

## **EMERGING JURISPRUDENCE ON THE RIGHT OF ACCESS TO INFORMATION IN INDIA: ROLE OF JUDICIARY**

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### **ABSTRACT**

It is needless to say that the judicial decisions, over the years, have shaped the Indian polity to a great extent. The role played by the judiciary has been pivotal in ensuring a process of fairness in governance and administration. Genesis of the right to information lies in the judicial pronouncements and interpretation of article 19(1) (a) and 21 of the Constitution of India. It is thus, more or less, a product of judicial creativity. Access to information right is not expressly conferred by the Constitution of India, but judiciary time and again vehemently supported the principles of transparency and irritability in all spheres of governance. Since 70's this right started receiving virtual expression in judicial verdicts and has been acknowledged, recognized and found implicit in freedom of speech and expression and right to life under the Constitution. The cumulative examination of a plethora of decisions referred in this article leave no manner of doubt that right to information is really a boon given by judiciary to the people of India. Judiciary can be said to be the backbone of the right to information in India. In this paper an activist goal oriented approach of the judiciary towards access to information has been discussed in detail. However, in the recent times even the judiciary has been embroiled in a controversy pertaining to the issues of disclosure. This is indicative of conflicts and contradictions coming to the fore after access law has actively been enforced. The author has not touched upon this aspect in present paper.

**Keywords:** Right of Access to Information and Judicial Activism

### **1. INTRODUCTION**

"The truth is that the law is uncertain. It does not cover all the situations that may arise. Time and again, practitioners are faced with new situations, where the decision may go either way. No one can tell what the law is until the Courts decide it. The judges do every day make law, though it is almost hereby to say so. If the truth is recognized then we may hope to escape from the dead hand of the past and consciously mould new principles to meet the needs of the present."

—Charles John Hamson<sup>1</sup>

The institution of judiciary in a democratic setup is perhaps one of the most important organs as it is entrusted with the great responsibility of administering justice, one of the core needs of the citizenry. As the custodian of rights of the citizens of a country, the judiciary is bestowed with the task of realizing the Constitutional values to its fullest extent, in furtherance of the vision of the Constitution makers.<sup>2</sup> Indian judiciary has played an important role in ensuring better public governance. No area has been left where judgments of the Supreme Court have not played a significant contribution in the governance –good governance-whether it be environment ,human rights, gender justice, education, minorities, police reforms, elections, formation of government ,limits on the constituent powers of Parliament to amend the Constitution etc. etc., the list is endless.<sup>3</sup> Indian judiciary has elaborated the scope of fundamental rights consistently, strenuously opposing intrusions into them by State, thereby upholding the rights and dignity of individual, in true spirit of good governance.<sup>4</sup> Indian Constitution does not explicitly refer to right to information but judiciary time and again vehemently supported the principles of transparency and irritability in all spheres of governance. The journey in India towards open, transparent governance begun in the early 1970's. By interpreting Article 19(1)(a) of the Constitution to necessarily include freedom of information, the Supreme Court of India gave access to information the status of 'fundamental right'. Since then by several landmark decisions, judiciary supported and accelerated the right to information in India.

The role of the Supreme Court as final interpreter is increasingly reflected in various judgments. Right to information, known as, the brain child of Indian Judiciary, found its existence in the realm of rights in India through various decisions of Judiciary. In India, Courts have derived right to know from two distinct constitutional sources, they are the fundamental right to freedom of speech and expression guaranteed in Article 19(1)(a) and the fundamental right to life and personal liberty under Article 21 of the Constitution. The Indian Judiciary played a pro-active role in the growth of rights provided in the Constitution. With the growing maturity of our democracy and with the growing resources of the country, the judicial interpretation of the fundamental rights gave them a new boost. Certain rights like freedom of speech and expression under Article 19(1)(a) and right to life and personal liberty under Article 21 achieved new heights of growth under the aegis of the Supreme Court. The law shed off its literal cover and it

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<sup>1</sup> Charles John Hamson 'Law Reform and Law Making' 1953, p. 31. Quoted in Burrabazar Fire Works Dealers v. The Commissioner of Police, AIR 1998 Cal. 121 and Moulana Mufti Syed Md. Noorur v. State of West Bengal, AIR 1999 Cal. 15.

<sup>2</sup> R.S. Pathak, "Administration of Justice and Public Accountability", 15 *Indian Bar Review* 213 (1988).

<sup>3</sup> Anshu Jain,"Good Governance and Right to Information : A Perspective" *Journal of the Indian Law Institute*, vol-54,2012,p.508

<sup>4</sup> *Id.* at 509

went deeper in the soul and spirit of human dignity and existence. It also good-bye to the colonial legal mindset and addressed the human problems from purely socio psychological and human angles. It was also the result of the growth of judicial consciousness in the back-drop of Indian socio-economic and psychological conditions. Judiciary can be said to be the backbone of the right to information in India. However, in the recent times even the judiciary has been embroiled in a controversy pertaining to the issues of disclosure. This is indicative of conflicts and contradictions coming to the fore after access law has actively been enforced. The author has not touched upon this aspect in present paper.

## **2. INDIAN JUDICIARY ON RIGHT TO INFORMATION**

A careful examination and analysis of the various pronouncements by the Indian judiciary, especially the Supreme Court, reveal its activist, creative and goal-oriented approach. It has shaped and re-shaped the various constitutional provisions in the light of the prevailing socio-economic conditions and needs. Judicial creativity and activism is found to be the most evident in the matter of interpretation of the Fundamental Rights guaranteed in Part-III of the Constitution. Over the years the judiciary in India has given many new dimensions to these basic valuable rights. An attempt has been made here to discuss the role and contribution of the Indian judiciary in recognizing people's right to freedom of information as a Fundamental Right under Chapter III of the Constitution. In this context the constitutional provisions under Article 19(1)(a), guaranteeing the freedom of speech and expression, and Article 21 protecting the right to life and personal liberty, have been relied upon by the courts. Several species of rights not expressly written into these two articles have branched off from the genus of these Articles through the process of interpretation by the Supreme Court of India.

Perhaps, the first decision which has adverted to this right is *State of U.P. v. Raj Narain*.<sup>5</sup> "The Right to Know", it was observed by Mathew, J. is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security. In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries.

The next milestone which further paved the way in concretizing this right is the decision in *S.P. Gupta v. Union of India*.<sup>6</sup> The Supreme Court of India said that the concept of an open Government is the direct emanation from the right to know which seems to be implicit in the

<sup>5</sup> 1975 4 SCC 428; AIR 1975 SC 865, para 74.

<sup>6</sup> 1981 Supp. SCC 87 : AIR 1982 SC 149, para 66.

right of free speech and expression guaranteed by Article 19(1)(a). Therefore, disclosure of information in regard to the functioning of government must be the rule and secrecy an exception. Peoples right to know about the governmental affairs was emphasized very clearly in the following words:<sup>7</sup>

"No democratic government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the government. It is only if people know how government is functioning that they can fulfil the role which democracy assigns to them and make democracy a really effective participatory democracy".

Again in the same wave length, the apex court on the issue of participatory democracy held in another case:<sup>8</sup> "True democracy cannot exist unless all citizens have a right to participate in the affairs of the polity of the country. The right to participate in the affairs of the country is meaningless unless the citizens are well informed on all sides of the issues, in respect of which they are called upon to express their views. One sided information, dis-information, mis-information and non-information all equally create an uniformed citizenry which makes democracy a farce".

In another landmark decision<sup>9</sup> the Hon'ble Supreme Court. has held that the right to know emanates from the fundamental right to freedom of speech and expression. It was held that people have a right know in order to be able to take part in a participatory development in industrial life and democracy. The right to know is a basic right to which citizens of a free country aspire in the broader horizon of the right to life – in our context, under Article 21 of the Constitution. More recently, this right has acquired new dimensions. It puts greater obligation upon those who take the responsibility to provide information. The elected representatives could meaningfully claim their true and democratic nature of their representation only if a people who were fully informed had given them that mandate.

In another landmark decision<sup>10</sup> on the subject of the right of the voters to know, the Supreme Court said

<sup>7</sup> *Id.*, p.232, para 63.

<sup>8</sup> Secretary, Ministry of Information and Broadcasting, Govt. of India v. Cricket Association of Bengal (1995) 2 SCC 161, para 75 and 82.

<sup>9</sup> *Reliance Petrochemicals Ltd. v. Proprietors Indian Express Newspapers Bombay Pvt. Ltd.*, AIR 1989 SC 190, para 35.

<sup>10</sup> *Peoples Union for Civil Liberties & Another. v. Union of India*, (2003). 4 SCC 399. Also see, *Union of India v. Association for Democratic Reforms* (2002) 5 SCC 294; *State of U.P. v. Raj Narain and Others* (1975) 4 SCC 428.

"...that for survival of true democracy, the voter must be aware of the antecedents of the candidate. Voter has to cast intelligent and rational vote according to his own criteria. A well informed voter is the foundation of democratic structure. That information to a voter, who is the citizen of this country, is one facet of the fundamental right under Article 19[1][a]."

The role of the Supreme Court played to expand the right to freedom of speech and expression so that the right to know acquired the status of fundamental right is praiseworthy. It linked the right to know with Article 19(1)(a) and 21 through the semantic expansion.<sup>11</sup> From the Supreme Court cases we can find that the fundamental right to freedom of speech and expression includes a number of rights which are directly or indirectly related to right to information. For example, the right to propagate one's views<sup>12</sup> and ideas and their circulation<sup>13</sup> have been recognized as guaranteed under Article 19(1)(a). Similarly, the right to seek, receive and impart information and ideas,<sup>14</sup> the right to inform and to be informed,<sup>15</sup> the right to know,<sup>16</sup> the voter's right to know the antecedents of electing candidates<sup>17</sup> are also covered under Article 19(1)(a) of the Indian Constitution. In order to examine comprehensively the role of the Indian judiciary in extending or narrowing the right to information. The author purposed to analyze the case law developed by the Supreme Court under the following sub-heads :

#### **(a). Judicial Scrutiny of Official Documents Permissible:**

In legal proceedings the State and its agencies can claim privilege under **Sections 123 and 162 of Indian Evidence Act, 1872** to withhold production of a document. In its earlier decisions, the approach of the Supreme Court was pro-immunity. The decision of the Supreme Court in *State of Punjab v. Sodhi Sukhdev Singh*<sup>18</sup> may be justly regarded as the locus classicus regarding the doctrine of disclosure. In this case the judicial thinking of the apex court was tilting towards upholding secrecy. Justice **Gajendragadker**, while speaking for the majority observed as under:

A valid claim for privilege made under Section 123 proceeds on the basis of the theory that the production of the document in question would cause injury to public interest, and that, where a conflict arises between public and private interest, the letter must yield to

<sup>11</sup> J.P. Bansal, "Right to Know", *Indian Socio Legal Journal*, XXIII, 1997, p.97.

