Supreme Court of India
People'S Union Of Civil Liberties ... vs Union Of India (Uoi) And Anr. on 18 December, 1996
Equivalent citations: 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
Author: K Singh
Bench: K Singh, S S Ahmad
ORDER Kuldip Singh, J.

1. Telephone-Tapping is a serious invasion of an individual's privacy. With the growth of highly sophisticated communication technology, the right to hold telephone conversation, in the privacy of one's home or office without interference, is increasingly susceptible to abuse. It is no doubt correct that every Government, howsoever democratic, exercises some degree of subrosa operation as a part of its intelligence out-fit but at the same time citizen's right to privacy has to be protected from being abused by the authorities of the day.

2. This petition-public interest-under Article 32 of the Constitution of India has been filed by the people's Union of Civil Liberties, a voluntary organisation, high lighting the incidents of telephone tapping in the recent past. The petitioner has challenged the constitutional validity of Section 5(2) of the Indian Telegraph Act, 1885 (the Act), in the alternative it is contended that the said provisions be suitably read-down to include procedural safeguards to rule out arbitrariness and to prevent the indiscriminate telephone-tapping.

3. The writ petition was filed in the wake of the report on "Tapping of politicians phones" by the Central Bureau of Investigation (CBI). Copy of the report as published in the "Mainstream" volume XXIX dated March 26, 1991 has been placed on record along with the rejoinder filed by the petitioner. The authenticity of the report has not been questioned by the learned Counsel for the Union of India before us. Para 21 and 22 of the report are as under:

21. Investigation has revealed the following lapses on the part of MTNL

(i) In respect of 4 telephone numbers through they were shown to be under interception in the statement supplied by MTNL, the authorisation for putting the number under interception could not be provided. This shows that records have not been maintained properly.

(ii) In respect of 279 telephone numbers, although authority letters from various authorised agencies were available, these numbers have not been shown in list, supplied by MTNL showing interception of telephones to the corresponding period. This shows that lists supplied were incomplete.

(iii) In respect of 133 cases, interception of the phones were done beyond the authorised part. The GM (O), MTNL in is explanation has said that this was done in good faith on oral requests of the representatives of the competent authorities and that instructions have now been issued that interception beyond authorised periods will be done only on receipt of written requests.

(iv) In respect of 111 cases, interception of telephones have exceeded 180 days period and no permission of Government for keeping the telephone under interception beyond 180 days was taken.

(v) The files pertaining to interception have not been maintained properly.

22. Investigation has also revealed that various authorized agencies are not maintaining the files regarding interception of telephones properly. One agency is not maintaining even the log books of interception. The reasons for keeping a telephone number on watch have also not been maintained properly. The effectiveness of the results of observation have to be reported to the Government in quarterly returns which is also not being sent in time and does not contain all the relevant information. In the case of agencies other than I.B., the returns are submitted to the MHA.

The periodicity of maintenance of the records is not uniform. It has been found that whereas DRI keeps record for the last 5 years, in case of I.B., as soon as the new quarterly statement is prepared, the old returns are destroyed for reasons of secrecy. The desirability of maintenance of unireturn and periodicity of these documents needs to be examined.

4. Section 5(2) of the Act is as under:

5(2)-On the occurrence of any public emergency, or in the interest of public safety, the Central Government or a State Government or any Officer specially authorised in this behalf by the Central Govt. or a State Government may, if satisfied that it is necessary or expedient so to do in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of an offence, for reasons to be recorded in writing, by order, direct that any message or class of messages to or from any person or class of persons, or relating to any particular subject, brought for transmission by or transmitted or received by any telegraph, shall not be transmitted, or shall be intercepted or detained, or shall be disclosed to the Government making the order or an officer thereof mentioned in the order:

Provided that press messages intended to be published in India of correspondents accredited to the Central Government or a State Government shall not be intercepted or detained, unless their transmission has been prohibited under this sub-section.

5. The above provisions clearly indicate that in the event of the occurrence of a public emergency or in the interest of public safety the Central Government or the State Government or any officer specially authorised in this behalf, can intercept messages if satisfied that it is necessary or expedient so to do in the interest of:

(i) The sovereignty and integrity of India.

(ii) The security of the State.

(iii) Friendly relations with foreign states.

