

**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION**

Civil Appeal No. 10044 of 2010

**Central Public Information Officer,
Supreme Court of India**

...Appellant

Versus

Subhash Chandra Agarwal

...Respondent

WITH

Civil Appeal No. 10045 of 2010

AND WITH

Civil Appeal No. 2683 of 2010

J U D G M E N T

Dr Dhananjaya Y Chandrachud, J

INDEX

- A Introduction
- B Reference to the Constitution Bench
- C Submissions of Counsel
- D Relevant statutory provisions
- E *S P Gupta*, candour and class immunity
- F Judicial independence
 - F.1 Judicial accountability
- G Fiduciary relationship
- H The right to privacy and the right to know
- I Conclusion
- J Directions

A Introduction

The backdrop

1. This batch of three civil appeals¹ raises questions of constitutional importance bearing on the right to know, the right to privacy and the transparency, accountability and independence of the judiciary.

2. In the first of the appeals² (“**the appointments case**”), the Central Public Information Officer³ of the Supreme Court of India challenges an order dated 24 November 2009 of the Central Information Commission⁴. The order directs the CPIO to provide information sought by the respondent in application under the Right to Information Act 2005⁵. The respondent, in an application dated 23 January 2009 sought copies of the correspondence exchanged between constitutional authorities together with file notings, relating to the appointment of Justice H L Dattu, Justice A K Ganguly and Justice R M Lodha (superseding the seniority of Justice A P Shah, Justice A K Patnaik and Justice V K Gupta). The appellant declined to provide the information sought in the application on the ground that the Registry of the Supreme Court does not deal with matters pertaining to the appointment of judges, and appointments of judges to the higher judiciary are made by the President of India, according to procedure prescribed by law. The first appellate authority rejected the appeal on the ground that the information sought by the respondent was not covered within the ambit of

¹ Civil Appeal no 10044/2010, Civil Appeal no 10045/2010 and Civil Appeal no 2683/2010

² Civil Appeal no 10044 of 2010

³ “CPIO”

⁴ “CIC”

⁵ “RTI Act”

Section 2 (f)⁶ and (j)⁷ of the RTI Act. The respondent preferred a second appeal before the CIC. On 24 November 2009, the CIC directed the appellant to provide the information sought by the respondent. The appellant has moved this Court under Article 136 of the Constitution challenging the decision of the CIC ordering disclosure.

3. In the second of the three appeals⁸ (“**the assets case**”), the appellant challenges a judgment dated 12 January, 2010 of a Full Bench of the Delhi High Court upholding the orders of the Single Judge⁹ dated 2 September 2009 and the CIC dated 6 January 2009¹⁰ directing the disclosure of information. On 10 November 2007, the respondent filed an application seeking a copy of the resolution dated 7 May 1997 of the judges of the Supreme Court requiring every sitting judge, and all future judges upon assuming office, to make a declaration of assets in the form of real estate or investments held in their names or the names of their spouses or any person dependant on them to the Chief Justice of the Court within a reasonable time. The respondent also requested “information on any such declaration of assets etc to respective Chief Justices in State”. While the appellant provided a copy of the resolution dated 7 May 1997, the CPIO declined (by an order dated 30 November 2007) to provide information concerning the declaration of assets by judges of the Supreme Court and the

⁶ **Section 2(f)** – “Information” means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force.

⁷ **Section 2(j)** – “Right to Information” means the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to— (i) inspection of work, documents, records; (ii) taking notes, extracts or certified copies of documents or records; (iii) taking certified samples of material; (iv) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device.

⁸ Civil Appeal no 2683 of 2010

⁹ The CPIO, Supreme Court of India v Subhash Chandra Agarwal & Anr, Writ Petition (C) 288/2009

¹⁰ Appeal no CIC/WB/A/2008/00426

High Court on the ground that the Registry of the Supreme Court did not hold it. The information pertaining to the declaration of assets by High Court judges, the appellant stated, were in the possession of the Chief Justices of the High Courts. The first appellate authority remanded the matter back to the appellant for transfer of the RTI application to the High Courts under Section 6(3)¹¹. The appellant declined to transfer the RTI application to the CPIOs of the High Courts on the ground that when the respondent filed the RTI application, he was aware that the information with respect to the declaration of assets by the judges of the High Court was available with the High Courts which formed distinct public authorities. On 6 January 2009, the CIC held in the second appeal that the information concerning the judges of the Supreme Court was available with its Registry and that the appellant represented the Supreme Court as a public authority. Therefore, the appellant was held to be obliged to provide the information under the RTI Act unless, the disclosure of information was exempted by law. The CIC held that the information sought by the respondent was not covered under the exemptions in clauses (e) or (j) of Section 8(1)¹² and directed the appellant to provide the information sought by the respondent. The

¹¹ **Section 6 (3)** - Where an application is made to a public authority requesting for an information,—

- (i) which is held by another public authority; or
- (ii) the subject matter of which is more closely connected with the functions of another public authority,

the public authority, to which such application is made, shall transfer the application or such part of it as may be appropriate to that other public authority and inform the applicant immediately about such transfer:

Provided that the transfer of an application pursuant to this sub-section shall be made as soon as practicable but in no case later than five days from the date of receipt of the application.

¹² **Section 8** - Exemption from disclosure of information.

(1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,—

(e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;

(j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information.

appellant instituted a writ petition¹³ before the Delhi High Court. On 2 September 2009, a Single Judge of the High Court dismissed the petition holding, *inter alia*, that the declaration of assets furnished by the judges of the Supreme Court to the Chief Justice of India and its contents constituted “information”, subject to the provisions of the RTI Act. The Single Judge held that: (i) judges of the Supreme Court hold an independent office; (ii) there exist no hierarchies in judicial functions; (iii) the Chief Justice of India does not hold such “information” in a fiduciary capacity; and (iv) the information sought by the respondent was not exempt under Section 8 (1)(e). In a Letters Patent Appeal, the Full Bench of the Delhi High Court upheld the decision of the Single Judge. The appellant has challenged the decision of the Full Bench.

4. In the third civil appeal (“**the undue influence case**”), the appellant has challenged the order of the CIC dated 24 November 2009¹⁴, by which the appellant was directed to provide information sought by the respondent in his RTI application. On 6 July, 2009, the respondent filed an RTI application on the basis of a newspaper report seeking the complete correspondence exchanged with the Chief Justice of India in regards to a Union Minister having allegedly approached Justice R Raghupati of the Madras High Court, through a lawyer to influence a judicial decision. The application sought a disclosure of the name of the Union Minister and the lawyer, and of the steps taken against them for approaching the judge of the Madras High Court for influencing the judicial decision. On 4 August 2009, the appellant rejected the request on the ground that no such information was available with the Registry of the Supreme Court. The first appellate

¹³ Writ Petition (C) 288/2009

¹⁴ Appeal no CICWB/A/2009/000859

authority rejected the appeal. The second appeal before the CIC led to a direction on 24 November 2009, to provide the information sought, except information sought in questions 7 and 8 on recourse taken to the in-house procedure. The appellant approached this Court challenging the decision of the CIC.

B Reference to the Constitution Bench

5. On 26 November 2010, a two judge Bench of this Court directed the Registry to place the present batch of appeals before the Chief Justice of India for constituting a Bench of appropriate strength and framed the following substantial questions of law:

“1. Whether the concept of independence of judiciary requires and demands the prohibition of furnishing of the information sought? Whether the information sought for amounts to interference in the functioning of the judiciary?”

2. Whether the information sought for cannot be furnished to avoid any erosion in the credibility of the decisions and to ensure a free and frank expression of honest opinion by all the constitutional functionaries, which is essential for effective consultation and for taking the right decision?

3. Whether the information sought for is exempt under Section 8(1)(j) of the Right to Information Act?”

6. On 17 August 2016, a three judge Bench referred these civil appeals to a Constitution Bench for adjudication.

C Submissions of Counsel

7. Mr K K Venugopal, Attorney General for India appearing on behalf of the appellant made the following submissions:

- (i) The present case is not covered by the decision of this Court in **S P Gupta v President of India**¹⁵, which is based on distinguishable facts. The decision in **S P Gupta** does not consider the relationship between the restrictions on the right to know and the restrictions existing under Article 19 (2) of the Constitution. Once Article 19(1)(a) is attracted, the restrictions under Article 19 (2) become applicable. The RTI Act came into force in 2005 and lists out the rights and restrictions on the right to information. The provisions of the RTI Act must be construed in a manner which makes it consistent with constitutional values including the independence of the judiciary;
- (ii) Information of which disclosure is sought under Section 2 (f) of the RTI Act, includes only that information which is in a physical form and which is already in existence and accessible to a public authority under law. The judge can decide to disclose assets voluntarily and place relevant information in the public domain. A third party cannot seek information on the disclosure of assets of a judge which does not exist in the public domain;
- (iii) The decision of this court in **S P Gupta** is based on a factually distinct situation where disclosure of correspondence regarding the non-

¹⁵ 1981 Supp SCC 87

appointment of an additional judge was ordered on the ground that the judge was a party to the proceeding before the Court. Further, the decision established a restriction on the disclosure of information to third parties;

- (iv) The correspondence and file notings with respect to recommendations for appointments of judges to the higher judiciary falls under a “class of information” that is highly confidential. Disclosure will result in damage to the institution and adversely affect the independence of the judiciary;
- (v) The process of concurrence by the members of the Collegium requires free and frank discussion on the character, integrity and competence of prospective appointee judges in order to ensure that the most suitable judges are appointed. It is in the public interest to uphold candour in matters of appointment and transfer of judges and to avoid unnecessary litigative debate by third parties. Disclosure of such information would undermine the independence of the judiciary and adversely impact the candour or uninhibited expression of views by the Collegium. Independence of judiciary is not limited to independence from executive influence. It is multi-dimensional and also independence from other pressure and prejudices including fearlessness from power centres, economic or political, and freedom from prejudices acquired and nourished by the class to which judges belong (**C Ravichandran Iyer v Justice A M Bhattacharjee**¹⁶);

¹⁶ (1995) 5 SCC 457

- (vi) Information sought regarding the assets and liabilities of judges and correspondence and file notings relating to character, conduct, integrity and competence of a judge includes certain “personal information” and is hence, exempt under Section 8 (1)(j) of the RTI Act;
- (vii) The correspondence and file notings that form the basis of the decision under Article 124 (2) of the Constitution includes information received from third parties in a fiduciary capacity. The information is held by the Chief Justice of India as a result of disclosure by third parties who give the information in confidence, complete good faith, integrity and fidelity. Therefore, disclosure of such information is exempt under Section 8 (1)(e);
- (viii) The disclosure of correspondence relating to conduct, character, integrity and competence of a judge may cause irreparable loss to their reputation, violate their right to privacy and adversely affect their functioning. There is also no remedy available to a judge for the comments made in the appointment process as the Chief Justice of India along with other judges are protected from civil/criminal proceedings under Section 3(1) of the Judges (Protection) Act 1985. While regulating the disclosure of information, the Supreme Court is required to balance the right of an individual to reputation and privacy under Article 21 and the right to information of third-party parties under Article 19(1)(a). The doctrine of proportionality has to be applied to resolve the conflict between the two rights and the right to reputation and privacy of a judge should prevail over the right to information of third parties; and

(ix) Legislation and rules with respect to disclosure of assets and liabilities of public servants do not provide for placing such information in the public domain or granting third party access to such information. The judiciary is seeking self-regulation by providing a voluntary disclosure of assets and liabilities and it is up to the Supreme Court to disclose such information. No third party can seek information which is not in the public domain.