<sup>12</sup> *Express Newspapers v. Union of India*, AIR 1958 SC 578 at p.614.

<sup>13</sup> *R.P. Ltd. v. Proprietors Indian Express Newspapers Ltd.*, AIR 1989 SC 190.

<sup>14</sup> *Hamard Dawakhana v. Union of India*, AIR 1960 SC 554 at p.564.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Indian Express v. Union of India*, AIR 1986 SC 515-529.

<sup>17</sup> *Union of India v. Association for Democratic Reforms*, AIR 2002, SC 2112.

<sup>18</sup> AIR 1961 SC 493 at p.501, para 13.

the former. Thus our conclusion is that reading Ss. 123 and 162 together, the Court cannot hold an inquiry into the possible injury to public interest which may result from the disclosure of the document in question. That is a matter for the authority concerned to decide, but the court is competent and indeed is bound, to hold a preliminary enquiry and determine the validity of the objections to its production, and that necessarily involves an inquiry into the question as to whether the evidence relates to an affair of State under S. 123 or not. In this enquiry the court has to determine the character or class of documents. If it comes to the conclusion that the document does not relate to affairs of State then it should reject the claim for privilege and direct its production, if it comes to the conclusion that the document relates to the affairs of State, it should leave it to the head of the department to decide whether he should permit its production or not.

The Supreme Court, in this case expressed the opinion that under no circumstances the court can inspect a document or permit giving of secondary evidence of its contents in case a privilege is claimed. While delivering the judgement, the Supreme Court of India noticed some English decisions on the subject where the claim for privilege was upheld. In **Home v. Bentinck**,<sup>19</sup> the Court was dealing with a claim where proceedings were initiated for libel alleged to be contained in the report made by President of an Inquiry Committee. Regarding this report privilege was claimed. **Dallas, C.J.**, referred to the precedents relevant to the point and observed that the basis of the said precedent was that disclosure would cause danger to the public good. The claim for privilege was upheld. In **Smith v. The East India Co.**,<sup>20</sup> the dispute with which the court was concerned had arisen with respect to a commercial transaction in which the East India Company had been engaged with regard to the correspondence which had been carried on by the East India Company with the Board of Control. It was held that the said correspondence was on the ground of public policy a privileged communication.

After two years of Sodhi Sukhdev decision,<sup>21</sup> in **Amar Chand Butail v. Union of India**,<sup>22</sup> a Constitutional Bench of the Supreme Court recognized the power of the court to inspect a document. In **Kishan Narayan v. State of Maharashtra**,<sup>23</sup> the Supreme Court observed as under:

English decisions would not be wholly apt in the circumstances of this country. In England, the law regarding evidence is wholly judge-made law but in this country the duty of judge is to interpret the provisions of the Evidence Act in its application to the particular circumstances of case.

<sup>19</sup> (1820) 129 ER 907.

<sup>20</sup> (1841) 41 ER 550.

<sup>21</sup> *Supra* note 18.

<sup>22</sup> AIR 1964 SC 1658.

<sup>23</sup> AIR 1993 SC 1018.

The scintillating sparkle of this right was first seen more than four decades ago in a judgement rendered by the Supreme Court in *State of U.P. v. Raj Narain*.<sup>24</sup> Election of late Smt. Indira Gandhi, the then Prime Minister, to the Lok Sabha was challenged. The petitioner, Raj Narain, required the State of Uttar Pradesh and Superintendent of Police, Rae Barailly, to produce in Court, Blue Books relating to the security arrangements of Mrs. Indira Gandhi as well as details of expenses incurred by the Government on those security arrangements. The State Government and the District Superintendent of Police claimed privilege under section 123 of the **Indian Evidence Act, 1872**. The Allahabad High Court disallowed this privilege and directed production of the record summoned by the election petitioner. On appeal the Supreme Court while disposing of the matter observed as under:<sup>25</sup>

In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of the country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security. To cover with veil of secrecy the common routine business, is not in the interest of the public. Such secrecy can seldom be legitimately desired. It is generally desired for the purpose of parties and political or personal self-interest or bureaucratic routine. The responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption.

In 1982, the Supreme Court in its landmark judgement in *S.P. Gupta v. Union of India*<sup>26</sup> popularly known as judges transfer case, ordered the disclosure of correspondence between the Law Minister, the Chief Justice of India and the Chief Justice of Delhi with regard to the appointment, transfer and extension of the term of judges on the ground that the damage which may be caused to public interest by the non-disclosure of correspondence and other relevant documents would far outweigh the injury which may be caused to such interest by their disclosure. This judgement had far reaching consequences because of certain principles of law which were laid down therein. Stressing the importance of openness and transparency in the function in a liberal democracy like ours, the Supreme Court emphasized that:<sup>27</sup>

<sup>24</sup> AIR 1975 SC 865.

<sup>25</sup> *Id.*, at p.884, para 74.

<sup>26</sup> AIR 1982 SC 149 : (1981) Supp. SCC 87.

<sup>27</sup> *Id.*, para 62.

The interpretation of every statutory provision must keep pace with changing concept and values and it must, to the extent to which language permits or rather does not prohibit suffer adjustments through judicial interpretation so as to accord with the requirements of the fast changing society which is undergoing rapid social and economic transformation. The language of the statutory provision is not a static vehicle of ideas, and concepts change as ideas and concepts change as they are bound to do in a country like ours, with the establishment of a democratic structure based on egalitarian values and aggressive developmental strategies, so must the meaning and content, of the statutory provisions undergo a change. It is elementary that law does not operate in a vacuum. It is not an antique to be taken down, dusted, admired and put back on the shelf but rather it is a powerful instrument fashioned by society for the purpose of adjusting conflicts and tensions which arise by reason of clash between conflicting interests. It is, therefore, intended to serve a social purpose and it cannot be interpreted without taking into account the social, economic and political setting in which it is intended to operate. It is here that the judge is called upon to perform a creative function. He has to inject flesh and blood in the dry skeleton provided by the legislature and by a process of dynamic interpretation, invest it with a meaning which will harmonize the law with the prevailing concepts and values and make it an effective instrument for delivery of justice.

The Hon'ble Supreme Court further emphasized that :<sup>28</sup>

We have adopted a democratic form of government where the society has chosen to accept democracy as its credal faith, it is elementary that the citizens ought to know what their government is doing. The citizens have a right to decide by whom and by what rules they shall be governed and they are entitled to call on those who govern on their behalf to account for their conduct. No democratic government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the government. It is only if the people know how government is functioning that they can fulfill the role which democracy assigns to them and make democracy a really effective participatory democracy.

The Hon'ble Supreme Court, perhaps, had in mind what **Emilia Zola** said,"<sup>29</sup> when truth is buried, underground it grows, it chokes, it gathers such an explosive force that on the day it bursts out, it blows everything with it". Transparency in the conduct of governmental business rebounds to the effectiveness of administrative machinery. There is created a rapport between the rulers and the ruled, which never ceases to widen in an environment of secrecy, creates an

<sup>28</sup> *Id.*, para 63.

<sup>29</sup> Quoted by J.P. Bansal in "Right to Know", *Indian Socio Legal Journal*, 1997, p.99.

estranged, distrustful and hostile citizenry. In this same case the Supreme Court further held that:<sup>30</sup>

The demand for openness in the government is based principally on two reasons. It is now widely accepted that democracy does not consist merely in people exercising their franchise once in five years to choose their 'rulers' and once the vote is cast, then retiring in passivity and not taking any interest in the government. Today, it is common ground that democracy has more positive content and its orchestration has to be continuous and pervasive. This means, *inter alia*, that people should not only cast intelligent and rational votes but should also exercise judgement on the conduct of the government and the merits of public politics, so that democracy, does not remain merely a sporadic exercise in voting but becomes a continuous process of government, an attitude and habit of mind. But this important role people can fulfill in a democracy only if it is an open government where there is full access to information in regard to the functioning of the government.

There is also in every democracy a certain amount of public suspicion and distrust of government, varying of course, from time to time according to its performance, which promotes people to insist upon maximum exposure of its functioning. It is axiomatic that every action of the government must be actuated by public interest even so we find cases, though not many, where governmental action is taken not for public good but for personal gains or other extraneous considerations. Sometimes governmental action is influenced by political and other motivations and pressures and at times, there are also instances of misuse or abuse of authority on the part of the executive. Now, if secrecy were to be observed in the functioning of government and the process of government were to be kept hidden from public scrutiny, it would tend to promote and encourage oppression, corruption and misuse or abuse of authority, for it would all be shrouded in the veil of secrecy without any public accountability. But if there is an open government with means of information available to the public, there would be greater exposure of the functioning of the government and it would hold to assure the people a better and more efficient administration. There can be little doubt that exposure to public gaze and scrutiny is one of the surest means of achieving a clean and healthy administration. It has been truly said that an open government against politics and administrative aberration and inefficiency.<sup>31</sup>

In this case<sup>32</sup> the concept of right to know has been discussed in detail. In this case, a question related to the disclosure of the correspondence exchanged between the Law Minister, the Chief Justice of Delhi High Court and the Chief Justice of India was involved. The defendant law

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<sup>30</sup> AIR 1982 SC 149, para 64.

<sup>31</sup> *Id.*, para 65.

<sup>32</sup> *S.P. Gupta v. Union of India* (Popularly known as Judges Transfer Case). AIR 1982 SC 149.

Minister claimed privilege of non-disclosure of such correspondence for two fold reasons. The first was that they formed part of the advice tendered by the Council of Ministers to the President so that Article 74(2) of the Constitution precludes the court from ordering their disclosure and looking into them and the second was that they were protected against disclosure under section 123 of the Indian Evidence Act, 1872.