(iv) Public order.

(v) For preventing incitement to the commission of an offence.

6. The CBI report indicates that under the above provisions of law Director Intelligence Bureau, Director General Narcotics Control Bureau, Revenue Intelligence and Central Economic Intelligence Bureau and the Director Enforcement Directorate have been authorised by the Central Government to do interception for the purposes indicated above. In addition, the State Governments generally give authorisation to the Police/Intelligence agencies to exercise the powers under the Act.

7. The Assistant DirectorGeneral, Department of Telecom has filed counter affidavit on behalf of the Union of India. The stand taken by the Union of India is as under:

The allegation that the party in power at the center/State or officer authorised to tap the telephone by the Central/State Government could misuse this power is not correct. Tapping of telephone could be done only by the Central/State Government order by the Officer specifically authorised by the Central/State Government on their behalf and it could be done only under certain conditions such as National Emergency in the interest of public safety, security of State, public order etc. It is also necessary to record the reasons for tapping before tapping is resorted to. If the party, whose telephone is to be tapped is to be informed about this and also the reasons for tapping, it will defeat the very purpose of tapping of telephone. By the very sensitive nature of the work, it is absolutely necessary to maintain secrecy in the matter. In spite of safeguards, if there is alleged misuse of the powers regarding tapping of telephones by any authorised officer, the aggrieved part could represent to the State Government/Central Government and suitable action could be taken as may be necessary. Striking down the provision Sections 5(2) of the Indian Telegraph Act, is not desirable as it will jeopardise public interest and security of the State.

8. Section 7(2)(b) of the Act which gives rule making power to the Central Government is as under:

7. Power to make rules for the conduct of telegraphs-(1) The Central Government may, from time to time, by notification in the Official Gazette, make rules consistent with this Act for the conduct of all or any telegraphs, established, maintained or worked by the Government or by persons licensed under this Act.

(2) Rules under this section may provide for all or any of the following, among other matters, that is to say:

(a) xxx xxx xxx

(b) the precautions to be taken for preventing the improper interception or disclosure of messages.

No rules have been framed by the Central Government under the provisions quoted above.

9. Mr. Rajinder Sachar, Sr. Advocate assisted by Mr. Sanjay Parikh vehemently contended that right to privacy is a fundamental right guaranteed under Article 19(1) and Article 21 of the Constitution of India. According to Mr. Sachar to save Section 5(2) of the Act from being declared unconstitutional it is necessary to read-down the said provision to provide adequate machinery to safeguard the right to privacy. Prior judicial sanction - ex-parte in nature-according to Mr. Sachar, is the only safeguard, which can eliminate the element of arbitrariness or unreasonableness. Mr. Sachar contended that not only the substantive law but also the procedure provided therein has to be just, fair and reasonable.

10. While hearing the arguments on September 26, 1995, this Court passed the following order:

Mr. Parikh is on his legs. He has assisted us in this matter for about half an hour. At this stage, Mr. Kapil Sibal & Dr. Dhawan, who are present in Court, stated that according to them the matter is important and they being responsible members of the Bar, are duty bound to assist this Court in a matter like this. We appreciate the gesture. We permit them to intervene in this matter. They need a short adjournment to assist us.

The matter is adjourned to October 11, 1995.

11. While assisting this Court Mr. Kapil Sibal at the out set stated that in the interest of the security and sovereignty of India and to deal with any other emergency situation for the protection of national interest, messages may indeed be intercepted. According to him the core question for determination is whether there are sufficient procedural safeguards to rule out arbitrary exercise of power under the Act. Mr. Sibal contended that Section 5(2) of the Act clearly lays down the conditions/situations which are sine qua non for the exercise of the power but the manner in which the said power can be exercised has not been provided. According to him procedural safeguards-short of prior judicial scrutiny-shall have to be read in Section 5(2) of the Act to save it from the vice of arbitrariness.

12. Both sides have relied upon the seven-Judge Bench judgment of this Court in Kharak Singh v. The State of U.P. and Ors. . The question for consideration before this Court was whether "surveillance" under Chapter XX of the U.P. Police Regulations constituted an infringement of any of the fundamental rights guaranteed by Part III of the Constitution. Regulation 236(b) which permitted surveillance by "domiciliary visits at night" was held to be violative of Article 21 on the ground that there was no "law" under which the said regulation could be justified.