8. On the contrary, Mr Prashant Bhushan, learned Counsel appearing on behalf of the respondent made the following submissions:

- (i) The observations made by the seven judge Bench of this Court in **S P Gupta** are binding on the present Bench. Even though certain aspects of the judgment have been overruled in **Supreme Court Advocates-on-Record Assn v Union of India**¹⁷, the decision of this Court vis-à-vis the disclosure of correspondence in respect of the appointment process remains unaffected. If **S P Gupta** has to be overruled, this could be only done by a Bench comprising of more than seven judges;
- (ii) This Court has interpreted Article 19(1)(a) to include the right to information under the ambit of free speech and expression even before the RTI Act was enacted by the Parliament. Disclosure of the information sought in the present batch of cases is an essential part of the freedom of speech and expression guaranteed in Article 19(1)(a) and involves a significant public interest;
- (iii) Free flow of information to citizens is necessary, particularly in matters which form part of public administration for ensuring good governance and

¹⁷ (1993) 4 SCC 441

transparency. The fundamental right of free speech and expression includes every citizen's right to know about assets, criminal antecedents and educational backgrounds of candidates contesting for public office. To cover public acts with a veil of secrecy is not in the interest of the public and may lead to oppression and abuse by, and distrust of, public functionaries. The lack of transparency, accountability and objectivity in the collegium system does not enhance the credibility of the institution. Disclosure of the information sought, on the other hand, would promote transparency and prevent undue influence over the judiciary;

- (iv) The claim of class privilege or class immunity to the correspondence between the Chief Justice of India and the Law Minister was rejected in **S P Gupta**. After the enactment of the RTI Act, information otherwise held by a public authority cannot be excluded from disclosure unless it falls under the exemptions laid down in Section 8 or relates to an institution excluded under Section 24¹⁸ of the RTI Act. When information regarding a judge is

¹⁸ **Section 24** - Act not to apply to certain organisations

(1) Nothing contained in this Act shall apply to the intelligence and security organisations specified in the Second Schedule, being organisations established by the Central Government or any information furnished by such organisations to that Government: Provided that the information pertaining to the allegations of corruption and human rights violations shall not be excluded under this sub-section: Provided further that in the case of information sought for is in respect of allegations of violation of human rights, the information shall only be provided after the approval of the Central Information Commission, and notwithstanding anything contained in section 7, such information shall be provided within forty-five days from the date of the receipt of request.

(2) The Central Government may, by notification in the Official Gazette, amend the Schedule by including therein any other intelligence or security organisation established by that Government or omitting therefrom any organisation already specified therein and on the publication of such notification, such organisation shall be deemed to be included in or, as the case may be, omitted from the Schedule.

(3) Every notification issued under sub-section (2) shall be laid before each House of Parliament.

(4) Nothing contained in this Act shall apply to such intelligence and security organisation being organisations established by the State Government, as that Government may, from time to time, by notification in the Official Gazette, specify: Provided that the information pertaining to the allegations of corruption and human rights violations shall not be excluded under this sub-section:

Provided further that in the case of information sought for is in respect of allegations of violation of human rights, the information shall only be provided after the approval of the State Information Commission and, notwithstanding anything contained in section 7, such information shall be provided within forty-five days from the date of the receipt of request. (5) Every notification issued under sub-section (4) shall be laid before the State Legislature.

provided to the Chief Justice of India, it constitutes information held by a public authority and thus, would be amenable to the provisions of the RTI Act;

- (v) In **S P Gupta**, the argument that disclosure of correspondence between constitutional functionaries in relation to the appointment process of judges would preclude the free and frank expression of opinions was rejected. During the drafting of the Right to Information Bill, the argument that disclosure will deter consultees from expressing themselves freely and fairly and that the dignity and reputation of people would be tarnished was rejected. The argument of candour does not fall under any of the exemptions under the RTI Act and therefore, this disclosure of information cannot be excluded from the purview of the RTI Act;
- (vi) The disclosure of assets of judges is warranted in the larger public interest. It cannot be argued that information regarding the assets of judges, who are public functionaries, is personal information having no relationship with any public activity or interest. Hence, the information sought is not exempt under Section 8 (1)(j);
- (vii) There exists no fiduciary relationship between those who are vested with the responsibility of determining whether an appointee is suitable for elevation as a judge and the appointee herself. The duty of a public servant is to act in the interest of the public and not in the interest of another public servant. The entire process of consultation and making information available to the members of the collegium regarding credentials and the suitability of the appointee is a matter of public interest.

Further, when judges act in their official capacity in compliance with the 1997 resolution and disclose their assets, it cannot be said that the Chief Justice of India acts in a fiduciary capacity for the judges. The Chief Justice of India and other members of the collegium discharge official duties vested in them by the law and the information sought is not exempt under Section 8(1)(e). Even if some part of the information is personal, that part can be severed after due examination on a case to case basis under Section 10; and

- (viii) The argument that the independence of the judiciary will be affected prejudicially due to the disclosure of information is misconceived. The independence of the judiciary means independence from the legislature and the executive and not from the public. It is a constitutional and legal right of the respondent to access information and identify the persons who have attempted to compromise the functioning of the judiciary. Disclosure of such information is essential for the citizenry to maintain their faith in the independence of the judiciary.

9. The rival submissions fall for our consideration.

D Relevant statutory provisions

10. For the purpose of the present dispute it is necessary to analyse the relevant provisions contained in the statutory framework of the RTI Act. Sections 2 and 3 read:

“2. Definitions. – In this Act, unless the context otherwise requires, -

...

- (e) “competent authority” means –
- (i) the Speaker in the case of the House of People or the Legislative Assembly of a State or a Union territory having such Assembly and the Chairman in the case of the Council of States of a Legislative Council of States;
 - (ii) the Chief Justice of India in the case of the Supreme Court;
 - (iii) the Chief Justices of the High Court in the case of a High Court;
 - (iv) the President or the Governor, as the case may be, in the case of other authorities established or constituted by or under the Constitution;
 - (v) the administrator appointed under article 239 of the Constitution;

(f) “information” means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any law for the time being in force.

...

(h) “public authority” means any authority or body or institution of self-government established or constituted,-

- (a) by or under the Constitution;
- (b) by any other law made by Parliament;
- (c) by any other law made by State Legislature;
- (d) by notification issued or order made by the appropriate Government, and includes any-
 - (i) body owned, controlled or substantially financed;
 - (ii) non-Government Organisation substantially financed,

Directly or indirectly by funds provided by the appropriate Government;

...

(j) “right to information” means the right to information accessible under the Act which is held by or under the control of any public authority and includes the rights to –

- (i) inspection of work, documents, records;
- (ii) taking notes, extracts, or certified copies of documents or records;
- (iii) taking certified samples of material;
- (iv) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device;

...

3. Right to information. – Subject to the provisions of this Act, all citizens shall have the right to information.

11. Both the terms “public authority” and “information” have been broadly defined. Section 2(j) which defines the “right to information” stipulates that the information accessible under the RTI Act is held by or under the control of any “public authority”, which is defined in Section 2(h) of the RTI Act. Section 3 of the Act confers on all citizens the substantive right to seek information covered within the ambit of the Act, subject to its provisions. The remaining scheme of the RTI Act operationalises the substantive right conferred by Section 3. Section 4 imposes a statutory duty on public authorities to create and maintain a record of the activities stipulated therein to ensure that these records are available to applicants. Section 6 empowers an individual to file a request with the relevant Central Public Information Officer (“**CPIO**”) or State Public Information Officer (“**SPIO**”) or their corresponding Assistant Officers (collectively hereafter “**Information Officer**”). Section 7 empowers the Information Officer to either provide the information sought or reject the application for reasons set out in Section 8 and 9.

12. For an authority to be covered under the RTI Act, it must be a “public authority” as defined under Section 2(h) of the Act. “Public authority” is defined as any authority or body or institution or self-government which falls within the ambit of any of the enumerated provisions in that sub-section. The Supreme Court of India is established by virtue of Article 124(1) of the Constitution of India. Similarly, Article 214 of the Constitution stipulates that there shall be a High Court for each state. In terms of Section 2(h)(a), a body or an institution which is established or constituted by or under the Constitution would be a public authority. But virtue of being established by the Constitution, the Supreme Court

and the High Courts would fall within the ambit of “public authority” in Section 2(h) of the Act.

13. Section 2(e)(ii) expressly stipulates that the competent authority means the Chief Justice of India in the case of the Supreme Court and Section 2(e)(iii) stipulates that the competent authority in the case of a high Court is the Chief Justice of that Court. Significantly, Article 124 of the Constitution of India stipulates that there shall be a Supreme Court of India consisting of a Chief Justice of India and other judges. The office of the Chief Justice of India is not distinct from the Supreme Court of India. The Supreme Court is constituted by virtue of the Constitution and consists of judges, of which the Chief Justice is the head. This however, does not mean that the Supreme Court and the Chief Justice are two separate ‘public authorities’ within the RTI Act.

14. The term information under Section 2(f) has been defined broadly to include “any material in any form”. The word ‘including’ denotes the intention of the Parliament to provide a non-exhaustive list of materials that fall within the ambit of the sub-clause. The sub-clause includes information relating to any private body “which can be accessed by a public authority under any law for the time being in force”. The import of this phrase is that information relating to a third party is included only where the requisite pre-conditions of any law in force to access such information is satisfied. The right sought to be exercised and information asked for should fall within the scope of ‘information’ and ‘right to information’ as defined under the Act. The information sought must be in existence and must be held or under the control of the public authority.

15. Section 8(1) begins with a non-obstante phrase “Notwithstanding anything contained in this Act”. The import of this phrase is that clause (1) of Section 8 carves out an exception to the general obligation to disclose under the RTI Act. Where the conditions set out in any of the sub-clauses to clause (1) of Section 8 are satisfied, the Information Officer is under no obligation to provide information to the applicant. The scope of the exception and its applicability to the present dispute shall be discussed in the course of the judgment.

16. Section 22¹⁹ contains a non-obstance clause and stipulates that the RTI Act has an overriding effect over laws. The import of this provision is to impart priority to the salient objectives of the Act and ensure that where information is held by or is under the control of a public authority, such information must be furnished to the applicant notwithstanding any prohibition in any other law in force at that time. It is pertinent to state that Section 22 does not obviate legal restrictions that apply to a public authority to the access to any information which is clarified by the use of the phrase “which can be accessed by a public authority under any law for the time being in force” in Section 2(f).

¹⁹ 22. **Act to have overriding effect.** – The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923 (19 of 1923), and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

E *S P Gupta*, candour and class immunity

17. Relevant to the present controversy, is the question whether the decision of this Court in **S P Gupta v Union of India**²⁰ is a binding precedent on the issues raised. Mr Prashant Bhushan, learned counsel appearing on behalf of the respondent contended that the points for determination that arise in the present case have been answered by the seven judge Bench in **S P Gupta** where this Court ordered the disclosure of the correspondence between the Chief Justice of India, the Chief Justice of Delhi and the Law Minister which concerned the non-appointment of an additional judge for a full term of two years. Counsel contended that this Court held that the public interest in disclosure outweighed the potential harm resulting from disclosure and that a free and open democratic society mandated the disclosure of correspondences concerning the appointment process of judges.

18. Opposing the submission, Mr K K Venugopal, learned Attorney General for India appearing on behalf of the appellant, urged that the decision of this Court in **S P Gupta** was based on a factually distinguishable situation. The Court in that case was concerned with the disclosure of the correspondence concerning the appointment process for the purpose of adjudicating the case before it. Moreover the judge whose appointment was in issue was a party to the case. The court did not address the potential harm to public interest by the disclosure of correspondence in all circumstances. The Attorney General contended that the

²⁰ (1982) 2 SCR 365

decision assessed the right to know in a passing observation and contrary to the submission of the respondent, it established a restriction on the disclosure of personal information.

19. In **S P Gupta**, this Court was concerned with two issues: (i) the initial appointment of additional judges and their reappointment on the expiry of their terms; and (ii) the transfer of High Court judges and the Chief Justices of the High Courts. Among the issues involved in the proceedings, one concerned the disclosure of the correspondence exchanged between the Chief Justice of India, the Chief Justice of Delhi and the Law Minister concerning the decision to grant an extension in the tenure to Justice O N Vohra and Justice S N Kumar as additional judges of the Delhi High Court by a period of three months. It was contended that Justice O N Vohra should have been appointed as a permanent judge and that Justice S N Kumar should have been reappointed as an additional judge for the complete tenure of two years upon the expiry of their initial tenure. During the course of the proceedings, their terms expired and a decision was communicated by the Central Government to not renew their terms. An application was filed to contend that the withholding of the re-appointment was mala fide and unconstitutional. Both former judges were impleaded as respondents. While Justice O N Vohra did not appear in the proceedings, Justice S N Kumar appeared through counsel and contended that the decision of the Central Government to not reappoint him for a complete term of two years was vitiated since it was reached without full and effective consultation with the Chief Justice of India.