As to the first reason, the Court concluded that it could not inquire about the advice tendered by the Council of Ministers to the President. However Justice **Bhagwati**, qualified this provision by saying that the material on which such advice was based, could not be said to be part of the advice and the correspondence exchanged between the Law Minister, the Chief Justice of Delhi High Court and the Chief Justice of India which constituted the material forming the basis of the decision of the Central Government must accordingly be held outside the exclusionary rule enacted in clause (2) of Article 74. As to the immunity against disclosure made under section 123, the court in conjunction with section 162 of the Evidence Act held that it is the court that would be best qualified to decide the public interest and not the minister or the secretary.<sup>33</sup>

The court did not find reasons to withhold the information regarding the correspondence in issue. It further held that the object of granting immunity to documents of this kind is to ensure the proper working of the government and not to protect the minister and other government servants from criticisms however intemperate and unfairly based.<sup>34</sup> Also, the Court conceded the fact that documents relating to affairs of State are documents belonging to noxious class. That is, documents by reason of their contents or the class to which they belong, are such that the disclosure may cause injury to public interest and the Court cannot for this purpose inspect the document or holds an inquiry into the possible injury to public interest which may result from the disclosure of the document.<sup>35</sup>

The Hon'ble Supreme Court, speaking through Justice **Bhagwati** observed:<sup>36</sup>

No democratic government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of government... that an open society is the new democratic culture towards which every liberal democracy is moving and our society should be no exception. The concept of the open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(a). Therefore, disclosure of information in regard to the functioning of the government must

<sup>33</sup> *Id.*, para 77.

<sup>34</sup> *Id.*, para 71.

<sup>35</sup> *Id.*, para 68.

<sup>36</sup> *Id.*, para 66.

be the rule, and secrecy an exception, justified only where the strictest requirement of public interest so demands".

**(b). Right of Public to Have Information Regarding Nexus Between Criminals and Politicians :**

In *Dinesh Trivedi M.P. and Others v. Union of India and Others*,<sup>37</sup> the Court dealt with a petition for disclosure of a report submitted by a Committee established by the Union of India which was chaired by erstwhile Home Secretary Shri N.N. **Vohra** which subsequently came to be popularly known as Vohra Committee. During July 1995, a known political activist Naina Sahni was murdered and one of the persons arrested happened to be an active politician who had held important political post. Consequently Newspaper report published a series of articles on the criminalization of politics within the country and the growing links between political leaders and mafia members. The attention of the masses was drawn towards the existence of the **Vohra Committee Report**. It was suspected that the contents of the Report were such that the Union Government was reluctant to make it public.

In this case, the court dealt with citizen's right to have information regarding nexus between criminals and politicians and observed "In modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the Government which, having been elected by them, seek to formulate sound policies of governance aimed at their welfare". The Court also observed "democracy expects openness and openness is concomitant of a free society and the sunlight is a best disinfectant."

**(c). Right to Seek, Receive and Impart Information:**

The Supreme Court once again laid emphasis on the right to freedom of information in a democratic country like India in *Union of India v. Association for Democratic Reforms*.<sup>38</sup> The court recalled what it had observed earlier in *Dinesh Trivedi v. Union of India*.<sup>39</sup> Emphasizing upon the citizen's right to freedom of information, the Court opined that:

Democracy becomes strong if people are informed. An informed public opinion is the best antinode to corruption and maladministration. One sided information, disinformation, misinformation and non-information will equally create an uniformed citizenry which makes democracy a farce .... freedom of speech and expression includes right to impart and receive information which include freedom to hold opinions. The role model for governance and decisions taken by the authorities should manifest, equity, fair

<sup>37</sup> (1997) A SCC 306.

<sup>38</sup> AIR 2002 SC 2112.

<sup>39</sup> *Supra* note 37.

play and justice. The cardinal principle of governance in a civilized society based on rule of law not only has to base its actions on transparency but must create an impression that the decision making process was motivated on the consideration of probity. The authorities have to rise above the nexus of vested interest and nepotism. They have to eschew window dressing. The act of governance has to withstand the test of judiciousness and impartiality and avoid arbitrary or capricious actions. The principle of governance has to be tested on the touch stone of justice, equality and fair play and if the decision is not based on justice, equity and fair play and has taken into consideration other matters then that decision cannot be allowed to operate.

After making these observations, the Supreme Court of India in the case of *Onkar Lal Bajaj v. Union of India*,<sup>40</sup> observed that the public in general has a right to receive information about the circumstances under which their elected representatives got certain benefits. This was a case where challenge was made to the grant of outlets, dealerships and distributorships of petroleum products.

#### **(d). Right to Get Information and Have Access to Telecasting:**

The public's right to know may also emanate from another's exercise of free speech rights. For example where one has a right to publish his views or telecast programmes, the public gets an opportunity to know such information. In matters of community interest, the courts take into account the public's right to know while deciding yet another's free speech rights. In *Secretary, Ministry of Information and Broadcasting v. Cricket Association Bengal*,<sup>41</sup> the question was related to rights of telecasting a cricket match. Apart from protecting the right to telecast under the free speech doctrine, the court also stressed rights of the viewers of cricket under the same doctrine. The Supreme Court observed:<sup>42</sup>

It may be true that what is protected by Article 19(1)(a) is an expression of thought and feeling and not of the physical or intellectual process or skill. It is also true that a person desiring to telecast sports events when he is not himself a participant in the game does not seek to exercise his right of self-expression. However, the right to freedom of speech and expression also includes one's right to educate, to inform and to entertain and also the right to be educated, informed and entertained. The former is the right of the telecaster and the latter that of the viewers.

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<sup>40</sup> AIR 2003 SC 2562.

<sup>41</sup> AIR 1995 SC 1236.

<sup>42</sup> *Id.*, p.1262.

The Supreme Court finding a duty on the government in relation to the rights of public, further observed:<sup>43</sup>

The right to circulate information is a part of the right guaranteed, under Article 19(1)(a). Even otherwise, the viewers and persons interested in sports by way of education information, record and entertainment have a right to such information, knowledge and entertainment. The content of the right under Article 19(1)(a) reaches out to protect the information of the viewers also. In the present case, there is a right of the viewers and also the right of the producer to telecast the event and in view of these two rights, there is an obligation on the part of the Department of Telecommunication to allow the telecasting of the event.

Thus, the right to inform and right to be informed are co-extensive. In India, where a good section of the public are illiterate, having no access to media, the Supreme Court stressed the relevance of a central agency, representing all sections of the community to inform the public and to ensure the viewer's right to be informed adequately and truthfully.<sup>44</sup>

#### **(e). The Right to Information and Environmental Matters:**

The right to information plays a very important role in environmental matters also. Thus, governmental plans of construction of dams or information of the proposed location of hazardous projects and nuclear power stations or thermal power plants and hazardous industries, which directly affect the lives and health of the people of that area, must be widely published. Some large projects require participation of a different nature. Public inquiries and hearings on the development and environment impacts can greatly help in drawing attention to different point of view.<sup>45</sup> Therefore, there has to be some access to information and availability of alternative options.

The right to information in environmental matters has been recognized by the Court in *L.K. Koolwal v. State of Rajasthan*.<sup>46</sup> In this case the Rajasthan High Court allowed a public spirited citizen's request for information relating to the sanitation conditions of his home city under the principle of right to know based on freedom of speech and expression. Mr. Koolwal on behalf of the local inhabitants wanted to see whether the local authority performed its obligatory and

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<sup>43</sup> *Id.*, p.1264.

<sup>44</sup> *Id.*, p.1269.

<sup>45</sup> World Commission on Environment and Development 1987, pp.63-64 (Brundtland Report).

<sup>46</sup> AIR 1988 Raj 2.

primary duties faithfully in accordance with the law of the land. The High Court while accepting the exceptions to the right to know of citizens observed that:<sup>47</sup>

A citizen has a right to know about the activities of the State, the instrumentality, the departments and the agencies of the State. The privilege of secrecy which existed in old times, that the State is not bound to disclose the facts, does not survive now to a great extent. Under Article 19(1)(a) of the Constitution there exists the right to freedom of speech. Freedom of speech is based on the foundation of the freedom of right to know and particularly in matters of sanitation and other allied matters every citizen has a right to know how the state is functioning and why the State is withholding such information in such matters.

In another landmark judgement *M.C. Mehta v. Union of India*<sup>48</sup> the Supreme Court held that the State owned media should broadcast environmental programmes and the State should consider including environment subjects in social and college curriculum. The Court again applied the logic to provide information which affects the life of the people. People have the right to be educated or be informed about such environmental issues.

#### **(f). Information Relating to Town Planning Schemes:**

In 1986, a landmark judgement<sup>49</sup> relating to the freedom of information and rights of recognized social groups to obtain information, was delivered by a division bench of the Bombay High Court in a writ petition filed by the Bombay Environmental Action Group. The Court held that the disclosure of information with regard to the functioning of the Government and the right to know of it flows from the right to free speech and expression guaranteed under Article 19(1)(a) of the Constitution.<sup>50</sup> Their lordship pointed out that it was high time that authorities started taking the assistance of social action groups instead of looking at askance and distrusting them. The help of such groups, it was observed, might help check sabotage of development plans by unscrupulous persons and corruption at all levels. In this case, the petitioners were registered as a society with the main object of looking after the environment in all its aspects and to ensure that the citizens in India enjoy an enhanced quality of life and have maximum civil amenities. To carry on their objects the petitioners addressed letters to be respondents, the Pune Cantonement Board in connection with the construction carried out within its limits. The

<sup>47</sup> *Ibid.*

<sup>48</sup> AIR 1992 SC 382.

<sup>49</sup> *Bombay Environmental Action Group & Others v. Pune Cantonement Board*. Writ Petition No. 2733 of 1986 decided on October 7, 1986. (This case has not been reported in any law reports). See, G. Singh (ed.), *The Environmental Activists Handbook*, 1993, p.435.

<sup>50</sup> Lawyers Collective , Vol. 5, No. 2, pp.24-25.

petitioners wanted that they should be granted either inspection or copies of applications made for building permissions, plans accompanying such applications and all official proceedings relating to such permissions, including renewals thereof. Their request was not accepted and thus they filed the writ petition for a declaration that it was incumbent upon the Cantonment Board to disclose to the petitioners and other citizens or grant to the petitions or other citizens inspection of all the desired documents.<sup>51</sup>

The Court directed the respondents to allow inspection of documents viz., application for building permissions, plans accompanying such applications and the final proceedings relating to the sanction of the permission, including renewals to the sanction of the permission. The Court categorically held that it was not any Tom, Dick or Harry who is asking for information but group acting in public interest that required information and thus should have full access to it. The Court went on to observe that the real democracy couldn't be worked by men sitting in the air-conditioned comforts of secretariat. It has to be worked from below by the people of every village and town. The Court recognized the concept that sovereignty resides in and flows from the people.<sup>52</sup> Against the decision of the Bombay High Court the defendant moved the Supreme Court for leave petition, but the Supreme Court confirmed the decision of the Bombay High Court.

