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With this thought, we hereby present to you

TWO-PARTY CONSENT: PROTECTION OF PRIVACY RIGHTS UNDER ARTICLE 21 FROM UNAUTHORIZED PHONE CALL RECORDINGS

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Abstract

This research article talks about the need to protect people's privacy, especially when it comes to recording phone conversations without their permission. In India, the right to privacy is part of the right to life under Article 21 of the Constitution. However, there is no clear law that stops someone from recording a phone call without the other person's consent. This creates a big gap in the legal system, which can lead to misuse and violation of personal privacy. It explains a concept called two-party consent, which means all the people involved in a phone call must agree before it can be recorded. Many countries like the United States (in some states), Germany, Australia, and France already have strong laws that protect people from being secretly recorded. These laws help make sure that conversations stay private unless everyone involved agrees to record them. In India, although some court decisions have supported the right to privacy and spoken against secret recordings, there is still no specific law that requires two-party consent. The article suggests that India should introduce such a law to better protect people's privacy. It also mentions that the proposed Personal Data Protection Bill could help if combined with clear rules on phone call recording.

INTRODUCTION

Privacy is an inalienable right of every individual in India as it has been guaranteed in the Constitution. About the right to privacy, it can be said that even if it is not embodied in the Indian Constitution, it is nevertheless recognized internally as a fundamental right as provided in Article 21 which is the right to life and personal liberty. The constitution had established what exactly was meant by this right in the instance of *K.S. Puttaswamy v. Union of India* in this regard; the Apex Court noted that the right of privacy was an essential component of the right to life and personal liberty guaranteed under Article 21. This judgment was also however quick to point out that privacy involves protection of personal autonomy, bodily privacy,

informational privacy as well as privacy of communications.¹ However, it is well known that there is nothing resembling any legal protection against unauthorized interception of private communications especially phone calls, which remains a huge legal vacuum in the Indian legal order on privacy issues. For example, certain states in US practice two-party consent laws that are absent in India as an example no statute exists which requires that all the parties to a conversation must give permission before a conversation is recorded.² Two-party consent laws aids in protecting the rights of every conversation participant as conversations cannot be recorded without their consent and knowledge.³ That being said there is no such law in India which allows people to abuse the use of telephony without restrictions which rules would have curbed privacy violations. In contrast, the majority of jurisdictions around the world have developed comprehensive legal means for ensuring protection of privacy of communication. In the USA while constitutionally there is a one-man consent clause to recording under the wiretapping law 1968, states like California however have adopted a two-consent rule whereby it is a criminal offense to record confidential communication between parties without the permission of the parties involved.⁴ **In Germany, the Federal Data Protection Act (Bundesdatenschutzgesetz) and the Criminal Code (Strafgesetzbuch) require** consent from all parties before recording a private conversation although making unauthorized recordings is punishable. Right to Hear US policies in clear terms.⁵ In France and Australia, it is the same practice to listen to the recordings when all parties have not provided their consent unless there are special warrants and exceptions of the law.⁶ India's legal system is congenitally not designed to allow the consent of both parties meaning dual consent is not built into the system which is alarming because people are constantly using mobile phones for conversation that can be easily recorded and sent to other people. In India, companies and service providers usually take the customer's consent to record the phone for service purposes clashing with the normal welfare of the individual's privacy for there are no explicit laws aimed toward addressing these issues. There are laws such as the Indian Telegraphic Act of 1885 as well as the Information Technology Act of 2000 that speak and put restrictions on interception of communication however them laws are only targeted for state intrusion for public Safety and or national security and do not protect private individuals from using recording devices to

¹ *K.S. Puttaswamy v. Union of India*, (2017) 10 S.C.C. 1 (India).

² **California** Penal Code § 632 (Deering 2023).

³ Bundesdatenschutzgesetz [BDSG] [Federal Data Protection Act], Jan. 27, 2017 (Ger.).

⁴ 18 U.S.C. §§ 2510–2522 (1968) (Federal Wiretap Act).