20. The government resisted the disclosure of the correspondence and urged that as it formed a part of the advice tendered by the Council of Ministers to the President of India, the court was precluded from ordering disclosure by virtue of Article 74(2)²¹ of the Constitution. It was also contended that the correspondence related to the 'affairs of the state' and its disclosure was precluded by virtue of Section 123²² of the Indian Evidence Act 1872.

21. An interim order dated 16 October 1981 ordered the disclosure of the correspondence to the Court. In its final judgment dated 30 December 1981, the Court, by a majority, rejected the contention of the Central Government and upheld the disclosure of the correspondence exchanged between the Chief Justice of India, the Chief Justice of Delhi and the Law Minister concerning the decision to not continue Justice S N Kumar as an additional Judge of the Delhi High Court for another full term.

22. Mr K K Venugopal, learned Attorney General for the Union of India sought to distinguish the decision in **S P Gupta** by contending that the order of disclosure was made in the specific context of Sections 123 and 162²³ of the Indian Evidence Act and in respect of judicial proceedings to which Justice S N Kumar was a party. Hence he urged that the decision does not establish the duty to disclose the correspondence in all circumstances. Justice S N Kumar had

²¹ "The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court."

²² "123. *Evidence as to affairs of State.*—No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit."

²³ "162. *Production of documents.*—A witness summoned to produce a document shall, if it is in his possession or power, bring it to court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the court.

The court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility...."

actively participated in the proceedings before the Court and information regarding his non-appointment was sought during the course of the proceedings to adjudicate upon the contention that there was no effective consultation between the Central Government and the Chief Justice of India. The balancing of interests in that case was between the public harm resulting from disclosure and the public interest in the administration of justice (by securing complete justice for the litigant before the court) which, it is urged, is materially different from the present case.

23. In **S P Gupta**, this Court, by an interim order directed the disclosure of the file notings only in respect of the non-renewal of the term of Justice S N Kumar. Justice O N Vohra had chosen to not appear in or participate in the proceedings before the court. As no relief was sought by the latter before the Court, the Court held that the correspondence pertaining to him was not relevant to the controversy. Consequently, the Union of India was not required to disclose it. Justice PN Bhagwati (as he then was) noted the comparably distinct role of Justice S N Kumar in the proceedings in the following terms:

“58. That takes us to the case of S.N. Kumar which stands on a totally different footing, because S.N. Kumar has appeared in the writ petition, filed an affidavit supporting the writ petition and contested, bitterly and vehemently, the decision of the Central Government not to continue him as an Additional Judge for a further term. Since S.N. Kumar has claimed relief from the Court in regard to his continuance as an Additional Judge, an issue is squarely joined between the petitioners and S.N. Kumar on the one hand and the Union of India on the other which requires to be determined for the purpose of deciding whether relief as claimed in the writ petition can be granted to S.N. Kumar.”

24. In its final judgment, the Court first rejected the contention that the correspondence formed part of the advice tendered to the President by the Council of Ministers. The Court noted that while the advice tendered by the Council of Ministers to the President is information protected under Article 74(2), the principal question was whether the correspondence between the Chief Justice of India, Chief Justice of the Delhi High Court and the Law Minister formed part of the advice tendered by the Council of Ministers to the President so as to preclude its disclosure by virtue of Article 74(2). The Court rejected this contention and held that any advice tendered by the Council of Ministers would be *based* on the views expressed by the two Chief Justices and their views would not form part of the advice tendered. In this view, the material on the basis of which the Council of Ministers formed a view and subsequently tendered the same to the President would not constitute advice protected under Article 74(2).

Justice Bhagwati held:

“61...The advice is given by the Council of Ministers *after* consultation with the Chief Justice of the High Court and the Chief Justice of India. The two Chief Justices are consulted on “full and identical facts” and their views are obtained and it is after considering those views that the Council of Ministers arrives at its decision and tenders its advice to the President. The views expressed by the two Chief Justices precede the formation of the advice and merely because they are referred to in the advice which is ultimately tendered by the Council of Ministers, they do not necessarily become part of the advice. What is protected against disclosure under clause (2) or Article 74 is only the advice tendered by the Council of Ministers...But the material on which the reasoning of the Council of Ministers is based and the advice is given cannot be said to form part of the advice.”

25. The Court then proceeded to the claim against disclosure under Section 123 of the Indian Evidence Act. It held that where protection from disclosure is

sought under Section 123 on the ground that the correspondence relates to the affairs of the state, the court, by virtue of Section 162, is called upon to carry out a balancing task between “the detriment to the public interest on the administrative or executive side which would result from the disclosure of the document against the detriment to the public interest on the judicial side which would result from non-disclosure of the document though relevant to the proceeding”. It held that the court balances the competing aspects of public interest and decides which should prevail in the particular case before it. A claim for non-disclosure, in this view, would be sustainable where the disclosure of the document would be injurious to the public interest to a greater degree than the harm caused to the administration of justice by non-disclosure. Analysing the claim in the context of Section 123, Justice Bhagwati noted:

“73. We have already pointed out that whenever an objection to the disclosure of a document under Section 123 is raised, two questions fall for the determination of the court, namely, whether the document relates to affairs of State and whether its disclosure would, in the particular case before the court, be injurious to public interest. **The court in reaching its decision on these two questions has to balance two competing aspects of public interest, because the document being one relating to affairs of State, its disclosure would cause some injury to the interest of the State or the proper functioning of the public service and on the other hand if it is not disclosed, the nondisclosure would thwart the administration of justice by keeping back from the court a material document...**The court has to decide which aspect of the public interest predominates or in other words, whether the public interest which requires that the document should not be produced, outweighs the public interest that a court of justice in performing its function should not be denied access to relevant evidence.”

(Emphasis supplied)

26. The Court held that the nature of the proceeding in which the disclosure is sought, the relevance of the document and the degree of importance that the document holds in the litigation are relevant factors in the balancing process. If the correspondence alone would furnish evidence relevant to adjudicating the dispute before the court, it would be inappropriate to 'exclude these documents which constitute the only evidence, if at all, for establishing this charge, by saying that the disclosure of these documents would impair the efficient functioning of the judicial institution.' The Court held thus:

"82. ...Apart from these documents, there would be no other documentary evidence available to the petitioner to establish that there was no full and effective consultation or that the decision of the Central Government was based on irrelevant considerations ... It is only through these documents that the petitioner can, if at all, hope to show that there was no full and effective consultation by the Central Government with the Chief Justice of the High Court, the State Government and the Chief Justice of India or that the decision of the Central Government was mala fide or based on irrelevant grounds and therefore, to accord immunity against disclosure to these documents would be tantamount to summarily throwing out the challenge against the discontinuance of the Additional Judge...The harm that would be caused to the public interest in justice by the non-disclosure of these documents would in the circumstances far outweigh the injury which may possibly be caused by their disclosure, because the non-disclosure would almost inevitably result in the dismissal of the writ petition and consequent denial of justice even though the claim of the petitioner may be true and just."

(Emphasis supplied)

The Court held that the potential injury caused by disclosure is outweighed by the public interest in justice as the non-disclosure of documents relevant to decide the controversy would inevitably lead to the dismissal of the writ petition. On a balancing of the above two competing public interests, the Court upheld the

interim order requiring the disclosure of the correspondence concerning the reappointment in respect of Justice S N Kumar.

27. The Court in **S P Gupta** was required to adjudicate claims resisting disclosure of documents in a judicial proceeding based on Sections 123 and 162 of the Indian Evidence Act. The balancing exercise was between the public harm resulting from a disclosure of documents relating to the affairs of the state and the public interest in the administration of justice. The public interest in the administration of justice pertained to the disposal of the case instituted before the court in which the judge was a party. The decision in **S P Gupta** did not lay down a general proposition that the correspondence between constitutional functionaries in regard to the appointment process must be disclosed to a member of the public in all circumstances. The view that the disclosure was ordered in the specific context of a judicial proceeding was also affirmed in the separate opinion of Justice E S Venkataramiah (as he then was):

“1194. It may be necessary to deal with the question of official secrecy in greater detail in a case where the constitutionality of the claim for official secrecy, **independently of the power of the Court to order discovery of official documents in judicial proceedings, arises for consideration. We are concerned in this case with the power of the Court to direct the disclosure of official documents in judicial proceedings.**

1203... we felt that a decision not to direct disclosure of the documents would result in graver public prejudice than the decision to direct such disclosure and that the public interest involved in the administration of justice should prevail over the public interest of the public service in the peculiar circumstances of the case.”

(Emphasis supplied)

28. Though, the decision in **S P Gupta** is not a precedent in support of a proposition for general disclosure in all circumstances, it is, however, relevant to the present dispute for it rejected the contention that: (i) disclosure and candour are incompatible; and (ii) such correspondence is entitled to class immunity.

Candour

29. The Court addressed the contention that the reason for protecting a certain class of documents is that they concern decision making at the highest level of government and only complete freedom from public gaze will enable freedom of expression and candour amongst government functionaries. In this view, public scrutiny was contended to adversely affect the ability of the participants in the decision-making process to express their opinion in a free and frank manner. The Court, however, rejected the contention that candour and frankness justify the grant of complete immunity against disclosures. Justice PN Bhagwati (as he then was) addressed the argument founded on candour in the following terms:

“71...The candour argument has also not prevailed with judges.

The candour argument has also not prevailed with Judges and jurists in the United States and it is interesting to note what Raoul Berger while speaking about the immunity claimed by President Nixon against the demand for disclosure of the Watergate Tapes, says in his book *Executive Privilege*: *A Constitutional Myth* at page 264:

“Candid interchange” is yet another pretext for doubtful secrecy. It will not explain Mr. Nixon's claim of blanket immunity for members of his White House staff on the basis of mere membership without more; it will not justify Kleindienst's assertion of immunity from congressional inquiry for two and one-half million federal employees. **It is merely another testimonial to the greedy expansiveness of power, the costs of**

which patently outweigh its benefits. As the latest branch in a line of illegitimate succession, it illustrates the excess bred by the claim of executive privilege.

We agree with these learned Judges that **the need for candour and frankness cannot justify granting of complete immunity against disclosure of documents of this class, but as pointed out by Gibbs, ACJ in *Sankey v. Whitlam*, it would not be altogether unreal to suppose “that in some matters at least communications between ministers and servants of the Crown may be more frank and candid if those concerned believe that they are protected from disclosure” because not all Crown servants can be expected to be made of “sterner stuff”. The need for candour and frankness must therefore certainly be regarded as a factor to be taken into account in determining whether, on balance, the public interest lies in favour of disclosure or against it** (vide: the observations of Lord Denning in *Neilson v. Lougharrie* (1981) 1 All ER at P. 835.

...

81. It is undoubtedly true that appointment or non-appointment of a High Court Judge or a Supreme Court Judge and transfer of a High Court Judge are extremely important matters affecting the quality and efficiency of the judicial institution and it is therefore absolutely essential that the various constitutional functionaries concerned with these matters should be able to freely and frankly express their views in regard to these matters...We have no doubt **that high level constitutional functionaries like the Chief Justice of a High Court and the Chief Justice of India would not be deterred from performing their constitutional duty of expressing their views boldly and fearlessly even if they were told that the correspondence containing their views might subsequently be disclosed...We have already dealt with the argument based on the need for candour and frankness and we must reject it in its application to the case of holders of high constitutional offices like the Chief Justice of a High Court and the Chief Justice of India. Be it noted — and of this we have no doubt — that our Chief Justices and Judges are made of sterner stuff; they have inherited a long and ancient tradition of independence and impartiality...**

(Emphasis supplied)

The Court held that though candour may be a **factor** in determining what set of communications require protection, the measure of protection depends whether, on a **balance of all competing interests**, public interest favours disclosure or secrecy. While the Court noted that candour may be a relevant factor to prevent disclosure in some circumstances, it expressly rejects its weight as a relevant factor when it comes to constitutional functionaries such as the Chief Justice of India and the Chief Justices of the High Courts. Constitutional functionaries are bound to the oath of their office to discharge their duties in a fair manner in accordance with the principles enshrined in the Constitution. It cannot be countenanced that public gaze or subsequent disclosure will detract an individual from discharging their duty in an effective manner true to the dignity and ethic associated with their office. Candour and frankness cannot be the reason to preclude disclosures of correspondence between constitutional functionaries which concern the appointment process of judges.