#### **(g). Citizen's Right to Take Part in the Process of Development:**

In *Reliance Petrochemicals Ltd. v. Indian Express Newspapers, Bombay (P) Ltd.*,<sup>53</sup> **Sabyasachi Mukherji, J.**, opined that "we must remember that the people at large have a right to know in order to be able to take part in a participatory development in the industrial life and democracy." With regard to right to know, **Mukherji, J.**, said:<sup>54</sup>

Right to know is a basic right which citizens of a free country aspire in the broaden horizon of the right to life in this age on our land under Article 21 of our Constitution. That right has reached new dimensions and urgency. That right puts greater responsibility upon those who take upon the responsibility to inform.

In order to appreciate the observations made, it is apposite to have a look at its factual matrix. The petitioner-company floated a mega issue of secured convertible debentures of Rs. 200 each. The issue was open for subscription from 22.8.88 to 31.8.88. A number of writ petitions were filed in various High Courts restraining the issue of debentures. The petitioner company on

<sup>51</sup> Faizan Mustafa, *Constitutional Issues in Freedom of Information*, 2003, p.127. Also see, Rodney D Ryder, *Right to Information*, 2006, p.250.

<sup>52</sup> *Ibid.*

<sup>53</sup> AIR 1989 SC 190 : (1988) & SCC 592.

<sup>54</sup> *Id.* at 203, para 35.

19.9.88 moved under Article 139 A of the Constitution an application before the Supreme Court requesting that all these petitions be withdrawn onto the file of the Supreme Court. The Court made an interim order<sup>55</sup> permitting the issue of debentures to be proceeded with without let or hinderance. On 25.8.88 the respondent, Indian Express, published an article under the caption "Infractions of law has unique features – RPL Debentures". It was stated therein that the issue was not a prudent or reliable venture. It provoked the petitioner – company into moving the Court by filing an application stating that since the publication of the article had prejudged the matter which was sub-judice before the Court, contempt proceedings be drawn against the persons responsible for the publication of the offending article. It was alleged that trial by newspapers was one of the grossest modes of interference with the administration of justice. The Court took cognizance of contempt, issued notices to all the respondents and also issued an order of injunction restraining the publication of any article, comment, report or editorial in the Indian Express and its sister publications questioning the legality of validity of any consent, approval or permission for the issue. On 26.8.88, the respondents filed the replication asking for the vacation of the order whereby the contempt proceedings had been drawn.

**(h). The Right to Information with Respect to Jails, Mental Asylums and Other Detention Centres:**

In *Sheela Barse v. Union of India*,<sup>56</sup> the Supreme Court of India directed that the petitioner should have access to information and should be permitted to visit jails, children's homes, remand homes, observation homes, and all institutions connected with housing delinquent or destitute children and the State Governments should extend necessary assistance to the petitioner.

In this case the appellant highlighted the sad plight of the children detained in jails pending trials, and sought for a speedy trial. Finding her a right person, she being a genuine social worker, the Supreme Court ordered for release of information to her regarding such undertrials kept in different parts of the country.

Though, the Court did not attract the right to freedom of speech and expression to confer the right to know, it can be seen that information were ordered to be released to her though she possessed no such right under any Statute. Though the disclosure of information was limited to her and the Court, it would very well help a speedy trial of the undertrial children. Thus, once a

<sup>55</sup> AIR 1989 SC 190, para 1.

<sup>56</sup> AIR 1986 SC 1773; (1986) 3 SCC 596 : 1986 SCC (Cri) 337.

need has been shown by a person having proper standing, he would be able to seek information from the government. The courts do not object to such a process.<sup>57</sup>

**(i). Information Regarding Banned Drugs:**

In *Vincent Pari Kurlangara v. Union of India*,<sup>58</sup> Right to Know has been accepted as a public right. In this case it has been held by the Supreme Court that, a citizen has a right to know, as information acquired can lead to safeguarding and protecting the unsuspecting public at large. Thus the right of a citizen to know whether a notification has been issued under the **Drugs and Cosmetic Act, 1940** can be implemented with a view to protect the public against Drugs which are banned in developed countries but which are sought to be dumped in the underdeveloped countries by multinationals.

**(j). Right to Receive Information – Whether Food Products, Cosmetics and Drugs are Vegetarian or Non-vegetarian :**

In a recent judgement of *Ozair Husain v. Union of India and Another*,<sup>59</sup> the Delhi High Court held that it is the fundamental right of the consumers to know whether the food products, cosmetics and drugs are of non-vegetarian or vegetarian origin, as otherwise it will violate their fundamental rights under Articles 19(1)(a), 21 and 25 of the Constitution.

Speaking through Anil D. Singh and Mukul Mudgal, JJ., the learned Court remarked that:<sup>60</sup>

To enable a person to practise the belief and opinions which he holds, in a meaningful manner, it is essential for him to receive the relevant information, otherwise he may be prevented from acting in consonance with his belief and opinions. In case a vegetarian consumer does not know the ingredients of cosmetics, drugs or food products which he/she wishes to buy, it will be difficult for him or her to practice vegetarianism. In the aforesaid context, freedom of expression enshrined in Article 19(1)(a) can serve two broad purposes, (1) it can help the consumer to discover the truth about the composition of the products, whether made of animals including birds and fresh water or marine animals or eggs and (2) it can help him to fulfill his belief or opinion in vegetarianism. Thus, where packages of food products, drugs and cosmetics do not disclose any information in writing and by an appropriate symbol about the composition of the

<sup>57</sup> M.C. Pramodan, "Right to Know : the Jurisprudence and Practice", *Cochin University Law Review*, Vol. xx, No. 1-2, p.107.

<sup>58</sup> 1987 Suppl. SCC 90.

<sup>59</sup> AIR 2003 Del 103.

<sup>60</sup> *Id.*, para 10 and 20.

products contained therein, right to freedom of conscience of the consumers is violated as they may be unconsciously consuming a product against their faiths, belief and opinions.

However, as far as life saving drugs are concerned a limited exception will apply because a patient, who is suffering from serious ailments, which can be fatal if a life saving drug is not administered to him, need not be informed in his own interest as to whether or not the drug contains part of any animal as it is conducive to preservation of life and therefore, in tune with Article 21 of the Constitution.<sup>61</sup>

#### **(k). Consumer's Right to Information**

In *Consumer Education and Research Society v. Godrej Soaps Ltd.*<sup>62</sup> the Court held that advertisement of the product is the backbone for higher sale of the products but at the same time to save the innocent, illiterate and poor consumers, it is necessary to regulate advertisements in such a manner that the advertisement depict the true and honest legal position and are prepared with a sense of responsibility and therefore misleading, false and deceptive advertisement should be controlled. The Court observed that the consumer must have the information about the product and its quality for his purchases.

In *A.C. Sekar v. D.R. of Co-operative Societies, Thiruvannamalai*<sup>63</sup> the Court held that consumer is entitled to seek details regarding ration shops run by Co-operative Societies and salesman cannot claim any right to privacy if daily sales details are furnished to any citizen who seeks such information.

#### **(l). Freedom of Press – The Necessity for Access to Information:**

The Supreme Court has laid emphasis in several cases on the importance of maintaining freedom of press in a democratic society because it is only the press which serves the citizen's interest in receiving information. The press seeks to advance public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgements. Articles and news are published in the press from time to time to expose the weaknesses of the government.

The recognition of right to information regarding freedom of press in India formed its real genesis in the apex court's decision relating to challenge of government's attempt to control newsprint prices and ban on the distribution of newspapers. In *Sakal Newspapers Pvt. Ltd. v.*

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<sup>61</sup> *Id.*, para 23.

<sup>62</sup> (1991) CPJ 589 (Guj).

<sup>63</sup> AIR 2008 Mad. 224.

**Union of India**<sup>64</sup> the price and page schedule which prescribed the number of pages and corresponding prices for newspapers was challenged as being violative of Article 19(1)(a). If a newspaper wanted to have more number of pages, it had to increase its price thereby adversely affecting its circulation. In this case, the main issue was the constitutionality of **Newspapers (Price and Page) Act, 1956** which regulated the number of pages according to the price changed, prescribed the number of supplements to be published by a newspaper establishment, and prohibited the publication, and sale of newspapers in contravention of the provisions of the Act.

The effect of the order issued under this Act was that the newspaper Sakal had either to increase its price or reduce the number of pages that it could give to its reading public. If it increased the price, the circulation of the paper would be reduced. If it did not increase the price, but reduced the number of pages, it could not give as much reading material to its readers as it wanted to. In either case, there was a restriction upon freedom of expression. Restrictions upon the area and size of advertisements would have put more economic burden upon the newspaper industry and thus it would have been required to seek financial aid from the State, which in effect would have required it to compromise its freedom of opinion. The purpose of the Act undoubtedly was to protect the interest of the smaller newspapers, and therefore, the restrictions were in the interest of the general public. But the Court struck down the impugned legislation, because the net effect of it was to restrict freedom of speech and expression. The Court held that this could not be done unless the legislation could be saved on any one of the grounds specified under clause (2) of Article 19. The Supreme Court speaking through Justice **Mudholkar** observed:<sup>65</sup>

It may well within the power of the State to place in the interest of the general public, restrictions upon the right of a citizen to carry on business but it not open to the State to achieve this object by directly or immediately curtailing any other freedom of the citizen guaranteed by the Constitution and which is not susceptible of abridgement on the same grounds as are set out in clause (6) of Article 19. Freedom of speech can be restricted only in the interest of the security of the State, friendly relations with foreign states, public order, decency, morality or in relation to the contempt of court, defamation or incitement to an offence. It cannot, like the freedom to carry on business, be curtailed in the interest of the general public.

Thus, the Supreme Court tactically admitted in this case that if circulation of a news paper was restricted, not only the press suffered but the reader in effect was denied the information.

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<sup>64</sup> AIR 1962 SC 305.

<sup>65</sup> *Id.* at 313.

Next, in **Indian Express Newspaper case**,<sup>66</sup> the Supreme Court observed that the basic purpose of the Freedom of Speech and Expression is that all members should be able to form their belief and communicate them freely to others. In sum, the fundamental principle involved here is people's right to know.