⁵ *Id.*

⁶ Telecommunications (Interception and Access) Act 1979 (Cth) (Austl.); Code pénal [C. pén.] [Penal Code] art. 226-1 (Fr.).

capture conversations without an agreement from both parties.⁷ The Indian case law has pointed out that the inviolability of personal correspondence and communication is to be safeguarded. For example, in case *People's Union for Civil Liberties v Union of India*, the Supreme Court held that making a phone call can be considered as an extension of one's personal life, which is eligible for the right to privacy.⁸ In *Rayala M. Bhuvaneswari v Nagaphanender Rayal*, It was held by the Andhra Pradesh High Court that the act of surreptitiously recording telephonic interactions between the spouses, at least one of whom does not is completely a plain violation of right to privacy under article 21.⁹ Similarly, in one of its recent decision, the Chhattisgarh High Court further stated that the intercepting and recording of a conversation in which one party is unaware and does not 'give permission' contravenes the provisions on an individual's right to privacy as contained in the Constitution.¹⁰ These cases illustrate the changing perception of the judiciary about the need for privacy of communication from unwanted interception, but the reality of the current situation is that there is still no specific two-party consent law. In order to avoid further cases of breaches of privacy under Article 21, it is recommended that the Indian legislature pass laws that require that for a recording of a conversation to be made all those who form part of the conversation should give their consent. Such legislation would not only offer more assurance and clarified for people's privacy issues but would also make India conform with the international practices concerning communication privacy. The Personal Data Protection Bill, 2019 currently being proposed seeks to set standards within which personal data can be collected and processed as such may work in conjunction with a two-party consent law considering it provides a bigger perspective within which information privacy can be protected in India.¹¹ As technology evolves there will be stronger legal reasons for the prevention of the uncontrolled recording of phone calls. The lack of clear and enforceable laws on the two-party consent puts Article 21 right to privacy at a risk of being violated, especially in the modern technological environment.

WHAT IS TWO PARTY CONSENT?

The two-party consent is a legal theory where two or more parties are included in a private affair and all or us consent before any recording can be made. This applies in circumstances

⁷ Indian Telegraph Act, No. 13 of 1885, § 5(2) (India).

⁸ *People's Union for Civil Liberties v. Union of India*, (1997) 1 S.C.C. 301 (India).

⁹ *Rayala M. Bhuvaneswari v. Nagaphanender Rayal*, MANU/AP/0907/2007 (India).

¹⁰ Partha Sarathi Behera, Recording of Phone Conversations Violates Privacy Rights: Chhattisgarh High Court, *Times of India* (Oct. 15, 2023).

¹¹ Personal Data Protection Bill, No. 373 of 2019 (India).

where an individual wants to take the pictures of a private conversation through a mobile phone or in person and it mostly serves to avoid intrusion into communication.

In two-party consent laws, if one party overhears the conversation and makes a recording without the other being aware, this is termed as invasion of privacy and may attract civil or criminal charges. This rule is more rigorous than the rule of 'one-party consent' which allows one of the people in the discussion (usually the one who records the conversation) to seek permission.

NEED FOR TWO - PARTY CONSENT

A phone call is a personal detail as part of our day to day life and therefore our right to privacy includes even the telephone conversations. Therefore, unless the law permits, tapping or listening to our telephone conversations will indeed infringe Article 21 of the Constitution of India.

Call recording provisions have been made in Section 25 of Indian Telegraph Act, 1885. It enumerates that it is okay if a person records a call with one other person.¹² However, in case if an unknown person who is not a party to the conversation records the talk then that is prohibited. The extension of the legislation is required with respect to the purposes of the parties recording any conversation as this will infringe on the privacy of the other party being recorded.