Class immunity

30. The second argument rejected in **S P Gupta** and relevant to the present case is the contention that the correspondence between “the Law Minister or other high level functionary of the Central Government, the Chief Justice of the High Court, the Chief Minister or the Law Minister of the State Government and the Chief Justice of India in regard to appointment or non-appointment of a High Court Judge or a Supreme Court Judge or transfer of a High Court Judge and the notings made by these constitutional functionaries in that behalf”, belong to a protected class of documents. It was contended that the disclosure of these

documents would be prejudicial to national interest and the dignity of the judiciary. In this view, the court is not required to assess the effects of the disclosure of correspondence in a particular case, as all correspondence of such nature belongs to a special class which is exempt from disclosure. In this view, disclosure is not precluded because of the specific contents of the documents, but because of its membership of a certain class of documents that require non-disclosure.

31. Justice Bhagwati, with whom five other judges agreed, held that a claim for class immunity is an 'extraordinary claim' which is granted as a 'highly exceptional measure' as such broad claims are contradictory to and destructive of the concept of an open government. He cautioned against blanket immunity and lay emphasis on the commitment to an open and transparent government in the following terms:

"80...It is only under the severest compulsion of the requirement of public interest that the court may extend the immunity to any other class or classes of documents and in the context of our commitment to an open Government with the concomitant right of the citizen to know what is happening in the Government, the court should be reluctant to expand the classes of documents to which immunity may be granted. The court must on the contrary move in the direction of attenuating the protected class or classes of documents, because by and large secrecy is the badge of an authoritarian Government..."

(Emphasis supplied)

The Court adopted a high standard for the conferral of class immunity which would be accorded "only under the severest compulsion of the requirement of public interest". With these observations, the Court rejected the contention that

correspondence between constitutional functionaries constitutes a class of documents exempt from public disclosure:

“81. ...it will be clear that the class of documents consisting of the correspondence exchanged between the Law Minister or other high level functionary of the Central Government, the Chief Justice of the High Court, the State Government and the Chief Justice of India in regard to appointment or non-appointment of a High Court Judge or Supreme Court Judge or the transfer of a High Court Judge and the notes made by these constitutional functionaries in that behalf cannot be regarded as a protected class entitled to immunity against disclosure...Confidentiality is not a head of privilege and the need for confidentiality of high level communications without more cannot sustain a claim for immunity against disclosure...”

Thus, the disclosure of correspondence between constitutional functionaries was held not to fall within a protected category exempt from disclosure. Disclosure is precluded only where it is injurious to public interest. Justice Bhagwati clarified that the principal consideration before the Court when assessing a claim for the non-disclosure of any document is that of public interest:

“80...Every claim for immunity in respect of a document, **whatever be the ground on which the immunity is claimed and whatever be the nature of the document,** must stand scrutiny of the court with reference to one and only one test, namely, **what does public interest require — disclosure or non-disclosure...this exercise has to be performed in the context of the democratic ideal of an open Government.**”

(Emphasis supplied)

32. A claim of immunity from disclosure for any document is subject to the controlling factor of public interest – a determination informed by the commitment to an open and transparent government:

“67...**The concept of an 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 Government must be the rule and secrecy **an exception justified only where the strictest requirement of public interest so demands.**

The approach of the court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest.”

(Emphasis supplied)

Justice Bhagwati expanded on the socio-political background that must inform any approach in a “democratic society wedded to the basic values enshrined in the Constitution”. He drew an interconnection between democracy, transparency and accountability to hold that a basic postulate of accountability, which is fundamental to a democratic government, is that information about the government is accessible to the people. He held that participatory democracy is premised on the availability of information about the functioning of the government. The right to know as a “pillar of a democratic state” imputes positive content to democracy and ensures that democracy does not remain static but becomes a “continuous process”. Thus, a limitation on transparency must be supported by more than a claim to confidentiality – it must demonstrate the public harm arising from disclosure is greater than the public interest in transparency. Justice Bhagwati emphasized transparency in the judicial apparatus in the following terms:

“85...We believe in an open Government and openness in Government does not mean openness merely in the functioning of the executive arm of the State. The same openness must characterise the functioning of the judicial apparatus including judicial appointments and transfers. Today the process of judicial appointments and transfers is shrouded in mystery. The public does not know how Judges are selected and appointed or transferred and whether any and if so what, principles and norms govern this process. The exercise of the power of appointment and transfer remains a sacred ritual whose mystery is confined

only to a handful of high priests, namely, the Chief Justice of the High Court, the Chief Minister of the State, the Law Minister of the Central Government and the Chief Justice of India in case of appointment or non-appointment of a High Court Judge and the Law Minister of the Central Government and the Chief Justice of India in case of appointment of a Supreme Court Judge or transfer of a High Court Judge. The mystique of this process is kept secret and confidential between just a few individuals, not more than two or four as the case may be, and the possibility cannot therefore be ruled out that howsoever highly placed may be these individuals, the process may on occasions result in making of wrong appointments and transfers and may also at times, though fortunately very rare, lend itself to nepotism, political as well as personal and even trade-off. **We do not see any reason why this process of appointment and transfer of Judges should be regarded as so sacrosanct that no one should be able to pry into it and it should not be protected against disclosure at all events and in all circumstances.**"

(Emphasis supplied)

The Court extended its observations on the indispensable nature of openness and transparency to the judiciary and held that there is no basis to conclude that information concerning appointments must be protected against disclosure "at all events and in all circumstances." The circumstances which justify disclosure on one hand and non-disclosure on the other calls into consideration a variety of factors which shall be adverted to in the course of the judgment. At this juncture, it is sufficient to note the observations of this Court that transparency in the functioning of the government serves a cleansing purpose:

"66....Now, if secrecy were to be observed in the functioning of Government and the processes 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 Government and it would help 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 is clean Government and a powerful safeguard against political and administrative aberration and inefficiency.”

33. The approach adopted by Justice Bhagwati in **S P Gupta**, with which we are in agreement provides a bright line standard for the Court on the approach that must be adopted when answering questions of disclosure in regards to the appointment process. The principal consideration will always be that of public interest. Any balancing must be carried out in the context of our commitment to the transparency and accountability of our institutions. The specific content of public interest and its role in the balancing process will be explored in the course of the judgment.

It was contended by the respondents that the decision of this Court in **S P Gupta** did not deal with the trade-off between disclosure and judicial independence. It is necessary to turn to this issue.

F Judicial independence

34. Mr K K Venugopal, learned Attorney General for India appearing on behalf of the appellant, contended that the disclosure of file notings between constitutional functionaries which concern the appointment process will erode the independence of the judiciary, which is part of the basic structure of the Constitution. It was further contended that disclosures will result in damage to the institution and adversely impact the independence of the judiciary. It is necessary to briefly analyse the contours of this concept in assessing the contention urged.

35. At the outset, it must be noted that while the term ‘independence of the judiciary’ is not new, its meaning is still imprecise.²⁴ There may be a debate over various facets of judicial independence: for instance, from whom and to do what is independence engrafted. Broadly speaking, judicial independence entails the ability of judges to adjudicate and decide cases without the fear of retribution. Judicial independence and the ability of judges to apply the law freely is crucial to the rule of law.

In his seminal work “**Cornerstone of a Nation**”, Granville Austin states:

“The [Constituent] Assembly went to great lengths to ensure that the courts would be independent, devoting more hours of debate to this subject than to almost any other aspect.”²⁵

However, it was the independence of the judiciary, and not its absolute insulation that appeared to be the prevailing view of members of the Constituent Assembly.²⁶ This, they believed was necessary for the preservation of inter-institutional equilibrium. The starting point of the independence of the judiciary is constitutional design through the provisions of the Constitution.

36. Article 124(2) guarantees a security of tenure for judges. Article 124(4) stipulates that a Judge of the Supreme Court shall not be removed from their office except on the ground of proved misbehaviour or incapacity. The proviso to clause (2) of Article 125 guarantees that a judges’ privileges, allowances and rights in respect of leave of absence or pension shall not be varied to their

²⁴ MP Jain, Securing the Independence of the Judiciary – The Indian Experience, Indian International and Comparative Law Review, p. 246

²⁵ Granville Austin, Cornerstone of a Nation (1999), p. 164

²⁶ Arghya Sengupta, Independence and Accountability of the Indian Higher Judiciary (2019), p. 17

disadvantage after their appointment. Article 129 empowers the Supreme Court to punish for the contempt of itself. Article 145 empowers the Supreme Court to make rules for regulating generally the practice and procedure of the Court. Clauses (1) and (2) of Article 146 stipulate that the Chief Justice of India or such other Judge or officer of the Court, as may direct, shall be responsible for the appointments and prescription of rules governing the conditions of service of the officers and servants of the Supreme Court. Clauses (1) and (2) of Article 229 assign responsibility to the Chief Justice of a High Court or such other judge or officer of the court, as they may direct, in respect of matters of appointment and prescription of rules governing the conditions of service of the officers and servants of a High Court.

37. Article 215 empowers the High Court to punish for contempt of itself. Article 217 provides security of tenure. The proviso to clause (2) of Article 221 stipulates that the allowances of a Judge of a High Court as well as the rights in respect of leave of absence or pension shall not be varied to their disadvantage after their appointment. Article 227(2) stipulates that each High Court may, by virtue of its power of superintendence under Article 227(1): (i) call for returns from certain courts and tribunals, (ii) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and (iii) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts.

38. These provisions reflect constitutional safeguards to ensure the independence of the judiciary and guarantee to it the freedom to function

independent of the will of the legislature and executive. Supriya Routh discusses these provisions in the following words:

“[T]he Constitution provides for adequate safeguards in furtherance of the independence of the judiciary in a democratic republic. It separates the judiciary from the executive and prohibits the Parliament and the state legislatures from questioning the conduct of judges of the higher judiciary in furtherance of their judicial duties...It also provides for an arduous and elaborate process for the impeachment of judges...”²⁷

The constitutional safeguards for judicial independence were noticed by this Court in **L Chandra Kumar v Union of India**²⁸. Chief Justice AM Ahmadi, speaking for a seven judge Bench of this Court held:

“78...While the Constitution confers the power to strike down laws upon the High Courts and the Supreme Court, it also contains elaborate provisions dealing with the tenure, salaries, allowances, retirement age of Judges as well as the mechanism for selecting Judges to the superior courts. The inclusion of such elaborate provisions appears to have been occasioned by the belief that, armed with such provisions, the superior courts would be insulated from any executive or legislative attempts to interfere with the making of their decisions.”

Justice Ruma Pal discussed the position in the following words:

“To ensure freedom from Executive and Legislative control, the pay and pension due to judges in the superior courts are charged on the Consolidated Funds of the States in the case of High Court judges and the Consolidated Fund of India in the case of Supreme Court judges and are not subject to the vote of the Legislative Assembly in the case of the former or Parliament in the latter case. Salaries are specified in the Second Schedule to the Constitution and cannot be varied without an amendment of the Constitution.”²⁹

²⁷ Supriya Routh, Independence Sans Accountability: A Case for Right to Information against the Indian Judiciary, 13 Washington University Global Studies Law Review 321 (2014)

²⁸ (1997) 3 SCC 261

²⁹ “*An Independent Judiciary*” – speech delivered by Ms. Justice Ruma Pal at the 5th V.M. Tarkunde Memorial Lecture, November 10, 2011.