In another case,<sup>67</sup> the Court held that there could be no reason for refusing permission to media to interview prisoners waiting for execution, unless there was clear evidence that they themselves refused to be interviewed. In this case, Smt. Prabha Dutt, Chief Reporter of the Hindustan Times, an English daily, published from New Delhi, willing to interview two prisoners, Billa and Ranga, who were sentenced to death for an offence under section 302 of Indian Penal Code and whose petitions to the President of India for commutation of the sentence were rejected, having been denied such interview by the Superintendent of Tihar Jail, in terms of the Manual for the Superintendence and Management of Jail, Punjab, as extended to Delhi, first approached the Lt. Governor, Delhi, for such permission. Anticipating delay in such permission as it involved consultation with the Ministry of Home, Government of India, coupled with the fact that the prisoners were to be executed next morning as per the then existing order, she moved the Supreme Court under Article 32 of the Constitution asking for writ of mandamus or any other appropriate writ or direction directing the respondents, particularly the Delhi Administration and Superintendent of Tihar Jail to allow her to interview the said two prisoners.

The concretisation of the right to means of information is found in clause (A) of rule 549 of the Jail Manual. According to the stipulation of this rule "every prisoner under sentence of death shall be allowed such interviews and other communications with his relatives, friends and legal advisors as the Superintendent thinks reasonable". Reading petitioner's right within the ambit of this rule, the Court stated most categorically "why newspapermen who can broadly ... be termed as friends of the society be denied the right of an interview under clause (A) of rule 549".<sup>68</sup>

Strictly speaking, the right to means of information and the right to express views and opinions, appear to be two different things, but they are not. The two are so interrelated that they cannot be separated without doing violence to logic and consistency. In this context, the observations of Mr. Justice **K.K. Mathew** are noteworthy:<sup>69</sup>

<sup>66</sup> *Indian Express Newspapers (Bombay) Pvt. Ltd. v. Union of India*, 1985 SCC 641.

<sup>67</sup> *Prabha Dutt v. Union of India*, AIR 1982 SC 6.

<sup>68</sup> *Ibid.*

<sup>69</sup> K.K. Mathew, "The Nature and Scope of the Right to Know in Democratic Republic", Buxi, Upendra (Ed.), *Democracy, Equality and Freedom*, 1979. Also see, K.K. Mathew, *op.cit.*, (1979), 3 SCC, (js), p.19. Daya Nand, "Right to Information : A Conjoint Consideration of Prabha Dutt, Sheela Barse and M. Hasan Cases", *M.D.U. Law Journal*, Vol. 4, 1998, p.128.

The guarantee of freedom of speech includes the right to publish whatever secret information the press is able to obtain unless the act is reasonable. A free press in a democratic society postulates the right to access to all governmental proceedings affecting the public compatible only with the most convincing grounds of national security without this right of access the freedom of the press is an empty guarantee.

The propounding of the Supreme Court that "newspapermen .... as friends of society (have) the right of interview (the prisoner) under clause (4) of Rule 549", has opened a new vista of rights to newspapermen, and the Supreme Court's stipulation that without fear of contradiction, "newspapermen can be termed as friends of society" is indeed commendable.

The theme, "Pressmen as friends of the society" is carried further in *Sheela Barse's case*.<sup>70</sup> In this case the petitioner, Sheela Barse, a Bombay-based freelance journalist, sought permission to interview the female prisoners in the Maharashtra State jails. The permission was granted by the Inspector-General of Prisons. When she started tape-recording her interview with the prisoners at Bombay Central Jail, she was advised instead to keep notes only of interviews. When the petitioner raised objection on this score, the Inspector General of Prisons, withdrew the permission. Later, the petitioner was informed that the grant of permission to have interviews were ordinarily "allowed to research scholars only".<sup>71</sup>

Two main issues were involved in this case, one, whether the pressmen as friends of the society and public spirited citizens have right of interviewing the prisoners; two, whether such right of interview extends even to tape-recording the interview.

With regard to the first issue, the petitioner contended that Articles 19(1)(a) and 21 guarantees to every citizen reasonable access to information about the institutions that "formulate, enact, implement and enforce the laws of the land". And as a journalist the petitioner had a right to collect and disseminate information to citizens. The petitioner further contended that in a participatory democracy like ours unless access is provided to the citizens and the media in particular, it would not be feasible to improve the conditions of the jails and maintain the quality of the environment in which a section of the population is housed segregated from the rest of the community.<sup>72</sup>

The State repelled the arguments by pleading that none of the Articles 19(1)(a) and 21 were attracted to the case. The Inspector-General in his affidavit had pleaded that the permission to

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<sup>70</sup> *Sheela Barse v. State of Maharashtra*, 1987 (4), SCC 373.

<sup>71</sup> *Id.* at 375, para 2.

<sup>72</sup> *Id.* at 376, para 5.

the journalist was given in contravention of the Maharashtra Prison Manual.<sup>73</sup> According to him, the prison authorities normally did not allow interviews with the prisoners unless the person seeking the interview was a research scholar studying for Ph.D., or intended to visit the prison as a part of his field work of curriculum prescribed for post-graduate courses. He further pleaded that there were no rules for permitting interviews except to the relatives and legal advisors for facilitating defence of prisoners and there was no inherent right of journalists to elicit information from prisoners.<sup>74</sup>

But, the Court accepted the necessity that public gaze should be permitted on the prisoners and conceded the petitioner's right to interview the prisoners by observing:<sup>75</sup>

".... The pressmen as friends of the society and public spirited citizen should have access not only to information but also interviews".

In this context, the Court quoted with approval the following observations of the Supreme Court in an earlier case that:<sup>76</sup>

The citizen's right to know the facts, the true facts about the administration of the country is true one of the pillars of a democratic State.

The Court, however, accepted the objection of the State about tape-recording of the interview by the petitioner. In this context the Court ruled that tape-recording should be "subject to special permission of the appropriate authority".<sup>77</sup> The Court was of the opinion that there might be some individuals or class of persons in prison with whom interview might not be permitted. Moreover, an interview cannot be forced and would depend on the willingness of the prisoners. The court concluded that the petitioner was free to make an application to the prescribed authority for the permission in view of the guidelines indicated in the case.

It is submitted that by extending the right of interviewing the prisoners to "public spirited citizen" along with "pressmen", the Court has usefully widened the citizen's right to access to information. With regard to the second issue, whether right to interview extends even to tape-recording the interview, it may be pointed out here that permission to interview was withdrawn only when the petitioner started tape-recording the interview. It seems if she had not resorted to tape-recording the interview, the permission would have remained intact.

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<sup>73</sup> *Id.* at 376, para 2.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Id.* at 218.

<sup>76</sup> *S.P. Gupta v. Union of India*, AIR, 1982 SC 140.

<sup>77</sup> *Supra* n. 70, p.218.

In *M. Hasan v. Government of Andhra Pradesh*,<sup>78</sup> the Andhra Pradesh High Court held that refusal to journalist and videographer seeking interview with condemned prisoners amounted to deprivation of citizen's fundamental right to freedom of speech and expression under Article 19(1)(a). In so far as the exercise of fundamental right is concerned, the Court said that the position of a condemned prisoner was on par with a free citizen. He had a right, the Court held, to give his ideas and was entitled to be interviewed or to be televised. The press while interviewing a person, must first obtain his willingness.

Actually, in this case two petitioners M. Hasan<sup>79</sup> and a free lance journalist<sup>80</sup> wanted to interview two condemned prisoners namely S. Chalpathi Rao and C. Vijya Vardhana Rao, who were sentenced to death for an offence under section 302 of Indian Penal Code.<sup>81</sup> Their application for interviewing these prisoners was rejected by the Director General and Inspector General of Prisons in terms of the A.P. Prison, Rules 1979. Thereafter the petitioners moved the Andhra Pradesh High Court under Article 226 of the Constitution praying for a writ of mandamus or any other appropriate writ or direction or directing the respondents to permit the petitioners to interview the condemned prisoners and also for video graphing the interview.

The petitioners contended that as free lance journalist, they were entitled to exercise their rights under Article 19(1)(a) of the Constitution. The petitioners further contended that the debate on the subject of death sentence – whether it should be abolished or not has gained currency after the conviction of the said prisoners. They further contended that the citizens of this country specially those residing in the State of Andhra Pradesh have a right to know as to under what circumstances the two prisoners resorted to that drastic steps which resulted in the killing of such large number of persons. The petitioners also placed reliance on Rules 784, 793(2)(f) and 793(3) of the Jail Manual for exercising their rights to interview the prisoners.

The Court accepted the plea of the petitioners and ruled that any denial to interview the prisoners expressing their willingness to be interviewed by the journalist and videographer is violative of citizens fundamental right of free speech and expression. In this context the Court observed:<sup>82</sup>

<sup>78</sup> AIR 1998, A.P., 35.

<sup>79</sup> M. Hasan is an experienced documentary film maker and a free lance Journalist and he has made about 200 documentary films on various subjects touching social, historical and technical aspects; Id., para 2, p.36.

<sup>80</sup> The Second Petitioner is a free lance journalist and he has contributed various articles on various subjects and he is publisher and Executive Committee Member of "Bhoomika" – a leading journal in Telgu in Andhra Pradesh.

<sup>81</sup> The Sessions Court and Appellate Courts had imposed and confirmed the death sentence on these two prisoners for a charge under section 302, IPC in an accident that occurred on 8.3.1983 resulting in death of 23 passengers travelling in a Road Transport Corporation Bus. Id., para 3, p.36.

<sup>82</sup> *Id.*, Para 29, p.48. The Court placed reliance on an earlier case of Prabha Dutt.

... jail manual permits the prisoner to be interviewed by others including a friend provided he is willing. A friend includes a journalist and which in turn includes a videographer.

**(m). Voter's Right to Information About Antecedents of Contesting Candidates:**

Right to information in the context of the voter's right to know the details of contesting candidates and the right of the media and others to enlighten the voter was considered by the Supreme Court in the two recent cases, namely, *Union of India v. Association for Democratic Reforms*<sup>83</sup> and *People's Union for Civil Liberties v. Union of India*.<sup>84</sup> On 2<sup>nd</sup> May, 2002 in the first case, this right was recognized and the second decision on 13<sup>th</sup> March, 2003 reiterated it.