THE RIGHT TO PRIVACY UNDER ARTICLE 21

Article 21 of the Indian constitution offers protection from law infringement in life and liberty. This clause, however, is normally vague at the outset; it has been expansive construed by the courts to include 'the right to the image'. In this context, the historic decision in the case of *K.S. Puttaswamy v. Union of India* made it clear that there are different facets of the fundamental right to privacy under Article 21 including personal decisions, bodily privacy, informational privacy and privacy of communication. The right to life and individual liberty, which is a tangible guarantee, is protected under Article 21. The concept is not novel but rather

¹² Indian Telegraph Act, No. 13 of 1885 (India).

conceived almost from the inception; nevertheless, the judiciary in most jurisdictions adopted even more widely the right to privacy.¹³

Contrary to unjustified phone tapping, Article 21 affords defence from such acts by stipulating the right to privacy of personal communications. The research puts forward that making unauthorized recordings of telephonic conversations including one or more of the participants without their consent violates Article 21 which safeguards severe injury to privacy. The article proposes enhancement of legal privacy in telephonic communications by introducing the two-party consent requirement for telephone calls and obtaining the consent from both parties, without infringing the rights of Individuals as enshrined in Article 21.

GLOBAL LEGAL FRAMEWORK ON TWO-PARTY CONSENT

Two-party consent as regards to recording conversations and communication is such an important legal principle that seeks to safeguard other people's privacy in any given conversation. Within this framework, it is illegal to record a conversation without getting permission from all the participants involved in the conversation. Countries across the globe have managed to come up with different laws governing this particular practice for privacy or cultural attitude towards communication. This section seeks to analyze the two-party consent which is verbally and physically present in the legal systems of different countries, namely the United States, Germany, Australia, and France.

United States

Federal and state treat call recording regulation differently in the U.S., hence the variation in consent requirements. The USA was still not in confidence then when the 1968's Wiretap Act allowed the presence of at least one consenting person in an audio-taped conversation, but the ruling also prohibited third party intervention in privacy infringement.¹⁴ This federal standard applies unless state law imposes stricter requirements. Actually, five American states including California, Florida, and Maryland, have enacted two-party consent laws that forbid a recording of a conversation unless all parties to that conversation give their consent.

¹³ *K.S. Puttaswamy v. Union of India*, (2017) 10 S.C.C. 1 (India).

¹⁴ 18 U.S.C. §§ 2510–2522 (1968) (Federal Wiretap Act).

In California, some of these aspects have been lawfully trumped up to withstand ever-existing paranoia over national security and all that, for instance California Penal Code Section 632 permits recording of confidential communications with or without permission of any or all parties concerned. Possible legal consequences for breach of this law process can also lead to civil liability fines and criminal prosecution as well. The reason why California residents have to abide to the two-party consent law on communicating by phone is that it will miserable people who are poor in the society from prying and eavesdropping in their private matters, which will be in favour of people freedom.¹⁵

In Florida, the law is quite the same in that all the participants in a conversation have to be consenting to the recording thereof or it is a matter that the state will more likely prosecute. This is further supported by the fact that the absence of consent leaves room for civil suits and even criminal prosecution, which underlines the right to privacy in communication. However, some states adopt a one-party consent approach, which is beneficial in enabling a person to make phone recordings without announcing to the other parties, which makes the issue of privacy defenses unsatisfactory to the citizens of such regions. The discrete, yet paradoxical variance between state and federal statutes must be viewed in light of the current legal changes regarding recording telephone conversations in the United states of America and the legal environment prevailing, thus making it needed for all individuals and such entities to know about the specific legal framework in place for their states or jurisdictions.¹⁶

Germany

Germany is in a class of its own in terms of regulation that determines the privacy of the individual in regard to listening devices. Both the Federal Data Protection Act¹⁷ and the Criminal Code state that both parties to the conversation must agree to the fact that it will be recorded. This makes it possible for the parties that are being interviewed to have some of their personal rights violated which is not legal either by individual or the parties doing the interrogation. Section 201 of the German Criminal Code which has provisions regarding even conversations without a consent addresses the unauthorised recording of a conversation in terms of legal terms. One cannot record a phone or a face-to-face conversation without the

¹⁵ Cal. Penal Code § 632 (Deering 2023).

