

## ***Naz Foundation Case expands India's constitutional privacy rights***

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The protection of privacy under the Indian Constitution, developed through case law by the Supreme Court, has been advanced further by the Delhi High Court's decision to strike down provisions criminalising homosexual sexual conduct on grounds of invasion of privacy (*Naz Foundation v Government of NCT of Delhi* WP(C) No.7455/2001 (2 July 2009) ('Naz Foundation Case')). The potential for further expansion of constitutional protection of privacy into the area of data protection is increased.

### ***Constitutional protection of privacy***

The Constitution of India provides that 'No person shall be deprived of his life or personal liberty except according to procedure established by law' (Article 21). The Supreme Court has interpreted this provision to include the protection of privacy since *Kharak Singh v. The State of U. P.* [1962] INSC 377; 1963 AIR 1295 1964 SCR (1) 332: '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' (per Subba Rao and Shah, JJ). Privacy was also held to be part of what was protected by Article 19(1)(a) (right to freedom of speech and expression) and Article 19(1)(d) (right of freedom of movement).

Article 14's guarantee of 'equality before the law or the equal protection of the laws' is also significant in its interaction with Article 21. Against the constitutional right of privacy must be balanced Article 19(1) (a) of the Constitution which guarantees to all citizens 'freedom of speech and expression'. Article 19(2) permits the State to impose reasonable restrictions on the exercise of the rights conferred by Article 19(1) (a) in the interest of sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency, morality, contempt of court, defamation and incitement of offence. The Supreme Court has held that a citizen has a right to receive information, derived from the concept of freedom of speech and expression comprised in Article 19(1)(a) (*State of U.P v Raj Narayan* (1975) AIR 1975 SC 865; *P.V.Narsimha Rao v State* (1998) AIR 1998 SC 2120).

The protection of privacy by the Indian courts has developed primarily from this constitutional basis, rather than by Indian courts developing a tort of invasion of privacy (as in the USA or New Zealand), or by extension of the law of breach of confidence (as in the UK).

The development of the Supreme Court's interpretation of Article 21 is summarised by the Delhi High Court in the *Naz Foundation Case*:

Until the decision of the Supreme Court in *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248, a rather narrow and constricted meaning was given to the guarantee embodied in Article 21. But in *Maneka Gandhi*, a seven-Judge Bench decision, P.N. Bhagwati, J. (as his Lordship then was) held that the expression "personal liberty" in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and give additional

protection under Article 19. Any law interfering with personal liberty of a person must satisfy a triple test: (i) it must prescribe a procedure; (ii) the procedure must withstand a test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation; and (iii) it must also be liable to be tested with reference to Article 14. As the test propounded by Article 14 pervades Article 21 as well, the law and procedure authorising interference with the personal liberty must also be right and just and fair and not arbitrary, fanciful or oppressive. If the procedure prescribed does not satisfy the requirement of Article 14, it would be no procedure at all within the meaning of Article 21. The Court thus expanded the scope and ambit of the right to life and personal liberty enshrined in Article 21 and sowed the seed for future development of the law enlarging this most fundamental of the fundamental rights.

The rights under Article 21 are available to all persons, whether or not they are citizens of India, whereas the guarantees of freedom of speech under Article 19(1) are only available to citizens of India (Dalal, 2007?).

### ***Previous cases on privacy***

The Supreme Court has insisted that authorities relying on the ‘procedure established by law’ exception to Article 21 ‘must strictly and scrupulously observe the forms and rules of the law’ (*Ram Narain v State of Bombay* (1952) SCR 652). Since *Menka Gandhi v Union of India* (1978) AIR 1978 SC 597 the phrase ‘procedure established by law’ has been held to have a meaning similar to ‘due process of law’ in the US Constitution. Ahmad (2009) summarizes that ‘it would not be enough to say that a violation of privacy would be justified by law; it must further be shown that the law under which the violation has taken place is just, fair and reasonable’.

In *People’s Union for Civil Liberties v Union of India* (1997) 1 SCC 318 (*PUCL v UOI*), concerning legislation authorising telephone tapping that had been used to justify surveillance of several politicians, the Supreme Court laid down guidelines concerning how such judgments should be made when legislation concerns national security.

One of most frequently quoted explanations of the Supreme Court’s approach to privacy is from *District Registrar and Collector, Hyderabad & Anr. v. Canara Bank & Ors.* (2005) 1 SCC 496, striking down a provision of a State law as invalid :

"Once we have accepted in *Gobind* and in later cases that the right to privacy deals with "persons and not places", the documents or copies of documents of the customer which are in a bank, must continue to remain confidential vis-a-vis the person, even if they are no longer at the customer's house and have been voluntarily sent to a bank. If that be the correct view of the law, we cannot accept the line of Miller [30] in which the Court proceeded on the basis that the right to privacy is referable to the right of "property" theory. Once that is so, then unless there is some probable or reasonable cause or reasonable basis or material before the Collector for reaching an opinion that the documents in the possession of the bank tend to secure any duty or to prove or to lead to the discovery of any fraud or omission in relation to any duty, the search or taking notes or extracts therefore, cannot be valid. The above safeguards must necessarily be read into the provision relating to search and inspection and seizure so as to save it from any unconstitutionality."

This ‘persons and not places’ emphasis is consistent with the Indian Supreme Court developing Article 21 in the direction of data protection principles, but it has not occurred as yet, as almost all cases on Article 21 are about search and seizure or telecommunications surveillance.