39. The above provisions are indicative of the intention of the founders of the Constitution to create a strong foundation to secure the independence of the judiciary. This also marked a strong departure from the 'pleasure doctrine' under the pre-constitutional colonial framework. Under the Government of India Act, 1935 the judges of the High Court held office during the pleasure of the Crown. Through Article 217(1) of the Constitution of India, tenure at the pleasure of the Crown was substituted with a fixed tenure subject to limited exceptions. Justice Srikrishna (speaking in non-judicial capacity) elucidates upon the importance of this tradition in the following words:

“A judge of the High Court or Supreme Court is thus not removable from office except for proved misbehaviour or incapacity during his tenure of office. The very obviolation of the pleasure doctrine as controlling the tenure of office of a judge of the High Court or the Supreme Court is explicit of the intention of the founding fathers to insulate the judges of the superior courts from the pleasure of the executive. The several Articles embedded in the Constitution ensure that a judge is fully independent and capable of rendering justice not only between citizens and citizens but also between citizens and the State, without let, hindrance, or interference by anyone in the State polity. This kind of insulation or immunity from the pleasure of the executive is essential in view of the fact that the Constitution has guaranteed several fundamental rights to the citizens and persons and also empowered the High Courts and Supreme Court under Article 226 and 32 to render justice against acts of the State.”³⁰

It becomes evident that judicial independence is secured through security over judicial tenure. The edifice of judicial independence is built on the constitutional safeguards to guard against interference by the legislature and the executive. Judicial independence is not secured by the secrecy of cloistered halls. It cannot be said that increasing transparency would threaten judicial independence.

³⁰ Justice BN Srikrishna, *Judicial Independence*, *The Oxford Handbook of the Indian Constitution* (2016) at p. 350.

40. The need for transparency and accountability has been emphasised in decisions of this Court. In **Supreme Court Advocates-on-Record Association v Union of India**³¹ ('NJAC'), a Constitution Bench of this Court struck down the 99th Constitutional Amendment Act setting up the National Judicial Appointments Commission as *ultra vires* the Constitution by a four-to-one majority. Significantly, Justice Kurian Joseph, in his separate concurring opinion and Justice Chelameswar, in his dissenting opinion, pointed to the lack of transparency and accountability in the manner of making appointments to the judiciary. Justice Kurian Joseph observed:

"990. All told, all was and is not well. To that extent, I agree with Chelameswar, J. that the present Collegium system lacks transparency, accountability and objectivity. The trust deficit has affected the credibility of the Collegium system, as sometimes observed by the civic society. Quite often, very serious allegations and many a time not unfounded too, have been raised that its approach has been highly subjective. Deserving persons have been ignored wholly for subjective reasons, social and other national realities were overlooked, certain appointments were purposely delayed so as either to benefit vested choices or to deny such benefits to the less patronised, selection of patronised or favoured persons were made in blatant violation of the guidelines resulting in unmerited, if not, bad appointments, the dictatorial attitude of the Collegium seriously affecting the self-respect and dignity, if not, independence of Judges, the court, particularly the Supreme Court, often being styled as the Court of the Collegium, the looking forward syndrome affecting impartial assessment, etc., have been some of the other allegations in the air for quite some time. These allegations certainly call for a deep introspection as to whether the institutional trusteeship has kept up the expectations of the framers of the Constitution... To me, it is a curable situation yet."

The need for greater transparency and accountability in the appointment procedure or the lack of the same, has also been highlighted by other eminent

³¹ (2016) 5 SCC 1

retired judges such as Justice JS Verma and Justice Ruma Pal. In an article quoted in Justice Lokur's separate concurring opinion in the **NJAC** decision, Justice Verma while speaking about the collegium system observed:

"546...Have any system you like, its worth and efficacy will depend on the worth of the people who work it! It is, therefore, the working of the system that must be monitored to ensure transparency and accountability."

Furthermore, Justice Chelameswar, in his dissenting opinion, references a speech made by Justice Ruma Pal,³² where she stated thus:

"... [T]he process by which a judge is appointed to a superior court is one of the best kept secrets in this country. The very secrecy of the process leads to an inadequate input of information as to the abilities and suitability of a possible candidate for appointment as a judge. A chance remark, a rumour or even third-hand information may be sufficient to damn a judge's prospects. Contrariwise a personal friendship or unspoken obligation may colour a recommendation. Consensus within the collegium is sometimes resolved through a trade-off resulting in dubious appointments with disastrous consequences for the litigants and the credibility of the judicial system. Besides, institutional independence has also been compromised by growing sycophancy and 'lobbying' within the system."

41. The collegium system has come under immense criticism for its lack of transparency. As early as in **S P Gupta**, this Court acknowledged that disclosure would lead to *bona fide* consideration and deliberation and proper application of mind on the part of the judges.³³ Even in **NJAC**, the need for transparency and accountability has not been denied in any of the separate opinions. The 99th Constitutional Amendment was struck down on the ground that it would adversely affect the independence of the judiciary by giving the executive a

³² "An Independent Judiciary" – speech delivered by Ms. Justice Ruma Pal at the 5th V.M. Tarkunde Memorial Lecture, November 10, 2011.

³³ S.P. Gupta v. Union of India, 1981 Supp SCC 87, 85 (per Bhagwati J.)

definitive say in the appointment of judges. The dilution of the judiciary's autonomy in the context of making judicial appointments was deemed to be unconstitutional. However, the need to reduce the opacity and usher in a regime of transparency in judicial appointments has not been denied and has in fact been specifically acknowledged by some of the learned Judges.

42. Scholars caution that while judicial independence is important, one should not lose sight of the larger goals and purposes which judicial independence is intended to serve. Charles Gardner Geyh considers such ends to include upholding of the rule of law, preserving the separation of governmental powers, and promotion of due process, amongst many others. Therefore, he believes that if judges are free to disregard such ends in their decision making, judicial independence serves no purpose. He notes thus:

“Most thoughtful scholars recognize that judicial independence is an instrumental value—a means to achieve other ends. As an instrumental value, judicial independence has limits, defined by the purposes it serves...[Hence,] judges who are so independent that they can disregard the law altogether without fear of reprisal likewise undermine the rule of law values that judicial independence is supposed to further. Judicial accountability is yin to the judicial independence yang.”³⁴

Burt Neuborne in his incisive article on the Supreme Court of India observes: “We care about constitutional courts not for the aesthetic value of their structures, but because where certain prerequisites are assembled, constitutional courts are capable of preserving the values of open, democratic governance.”³⁵

³⁴ Charles Gardner Geyh, ‘Rescuing Judicial Accountability from the Realm of Political Rhetoric’, 56 Case Western Reserve Law Review 911 (2006)

³⁵ *International Journal of Constitutional Law*, Volume 1, Issue 3, July 2003, Pages 476–510

43. Lorne Sossin argues that transparency is necessary to ensure the public perception of the judiciary as independent. In the context of judicial appointments, he believes that appointments may happen on a proper, well-justified, substantive understanding of judicial ‘merit’. However, in order for the same to be truly independent, they must include within themselves the transparency of the criteria and openness of the process. He notes that:

“What matters most in a democracy, I would suggest, is not the precise criteria for merit but the transparency of the criteria, and the authenticity of the reasons for choosing one individual over another. Merit, in other words, is as much about process as substance.”³⁶

He then goes on to address how the transparency of criteria and the process is a logical extension of the judicial appointment being ‘meritorious’, and that doing so would remove the ‘arbitrariness’ of the process, leading to upholding of rule of law:

“We often frame our concern with the rule of law as one designed to prevent “arbitrary” decisions. Arbitrary decisions are not, however, decisions taken for no reason. **They are, rather, decisions taken for undisclosed reason.** In a democracy, some reasons for judicial selection will and should be seen as more legitimate than others. Increasingly, however, **it is the demand for justification itself that is coming to define our democratic aspirations.** This demand, in my view, not only arises as a logical extension to the requirement of merit, but is also justified as a necessary condition of judicial independence.”

(Emphasis supplied)

44. The fault that was identified with the purported framework under Article 124A of the Constitution of India for ensuring transparency was the lack of

³⁶ Lorne Sossin, ‘Judicial Appointment, Democratic Aspirations, and the Culture of Accountability’, 58 University of New Brunswick Law Journal 11 (2008)

adequate safeguards for protecting the right to privacy of the appointees.³⁷ This was in the context of the deliberations of the **NJAC** falling within the purview of the RTI Act. Justice Madan B Lokur in his separate concurring opinion noted that the right to know was circumscribed by the right to privacy of individuals.³⁸

“555. The balance between transparency and confidentiality is very delicate and if some sensitive information about a particular person is made public, it can have a far-reaching impact on his/her reputation and dignity. The 99th Constitution Amendment Act and the NJAC Act have not taken note of the privacy concerns of an individual. This is important because it was submitted by the learned Attorney General that the proceedings of NJAC will be completely transparent and any one can have access to information that is available with NJAC. This is a rather sweeping generalisation which obviously does not take into account the privacy of a person who has been recommended for appointment, particularly as a Judge of the High Court or in the first instance as a Judge of the Supreme Court. The right to know is not a fundamental right but at best it is an implicit fundamental right and it is hedged in with the implicit fundamental right to privacy that all people enjoy. The balance between the two implied fundamental rights is difficult to maintain, but the 99th Constitution Amendment Act and the NJAC Act do not even attempt to consider, let alone achieve that balance.”

None of these failings of the specific framework envisaged by the 99th Constitutional Amendment Act however can be interpreted as a denial of the importance of disclosure, transparency and accountability in the context of judicial appointments or of its constitutionality. They only point to the need for a **balance** between the right to know and the right to privacy, the specific contours of which will be explored shortly.

³⁷ NJAC., 953

³⁸ Id

45. Judicial independence cannot be used as a byword for avoiding the accountability and criticism that accompanies transparency:

“[T]hrough judicial activism, the Supreme Court of India has completely insulated the judiciary from any democratic deliberation, thereby sacrificing accountability and transparency in the functioning of the judges...Accountability and transparency are not only necessary for upholding the democratic underpinnings of the Constitution, but are also necessary for the independence of the judiciary itself, because if public trust and confidence in the judiciary cannot be maintained, the judiciary is destined to lose its independence.”³⁹

The judiciary is an important organ of the Indian state, and it has a vital role in the proper functioning of the state as a democracy based on the rule of law. The integrity, independence, and impartiality of the judiciary are preconditions for fair and effective access to justice and for the protection of rights. The judiciary has a vital role to play as a bulwark of the integrity infrastructure in the country.

Failure to bring about accountability reforms would erode trust in the courts' impartiality, harming core judicial functions. Further, it also harms the broader accountability function that the judiciary is entrusted with in democratic systems including upholding citizens' rights and sanctioning representatives of other branches when they act in contravention of the law. Transparency and the right to information are crucially linked to the rule of law itself.

F.1 Judicial accountability

46. Questions of judicial accountability raise three interconnected questions:

³⁹ Supriya Routh, *Independence Sans Accountability: A Case for Right to Information against the Indian Judiciary*, 13 *Washington University Global Studies Law Review* 321 (2014)

- (i) What is the source of accountability?;
- (ii) To whom is the accountability owed?; and
- (iii) What does accountability entail?

Judicial independence and judicial accountability are often seen as conflicting values. It is believed that judicial independence, which mandates that adjudication take place free from interference by the legislature and the executive, is compromised by the questions of responsibility which judicial accountability entails. In this view, accountability compromises the ability of judges to decide free from external pressure and is undesirable. There is a fallacy about the postulate that independence and accountability are conflicting values.

47. Judicial independence is defined by the existence of conditions which enable a judge to decide objectively, without succumbing to pressures and influences which detract from the course of justice. To be independent a judge must have the ability to decide 'without fear or favour, affection or ill will'. The Constitution creates conditions to secure the independence of judges by setting out provisions to govern appointments, tenure and conditions of service. These are provisions through which the conditions necessary to secure judicial independence are engrafted as mandatory institutional requirements. These are intrinsic elements of our constitutional design. But constitutional design must be realised through the actual working of its functionaries. Mechanisms which facilitate independence are hence a crucial link in ensuring that constitutional design translates into the realisation of judicial independence. Facilitative mechanisms include those which promote transparency. For true judicial

independence is not a shield to protect wrong doing but an instrument to secure the fulfilment of those constitutional values which an independent judiciary is tasked to achieve. Judicial independence is hence not a *carte blanche* to arbitrary behaviour. Where the provisions of the Constitution secure a standard of judicial independence for free and impartial adjudication, the independence guaranteed by the Constitution must be employed in a manner that furthers the objective for which it was secured. In the quest for a balance between the freedom guaranteed and the responsibility that attaches to the freedom, judicial independence and judicial accountability converge.

