important to remove such testimony during court proceedings. **Boyd vs. United States**<sup>17</sup> (1886) is a landmark case based on the exclusionary rule, in which certain customs officers checked and confiscated petitioner's glass plates on suspicion that the records relating to these items were falsified in order to circumvent customs duties. The court had to decide if the processing of a person's private papers to be used as evidence against him in court constituted unreasonable search and seizure under the Fourth Amendment.

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14. Full text of Amendment- The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall be issued, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

15. The Unfair Operation Principle and the Exclusionary Rule: On the Admissibility of Illegally Obtained Evidence in Criminal Trials in India." *Indiana International & Comparative Law Review* 27, no. 2 (2017): 147. Accessed May 9, 2021.

16. The Law Commissions for the first time was established in 1834 under the Charter Act of 1833 under the Chairmanship of Lord Macaulay which recommended codification of the Penal Code, the Criminal Procedure Code and a few other matters.

17. 116 U.S. 616

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The 94<sup>th</sup> Law Commission Report<sup>18</sup> agreed that, due to a rise in human rights violations and the extension of Article 21<sup>19</sup>, it is appropriate to reconsider the incorporation of this doctrine into the existing legislation. Wiretapping and illegal seizures are invasive to human dignity and social values, which are critical to a fair criminal justice system. The Indian Evidence Act of 1872, like many laws based on English law, devotes an entire chapter to the relevance of proof, stating that the primary criteria for deciding the admissibility of evidence in Indian courts and its relevance. There is no constitutional ban against unlawfully collected evidence under Indian law.<sup>20</sup> It was decided in one of the cases before the Hon'ble Supreme Court of India - *Umesh Kumar vs. State of A.P.* (2013) - that even if a document is obtained illegally, its admissibility is not barred. It is self-evident that if a piece of proof is obtained by unethical or illegitimate means, it is admissible if it is otherwise relevant and its genuineness is established, implying that the ends justify the means. In another case, **Poorna Mal vs. Director of Income Tax (Investigation)**<sup>21</sup> (1973), the Hon'ble Supreme Court, in deciding on the admissibility of information confiscated in a search that was allegedly tainted by illegality, held that if the evidence is gathered by illegal search, it is not liable to blockade unless in the constitution or statute states an expressed or implied ban.

## CONCLUSION

At the moment, India has adequate regulations in place to control contact interception. The general conclusion of the article is that communications monitoring is an essential component in protecting the state's authority, dignity, and defence, and that it is not illegal if ordered according to a specified protocol. Electronic records is an admissible form of evidences, to what extent they are admissible and reliable form of evidences can be verified with a certificate under section 65 B (4) of Indian Evidences Act. Many decisions have been handed down in India about the legality of phone tapping, both of which have held that it should be done in compliance with the correct rules and procedures laid down in the PUCL case, the Telegraph Act of 1885, and, most notably, the Information Technology Act of 2000. There is also a growing support of telephone tapping which is even considered as more necessary. The rise of terrorism on a global scale has prompted most countries to introduce tough anti-terror

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18. Law Commission Report No. 94- "Evidence obtained illegally or improperly proposed Section 166A, Indian Evidence Act, 1872."

19. Constitution of India, 1950

20. Indian Evidence Act of 1872 or the Code of Criminal Procedure of 1973.

21. 1974 AIR 348, 1974 SCR (2) 704.

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laws, such as the USA's PATRIOT Act and India's POTA. The most critical provisions of these statutes deal with telephone tapping, which severely restricts civil liberty. Governments believe that using the intelligence gathered by electronic eavesdropping techniques to prevent terrorist attacks is the most successful way to tackle the threat of terrorism. Citizens are being forced to give up some of their rights and endure slight inconveniences in the name of the nation's common good. The truth remains that while everyone opposes wiretapping, no one prevents it from being used where necessary. For the time being, the Indian public has increasingly become aware of potential privacy breaches incurred by technology, and they understand that such information must be sought in the detection and prosecution of offences, or in protecting the dignity, independence, and protection of the state, or if such information discloses signs and facts of a crime or scandal. If an interception is carried out in an illegal manner, it may infringe on the right to privacy. It can only be carried out in cases where guilt is certain and the matter is relevant to the national interest, sovereignty, or protection. As a result, though it is not unconstitutional, proper protocol must be followed. Finally, the Information Technology Act is there for the protection of our privacy.

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