The Supreme Court in the first case observed<sup>85</sup> that the right to get information in a democracy is recognized all throughout the world and it is natural right flowing from the concept of democracy. Article 19(1)(a) of the Constitution of India provides for freedom of speech and expression and obviously voter's speech or expression in case of election would include casting of votes, that is to say, voter speaks out or expresses by casting vote. For this purpose, information about the candidate to be selected is essential. Voter's right to know the antecedents including criminal past of the candidate contesting election for the Member of Parliament or Legislative Assembly is much more fundamental and basic for the survival of democracy.

The Court went to say that if right to telecast and right to view sport games and right to impart such information is considered to be part and parcel of Article 19(1)(a), we fail to understand why the right of a citizen/voter – a little man – to know about the antecedents of his candidate cannot be held to be fundamental right under Article 19(1)(a). In Court's view, democracy cannot survive without free and fair election, without free and fairly informed voters. Votes cast by uninformed voters in favour of X or Y candidate would be meaningless. As stated earlier, non-information, one-sided information, disinformation, misinformation, all equally create an uninformed citizenry which makes democracy a force. Therefore, casting of a vote by a misinformed and non-informed voter or a voter having one-sided information only is bound to affect the democracy seriously. Freedom of speech and expression, said the Court,<sup>86</sup> includes right to impart and receive information which includes freedom to hold opinions. Entertainment is implied in freedom of "speech and expression" and there is no reason to hold that freedom of

<sup>83</sup> (2002) 5 SCC 294; AIR 2002 SC 2112.

<sup>84</sup> (2003) 4 SCC 399; AIR 2003 SC 2363.

<sup>85</sup> AIR 2002 SC 2112.

<sup>86</sup> *Ibid.*

speech and expression would not cover right to get material information with regard to a candidate who is contesting election for a post which is of utmost importance in the democracy.

The Court directed the Election Commission to give effect to the decision as early as possible. Accordingly, the Commission went ahead implementing the Court's order and issued a notification to this effect on 28<sup>th</sup> June, 2002.<sup>87</sup>

In all party meeting held on 8<sup>th</sup> July, 2002, 21 political parties unanimously rejected the Election Commissions directive of June 2002 to the candidates seeking details of their assets and criminal antecedents. The Government went ahead and drafted a Bill to amend certain provisions of the Representations of People Act, 1951, as to overrule Supreme Court's decision. Now the **Representation of the People (Third Amendment) Act, 2002** has inserted section 33 B<sup>88</sup> in the Representation of People Act, 1951.

In **Peoples Union for Civil Liberties v. Union of India**,<sup>89</sup> the validity of said section 33-B was challenged before the Supreme Court. The bench of three judges consisting of **M.B. Shah, P.V. Reddi** and **D.M. Dharmadhikari**, declared it as "unconstitutional". The Court was of the opinion that voter has a fundamental right under Article 19(1)(a) of the Constitution to know the antecedents of a candidate. The amended Act did not wholly cover the directions issued by this Court. On the contrary, it provided that a candidate would not be bound to furnish certain information as directed by that Court which in the opinion of the Court was improper and unconstitutional. A voter is first a citizen of this country and apart from the statutory rights, he has fundamental rights conferred by the Constitution. Members of a democratic society should be sufficiently informed so that they may cast their votes intelligently in favour of persons who were to govern them. Right to vote would be meaningless unless the citizens were well informed about the antecedents of a candidate.

**M.B. Shah, J.**, speaking for the Court observed:<sup>90</sup>

The foundation of a healthy democracy is to have well informed citizen voters. The reason to have right to information with regard to the antecedents of the candidate is that voter can judge and decide in whose favour he should cast his vote. It is voter's

<sup>87</sup> Bibha Tripathi, "Voter's Right to Information", AIR 2003 Journal Section., p.348.

<sup>88</sup> S. 33 B reads as under : Candidates to furnish information only under the Act and the Rules:

"Notwithstanding anything contained in any judgement, decree or order of any court or any direction order or any other instruction issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information in respect of his election, which is not required to be disclosed or furnished under this Act or the rules made thereunder".

<sup>89</sup> *Supra* note 88.

<sup>90</sup> *Id.*, para 18.

discretion whether to vote in favour of an illiterate or literate candidate. It is his choice whether to elect a candidate against whom criminal cases for serious or non-serious charges were filed but is acquitted or discharged. He is to consider whether his candidate may or may not have sufficient assets so that he may not be tempted to indulge in unjustified means for accumulating wealth.

While elaborating on this aspect, the Court further observed<sup>91</sup> that for assets or liability, the voter may exercise his discretion in favour of a candidate whose liability is minimum and/or there are no over-dues of public financial institution or governmental dues. From this information, it would be, to some extent, easy to verify whether unaccounted money is utilized for contesting election and whether a candidate is contesting election for getting rich or after being elected to what extent he became richer. Exposure to public scrutiny is one of the known means for getting clean and less polluted persons to govern the country. A little man – a citizen – a voter is the master of his vote. He must have necessary information so that he can intelligently decide in favour of a candidate who satisfies his criterion of being elected as M.P. or M.L.A. On occasions, it is stated that we are not having such intelligent voters. This is no excuse. This would be belittling a little citizen/voter. He himself may be illiterate but still he would have guts to decide in whose favour he should cast his vote. In any case, for having free and fair election and not to convert democracy, into a monocracy and mockery or farce, information to voters is the necessity.

Undoubtedly, these two decisions of the Supreme Court on the right to information in the matter of elections are significant milestones in the judicial review of election process. The decisions attempted to find out early symptoms of a disease that would have developed into malignancy in the politic body. With a warning signal to politicians, the judiciary strove to shed off the tendencies to politicize criminal activities for winning personal gains. The message is clear and unambiguous. The electorate shall have the right to analyze thoroughly and objectively the merits and demerits of the candidates, for free and fair election and not to convert democracy into a monocracy and mockery or farce.<sup>92</sup>

#### **(n). Right to Information Regarding Medical Condition of a Person:**

Does the disclosure by a hospital of the medical condition of an AIDS patient to his fiancée amount to a breach of the patients privacy or whether she was entitled to information regarding this ? This question arose in *Mr. 'X' v. Hospital 'Y'*.<sup>93</sup> The Supreme Court was confronted with

<sup>91</sup> *Ibid.*

<sup>92</sup> V.R. Jayadevan, "Disclosure of Antecedents for Free and Fair Election : The Need to Widen the Basic Structure Doctrine", *J.I.L.I.*, Vol. 46, No. 4, 2004, p.576.

<sup>93</sup> (1998) 8 SCC 296. This case may be compared with the English case *X v Y*. (1988) 2 All ER

the task of striking a balance between two conflicting fundamental rights : the AIDS patients right to life and personal liberty which includes his right to privacy and confidentiality of his medical condition, and the right of the lady to whom he was engaged to lead a healthy life. The Supreme Court concluded that since the life of the fiancée would be endangered by her marriage and consequent conjugal relations with the AIDS victim, she was entitled to information regarding the medical condition of the men she was to marry. There was, therefore, no infringement of the right to privacy.

**(o). Right to inspect Answer Sheets:**

In *C.B.S.E & Ors. Vs. Aditya Bandhopadhyay & Ors*<sup>94</sup>, on 9<sup>th</sup> August,2011, A bench comprising Justice **R.V. Raveendran** and **A.K. Patnaik** upheld the judgment of the Calcutta High Court allowing the disclosure of answer sheets thereby dismissing petitions filed by different public authorities. Public examination bodies like Central Board of Secondary Education, West Bengal Board of Secondary Education , University of Calcutta , Institute of Chartered Accountants of India were among the many petitioners which had filed a case challenging the February 2009 verdict of the Calcutta High Court. An intervention application was filed by the independent human rights law agency Human Rights Law Network (HRLN) and argued successfully by its lawyer Divya Jyoti Jaipuriar.

The right to information is a cherished right. Information and the right to information are intended to be formidable tools in the hands of responsible citizens to fight corruption and to bring about transparency and accountability, the Supreme Court has held. A Bench of Justices R.V. Raveendran and A.K. Patnaik gave this ruling while allowing disclosure of answer sheets of students in public examinations. The Bench said the RTI Act provisions should be enforced strictly and all efforts made to bring to light the necessary information under Section 4 (4) (b) which “relates to securing transparency and accountability in the working of public authorities and in discouraging corruption.” Disposing of appeals, the Bench affirmed the Calcutta High Court order directing examining bodies to permit examinees to inspect their answer books, subject to certain clarifications on the scope of the RTI Act.

Writing the judgment, Justice **Raveendran**, however, said: “Indiscriminate and impractical demands or directions under the RTI Act for disclosure of all and sundry information [unrelated to transparency and accountability in the functioning of the public authorities and eradication of corruption] would be counter-productive as it will adversely affect the efficiency of the administration and result in the executive getting bogged down in the non-productive work of collecting and furnishing information.” The Bench further said: “The RTI Act should not be

648.

<sup>94</sup> Civil Appeal No. 6454 of 2011 Decided on 9<sup>th</sup> August,2011.

allowed to be misused or abused to become a tool to obstruct national development and integration or to destroy peace, tranquility and harmony among its citizens. Nor should it be converted into a tool of oppression or intimidation of honest officials striving to do their duty. The nation does not want a scenario where 75 per cent of the staff of public authorities spends 75 per cent of its time in collecting and furnishing information to applicants instead of discharging regular duties.”

On disclosure of answer books, the Bench said the provisions of the RTI Act would prevail over the provisions of the bylaws/rules of the examining bodies. As a result, “unless the examining body demonstrates that the answer books fall under the exempted category of information under Section 8 (1) (a) of the RTI Act, it will be bound to provide access to an examinee to inspect and take copies of his evaluated answer books, even if such inspection or taking copies is barred under the rules.” On the contention that the examining bodies held the answer books in their fiduciary capacity, the Bench said: “Once the examiner has evaluated the answer books, he ceases to have any interest in the evaluation done by him. He does not have any copyright or proprietary right or confidentiality right in regard to the evaluation. Therefore, it cannot be said that the examining body holds the evaluated answer books in a fiduciary relationship, qua the examiner. As no other exemption under Section 8 of the RTI Act is available in respect of evaluated answer books, the examining bodies will have to permit inspection.” However, to protect the safety and identity of the examiners, those portions which contain information on examiners/coordinators/scrutinisers/head examiners or which “may disclose their identity with reference to signature or initials shall have to be removed, covered, or otherwise severed from the non-exempted part of the answer books.” The threat of penalties under the RTI Act and the pressure of the authorities under the RTI Act should not lead to employees of a public authorities prioritising ‘information furnishing’, at the cost of their normal and regular duties.