13. The word "life" and the expression "personal liberty" in Article 21 were elaborately considered by this Court in Kharak Singh's case. The majority read "right to privacy" as part of the right to life under Article 21 of the Constitution on the following reasoning:

We have already extracted a passage from the judgment of Field, J. in Munn v. Illinois (1877) 94 U.S. 113, 142, where the learned Judge Pointed out that "life" in the 5th and 14th Amendments of the U.S. Constitution corresponding to Article 21, means not merely the right to the continuance of a person's animal existence, but a right to the possession of each of his organs-his arms and legs etc.

We do not entertain any doubt that the word "life" in Article 21 bears the same signification. Is then the word "personal liberty" to be construed as excluding from its purview an invasion on the part of the police of the sanctity of a man's home and an intrusion into his personal security and his right to sleep which is the normal comfort and a dire necessity for human existence even as an animal? It might not be inappropriate to refer here to the words of the preamble to the Constitution that it is designed to "assure the dignity of the individual" and therefore of those cherished human value as the means of ensuring his full development and evolution. We are referring to these objectives of the trainers merely to draw attention to the concepts underlying the Constitution which would point to such vital words as "personal liberty" having to be construed in a reasonable manner and to be attributed that sense which would promote and achieve those objectives and by no means to stretch the meaning of the phrase to square with any preconceived notions or doctrinaire constitutional theories. Frankfurter, J. observed in Wolfs. Colorado (1949) 338 US 25:

The security of one's privacy against arbitrary intrusion by the police is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples We have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the fourteenth Amendment.

Murphy, J. considered that such invasion was against "the very essence of a scheme of ordered liberty.

It is true that in the decision of the U.S. Supreme Court from which we have made these extracts, the Court had to consider also the impact of a violation of the Fourth Amendment which reads.

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 issue 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.

and that our Constitution does not in terms confer any like constitutional guarantee. Nevertheless, these extracts would show that an unauthorised intrusion into a person's home and the disturbance caused to him thereby, is as it were the violation of a common law right of a man-an ultimate essential of ordered liberty, if not of the very concept of civilisation. An English Common Law maxim asserts that "every man's house is his castle" and in Semayne's case (1604) 5 Coke 91, where this was applied, it was stated that "the house of everyone is to him as his castle and fortress as well as for his defence against injury and violence as for his repose". We are not unmindful of the fact that Semayne's case was concerned with the law relating to executions in England, but the passage extracted has a validity quite apart from the context of the particular decision. It embodies an abiding principle which transcends mere protection of property rights and expounds a concept of "personal liberty" which does not rest on any element of feudalism or on any theory of freedom

which has ceased to be of value.

In our view Clause (b) of Regulation 236 is plainly violative of Article 21 and as there is no "law" on which the same could be justified it must be struck down as unconstitutional.

14. Subba Rao J. (as the learned Judge then was) in his minority opinion also came to the conclusion that right to privacy was a part of Article 21 of the Constitution but went a step further and struck down Regulation 236 as a whole on the following reasoning:

Further, the right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security. In the last resort, a person's house, where he lives with his family, is his "castle": it is his rampart against encroachment on his personal liberty. The pregnant words of that famous Judge, Frankfurter J., in Wolfv. Colorado, (1949) 338 US 25, pointing out the importance of the security of one's privacy against arbitrary intrusion by the police, could have no less application to an Indian home as to an American one. If physical restraints on a person's movements affect his personal liberty, physical encroachments on his private life would affect it in a larger degree. Indeed, nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy. We would, therefore, define the right of personal liberty in Article 21 as a right of an individual to be free from restriction or encroachments on his person, whether those restriction or encroachments are directly imposed or indirectly brought about by calculated measures. If so understood, all the acts of surveillance under Regulation 236 infringe the fundamental right of the petitioner under Article 21 of the Constitution.

15. Article 21 of the Constitution has, therefore, been interpreted by all the seven learned Judges in Kharak Singh's case (majority and the minority opinions) to include that "right to privacy" is a part of the right to "protection of life and personal liberty" guaranteed under the said Article.