¹⁶ Florida Statutes § 934.03 (2023).

¹⁷ Bundesdatenschutzgesetz [BDSG] [Federal Data Protection Act], Jan. 27, 2017 (Ger.).

consent of all the people involved and which also includes the abovementioned information, is under punishment of Law.¹⁸

The provisions in the above media attention policies are consistent with the protection of such information within the scope of the German Member state and within the scope of the European Union. The decrease in the state protection of the individuals physical body places increasing responsibility under the Regulation on only correct data processing on information entered into the information systems.¹⁹ Thus, under such regulations, prior consent must be obtained first on how the data would be used and then followed by the recording itself. The strong regulations in Germany demonstrate the sensitivity of the issue and especially the issues of privacy and the need of the individuals to be informed on the scope and the use of such recording of their communication.

Australia

Australia also has strong provisions on the legal status of telephone recordings. The Act of 1979 on Telecommunications contains specific provisions regarding the recording of conversations and states that any recording of a conversation without the consent of all parties completing it is unlawful.²⁰ However, as in the case of the United States, there are also some exceptions granted in Australia towards particular circumstances, for example opting for a warrant. In working practice, business entities and other organizational structures should notify their clients that calls can be recorded and seek their permission before completing the move.²¹

Australian states and territories might have further laws that support and enhance the Commonwealth legislation. For instance, in NSW, the Surveillance Devices Act 2007 has the inordinate ambit to codify recording of private conversation upon certain conditions, thus outlining the need for the parties to consent.²² The starting point is that there is a requirement to seek consent from all the parties to a conversation except in terms of quality control or training where the conversation may be recorded.

¹⁸ Strafgesetzbuch [StGB] [Criminal Code], § 201, May 15, 1871 (Ger.).

¹⁹ Regulation 2016/679 of the European Parliament and of the Council, 2016 O.J. (L 119) 1 (EU General Data Protection Regulation).

²⁰ Telecommunications (Interception and Access) Act 1979 (Cth) (Austl.).

²¹ Austl. Competition & Consumer Comm'n (ACCC), *ACCC Guidelines on Call Recording*, <https://www.accc.gov.au> (last visited Sept. 15, 2024).

²² Surveillance Devices Act 2007 (NSW) (Austl.).

There is a requirement that a person must consent to making an audio or video recording of any conversation. In this context, it seeks to advance a growing emphasis in Australian laws over an individual's right to privacy against one's personal communication. Movements fostering human rights enhancement and fundamental freedoms tranquillize individuals such that they invariably understand recording as a means strengthening the people's requirements.

France

France too has a two party consent law requirement under its legal regime. According to the French Penal Code, any person who records a conversation without the agreement of all parties involved commits an offence of infringement of privacy. Article 226-1 of the Penal Code makes it unlawful for a person to record another person(s) in a conversation without his/her knowledge, and that of others involved in that conversation. Failure to respect such laws attracts sanctions, both in terms of monetary and custodial sentences.²³

The French Law on the Protection of the Unauthorised use of Personal Data shows the political will of the state to protect the interests of its citizens from encroachments. Similarly, the two-party consent is a provision that is in line with the more general provisions of protecting data and privacy as laid down in the European statutes particularly in the GDPR. The GDPR upholds the right to privacy by upholding the principle of lawful processing of individuals' personal data even though consent is obtained from the individual.²⁴

THE LEGAL SITUATION IN INDIA: GAPS IN PROTECTION

In India, there is no effective legal regime that is in place regarding the recording of telephonic conversations and this makes the situation pretty concerning when it comes to defence of individuals' privacy rights. Despite the recognition of privacy as an integral constitutional right under Article 21 of the Indian Constitution, the laws in force have been silent as far as prohibition of unauthorized recording of telephones is concerned. This creates a great deal of downside on the part of the individuals as they suffer mostly from possible cases of invasions of privacy acting on the poor existing laws.

The dominant legislative framework in which the telecommunications sector in India is

²³ Code pénal [C. pén.] art. 226-1 (Fr.), <https://www.legifrance.gouv.fr> (last visited Apr. 10, 2025).

