

PRIVACY & THE CONSTITUTION

N. S. Nappinai
Advocate

Nappinai & Co.,

*Founder Member – Technology Law
Forum*

nappinai@nappinai.com
N S Nappinai©



SIMPLICITY OF EXPRESSION!!



“No person shall be deprived of his life or personal liberty except according to procedure established by law.”

PRIVACY FUNDAMENTALS



- Concepts of Privacy – A move from Property to Person – Search & Seizure to Dignity & Protection of Personal Rights;
- Black’s Law Dictionary: “right to be let alone; the right of a person to be free from unwarranted publicity; and the right to live without unwarranted interference by the public in matters with which the public is not necessarily concerned”

INTERNATIONAL CONCEPTS OF PRIVACY



- Article 12: Universal Declaration of Human Rights (1948) :
- "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

INTERNATIONAL – CONTD.,



- Article 17: International Covenant of Civil and Political Rights (to which India is a party):
- "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence, nor to unlawful attacks on his honour and reputation."

INTERNATIONAL – CONTD.,



- Art.8: European Convention on Human Rights:
- “Everyone has the right to respect for his private and family life, his home and his correspondence;
- There shall be no interference by a public authority except such as is in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals or for the protection of the rights and freedoms of others.”

SOME PRIVACY POSITIONS



- No specific provision in the US Constitution;
 - First, Fourth & Fourteenth Amendments of bill of Rights interpreted to include Right to Privacy from unwarranted search or seizure & due process right for protecting right to privacy of person within family, marriage, motherhood, procreation etc.,

PRIVACY POSITIONS CONTD.,



- No express Right to Privacy Law in UK;
The Human Rights Act 1998 (the “Act”) incorporated European Convention on Human Rights into UK law & Data protection Act, 1998 regulates receiving, processing, retention etc., of personal data;
- The Canadian Charter of Rights and Freedoms: `Everyone has the right to be secure against unreasonable search and seizure.’
- Sec. 21: New Zealand Bill of Rights: `everyone has the right to be secure against the unreasonable search or seizure, whether of the person, property or correspondence or otherwise.”

PRIVACY - FOUNDATIONS



- *Semayne's Case* (1572) – English Common Law Case establishing the “Knock & Announce” Rule;
- Sir Edward Coke's words immortalized:
- “the house of every one is to him as his castle and fortress, as well for his defense against injury and violence as for his repose”

DEVELOPMENT OF RIGHT IN USA



- *Griswold v. Connecticut* (1965), (landmark Majority Judgment of the US Supreme Court, upholding the Right to marital privacy)
- A Connecticut law prohibiting use of contraceptives in any form was contested as violative of the 14th Amendment i.e., that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law...nor deny any person the equal protection of the laws,"



Following Griswold

- Roe Vs. Wade (1973): A pregnant single woman (Roe) brought a class action challenging the constitutionality of the Texas criminal abortion laws, which proscribe procuring or attempting an abortion except on medical advice for the purpose of saving the mother's life.
- US SC upheld a woman's choice to have an abortion, as it was a private decision between her and her doctor.

INTERCEPTION AS AN INTRUSION OF RIGHT - USA



- *Olmstead v. United States* (1928): A case of wire-tapping or electronic surveillance without actual physical invasion. Only the minority dissent of Justice Brandeis, stated that the amendment protected the right to privacy which meant "the right to be let alone", and its purpose was "to secure conditions favourable to the pursuit of happiness", while recognizing "the significance of man's spiritual nature, of his feelings and intellect: the right sought "to protect Americans in their beliefs, their thoughts, their emotions and their sensations". This became law several decades later!

WIRETAPPING – AMOUNTS TO SEARCH - USA



- Katz Vs. United States (1967): Charles Katz used a public pay phone booth to transmit illegal gambling wagers from LA to Miami & Boston. FBI recorded his conversations using an electronic eavesdropping device attached to the outside of the phone booth and Katz was convicted based on these recordings. He challenged his conviction, arguing that the recordings were obtained in violation of his 4th Amendment rights. SC ruled that amendment's protections apply only when the searched party has a "reasonable expectation of privacy" & in this instance Katz would have had such expectation. This case made wiretapping by state and federal authorities subject to the Fourth Amendment's warrant requirements.