### **3. REASONABLE RESTRICTIONS AND RIGHT TO INFORMATION**

To say that no secrecy is to be practiced at any level in the affairs of the State is a quixotic madness. Matters concerning defence, foreign relations and national security etc. cannot be thrown open to the people. In transactions which have serious repercussions on public security, secrecy can legitimately be claimed because it would then be in public interest that such matters are not publicly disclosed or disseminated. If every action taken by the political or executive functionary is transformed into a public controversy and made subject to an enquiry to soothe popular sentiments, it will undoubtedly have a chilling effect on the independence of the decision

maker who may find it safer not to take any decision. It will paralyse the entire system and bring it to a grinding halt.<sup>95</sup>

In *Dinesh Trivedi v. Union of India*,<sup>96</sup> the then **C.J. Ahmed** opined:

In modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the Government which, having been elected by them, seeks to formulate sound policies of governance aimed at their welfare. However, like all other rights, even this right has recognized limitations, it is, by no means, absolute.

A right has meaning only if it is coupled with restraint. Since right to information comes mainly from the speech and expression, so it stands on no higher footing. In other words, this right is subject to reasonable restrictions as specified in clause (2) of Article 19.<sup>97</sup> There is another area also where care and circumspection is required, that is, the right to privacy which has not been incorporated in clause (2) of Article 19, but it is one of the valid reasons for non-disclosure of information. While examining the reasonableness of these restrictions one must keep in mind what was said by the Supreme Court in *M.R.F. Ltd. v Inspector, Kerala Government*.<sup>98</sup> It was observed that in determining reasonableness one has to keep in mind the following points:<sup>99</sup>

- a) The Directive Principles of State Policy
- b) Restrictions must not be arbitrary or of an excessive nature so as to go beyond the requirement of the interest of general public.
- c) In order to judge the reasonableness of the restrictions, no abstract or general pattern or a fixed principle can be laid down which may have universal application as the same will vary from case to case as also with regard to changing conditions, values of human life, social philosophy of the Constitution, prevailing conditions and the surrounding circumstances.
- d) A just balance has to be struck between the restrictions imposed and the social control.
- e) Prevailing social values as also social needs which are intended to be satisfied by the restrictions.

<sup>95</sup> Rodney D. Ryder, *Right to Information – Law-policy-practice*, 2006, p.245.

Also see, J.P. Bansal, "Right to Know", *Indian Socio Legal Journal*, 1997, p.103.  
(1997) A SCC 306.

<sup>96</sup> <sup>97</sup> Clause (2) of Article 19 specifies the grounds on which reasonable restrictions can be imposed: on the right to freedom of speech and expression. These are (a) Security of the State (b) Friendly relations with foreign States (c) Public Order (d) Decency or Morality (e) Contempt of Court (f) Deformation (g) Incitement of an offence (h) Sovereignty and Integrity of India.

<sup>98</sup> 1998 (8) SCC 227; AIR 1999 SC 188.

<sup>99</sup> AIR 1999 SC 188, p.191, para 13.

- f) There must be direct and proximate nexus or a reasonable connection between the restrictions imposed and the object sought to be achieved.

In many cases, courts have explicitly held that, the right to information is subject to reasonable restrictions. Some of these cases are discussed and analysed hereunder:

**(a). Security of the State:**

In *Peoples Union for Civil Liberties v. Union of India*,<sup>100</sup> right to information was held subject to reasonable restrictions. When information was sought regarding safety violations and defects in various nuclear installations and access was sought to power plants, this was denied on the ground that this would affect the interest of security of State. The provisions of Atomic Energy Act, 1962 were under consideration. It was said that the information which has been classified as "secret" cannot be made available.

While delivering the judgement the Supreme Court categorically observed:<sup>101</sup>

Every right – legal or moral carries with it a corresponding objection. It is subject to several exemptions/ exceptions indicated in broad terms. Generally, the exemptions/exceptions under those laws entitle the Government to withhold information relating to the following matters : (i) International relations; (ii) National Security (including defence) and public safety; (iii) Investigation, detection and prevention of crime; (iv) Internal deliberations of the Government (v) Information received in confidence from a source outside the Government.; (vi) Information which, if disclosed, would violate the privacy of individual; (vii) Information of economic nature, (including trade secrets) which, if disclosed, would confer an unfair advance on some person or concern, or, subject some person or Government to an unfair disadvantage; (viii) information which is subject to a claim of legal professional privilege, e.g., communication between legal advisor and the client; between a physician and the patient; (ix) Information about scientific discoveries.

A reasonable restriction on the exercise of the right is always permissible in the interest of the security of the State. The operation and functioning of a nuclear plant is sensitive in nature. Any information relating to the training features, process or technology cannot be disclosed as it may be vulnerable to sabotage. Knowledge of specific data may enable the enemies of the nation to estimate and monitor strategic activities. As fissile materials are used in fuels, although the nuclear plants are engaged in commercial activities, the contents of the fuel discharged or any

<sup>100</sup> AIR 2004 SC 1442.

<sup>101</sup> *Id*, para 59.

other details must be held to be matters of sensitive character. Hence, if a reasonable restriction is imposed in the interest of the State by reason of a valid piece of legislation, the court normally would respect the legislative policy behind the same.

**(b). National Interest:**

In *S.P. Anand v. Union of India and Others*,<sup>102</sup> the petitioner sought the information regarding Kargil Infiltration from the concerned authorities and on their refusal filed the writ for appropriate directions. Dismissing the petition, the M.P. High Court observed:<sup>103</sup>

In our opinion, the public interest cannot be more than national interest and national security. There could be reasonable restrictions on the rights of the citizens as indicated by some previous judgements of the Supreme Court like Minerva Mill's case. National security assumes far more importance than the right of information, bestowed on a citizen. Therefore, this court did not find it necessary to open hearing of this petition, keeping in view the national interest and national security we do not wish to say anything more. The nation, national interest and national security is above the right to information possessed by the citizens.

**(c). Trade Secrets:**

Trade secrets consist of virtually any information developed by any person or organization through the expenditure of time and effort, unknown to others in competing business, and which gives an advantage to the person, business organizations, etc. over his competitors. The protection of confidentiality and business secrecy, and prohibition on exchange of confidential information between competitors are part of commercial activities. Often the trade secret is backed up with trademarks, patents, copyrights and designs, but it is the trade secret that is very significant to an enterprise. Secrecy in itself can confer commercial advantage over rivals, and often the continued commercial success of a business can depend on an adequate protection to its secrets. A trade secret provides the lead-time advantage to the holder over his rivals.<sup>104</sup>

As the trade secrets are between the parties standing in contractual, quasi-contractual or fiduciary relationship, with varied form of contracts, so most of the cases<sup>105</sup> on trade secrets are considered under section 27 of the Contract Act, 1872. The Supreme Court in *Niranjan Shankar Golikari v.*

<sup>102</sup> AIR 2000 MP 47.

<sup>103</sup> *Id.*, para 3, 4, 5.

<sup>104</sup> S.K. Verma, "Legal Protection of Trade Secrets – A Confidential Information", *J.I.L.I.*, Vol. 44, No. 3, p.336.

<sup>105</sup> *Niranjan Shankar Golakari v. Century Spinning & Mfg. Co. Ltd.*, AIR 1967 SC 1098. *Krishan Murgri v. Superintendent Co. of India Pvt. Ltd.* AIR 1980 SC 1717. *Taproggee GmbMV. IAEC India Ltd.*, AIR 1988, Bom, 1957.

*Century Spg. & Mfg. Co., Ltd.*<sup>106</sup> enumerated the lists to determine the validity of agreements in terms of Section 27. A foreign producer collaborated with a company manufacturing tyre cord yarn on the condition that the company would maintain secrecy of all technical information and that it obtain corresponding secrecy arrangements from its employees. The defendant was appointed for a period of five years on the condition that during this period he shall not serve anywhere else even if he left the service earlier. Shelat., J. held the agreement to be valid. Similarly in *Gopal Paper Mills v. S.K.G. Malhotra*,<sup>107</sup> the Calcutta High Court held that a covenant of restraint in a contract would be valid if designed to protect the legitimate-proprietary interest of the convenantee. An employer may protect his trade secrets against their disclosure or revelation by an employee.

**(d). Privacy:**

Information and communication are means to an end. That end includes inter-alia, promotion of human rights, fundamental freedoms and the dignity and the worth of the human person. When the essence of dignity in the shape of privacy of a person is molested and information extracted or forced out or stolen, the consequence is an outrage on the value of personhood.<sup>108</sup> Individual right to privacy is a precarious part of jurisprudence of communicable information. Confidentiality deserves immunity in certain circumstances of personal privacy. The right to dignity and decency is a human right and if this part of personhood is stripped naked by State process, the right to life becomes worthless.<sup>109</sup> The right to freedom of speech and expression and the right to privacy are two sides of the same coin. One person's right to know and be informed may violate another's right to be left alone. Just as the freedom of speech and expression is vital for the dissemination of information on matters of public interest, it is equally important to safeguard the private life of an individual to the extent that it is unrelated to public duties or matters of public interest. The law of privacy endeavours to balance these competing freedoms.

In India, the right to privacy is not a specific fundamental right but has gained constitutional recognition under Article 21 of Indian Constitution. Though, the right to privacy is not one of the "reasonable restrictions"<sup>110</sup> to the right to freedom of speech and expression under Article 19(1)(a). This has, however, not prevented the courts from carving out a constitutional right to

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<sup>106</sup> AIR 1967 SC 1098.

<sup>107</sup> AIR 1962 cal. 61 at 65.

<sup>108</sup> V.R. Krishna Iyer, *Freedom of Information*, 1990, p.127.

<sup>109</sup> *Id.* at 130.

<sup>110</sup> *Supra* note 99.

privacy by a creative interpretation of the right to life<sup>111</sup> and the right to freedom of movement.<sup>112</sup>

The first few cases that presented the Indian Supreme Court with the opportunity to develop the law on privacy were cases involving the activities of police to keep a secret watch on the movements of an individual. The first of these cases, *Kharak Singh v. State of U.P.*<sup>113</sup> was a challenge to the Constitutional validity of Rule 236 of the U.P. Police Regulations which permitted surveillance. A majority on the Bench struck down Regulation 236(b) which authorised domiciliary visits as being unconstitutional. The majority were unreceptive to the idea of recognizing a right to privacy and dismissed the claim on the ground that there could be no fundamental right to protect "mere personal sensitiveness". *Gobind v. State of M.P.*<sup>114</sup> and *Malak Singh v. State of P & H*<sup>115</sup> were also the cases of Surveillance, where again the Supreme Court had acknowledged the limited right to privacy.