²⁴ Regulation 2016/679 of the European Parliament and of the Council, 2016 O.J. (L 119) 1 (EU) (General Data Protection Regulation).

governed is the Indian Telegraph Act, 1885 which allows any means of communication to be tapped for national and public security. The Indian Telegraph Act in section 5(2) provides that the sovereignty, integrity, and security of India or the reasonable suspicion of persons and property will warrant the intercept of messages during a public emergency or the conduct of terrorism. However, this clause is limited only to government interception of messages and does not stop private individuals from making recordings of messages in a conversation. Thus, it is not required that all the individuals in the conversation consent to the recording of the conversation regardless of whether it involves the use of tape-recording equipment or not.

Another such law that deals with the area of data communication and privacy is the Information Technology Act, 2000, and this law also has no provisions on the recording of telephone conversations and its regulations.²⁵ Even though the Act provides for the sanction of improper disclosure of such sensitive personal data, it does not provide satisfactory solutions to the privacy issues that arise due to the presence of telephone conversations. All in all, the legal aspect is not clear with respect to what kind of consent is necessary in order to be able to record personal conversations.

Since there exists no law that seeks to regulate the practice of recording calls by telephone wherein people from different geographic areas engage in a conversation through voice technology, this has left many areas open to abuse in terms of human rights. Most especially because mobile phones and communication apps have made it simple to record phone calls, illegal recording of telephone conversations is a further infringement into the right to privacy. Illegal recordings made can also be abused in many ways such as through threats, extortion or gossiping which may have negative impacts on the attacked persons. The uncertainty made by the absence of good principles regulating the use of v recording of discussions makes it hard for persons to defend themselves effectively.

Judicial interpretation has addressed some of these inequalities as best it could. The case concerning *People's Union for Civil Liberties v Union of India* on the other hand stated that personal communication is private and that the recording of a conversation without the consent of either party is an infringement on the right to privacy guaranteed under Article 21.²⁶ The same verdict was given in the case of *Rayala M. Bhuvaneswari v Nagaphanender Rayal*

²⁵ Information Technology Act, No. 21 of 2000 (India)

²⁶ *People's Union for Civil Liberties v. Union of India*, (1997) 1 S.C.C. 301 (India).

whereby surreptitious audio recording of spouses speaking privately was found to encroach upon their privacy.²⁷ These cases form a picture of the gradual change that is occurring in the courts and their attitude towards the need to safeguard personal communication. Or, these cases indicate that there is an urgent need for action by lawmakers to amend the law to provide clear safeguards that will prohibit unauthorized recording of phone calls by introducing preventative measures first.

In contrast to the fragmented legal system of India, it has been observed that many countries have effective legislation that allows for two party consent in telephone call recordings making effective privacy rights protection. There is no such legislation in India therefore putting a serious loophole in the legal framework and this needs to be rectified as soon as possible by constituting specific regulations regarding phone call recordings. Of this we could include the enacting of two party consent provisions as to telephone call conversations with all parties willing to be recorded to obtain their permission first as being the example that makes this country up to date.

EXISTING JUDGEMENTS RELATED TO CALL RECORDING IN INDIA

❖ *People's Union for Civil Liberties v. Union of India (1997)*

This critical case was about the illegal wiretapping of the citizens of the country by the government. It was ruled by the Supreme Court that any form of interception undertaken without consent of the concerned parties is infringement of the right to privacy found under Article 21. The phone calls are considered as a part of personal seclusion since they are as legitimate as conversations held in the domestic environment. According to the ruling, an individual can reasonably expect that his or her private communications are free from interception, thereby such acts, and its authoriser, the state, or any other third party to the communication, is also barred and cannot surveil or intercept.²⁸ This decision has laid down the foundations towards the revival of the privacy poise in the rest of the decisions.