RIGHT TO PRIVACY IN INDIA



- Article 21: Indian Constitution:
 - “No person shall be deprived of his life or personal liberty except according to procedure established by law.”
- Other relevant Provisions:
 - Information Technology Act, 2000 (as amended): S.43; 43A; S.66E; S.72A;
 - Indian Penal Code, 1860;
 - Criminal Procedure Code, 1973;
 - Other Special enactments including Income Tax Act etc.,

Smt. Maneka Gandhi v. Union of India & Anr., (1978)



- (SC 7-Judge Bench): 'Personal Liberty' in Article 21 covers a variety of rights & some have status of fundamental rights and given additional protection under Article 19. Triple Test for any law interfering with personal liberty: (i) it must prescribe a procedure; (ii) the procedure must withstand the 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 withstand test of Article 14. The law and procedure authorizing interference with personal liberty and right of privacy must also be right and just and fair and not arbitrary, fanciful or oppressive.

Naz Foundation Case (2009)

Del HC



- Landmark Decision on consensual Homosexuality;
- S.377 IPC & Articles 14, 19 & 21 examined;
- Right to privacy held to protect a "private space in which man may become and remain himself".
- Individuals need a place of sanctuary where they can be free from societal control – where individuals can drop the mask, desist for a while from projecting on the world the image they want to be accepted as themselves, an image that may reflect the values of their peers rather than the realities of their natures.

THE PRIVACY BILL, 2011



- A Bill to provide for the *right to privacy* to *citizens of India* and regulate the collection, maintenance, use, and dissemination of their *personal information* and provide for penalization for violation of such right and for matters connected therewith or incidental / hereto.

BROAD HEADS UNDER PRIVACY BILL



- **Interception** (S.4) (exception S. 5 of Indian Telegraphs Act) (S.14 – procedure for interception)
- **Surveillance** (S.24); (Includes thorough following a person or closed circuit television or other electronic' mode or by any other mode;
- **Use of** photograph, DNA samples, fingerprints etc., (S.25);
- **Health** Information (S.27);
- Collection; processing & use of **personal data** (S.29);



INTERCEPTION

- Existing Laws / Provisions:
- Article 21 of the Indian Constitution;
- S.5 Indian Telegraphs Act;
- S.69, S.69A & S.69B of Information Technology Act, 2000;
- Other Special Enactments (MCOCA);
- ISP License Terms for Encrypted Data;

CASE STUDY - INTERCEPTION



- Amar Singh Vs. Union of India (DoJ: May 11, 2011) (SC):
- Allegations of Phone Tapping. Petition filed invoking Article 21. Interim reliefs granted and in force for several years. Duty of service provider to exercise care and caution in complying with alleged orders for interception / wiretapping emphasized. Prevarications in Affidavits of Petitioner, hence Petition rejected.

State of Maharashtra v. Bharat Shanti Lal Shah, (2008) (SC)



- Object of MCOCA being to prevent organized crime, authority to intercept wire, electronic or oral communication only to prevent commission of or to collect evidence of such organized crime, where enough procedural safeguards & provision for prohibiting and punishing unauthorized user of information acquired, constitutes sufficient safeguards
- Constitutional validity of S. 13 to 16 of MCOCA upheld;

PHONE TAPPING



- People's Union for Civil Liberties (PUCL) Vs. Union of India (DoJ:18.12.1996):
- Public interest litigation filed protesting rampant instances of phone tapping of politicians' phones by CBI;
- Right to Privacy held to be inherent in Article 21;
- Explicit guidelines laid down for exercise of rights of interception under S.5 of Telegraphs Act, 1885

EMAIL INTERCEPTIONS AT WORKPLACE



- Bonita P. Bourke Vs. Nissan Motor Corps (California Court of Appeal):
 - Case of email interception at work place;
 - Held that employee had no reasonable expectation of privacy in their E-mail messages – case rejected;
- Michael A. Smyth Vs. The Pillsbury Company (USA):
 - Interception of emails at workplace held to not be invasion of privacy. Even if there is reasonable expectation of privacy no reasonable person would consider interception of these communications to be a substantial and highly offensive invasion of his privacy.