48. Accountability, defined narrowly, is “a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences”⁴⁰. The narrow conception of accountability however suffers from a straight-jacket view devoid of general guiding principles. Professor Stephen Burbank stipulates:

“...the concept of accountability, defined inclusively ...includes a broader complex of values which public organisations must adopt based in the fundamental values of democratic regimes. Accountability is conceived in such a way as to enable the democratic process of establishing respect for those values, whether of efficiency or independence, efficacy in achieving objectives, or impartiality in the treatment of citizens.”⁴¹

In this view, accountability is the search for normative values informed by democratic values that guide the exercise of power and freedom granted by the

⁴⁰ M Bovens, *Analysing and Assessing Accountability: A Conceptual Framework*, *European Law Journal* (2007), p. 450.

⁴¹ Contini, F and Mohr, R, *Reconciling independence and accountability in judicial systems*, *Utrecht Law Review* (2007), p. 31

Constitution. The judiciary, like other institutions envisaged by the Constitution, is essentially a human institution. The independence of the judiciary was not envisaged to mean its insulation from the checks and balances that are inherent in the exercise of constitution power. The independence of the judiciary, is a constitutional guarantee of freedom. Notions of accountability however, concern the manner and ends for which the freedom guaranteed is employed. Where judicial independence focuses on freedom, judicial accountability is concerned with the manner in which that freedom is exercised by the adjudicator.

49. Article 124(6) and Article 219 of the Constitution of India prescribe that every person who is appointed to be a judge of the Supreme Court or the High Court respectively, shall, prior to entering office, make and subscribe to an Oath or affirmation set out in the Third Schedule of the Constitution. The Oath for the office reads:

“I, (name), having been appointed Chief Justice (or a Judge) of the Supreme Court of India, do swear in the name of God (or affirm) that I will bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India, that I will **duly and faithfully** and to the best of my ability, knowledge and judgment perform the duties of my office **without fear or favour, affection or ill-will** and that **I will uphold the Constitution** and the laws.”

(Emphasis supplied)

Prior to the advent of the Constitution, the oath or affirmation for a person appointed to the Federal Court was prescribed in Schedule IV to the Government of India Act, 1935. Significantly, the words “without fear or favour, affection or ill-will”, contained in the present Constitution in Form VIII did not find place in the

oath prescribed⁴² in Schedule IV to the Government of India Act, 1935. Added to the present Constitution, these are words with significance. The framers of the Constitution were alive to the need for the exercise of judicial power in accordance with the ethics of judicial office. The express inclusion of these words indicates that persons entering judicial office bind themselves to the principles inherent in the effective discharge of the judicial function, in conformity with the rule of law and the values of the Constitution.

50. The oath of office postulates that the judge shall discharge the duties of the office without fear or favour, affection or ill-will. Any action that abridges the discharge of judicial duty in conformity with the principles enunciated in the oath negates the fundamental precept underlying the conferment of judicial power. Commenting on the significance of the inclusion of the term in its application to judges of the High Courts in **Union of India v Sankalchand Himatlal**⁴³, Justice PN Bhagwati (as he then was) held:

“These words, of course, do not add anything to the nature of the judicial function to be discharged by the High Court Judge because, even without them, the High Court Judge would, by the very nature of the judicial function, have to perform the duties of his office without fear or favour, **but they serve to highlight two basic characteristics of the judicial function, namely, independence and impartiality...**”

(Emphasis supplied)

As constitutional functionaries tasked with adjudication, judges of the High Courts and Supreme Court are bound to discharge their duties in a fair and impartial

⁴² “I, A.B., having been appointed Chief Justice [or a judge] of the Court do solemnly swear [or affirm] that saving the faith and allegiance which I owe to C.D., his heirs and successors, I will be faithful and bear true allegiance in my judicial capacity to His Majesty the King, Emperor of India, His heirs and successors, and that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment.”

⁴³ (1977) 4 SCC 193

manner in accordance with law and the principles enshrined in the Constitution. But this indeed is only a restatement of a principle which attaches to all judicial office. The principles embodied in the oath furnish a non-derogable obligation upon the person affirming it to abide by its mandate.

51. On 21 November 1993, the then Chief Justice of India constituted a Committee to draft and circulate a statement on the values that must be reflected in judicial life. In December 1999, the Conference of Chief Justices of all High Courts resolved and adopted the Restatement of Values of Judicial Life. The statement serves as a guiding light of the values that must be followed in conformity with the dignity and ethic required of judicial life. The statement, apart from mentioning 16 values of judicial life concludes that the values enumerated are not exhaustive but illustrative of what is expected of a judge. The Bangalore Principles of Judicial Conduct 2002 which were adopted at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague in 2002 defined six main values as an inherent element of the judicial system: independence, impartiality, integrity, propriety, equality and competence, and diligence.

52. Judicial accountability also stems from the principle that the entrustment and exercise of power in a constitutional democracy is not unfettered. The Constitution confers upon judges with the power to dispense justice, which is a foundational value in the Preamble to the Constitution. Judicial power, conferred in public interest as a necessary element in the administration of justice cannot be used to achieve extraneous ends. The private interests of an individual have

no nexus to the discharge of the official duties of a judge. Professor TRS Allen stipulates:

“Powers may be conferred on public officials and agencies for the attainment of appropriate ends, consistent with a plausible account of the public good; but such powers must not be abused for extraneous ends, serving only private interests, nor wielded in a manner that undermines the ideal of freedom as independence. No one should be at the mercy of unfettered official discretion; and the enforcement of legal constraints on such discretion is a necessary part of the idea of government according to law.”⁴⁴

The rule of law commands compliance with the law, without exception. It requires the protection of individuals against the unfettered discretion by officials on one hand and the protection of individuals from depredations by other private individuals.

53. Adjudicators in robes are human and may be pre-disposed to the failings that are inherently human. But the law demands that they must aspire to a standard of behaviour that does not condone those failings of a human persona in the discharge of judicial duties. Recognition of the fallibility of individuals who work constitutional institutions and of the need for safeguards to prevent the abuse of power found articulation in the Constitutional Assembly Debates. Dr B R Ambedkar, K T Shah, H V Kamath, S Nagappa, Hussain Imam, Pandit Lakshmi Kanta Maitra, Alladi Krishnaswami Ayyar, B Pocker Sahib Bahadur, Z H Lari, A K Ghosh, and R K Sidhva all emphasized the possibility of human error in the inherently human institutions that the Constitution envisaged. This idea was given its clearest articulation in by Dr B R Ambedkar when he reminded us that:

⁴⁴ TRS Allen, *Accountability to Law*, in *Accountability in the Contemporary Constitution* (Nicholas Bamforth and Peter Leyland eds.) (2013), Oxford Scholarship Online, p. 84

“however good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot.’

54. To equate the actions of an individual which have no nexus with the discharge of official duties as a judge with the institution may have dangerous portents. The shield of the institution cannot be entitled to protect those actions from scrutiny. The institution cannot be called upon to insulate and protect a judge from actions which have no bearing on the discharge of official duty. It is for this reason that judicial accountability is an inherent component of the justice delivery system. Accountability is expected to animate the day to day functioning of the courts. Judges are required to issue reasoned orders after affording an opportunity to both sides of a dispute to present their case. Judicial ethic requires that a judge ought to recuse herself from hearing a case where there is a potential conflict of interest. These illustration norms serve to further the democratic ideal that no constitutional functionary is above the rule of law.

55. In the view explored above, judicial accountability traces itself from both the oath of office and the nature of the judicial power itself. In a broader sense however, there is a significant public interest in ensuring the smooth and efficient functioning of the justice delivery system, consistent with the requirements of justice in individual cases. The legitimacy of the institution which depends on public trust is a function of an assurance that the judiciary and the people that work it are free from bias and partiality. Mark Tushnet explores the idea of judicial accountability in the following terms:

“Under prevailing understandings in liberal democracies, law is a human artefact, so accountability ‘to law’ must involve

accountability to someone. Roughly, 'political accountability' refers to accountability to contemporaneous power-holders as representatives of today's people, whereas **'accountability to law' refers to accountability to the people and their representatives in the more distant past. Accountability to law is a form of indirect accountability to the people in the past, taking its route through their enactments of law.**⁴⁵

(Emphasis supplied)

In this view, accountability is not confined to elected posts. The creation of the legal system founded on constitutional precept marked a break from its colonial past. An independent judiciary is the guardian and final arbiter of the text and spirit of the Constitution. To ensure this, the Constitution envisages a system of checks and balances. Article 124(4)⁴⁶ of the Constitution stipulates that a judge of the Supreme Court may be removed by an order of the President on the ground of proven misbehavior or incapacity. Article 218⁴⁷ of the Constitution makes the substantive provisions in Article 124(4) and Article 124(5) applicable to judges of the High Courts. The Judges (Enquiry) Act 1986 was enacted in furtherance of Article 124(5) which empowered the Parliament to regulate the presentation of an address and investigation of judges. A notice of motion to present an address to the President of India for the removal of judge is given in the Lok Sabha on receiving the signatures of not less than one hundred members or in the Rajya Sabha on receiving the signature of not less than fifty members. The Speaker of the Lok Sabha or the Chairman of the Rajya Sabha constitutes a Committee as

⁴⁵ Mark Tushnet, *Judicial Accountability in Comparative Perspective*, in *Accountability in the Contemporary Constitution* (Nicholas Bamforth and Peter Leyland eds.) (2013), Oxford Scholarship Online at Tushnet, p. 69

⁴⁶ 124(4) - A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after as address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.

⁴⁷ 218 – The provisions of clauses (4) and (5) of article 124 shall apply in relation to a High Court as they apply in relation to the Supreme Court with the substitution of references to the High Court for references to the Supreme Court.

stipulated in the Act to enquire into the alleged misbehavior of incapacity. If the report of the Committee finds that a judge is guilty of misbehavior or suffers from any incapacity, each house of the Parliament votes on the motion in accordance with Article 124(4) of the Constitution. The Lok Sabha and the Rajya Sabha must both pass a motion to impeach the judge with a majority of not less than two-thirds of the members of the house present and voting. The stringent procedure adopted by the Parliament for the impeachment of a judge draws a balance between ensuring the independence of judges from political will and ensuring the accountability of judges for their actions.

56. Judicial independence does not mean the insulation of judges from the rule of law. In a constitutional democracy committed to the rule of law and to the equality of its citizens, it cannot be countenanced that judges are above the law. The notion of a responsible judiciary furthers the ideal for which an independent judiciary was envisaged. It is the exercise of the decision making authority guaranteed by judicial independence in a just and responsible manner, true to the ethos of judicial office that sub-serves the founding vision of the judiciary. Professor Stephen Burbank has characterized judicial independence and accountability as "different sides of the same coin".⁴⁸ Professor Charles Gardner has stated that:

"Judicial accountability is yin to the judicial independence yang. Although some trumpet judicial accountability as if it were an end in itself, accountability-like independence-is better characterized as an instrumental value that promotes three discrete ends: the rule of law, public confidence in the courts, and institutional responsibility."⁴⁹

⁴⁸ Stephen Burbank, *The Past and Present of Judicial Independence*, California Law Review (1999).

⁴⁹ Charles Gardner, *Rescuing Judicial Accountability from the Realm of Political Rhetoric* (2006), p .916

Hence, independence and accountability are mutually reinforcing concepts. The specific form of accountability which this Court has been called to address is in regard to the appointment process and disclosure of assets owned by judges. This form of accountability involves competing interests between the need for transparency and accountability and the privacy interests of judges. The nature and balancing of the competing interests involved in such a determination shall be explored in the course of the judgment.

57. The executive in a cabinet form of government is accountable to the legislature. Ministers of the government are elected members of the legislature. Collectively, the government is accountable to the legislature as an institution and through the legislature to the people. Unlike the elected representatives of the people, judges of the district and higher judiciary are not elected. The accountability which the political process exacts from members of the legislature is hence distinct from the accountability of judges who are accountable to the trust which is vested in them as independent decision makers. Making them accountable in the discharge of that trust does not dilute their independence. The independence of judges is designed to protect them from the pressures of the executive and the legislature and of the organised interests in society which may detract judges from discharging the trust as dispassionate adjudicators. Scrutiny and transparency, properly understood are not placed in an antithesis to independence. They create conditions where judges are protected against unwholesome influences. Scrutiny and transparency are allies of the conscientious because they are powerful instruments to guard against influences which threaten to suborn the judicial conscience. To use judicial independence

as a plea to refuse accountability is fallacious. Independence is secured by accountability. Transparency and scrutiny are instruments to secure accountability.