❖ *Rayala M. Bhuvaneswari v. Nagaphanender Rayal (2008)*

Justice explained the limits of privacy in the case of private relations in this case, Andhra

²⁷ *Rayala M. Bhuvaneswari v. Nagaphanender Rayal*, MANU/AP/0907/2007 (India).

²⁸ *Id.*

Pradesh High Court. The petitioner tried to bring out the evidence of the captured voice of one party while recording the conversation and intervening in the divorce case. The Court stated that the husband violated his wife's privacy rights by committing an offence under Article 21 by hiding a tape recorder in her family's discussions. The judgment reinforced the idea of privacy as a fundamental human right, which is particularly violated in emotionally intimate relationships, and any audio video recording without the consent of the subject can cause great detrimental consequences. The Court observed that the integrity and confidentiality of the private life of individuals ought to be respected and disregarding that any such contact, especially for the purpose of surreptitious recording, is not allowed.²⁹

❖ *Chhattisgarh High Court Judgment(2022)*

In a recent judgement, the Chhattisgarh High Court highlighted the need for the protection of persons' privacy especially when it comes to private communications. The Court, in its judgement, opined that interception and recording of a telephone conversation without the knowledge and consent of the other party, is an infringement of the right to privacy under Article 21. It was also pointed out in the judgement that privacy is inextricably linked with human honor and that people have the right to manage their transactions of communication. It is correct to state that this attitude in judicial activities emerges under the overwhelming influence of modern communication tools, allowing to capture the conversation but also stressing the importance of consent in the legality of such action.³⁰

❖ *R.M Malkani v. state of Maharashtra(1972)*

In this matter, the State and Respondent Supreme Court grappled with the question of whether a tape recording documentary with respect to the conversation, which had been captured unlawfully should be admitted in evidence. Although the Court had excise the evidence despite the unlawful obtained nature, it determined that the information was material and useful to the case. Nonetheless, this pronouncement raises moral issues in contravention of laws protecting the right to privacy, as it indicates that the goal achieves through legal processes warrants any unorthodox tools. The judgment morphs the balance between the necessity for proof and

²⁹ *Rayala M. Bhuvaneshwari v. Nagaphanender Rayal*, MANU/AP/0907/2007 (India).

³⁰ Recording Phone Conversation Without Permission Violates Right To Privacy Under Article 21: Chhattisgarh High Court, *LiveLaw* (Oct. 15, 2023), <https://www.livelaw.in/high-court/chhattisgarh-high-court/chhattisgarh-high-court-ruling-recording-telephonic-conversations-without-consent-violates-privacy-right-article-21-240133> (last visited Sept. 15, 2024).

invasion of rights, it makes imperative that the legislative instrument that regulates the recordings of conversations be enacted.³¹

CONCLUSION

Right to privacy, as provided by Article 21 of the Constitution of India, has been extensively interpreted by the courts of law to include the privacy of personal correspondence. In India, the lack of a comprehensive statutory scheme dealing with the recording of phone calls without the consent of the parties to the conversation creates a gap in law. Unlike 'two party consent' jurisdictions like the United States (only some states), Germany, France and Australia, India does not have specific legislation dealing with the recording of conversations without the knowledge or consent of the parties involved. While the courts have recognized the right to privacy in the context of telephonic communication, they have not provided for comprehensive legislation to enforce such rights. This gap in law makes individuals susceptible to breaches of their privacy while at the same time lessens the basic values of dignity and self-governance as provided by Article 21.

The rise of mobile and internet communication services has made privacy protection increasingly critical. Implementing a two-party consent rule in Indian legislation would mean that every party to a conversation has a say regarding its recording. This step would bring India to the global privacy jurisprudence and enhance the reality of fundamental rights in the digital epoch of India. The proposed Personal Data Protection Bill, if enacted with appropriate clauses, could mitigate this problem. We emphasize that the safeguarding of communication privacy will need proactive, systematic, and anticipatory legal solutions rather than waiting for judicial action to define those boundaries.

³¹ *R.M. Malkani v. State of Maharashtra*, MANU/SC/0204/1972 (India).