SURVEILLANCE – CASE STUDY



- Kharak Singh v. The State of U.P., (1964):
- U.P. Regulations regarding domiciliary visits struck down. Minority view of J. Subba Rao that Article 21 included Right to Privacy;
- Gobind v. State of M.P., (1975): Protest against continuous domiciliary visits by police; picketing etc., Court relied on Griswold; Roe Vs. Wade and Kharak Singh & held that privacy - dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior & of such paramount importance as would justify an infringement of the right. Right to privacy held should go through a process of case-by-case development.

PRISONER'S PRIVACY RIGHTS



- R. Rajagopal v. State of T.N., (1994): Auto Shankar & Nakkeeran - Right to privacy held to be implicit in Article 21. "It is the right to be left alone". A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among many other matters. Right of a prisoner to privacy recognized;

RIGHT OF PRESS VS. RIGHT OF PRIVACY



- State through SUPTD, Central Jail (ND) Vs. Charulata Joshi (DoJ:13.04.1999):
- India Today's request for interviewing Murder Undertrial Prisoner. Held that such right of freedom of press was subject to the personal rights of the prisoner to volunteer information and contenting to its publication. Other rights of Jail authorities also recognized.

Selvi Vs. State of Karnataka, (2010) (SC)



- Involuntary administration of scientific techniques, narco analysis, polygraph & Brain Electrical Activation Profile test for investigation efforts in criminal cases.
- Narco Analysis Test - Access to what in a human being is of the utmost privacy, the privacy of his own mind.
- No individual should be forcibly subjected to any of the techniques in question, whether in the context of investigation in criminal cases or otherwise;

CASE STUDY - HEALTH INFORMATION



- Neera Mathur v. LIC (DOJ: 31.10.1991) (SC): Petitioner contested wrongful termination after she availed of maternity leave.
- LIC required the women applicants to furnish personal details like their menstrual cycles, conceptions, pregnancies, etc. at the time of appointment was held to be a breach of privacy.
- Held that termination was only because of disclosures in Application, which was held to be intrusive, embarrassing and humiliating. LIC directed to delete such questions

DISCLOSURES IN PUBLIC INTEREST



- Mr. 'X' VS. Hospital 'Z' (DOJ: 21-09-1998) (SC): First Decision on sensitive data related to health. Appellant's blood test conducted at Respondent's hospital and he was found to be HIV (+). Mr. X's marriage already settled was called off after revelation & he was ostracized by the community. Hospital Z sued for disclosing information about his health, which, ought to have been kept confidential.
- Held that disclosure in the interest of the person engaged to Mr. X, as HIV + was a communicable ailment was permissible and did not amount to violation of confidentiality;
- Case rejected

UNFETTERED POWERS IN DATA HANDLING



- Dist.Registrar and Collector, Hyderabad Vs. Canara Bank (01.11.2004):
- Confidentiality of Banker – customers upheld;
- S.73 of Stamp Act Incorporated by A.P. Act No. 17 of 1986, giving unfettered powers to the Distributor. Collector for accessing documents even in private custody, without any procedures being prescribed, held to be ultra vires the Constitution.



CONCLUSIONS

- Is there necessity for a separate legislation?
- If yes, concerns it should address;
- Avoiding redundancies & inconsistencies;
- Restricted application to “Citizens” to be reviewed;
- Does it take away the fundamental aspect of Right read into Articles 14, 19 & 21?
- Need for expansion to meet objects & reasons;

ISSUES TO BE ADDRESSED



- Contractual / consensual interceptions etc.,
- From Sting Operations to Reality TV to Social Networking;
- Overriding powers – conflicts under several special Acts?
- Incorporating lessons / ratios already in place;
- Following basic Principles in its Application;

Q & A



**THANK YOU
N S NAPPINAI
ADVOCATE
(nappinai@nappinai.com)**