The Supreme Court touched upon the rights of the individual to privacy vis-à-vis invasions by journalists in *Sheela Barse v. State of Maharashtra*,<sup>116</sup> *Prabha Dutt v. Union of India*<sup>117</sup> and *State through Supdt., Central Jail New Delhi v. Charulata Joshi*.<sup>118</sup>

In all these cases journalists sought permission from the Court to interview and photograph prisoners. Although the issue of privacy was not directly dealt with, the Court implicitly acknowledged the right to privacy by holding that the press had no absolute right to interview or photograph a prisoner but could do so only with the consent.<sup>119</sup> Similarly in *R. Rajagopal v. State of T.N.* (popularly known as Auto Shankar's Case)<sup>120</sup> the Supreme Court discussed the right to privacy in the context of the freedom of press and held "a citizen has the right to safeguard his own privacy, that of his family, marriage, procreation, motherhood, child-bearing, education etc. and no person can publish any thing relating to such matters without the consent of the person concerned". The Court acknowledged two exceptions to this rule.<sup>121</sup> First, where the matter has become a matter of public record, the right to privacy no longer subsists.<sup>122</sup>

<sup>111</sup> Article 21.

<sup>112</sup> Article 19 (1)(g).

<sup>113</sup> AIR 1963 SC 1295.

<sup>114</sup> (1975) 2 SCC 148.

<sup>115</sup> (1981) 1 SCC 420.

<sup>116</sup> (1987) 4 SCC 373.

<sup>117</sup> (1982) 1 SCC 1.

<sup>118</sup> (1999) 4 SCC 65.

<sup>119</sup> These cases are important because they endeavour to strike a balance between the public's right to know and the privacy of the individual.

<sup>120</sup> (1994) 6 SCC 632.

<sup>121</sup> *Id.* at 649, para 26.

<sup>122</sup> Except in the interests of Decency.

Second, public officials are not entitled to claim privacy when the act or conduct in question relates to the discharge of their official duties. Even where the publication is based upon facts found to be untrue, the public official is not entitled to protection unless it is shown that the publication was made with reckless disregard for truth. It is sufficient for the publishers to show that he acted after a reasonable verification of facts.

The issue of right to privacy vis-à-vis personal information was discussed by the Supreme Court in *Neera Mathur's case*.<sup>123</sup> In this case LIC wanted some personal information from the female candidate who applied for job. These information related to her menstrual periods, her conceptions, her abortions, date of her last menstrual periods and whether she was pregnant. She did not supply these information correctly. At the same time she was pregnant and after her appointment she applied for leave. When she wanted to join back she was dismissed. **Jagannatha Shetty, J.**, who delivered the judgement said most of the information sought was embarrassing if not humiliating. The learned judge further said:

The modesty and self respect may perhaps preclude disclosure of such personal problems like whether her menstrual period is regular or painless, the number of conceptions taken place, how many have gone full term etc. The corporation do well to delete such volumes in the declaration.

The Supreme Court considered this type of information as intrusion into the right of privacy. Neera Mathur was ordered to be reinstated.

In today's complex society, the range and quality of personal information maintained by governments about their citizens is enormous. While the maintenance and use of sensitive personal data is unquestionably necessary to the effective functioning of government, there exists a concomitant responsibility on all governmental agencies to devote attention and care for the protection of individual privacy interest in such information.<sup>124</sup> With the advancement in science and technology, gadgets and devices have been produced which can "pry into the private lives of individuals". Today the close circuit cameras or mobile cameras are being increasingly used as a "private eye". Information Satellites – are used for eavesdropping on the activities of hostile countries. Thus, the life and activities of modern men and women are all laid bare to the prying eyes. Therefore, there is a grater need to properly harmonise the need for freedom of information and right to individual's privacy, by keeping in mind the warning of Mr. **Pierre**

<sup>123</sup> *Neera Mathur v. LIC of India*, AIR 1992 SC 392.

<sup>124</sup> Faizan Mustafa, *Freedom of Information*, 2003, p.81.

**Trudeau**, former Prime Minister of Canada that the,<sup>125</sup> "State has no place in the bedroom of the nation or of its citizens".

Very recently on the 24th of August 2017 , a nine-judge bench of the Supreme Court delivered its verdict in Justice **K.S. Puttaswamy vs Union of India**,<sup>126</sup> unanimously affirming that the right to privacy is a fundamental right under the Indian Constitution. The verdict brought to an end a constitutional battle that had begun almost exactly two years ago, on August 11, 2015, when the Attorney-General for India had stood up during the challenge to the Aadhaar Scheme, and declared that the Constitution did not guarantee any fundamental right to privacy. The three judges hearing the case referred the constitutional question to a larger bench of five judges which, in turn, referred it further to a nine-judge bench. The bench comprised Chief Justice Khehar and Justices J. Chelameswar, S.A. Bobde, R.K. Agrawal, Rohinton Nariman, A.M. Sapre, D.Y. Chandrachud, Sanjay Kishan Kaul and S. Abdul Nazeer. In its 547-page judgment that declares privacy to be a fundamental right, the Supreme Court has overruled verdicts given in the **M.P. Sharma case**<sup>127</sup> and the **Kharak Singh case**<sup>128</sup> , both of which said that the right to privacy is not protected under the Indian constitution.

In case of right to information, the issue is even more straightforward, because the RTI Act already protects privacy.<sup>129</sup> Now the question is does the judgment affect the right to information? The only aspect that it might possibly impact is the meaning of the phrase "personal information." But even here, a close reading of the judgment dispels that impression. The phrase "personal information" occurred and recurred multiple times through the separate opinion, but it was only Justice **Bobde's** opinion that defined it in any meaningful way and that too in the context of State surveillance ("...the non-consensual revelation of personal information such as the state of one's health, finances, place of residence, location, daily routines and so on efface one's sense of personal and financial security.") Justice **Kaul**, who had a full section dealing with the concept of "personal information" (in the context of data collection) refrained from defining it either. In fact, more importantly, the separate opinions in *Puttaswamy* specifically acknowledged the Right to Information Act as an example of how the legislature had balanced the two constitutional values of access to information, and the right to privacy. For example, Justice **Chandrachud** observed that "legislative protection is in many cases, an acknowledgment and recognition of a constitutional right which needs to be effectuated and enforced through protective laws for instance, the provisions of Section 8(1)(j) of the Right

<sup>125</sup> Quoted by M.S. Sharma in, "Right to Know : An Overview", *Journal of Parliamentary Information*, p.449.

<sup>126</sup> (2017) 10 SCC 1

<sup>127</sup> M.P.Sharma and Others vs. Satish Chandra and Others , AIR 1954 SC 300.

<sup>128</sup> Kharak Singh vs. State of U.P. and Others, AIR 1963 SC 1295

<sup>129</sup> Section 8(j) RTI Act, 2005

to Information Act, 2005 which contain an exemption from the disclosure of information refer to such information which would cause an unwarranted invasion of the privacy of the individual.”<sup>130</sup> Justice **Nariman** cited Section 8(j) for the proposition that, in the Right to Information Act, the legislature had recognised the right to privacy (para 89). Both Justice **Chandrachud** and Justice **Nariman** cited the prior judgment of the Supreme Court in *Bihar Public Service Commission vs Sayed Hussain Abbas Rizvi*,<sup>131</sup> where Justice **Swatanter Kumar** had specifically held that “thus, the public interest has to be construed while keeping in mind the balance factor between right to privacy and right to information with the purpose sought to be achieved and the purpose that would be served in the larger public interest, particularly when both these rights emerge from the constitutional values under the Constitution of India.”

The point, therefore, is this: the judgments in *Puttaswamy* acknowledge the fact that, in the Right to Information Act, the legislature has already struck a balance between two competing constitutional values: the right to privacy, and the right to information. This balance has been struck in the following manner: (1) define “personal information” in terms of that which has no relationship to any public interest or public activity; (2) presumptively protect personal information in cases where disclosure would amount to an “unwarranted interference in privacy”, and (3) override this presumption where the larger public interest requires it. To come back for a moment to the candidates’ spouses assets question: this disclosure does not fall within Section 8(j) because, given the social realities in India, spouses’ assets are often inseparable, and often deliberately so. In disclosing a spouse’s assets, there is, therefore, a definite relationship with a “public activity” (that is, candidature for public office), and even if not, a larger public interest exists.

#### **4. CONCLUSION**

The institution of judiciary in a democratic setup is perhaps one of the most important organs as it is entrusted with the great responsibility of administering justice, one of the core needs of the citizenry. As the custodian of rights of the citizens of a country, the judiciary is bestowed with the task of realizing the Constitutional values to its fullest extent, in furtherance of the vision of the Constitution makers. Judiciary in India has been creative and purposive. It has adopted an activist goal oriented approach in the matter of interpretation of the Constitution. Judiciary has expanded the frontiers of fundamental rights and in the process, re-written some parts of the Constitution through a variety of techniques of judicial activism.

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<sup>130</sup> (2017) 10 SCC 1, Para 153

<sup>131</sup> (2012)13 SCC 61

It is needless to say that the judiciary and the judicial decisions, over the years, have shaped the Indian polity to a great extent. The role played by the judiciary has been pivotal in ensuring a process of fairness in governance and administration. Thus, be it the pragmatic interpretation of Article 19 or Article 21 or propounding doctrines of equality, the judicial decisions in India have infiltrated through every strata of the society. Judiciary, as one understands, is the edifice of a strong democracy as it endeavors not merely to interpret the black letter of the law but also adopting an activist stance of creatively interpreting it to suit the needs of the society. On the strength of the above discussion, one can fairly conclude that judicial activism is playing an important role in the growth and development of right to information, because the government run by laws made by legislature as well as those made by executives is not immune from mistakes. The judicial creativity and activism has fertilized many provisions of the Constitution with meaning and content. In the exercise of its jurisdiction and power, the judiciary has devised new strategies, forged new tools and broadly interpreted the letter of law to ensure the protection of human rights specially the right to information.