16. In Govind v. State of Madhya Pradesh , a three-Judge Bench of this Court considered the constitutional validity of Regulations 855 and 856 of the Madhya Pradesh Police Regulations which provided surveillance by way of several measures indicated in the said regulations. This Court upheld the validity of the regulations by holding that Article 21 was not violated because the impugned regulations were "procedure established by law" in terms of the said article.

17. In R. Rajagopal alias R.R. Gopal and another v. State of Tamil Nadu , Jeevan Reddy, J. speaking for the Court observed that in recent times right to privacy has acquired constitutional status. The learned Judge referred to Kharak's case, Govind's case and considered a large number of American and English cases and finally came to the conclusion that "the right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". A citizen has a right "to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters".

18. We have, therefore, no hesitation in holding that right to privacy is a part of the right to "life" and "personal liberty" enshrined under Article 21 of the Constitution. Once the facts in a given case constitute a right to privacy, Article 21 is attracted. The said right cannot be curtailed "except according to procedure established by law".

19. The right to privacy-by itself-has not been identified under the Constitution. As a concept it may be too broad and moralistic to define it judicially. Whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case. But the right to hold a telephone conversation in the privacy of one's home or office without interference can certainly be claimed as "right to privacy". Conversations on the telephone are often of an intimate and confidential character. Telephone-conversation is a part of modern man's life. It is considered so important that more and more people are carrying mobile telephone instruments in their pockets. Telephone conversation is an important facet of a man's private life. Right to privacy would certainly include telephone-conversation in the privacy of one's home or office. Telephone-tapping would, thus, infract Article 21 of the Constitution of India unless it is permitted under the procedure established by law.

20. Right to freedom of speech and expression is guaranteed under Article 19(1)(a) of the Constitution. This freedom means the right to express one's convictions and opinions freely by word of mouth, writing, printing, picture, or in any other manner. When a person is talking on telephone, he is exercising his right to freedom of speech and expression. Telephone-tapping unless it comes within the grounds of restrictions under Article 19(2) would infract Article 19(1)(a) of the Constitution.

21. India is a signatory to the International Covenant on Civil and Political Rights, 1966. Article 17 of the said covenant is as under:

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 honour and reputation.

2. Every one has the right to the protection of the law against such interference or attacks.

Article 12 of the Universal Declaration of Human Rights, 1948 is almost in similar terms.

22. International law today is not confined to regulating the relations between the States. Scope continues to extend. Today matters of social concern, such as health, education and economics apart from human rights fall within the ambit of International Regulations. International law is more than ever aimed at individuals.

23. It is almost an accepted proposition of law that the rules of customary international law which are not contrary to the municipal law shall be deemed to be incorporated in the domestic law.

24. Article 51 of the Constitution directs that the State shall endeavour to inter alia, foster respect for international law and treaty obligations in the dealings of organised peoples with one another. Relying upon the said Article, Sikri, C.J in Kesavananda Bharathi v. State of Kerala [1973] Supp. SCR 1, observed as under:

It seems to me that, in view of Article 51 of the directive principles, this Court must interpret language of the Constitution, if not intractable, which is after all a municipal law, in the right of the United Nations Charter and the solemn declaration subscribed to by India.

In A.D.M. Jabalpur v. 5. Shukla, Khanna J. in his minority opinion observed as under:

Equally well established is the rule of construction that if there be a conflict between the municipal law on one side and the international law or the provisions of any treaty obligation on the other, the Courts would give effect to municipal law. If, however, two constructions of the municipal law are possible, the Courts should lean in favour of adopting such construction as would make the provisions of the municipal law to be in harmony with the international law. on treaty obligations. Every statute, according to this rule is interpreted, so far as its language permits, so as not to be inconsistent with the comity of nations on the established rules of international law, and the Court will avoid a construction which would give rise to such inconsistency unless compelled to adopt it by plain and unambiguous language.

In Jolly George Varghese v. Bank of Cochin , Krishna Iyer, J. posed the following question:

From the perspective of international law the question posed is whether it is right to enforce a contractual liability by imprisoning a debtor in the teeth of Article 11 of the International Covenant on Civil and Political Rights. The Article reads:

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

The learned Judge interpreted Section 51 of the CPC consistently with Article 11 of the International Covenant.