G Fiduciary relationship

58. The appellant argued that the information about the assets of judges is exempt from disclosure, by virtue of Section 8(1)(e) of the RTI Act which casts a fiduciary duty on the Chief Justice of India to hold the asset declarations in confidence. It is argued by the respondent that judges, while declaring their assets, do so in their official capacity in accordance with the 1997 resolution and not as private individuals. It is urged that the process of information gathering about the assets of the judges by the Chief Justice of India, is in his official capacity and therefore, no fiduciary relationship exists between them.

59. In order to determine whether the Chief Justice of India holds information with respect to asset declarations of judges of the Supreme Court in a fiduciary capacity, it is necessary to assess the nature of the relationship and the power dynamics between the parties. Justice Frankfurter of the United States Supreme Court in **SEC v Chenery Corp**⁵⁰, while determining the question whether officers and directors who manage a holding company in the process of reorganisation occupy positions of trust, stated:

“ But to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect

⁵⁰ SEC v. Chenery Corp., 318 U.S. 80, 85–86 (1942)

has he failed to discharge these obligations? And what are the consequences of his deviation from duty?”⁵¹

60. **Black’s Law Dictionary**⁵², defines “fiduciary relationship” thus:

“A relationship in which one person is under a duty to act for the benefit of the other on matters within the scope of the relationship. Fiduciary relationships – such as trustee-beneficiary, guardian-ward, principal-agent, and attorney-client – require an unusually high degree of care. Fiduciary relationships usually arise in one of four situations : (1) when one person places trust in the faithful integrity of another, **who as a result gains superiority or influence over the first**, (2) **when one person assumes control and responsibility over another**, (3) **when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship**, or (4) when there is a specific relationship that has traditionally been recognized as involving fiduciary duties, **as with a lawyer and a client or a stockbroker and a customer.**”

(Emphasis supplied)

In **Words and Phrases**⁵³ the term “fiduciary” is defined:

“Generally, the term ‘fiduciary’ applies to any person who occupies a position of peculiar confidence towards another... It refers to integrity and fidelity... It contemplates fair dealing and good faith, rather than legal obligation, as the basis of the transaction... The term includes those informal relations which exist **whenever one party trusts and relies upon another, as well as technical fiduciary relations.**”

(Emphasis supplied)

In **Corpus Juris Secundum**⁵⁴ “fiduciary” is defined thus:

“A general definition of the word which is sufficiently comprehensive to embrace all cases cannot well be given. The term is derived from the civil, or Roman law. It connotes the idea of trust or confidence, contemplates good faith, rather than legal obligation, as the basis of the transaction,

⁵² Black’s Law Dictionary, Tenth Edition, p. 744

⁵³ Words and Phrases, Volume 16-A, St. Paul: West Pub. Co, 1940

⁵⁴ Corpus Juris Secundum: A Complete Restatement of the Entire American Law As Developed by All Reported Cases, Volume 36-A, p. 38

refers to the integrity, the fidelity, of the party trusted, rather than his credit or ability, and has been held to apply to all persons who occupy a position of peculiar confidence toward others, and to include those informal relations which exist whenever one party trusts and relies on another, as well as technical fiduciary relations.

The word 'fiduciary', as a noun, means one who holds a thing in trust for another, a trustee, a person holding the character of a trustee, or a character analogous to that of a trustee, with respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires; a person having the duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking. Also more specifically, in a statute, a guardian, trustee, executor, administrator, receiver, conservator or any person acting in any fiduciary capacity for any person, trust or estate. Some examples of what, in particular connections, the term has been held to include and not to include are set out in the note."

61. In **CBSE v Aditya Bandopadhyay**⁵⁵, a two judge Bench of this Court while discussing the nature of fiduciary relationships relied upon several decisions and explained the terms "fiduciary" and "fiduciary relationship" thus:

"39. The term "fiduciary" refers to a person having a duty to act for the benefit of another, showing good faith and candour, where such other person reposes trust and special confidence in the person owing or discharging the duty. **The term "fiduciary relationship" is used to describe a situation or transaction where one person (beneficiary) places complete confidence in another person (fiduciary) in regard to his affairs, business or transaction(s).** The term also refers to a person who holds a thing in trust for another (beneficiary). The fiduciary is expected to act in confidence and for the benefit and advantage of the beneficiary, and use good faith and fairness in dealing with the beneficiary or the things belonging to the beneficiary. If the beneficiary has entrusted anything to the fiduciary, to hold the thing in trust or to execute certain acts in regard to or with reference to the entrusted thing, the fiduciary has to act in confidence and is expected not to disclose the thing or information to any third party."

(Emphasis supplied)

⁵⁵ (2011) 8 SCC 497

62. In **RBI v Jayantilal N Mistry**⁵⁶, a two judge Bench of this Court reiterated the observations made in **CBSE v Aditya Bandopadhyay** and held that RBI did not place itself in a fiduciary relationship with other financial institutions by virtue of collecting their reports of inspections, statements of the banks and information related to the business. It was held that the information collected by the RBI was required under law and not under the pretext of confidence or trust:

“64. The exemption contained in Section 8(1)(e) applies to exceptional cases and only with regard to certain pieces of information, for which disclosure is unwarranted or undesirable. If information is available with a regulatory agency not in fiduciary relationship, there is no reason to withhold the disclosure of the same. **However, where information is required by mandate of law to be provided to an authority, it cannot be said that such information is being provided in a fiduciary relationship.** As in the instant case, the financial institutions have an obligation to provide all the information to RBI and such information shared under an obligation/duty cannot be considered to come under the purview of being shared in fiduciary relationship.”

(Emphasis supplied)

63. The Canadian Supreme Court in the case of **Hodgkinson v Simms**⁵⁷, discussed the term ‘fiduciary’ thus:

“A party becomes a fiduciary where it, acting pursuant to statute, agreement or unilateral undertaking, has an obligation to act for the benefit of another and that obligation carries with it a discretionary power. Several indicia are of assistance in recognizing the existence of fiduciary relationships: (1) scope for the exercise of some discretion or power; (2) that power or discretion can be exercised unilaterally so as to effect the beneficiary's legal or practical interests; and, (3) a peculiar vulnerability to the exercise of that discretion or power.

The term fiduciary is properly used in two ways. The first describes certain relationships having as their essence

⁵⁶ (2016) 3 SCC 525

⁵⁷ [1994] 3 SCR. 377

discretion, influence over interests, and an inherent vulnerability. A rebuttable presumption arises out of the inherent purpose of the relationship that one party has a duty to act in the best interests of the other party. The second, slightly different use of fiduciary exists where fiduciary obligations, though not innate to a given relationship, arise as a matter of fact out of the specific circumstances of that particular relationship. In such a case the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue. Discretion, influence, vulnerability and trust are non-exhaustive examples of evidentiary factors to be considered in making this determination. Outside the established categories of fiduciary relationships, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party. In relation to the advisory context, then, there must be something more than a simple undertaking by one party to provide information and execute orders for the other for a relationship to be enforced as fiduciary.”

64. Dr Paul Finn in his comprehensive work on “**Fiduciary Obligations**”⁵⁸, describes a fiduciary as someone who has an obligation to act “in the interests of” or “for the benefit of” their beneficiaries in some particular matter. For a person to act as a fiduciary they must first have bound themselves in some way to protect and further the interests of another.⁵⁹ Where such a position has been assumed by one party then that party's position is potentially of a fiduciary.⁶⁰ The Federal Court of Australia in the case of **Australian Sec & Inv Comm’n v Citigroup Global Markets Australia Pty Ltd**⁶¹ has held:

“The question of whether a fiduciary relationship exists, and the scope of any duty, will depend upon the factual circumstances and an examination of the contractual terms between the parties... Apart from the established categories, perhaps the most that can be said is that **a fiduciary**

⁵⁸ P.D. Finn “Fiduciary Obligations”, Carswell 1977 at p. 15

⁵⁹ P.D. Finn “Fiduciary Obligations”, Carswell 1977 at p. 9

⁶⁰ P.D. Finn “Fiduciary Obligations”, Carswell 1977 at p.9

⁶¹ *Australian Sec. & Inv. Comm’n v Citigroup Global Markets Australia Pty. Ltd.*, [2007] FCA 963 (Citing P.D. Finn, *The Fiduciary Principle, in Equity, Fiduciaries and Trusts* (T. Youden ed., 1989))

relationship exists where a person has undertaken to act in the interests of another and not in his or her own interests but all of the facts and circumstances must be carefully examined to see whether the relationship is, in substance, fiduciary... The critical matter in the end is the role that the alleged fiduciary has, or should be taken to have, in the relationship. It must so implicate that party in the other's affairs or so align him with the protection or advancement of that other's interests that foundation exists for the fiduciary expectation." (Emphasis supplied)

65. A fiduciary must be entrusted with a degree of discretion (power) and must have freedom to act without resorting to prior approval of the beneficiary.⁶² The greater the independent authority to be exercised by the fiduciary, the greater the scope of fiduciary duty.⁶³ The person so entrusted with power is required to determine how to exercise that power.⁶⁴ Fiduciaries are identified by ascendancy, power and control on the part of the stronger party and therefore, a fiduciary relationship implies a condition of superiority of one of the parties over the other.⁶⁵ It is not necessary that the relationship has to be defined as per law, it may exist under various circumstances, and exists in cases where there has been a special confidence placed in someone who is bound to act in good faith and with due regard to the interests of the one reposing the confidence. Such is normally the case with, *inter alia*, attorney-client, agent-principal, doctor-patient, parent-child, trustees-beneficiaries⁶⁶, legal guardian-ward⁶⁷, personal representatives, court appointed receivers and between the directors of company and its shareholders. In **Needle Industries (India) Ltd v Needle Industries**

⁶² Tamar Frankel, "Fiduciary Law" Oxford University Press, 2011

⁶³ Scott, Austin W. "The Fiduciary Principle." *California Law Review* 37, no. 4 (1949): 539-55.

⁶⁴ Tamar Frankel, "Fiduciary Law" Oxford University Press, 2011

⁶⁵ Ken Coghill, Charles Sampford and Tim Smith "Fiduciary Duty and the Atmospheric Trust", Ashgate (2012)

⁶⁶ Section 88, Indian Trusts Act 1882

⁶⁷ Section 20, Guardians and Wards Act 1890

Newey (India) Holding Ltd⁶⁸ and **Dale & Carrington Invt (P) Lt v P K Prathaphan⁶⁹**, this Court held that the directors of the company owe a fiduciary duty to its shareholders. In **P V Sankara Kurup v Leelavathy Nambier⁷⁰**, this Court held that an agent and power of attorney can be said to owe a fiduciary relationship to the principal.

66. Other structural properties of the fiduciary relationship are dependence and vulnerability, where the beneficiary is dependent upon the fiduciary to exercise power and impact the practical interests.⁷¹ Once a fiduciary relationship is established, fiduciary duties include the duty of loyalty and duty of care towards the interests of the beneficiaries.⁷²

67. From the discussion above, it can be seen that a fiduciary is someone who acts for and on behalf of another in a particular matter giving rise to a relationship of trust and confidence. A fiduciary relationship implies a condition of superiority of one of the parties over the other, where special confidence has been reposed in an individual to act in the best interests of another.

68. The dispute before us is whether the Chief Justice of India while exercising its official function and holding asset declaration information of the judges acts in a fiduciary capacity. The Full Bench of the Delhi High Court agreed with the learned single judge and held:

⁶⁸ (1981) 3 SCC 333

⁶⁹ (2005) 1 SCC 212

⁷⁰ (1994) 6 SCC 68

⁷¹ Gold, Andrew S.; Miller, Paul B. "Philosophical foundations of fiduciary law" Oxford University Press, 2016.