### ***The Naz Foundation Case***

The most significant development outside search and surveillance issues is the new decision of the High Court of Delhi in the *Naz Foundation Case* (2 July 2009). The case was public interest litigation brought by the NGO, Naz Foundation to challenge the constitutional validity of Section 377 of the Indian Penal Code, 1860 (IPC), which criminally penalizes what is described by the section heading as ‘unnatural offences’ (‘Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal ...’), therefore in the Court’s interpretation effectively criminalising sex other than heterosexual penile-vaginal. The Delhi High Court initially dismissed the application as an ‘academic challenge’, but was required by the Supreme Court in 2004 to re-examine the matter.

The petitioners argued ‘to the effect that the prohibition of certain private, consensual sexual relations (homosexual) provided by Section 377 IPC unreasonably abridges the right of privacy and dignity within the ambit of right to life and liberty under Article 21 [which] can be abridged only for a compelling state interest which, in its submission, is amiss here’. As the Court noted ‘A rather peculiar feature of this case is that completely contradictory affidavits have been filed by two wings of Union of India. The Ministry of Home Affairs (MHA) sought to justify the retention of Section 377 IPC, whereas the Ministry of Health & Family Welfare insisted that continuance of Section 377 IPC has hampered the HIV/AIDS prevention efforts.’ The Court concluded that ‘it is clear that the thrust of the [MHA’s] resistance to the claim in the petition is founded on the argument of public morality. Though the MHA has referred to the issue of public health and healthy environment, the affidavit has not set out elaborately the said defence.’

The key passage in the Court’s finding that s377 breached the right of privacy is:

The sphere of privacy allows persons to develop human relations without interference from the outside community or from the State. The exercise of autonomy enables an individual to attain fulfillment, grow in self-esteem, build [WP(C)7455/2001] Page 39 of 105 relationships of his or her choice and fulfill all legitimate goals that he or she may set. In the Indian Constitution, the right to live with dignity and the right of privacy both are recognised as dimensions of Article 21. Section 377 IPC denies a person's dignity and criminalises his or her core identity solely on account of his or her sexuality and thus violates Article 21 of the Constitution. As it stands, Section 377 IPC denies a gay person a right to full personhood which is implicit in notion of life under Article 21 of the Constitution.

The Court then disposed of claims that this invasion of privacy was justified within the exception to Article 21:

While it could be “a compelling state interest” to regulate by law, the area for the protection of children and others incapable of giving a valid consent or the area of non-consensual sex, enforcement of public morality does not amount to a “compelling state interest” to justify invasion of the zone of privacy of adult homosexuals engaged in consensual sex in private without intending to cause harm to each other or others.

... it is not within the constitutional competence of the State to invade the privacy of citizens lives or regulate conduct to which the citizen alone is concerned solely on the basis of public morals. The criminalisation of private sexual relations between consenting adults absent any evidence of serious harm deems the provision's objective both arbitrary and unreasonable. The state interest "must be legitimate and relevant" for the legislation to be non-arbitrary and must be proportionate towards achieving the state interest. If the objective is irrational, unjust and unfair, necessarily classification will have to be held as unreasonable. The nature of the provision of Section 377 IPC and its purpose is to criminalise private conduct of consenting adults which causes no harm to anyone else. It has no other purpose than to criminalise conduct which fails to conform with the moral or religious views of a section of society. The discrimination severely affects the rights and interests of homosexuals and deeply impairs their dignity.

In addition, the Court held that s377 violated Article 14 (equality before the law) and its more particular expression in Article 15 (prohibiting discrimination on the grounds of sex). It found that sexual orientation is a ground analogous to sex, and that discrimination on the grounds of sexual orientation violates Article 15. While some constitutional rights are only of 'vertical' application (against State actions), 'Article 15(2) incorporates the notion of horizontal application of rights. In other words, it even prohibits discrimination of one citizen by another in matters of access to public spaces. In our view, discrimination on the ground of sexual orientation is impermissible even on the horizontal application of the right enshrined under Article 15'.

The Court therefore held that s377 violated Articles 21, 14 and 15 of the Constitution, insofar as it criminalises consensual sexual acts of adults in private. Because of the doctrine of severability, it 'will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors' [under 18].

#### ***Data protection in Indian case law***

The *Naz Foundation Case* therefore takes the protection of privacy under the Indian Constitution beyond issues of search and surveillance. The broadest statement of the Delhi High Court's approach is where, following its review of Indian case law to date on protection of privacy, it states 'The right to privacy thus has been held to protect a "private space in which man may become and remain himself". The ability to do so is exercised in accordance with individual autonomy'. If such an expansive approach was adopted by the Indian Supreme Court, it is capable of developing in the direction of something like the 'right to informational self determination' of the German Constitutional Court.

Although the cases on Article 21 have not yet involved data protection issues, the Indian legal system is open to such judicial intervention, as illustrated by the Supreme Court's development of a right of access to public information prior to its national enactment in the *Right to Information Act 2005*. One commentator has described the unusual nature of this aspect of the Indian judicial process as follows (Dalal, 2007?):

'If the legislature fails to meet the need of the hour, the courts may interfere and fill-in the vacuum by giving proper directions. These directions would be binding and enforceable in law until suitable legislation is enacted to occupy the field (*Vishaka v State of Rajasthan* (1997) 6 SCC 241). Thus, directions given by the court will operate only till the law is made by the legislature and in that sense temporary in nature. Once legislation is made, the court has to make an

independent assessment of it. In embarking on this exercise, the points of disclosure indicated by this court, even if they be tentative or ad hoc in nature, should be given due weight and substantial departure there from cannot be countenanced (Per P.V.Reddi. J in P.U.C.L v U.O.I, 2003(3) SCALE 263: JT 2003 (2) SC 528(Para 122)). The courts may also rely upon International treaties and conventions for the effective enforcement of the municipal laws provided they are not in derogation with municipal laws.'

It is therefore necessary to keep the possibility of judicial developments in mind when considering the scope of Indian data protection law, including that Article 21 of the Constitution can be relied upon by persons who are not Indian citizens.