25. Article 17 of the International Covenant-quoted above - does not go contrary to any part of our Municipal law. Article 21 of the Constitution has, therefore, been interpreted in conformity with the international law.

26. Learned Counsel assisting us in this case have not seriously challenged the constitutional vires of Section 5(2) of the Act. In this respect it would be useful to refer to the observations of this Court in Hukam Chand Shyam Lai v. Union of India and Ors. :

Section 5(1) if properly construed, does not confer unguided and unbridled power on the Central Government/State Government specially authorised officer to take possession of any telegraph. Firstly, the occurrence of a "public emergency" is the sine qua non for the exercise of power under this section. As a preliminary step to the exercise of further jurisdiction under this section the

Government or the authority concerned must record its satisfaction as to existence of such an emergency. Further, the existence of the emergency which is a pre-requisite for the exercise of power under this section, must be a 'public emergency and not any other kind of emergency. The expression 'public emergency has not been defined in the statute, but contours broadly delineating its scope and features are discernible from the section which as to be read as a whole. In Sub-section (1) the phrase 'occurrence of any public emergency is connected with and is immediately followed by the phrase "or in the interests of the public safety". These two phrases appear to take colour from each other. In the first part of Sub-section (2) those two phrases again occur in association with each other, and the context further clarifies with amplification that a 'public emergency within the contemplation of this section is one which raises problems concerning the interest of the public safety, the sovereignty and integrity or India, the security of the State, friendly relations with foreign States of public order or the prevention of incitement to the commission of an offence. It is in the context of these matters that the appropriate authority has to form an opinion with regard to the occurrence of a 'public emergency" with a view to taking further action under this section. Economic emergency is not one of those matters expressly mentioned in the statute. Mere 'economic emergency'-as the High Court calls it -may not necessarily amount to a 'public emergency' and justify action under this section unless it raises problems relating to the matters indicated in the section.

27. As mentioned above, the primary contention raised by the learned Counsel is to lay-down necessary safeguards to rule-out the arbitrary exercise of power under the Act.

28. Section 5(2) of the Act permits the interception of messages in accordance with the provisions of the said Section. "Occurrence of any public emergency" or "in the interest of public safety" are the sine qua non. for the application of the provisions of Section 5(2) of the Apt. Unless a public emergency has occurred or the interest of public safety demands, the authorities have no jurisdiction to exercise the powers under the said Section. Public emergency would mean the prevailing of a sudden condition or state of affairs affecting the people at large calling for immediate action. The expression "public safety" means the state or condition of freedom from danger or risk for the people at large. When either of these two conditions are not in existence, the Central Government or a State Government or the authorised officer cannot resort to telephone tapping even though there is satisfaction that it is necessary or expedient so to do in the interests of sovereignty and integrity of India etc. In other words, even if the Central Government is satisfied that it is necessary or expedient so to do in the interest of the sovereignty and integrity of India or the security of the State or friendly relations with sovereign States or public order or for preventing incitement to the commission of an offence, it cannot intercept the messages or resort to telephone tapping unless a public emergency has occurred or the interest of public safety or the existence of the interest of public safety requires. Neither the occurrence of public emergency nor the interest of public safety are secretive conditions or situations. Either of the situations would be apparent to a reasonable person.

29. The first step under Section 5(2) of the Act, therefore, is the occurrence of any public emergency of 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. When any of the five situations mentioned above to the satisfaction of the competent authority require then the said authority may pass the order for interception of messages by recording reasons in writing for doing so.

30. The above analysis of Section 5(2) of the Act shows that so far the power to intercept messages/conversations is concerned the Section clearly lays-down the situations/conditions under which it can be exercised. But the substantive law as laid down in Section 5(2) of the Act must have procedural backing so that the exercise of power is fair and reasonable. The said procedure itself must be just, fair and reasonable. It has been settled by this Court in Maneka Gandhi v. Union of India , that "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, understood, "procedure" must rule out anything arbitrary, freakish or bizarre. A valuable constitutional right can be canalised only by civilised processes".

31. We are of the view that there is considerable force in the contention of Mr. Rajinder Sachar, Mr. Kapil Sibal and Dr. Rajiv Dhawan that no procedure has been prescribed for the exercise of the power under Section 5(2) of the Act. It is not disputed that no rules have been framed under Section 7(2)(b) of the Act for providing the precautions to be taken for preventing the improper interception or disclosure of messages. In the absence of just and fair procedure for regulating the exercise of power under Section 5(2) of the Act, it is not possible to safeguard the rights of the citizens guaranteed under Articles 19(1)(a) and 21 of the Constitution of India. The CBI investigation has revealed several lapses in the execution of the orders passed under Section 5(2) of the Act. Paras 21 and 22 of the report have already been quoted in the earlier part of this judgment.

32. The Second Press Commission in paras 164,165 and 166 of its report has commented on the "tapping of telephones" as under:

Tapping of Telephones

164. It is felt in some quarters, not without reason, that not infrequently the Press in general and its editorial echelons in particular have to suffer tapping of telephones.

165. Tapping of telephones is a serious invasion of privacy. It is a variety of technological eavesdropping. Conversations on the telephone are often of an intimate and confidential character. The relevant statue, i.e., Indian Telegraph Act, 1885, a piece of ancient legislation, does not concern itself with tapping. Tapping cannot be regarded as a tort because the law as it stands today does not know of any general right to privacy.

166. This is a hardly satisfactory situation. There are instances where apprehensions of disclosure of sources of information as well as the character of information may result in constraints on freedom of information and consequential drying up of its source. We, therefore, recommend that telephones

may not be tapped except in the interest of national security, public order, investigation of crime and similar objectives, under orders made in writing by the Minister concerned or an officer of rank to whom the power in that behalf is delegated. The order should disclose reasons. An order for tapping of telephones should expire after three months from the date of the order. Moreover, within a period of six weeks the order should come up for review before a Board constituted on the lines prescribed in statutes providing for preventive detention. It should be for the Board to decide whether tapping should continue any longer. The decision of the Board should be binding on the Government. It may be added that the Minister or his delegates will be competent to issue a fresh order for tapping of the telephone if circumstances call for it. The Telegraph Act should contain a clause to give effect to this recommendation.

33. While dealing with Section 5(2) of the Act, the Second Press Commission gave following suggestions regarding "public emergency" and "interest of public safety":

160. It may be noticed that the public emergency mentioned in the sub-section is not an objective fact. Some public functionary must determine its existence and it is on the basis of the existence of a public emergency that an authorised official should exercise the power of withholding transmission of telegrams. We think that the appropriate government should declare the existence of the public emergency by a notification warranting the exercise of this power and it is only after the issue of such a notification that the power of withholding telegraphic messages should be exercised by the delegated authority. When such a notification is issued, the principal officer of the telegraph office can be required to submit to the District Magistrate, whom we consider to be the proper person to be the delegate for exercising this power, such telegrams brought for transmission which are likely to be prejudicial to the interest sought to be protected by the prejudicial to the interest sought to be protected by the sub-section. Thereupon the District Magistrate should pass an order in writing withholding or allowing the transmission of the telegram. We are suggesting the safeguard of a prior notification declaring the existence of a public emergency because the power of the interception is a drastic power and we are loath to leave the determination of the existence of a public emergency in the hands of a delegate.

We are of the view that whenever the power is exercised in the interest of public safety, it should, as far as possible, be exercised by the concerned Minister of the appropriate government for one month at a time extendible by Government if the emergency continues. However, in exceptional circumstances the power can be delegated to the District Magistrate.

163. We also think that as soon as an order is passed by the District Magistrate withholding the transmission of a telegraphic message, it should be communicated to the Central or State Government, as the case may be, and also to the sender and the addressee of the telegram. The text of the order should be placed on the table of the respective State legislatures after three months. We recommend that, as suggested by the Press Council of India in its annual report covering 1969, the officer in charge of a telegraph office should maintain a register giving particulars of the time of receipt, the sender and addressee of every telegram which he refers to the District Magistrate with recommendation of its withholding. Similarly, the District Magistrate should maintain a register of the time receipt, contend and addressee of each telegram and record his decision thereon, together

with the time of the decision. Data of this nature will help courts, if called upon, to determine the presence or absence of mala fide in the withholding of telegrams.

According to Mr. Sachar the only way to safeguard the right of privacy of an individual is that there should be prior judicial scrutiny before any order for telephone-tapping is passed under Section 5(2) of the Act. He states that such judicial scrutiny may be ex-parte. Mr. Sachar contended that the judicial scrutiny alone would take away the apprehension of arbitrariness or unreasonableness of the action. Mr. Kapil Sibal, on the other hand, has suggested various other safeguards-short of prior judicial scrutiny-based on the law on the subject in England as enacted by the Interception of the Communications Act, 1985.

34. We agree with Mr. Sibal that in the absence of any provision in the statute, it is not possible to provide for prior judicial scrutiny as a procedural safeguard. It is for the Central Government to make rules under Section 7 of the Act. Rule 7(2)(b) specifically provides that the Central Government may make rules laying down the precautions to be taken for preventing the improper interception or disclosure of messages. The Act was enacted in the year 1885. The power to make rules under Section 7 of the Act has been there for over a century but the Central Government has not thought it proper to frame the necessary rules despite severe criticism of the manner in which the power under Section 5(2) has been exercised. It is entirely for the Central Government to make rules on the subject but till the time it is done the right to privacy of an individual has to be safeguarded. In order to rule-out arbitrariness in the exercise of power under Section 5(2) of the Act and till the time the Central Government lays down just, fair and reasonable procedure under Section 7(2)(b) of the Act, it is necessary to lay down procedural safeguards for the exercise of power under Section 5(2) of the Act so that the right to privacy of a person is protected.

35. We, therefore, order and direct as under:

1. An order for telephone-tapping in terms of Section 5(2) of the Act shall not be issued except by the Home Secretary, Government of India (Central Government) and Home Secretaries of the State Governments. In an urgent case the power may be delegated to an officer of the Home Department of the Government of India and the State Governments not below the rank of Joint Secretary. Copy of the order shall be sent to the Review Committee concerned within one week of the passing of the order.

2. The order shall require the person to whom it is addressed to intercept in the course of their transmission by means a public telecommunication system, such communications as are described in the order. The order may also require the person to whom it is addressed to disclose the intercepted material to such persons and in such manner as are described in the order.

3. The matters to be taken into account in considering whether an order is necessary under Section 5(2) of the Act shall include whether the information which is considered necessary to acquire could reasonably be acquired by other means.

4. The interception required under Section 5(2) of the Act shall be the interception of such communications as are sent to or from one or more addresses, specified in the order, being an address or addresses likely to be used for the transmission of communications to or from, from one particular person specified or described in the order or one particular set of premises specified or described in the order.

5. The order under Section 5(2) of the Act shall, unless renewed, cease to have effect at the end of the period of two months from the date of issue. The authority which issued the order may, at. any time before the end of two month period renew the order if it considers that it is necessary to continue the order in terms of Section 5(2) of the Act. The total period for the operation of the order shall not exceed six months.

6. The authority which issued the order shall maintain the following records:

(a) the intercepted communications,

(b) the extent to which the material is disclosed,

(c) the number of persons and their identity to whom any of the material is disclosed.

(d) the extent to which the material is copied and

(e) the number of copies made of any of the material.

7. The use of the intercepted material shall be limited to the minimum that is necessary in terms of Section 5(2) of the Act.

8. Each copy made of any of the intercepted material shall be destroyed as soon as its retention is no longer necessary in terms of Section 5(2) of the Act.

9.There shall be a Review Committee consisting of Cabinet Secretary, the Law Secretary and the Secretary, Telecommunication at the level of the Central Government. The Review Committee at the State level shall consist of Chief Secretary, Law Secretary and another member, other than the Home Secretary, appointed by the State Government.

(a) The Committee shall on its own, within two months of the passing of the order by the authority concerned, investigate whether there is or has been a relevant order under Section 5(2) of the Act. Where there is or has been an order whether there has been any contravention of the provisions of Section 5(2) of the Act.

(b) If on an investigation the Committee concludes that there has been a contravention of the provisions of Section 5(2) of the Act, it shall set aside the order under scrutiny of the Committee. It shall further direct the destruction of the copies of the intercepted material.

(c) If on investigation, the Committee comes to the conclusion that there has been no contravention of the provisions of Section 5(2) of the Act, it shall record the finding to that effect.

36. The writ petition is disposed of. No costs.