⁷² Tamar Frankel, "Fiduciary Law" Oxford University Press, 2011

“The CJI cannot be a fiduciary vis-à-vis Judges of the Supreme Court. The Judges of the Supreme Court hold independent office, and there is no hierarchy, in their judicial functions, which places them at a different plane than the CJI. The declarations are not furnished to the CJI in a private relationship or as a trust but in discharge of the constitutional obligation to maintain higher standards and probity of judicial life and are in the larger public interest. In these circumstances, it cannot be held that the asset information shared with the CJI, by the Judges of the Supreme Court, are held by him in the capacity of fiduciary, which if directed to be revealed, would result in breach of such duty.”

We are in agreement with the above observation. The words “held by” or “under the control of” under Section 2(j) of the RTI Act will include not only information under the legal control of the public authority but also all such information which is otherwise received or used or consciously retained by the public authority while exercising functions in its official capacity. The 1997 resolution on declaration of judge’s assets as adopted on 7 May 1997 states:

“RESOLVED FURTHER THAT every Judge should make a declaration of all his/her assets in the form of real estate or investments (held by him/her in his/her own name or in the name of his/her spouse or any person dependent on him/her) within a reasonable time of assuming office and in the case of sitting Judges within a reasonable time of adoption of this Resolution and thereafter whenever any acquisition of a substantial nature is made, it shall be disclosed within a reasonable time. The declaration so made should be to the Chief Justice of the Court. The Chief Justice should make a similar declaration for the purpose of the record. The declaration made by the Judges or the Chief Justice, as the case may be, shall be confidential.”

69. The Chief Justice of India in exercising his official functions in accordance with the 1997 resolution while holding asset information of other judges does not act for and on behalf of other judges of the Supreme Court. There exists no fiduciary relationship between them. The Chief Justice of India is not entrusted

with the power to protect and further the interests of individual judges who disclose their assets. The information is required by the mandate of the resolution dated 7 May 1997 passed by all the then sitting judges of the Supreme Court and it cannot be said that such information is being provided in any personal capacity. The Chief Justice of India merely holds the information in accordance with the official functions and not in any fiduciary capacity. The judges of the Supreme Court, including the Chief Justice of India occupy a constitutional office. There exists no set hierarchies between the judges and they enjoy the same judicial powers and immunities. The judges who disclose their assets cannot be said to be vulnerable to and dependent on the Chief Justice of India. In these circumstances, it cannot be held that asset information shared with the Chief Justice of India, by the judges of the Supreme Court, are held by him in a fiduciary capacity, which if revealed, would result in breach of fiduciary duty. Therefore, the argument that the information sought is held in a fiduciary capacity is inapplicable and cannot be used to prevent the information from being made public.

70. While we have not accepted the argument of the appellant regarding the existence of the fiduciary relationship between the Chief Justice of India and the judges, it is relevant to point out the application of the fiduciary principle to public institutions where judges hold citizens' interests in public trust, guided by fiduciary standards.⁷³ A Judge's public fiduciary obligation towards the citizen includes a duty of loyalty, duty of care and the cluster comprising the duties of

⁷³ Robert G. Natelson, "Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders", 11 Tex. Rev. L. & PoL 239, 245

candour, disclosure and accounting.⁷⁴ The duty of loyalty for a judge entails them being loyal to the citizenry by remaining impartial towards the litigants before them.⁷⁵ The duty of care for judges includes the expectation from judges to fulfil their responsibilities with reasonable diligence and to engage in reason based decision making.⁷⁶ The duties of candour, disclosure and accounting are based on the premise of judicial transparency and judicial honesty.

H The right to privacy and the right to know

71. The third referral question to be answered by this Court is: “Whether the information sought for is exempt under Section 8(1)(j) of the RTI Act⁷⁷.” The question requires this Court to determine whether and under what circumstances the information sought by the applicant should be disclosed under the provisions of the RTI Act. This Court is cognisant that in interpreting the statutory scheme of the RTI Act, the constitutional right to know and the constitutional right to privacy of citizens are also implicated. In answering the question, it is necessary to analyse the scheme of the RTI Act, the role of the exemptions under Section 8, the interface between the statutory rights and duties under Section 8(1)(j) and the constitutional rights under Part III of the Constitution.

⁷⁴ Leib, Ethan J., David L. Ponet, and Michael Serota. "A Fiduciary Theory of Judging." *California Law Review* 101, no. 3 (2013): 699-753.

⁷⁵ Matthew Conaglen, Public-Private Intersection: Comparing Fiduciary Conflict Doctrine and Bias, 2008 PUB. L. 58 (2008)

⁷⁶ Leib, Ethan J., David L. Ponet, and Michael Serota. "A Fiduciary Theory of Judging." *California Law Review* 101, no. 3 (2013): 699-753. See also Alon Harel & Tsvi Kahana, The Easy Core Case for Judicial Review, 2 J. LEGAL analysis 227, 249 n.23 (2010).

⁷⁷ "RTI Act"

72. In order to facilitate effective governance, the government or 'public authority' must be empowered to efficiently coordinate diverse activities and at the same time be constrained to ensure that it does not override the freedoms of those it serves. In explaining the system of checks and balances in the American Constitution, James Madison noted:

"If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. **In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.** A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."⁷⁸

(Emphasis supplied)

Our Constitution institutes and operationalises the functions of government. It is necessary to empower the government to operationalise the public functions of the state and ensure the governance of the public lives of citizens. However, the framers of our Constitution recognised that this act of empowerment also carried certain associated risks, that no government of people is infallible and that in addition to democratic controls, certain additional checks and balances on governmental power are necessary. Part III of the Constitution represents a crucial aspect of the constitutional scheme by which governmental power is restricted, and the government is obligated to respect the rights and freedoms of citizens.

⁷⁸ James Madison, Federalist No 51 (1788)

Scheme of Sections 8 and 11

73. The RTI Act was enacted in furtherance of the principles found in Part III of the Constitution. The RTI Act operationalises the disclosure of information held by ‘public authorities’ in order to reduce the asymmetry of information between individual citizens and the state apparatus. The RTI Act facilitates transparency in the decisions of public authorities, the accountability of public officials for any misconduct or illegality and empowers individuals to bring to light matters of public interest. The RTI Act has provided a powerful instrument to citizens: to individuals engaged in advocacy and journalism. It facilitates a culture of assertion to the citizen – activist, to the whistle-blower, but above all to each citizen who has a general interest in the affairs of the state. The preamble of the RTI Act notes:

“An Act to provide for setting out the practical regime of right to information for citizens **to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority**, the constitution of a Central Information Commission and State Information Commissions and for matters connected therewith or incidental thereto.

...

AND WHEREAS democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed;”

(Emphasis supplied)

As observed earlier in the judgement, the provisions of the RTI Act are dedicated to operationalising access to information held by public authorities. The scheme of the RTI Act and its applicability to the judiciary has already been examined in detail. In answering the third referral question, this Court can confine itself to the

statutory exemptions carved out from the general obligation of disclosure. When enacting the RTI Act, Parliament was cognisant that the unrestricted disclosure of information could be fiscally inefficient, result in real world harms and infringe on the rights of others. In addition to the extracts above, the preamble to the RTI Act also states:

“AND WHEREAS revelation of information in actual practice is likely to conflict with other public interests including efficient operations of the Governments, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information;”

(Emphasis supplied)

74. To address the harms that may result from an unrestricted disclosure of information, the legislature included certain qualified and unqualified exemptions to the general obligation to disclose under Sections 3, 4 and 7 of the RTI Act. Section 8(1) sets out certain classes of information, the disclosure of which, the legislature foresaw may result in harm to the nation or the rights and interests of other citizens. Section 8 reads as under:

“8. Exemption from disclosure of information –

(1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen, -

(a) information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;

(b) information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court;

(c) information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature;

(d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;

(e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that

the larger public interest warrants the disclosure of such information;

(f) information received in confidence from foreign Government;

(g) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;

(h) information which would impede the process of investigation or apprehension or prosecution of offenders;

(i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers:

Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over:

Provided further that those matters which come under the exemptions specified in this section shall not be disclosed;

(j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:

Provided that the information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.

(2) Notwithstanding anything in the Official Secrets Act, 1923 (19 of 1923) nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests....”

Section 8(1) begins with a non-obstante phrase “Notwithstanding anything contained in this Act”. The import of this phrase is that clause (1) of Section 8 carves out an exception to the general obligation to disclose under the RTI Act. Where the conditions set out in any of the sub-clauses to clause (1) of Section 8 are satisfied, the Information Officer is under no obligation to provide information to the applicant. By expressly enumerating the circumstances in which the

disclosure of information may be restricted on the grounds of certain identified harms, the RTI Act negates the notion that information may be withheld on the grounds of confidentiality simpliciter. A harm under clause (1) of Section 8 must be identified and invoked to justify the non-disclosure of a document requested for under the RTI Act.

75. It is also pertinent to note that clauses (a), (b), (c), (f), (g) and (h) to clause (1) of Section 8 provide an absolute exemption from the obligation of disclosure under the RTI Act. However, clauses (d), (e), (i) and (j) to clause (1) of Section 8 provide a qualified exemption from disclosure. For example, clause (a) to sub section (1) of Section 8 provides an unconditional exemption where it is determined that disclosure of the information sought “would prejudicially affect the sovereignty and integrity of India”. On the other hand, while clause (d) to Section 8(1) similarly provides that information is exempt from disclosure where such disclosure “would harm the competitive position of a third party” the exemption is further qualified by the phrase, “unless the competent authority is satisfied that larger public interest warrants the disclosure”. Thus, the exemption under clause (d) is not absolute but is qualified and cannot be invoked where there exists a “larger public interest”. Where the Information Officer determines that the “larger public interest” warrants a disclosure, the exemption in clause (d) cannot be invoked and the information must be disclosed.

76. Clause (j) of Section 8(1) provides a qualified exemption from disclosure where the information sought relates to “personal information the disclosure of which has no relationship to any public activity or interest” or the disclosure of the

information would cause an “unwarranted invasion of the privacy”. However, the exemption may be overridden where the Information Officer is “satisfied that the larger public interest justifies the disclosure”. Clause (j) is not an absolute exemption from the disclosure of information on the ground of privacy but states that disclosure is exempted in cases where “personal information” is sought and there exists no “larger public interest”. Where the Information Officer is satisfied that the existence of the “larger public interest” justifies the disclosure of the “personal information”, the information must be disclosed. The exact contours of the phrases “personal information” and “larger public interest” with respect to members of the judiciary, and the exact manner in which they relate to each other form the subject matter of the third referral question and shall be analysed during the course of this judgement.

77. Sections 2(n) and 11 of the RTI Act read as under:

“2(n) **“third party”** means a person other than the citizen making a request for information and includes a public authority”

“11. Third party information.—(1) Where a Central Public Information Officer or a State Public Information Officer, as the case may be, intends to disclose any information or record, or part thereof on a request made under this Act, **which relates to or has been supplied by a third party and has been treated as confidential by that third party, the Central Public Information Officer or State Public Information Officer, as the case may be,** shall, within five days from the receipt of the request, give a written notice to such third party of the request and of the fact that the Central Public Information Officer or State Public Information Officer, as the case may be, intends to disclose the information or record, or part thereof, and invite the third party to make a submission in writing or orally, regarding whether the information should be disclosed, and such submission of the third party shall be kept in view while taking a decision about disclosure of information:

Provided that except in the case of trade or commercial secrets protected by law, **disclosure may be allowed if the**

public interest in disclosure outweighs in importance any possible harm or injury to the interests of such third party.

(2) Where a notice is served by the Central Public Information Officer or State Public Information Officer, as the case may be, under sub-section (1) to a third party in respect of any information or record or part thereof, the third party shall, within ten days from the date of receipt of such notice, be given the opportunity to make representation against the proposed disclosure.

(Emphasis supplied)

The definition of a “third party” includes a public authority. ‘Third party information’ is information which “relates to or has been supplied by any other person (including a public authority) other than the information applicant and has been treated as confidential by such third party. Where disclosure of ‘third party information’ is sought, and such information has been *prima facie* treated as confidential by the third party in question, the procedure under Section 11 of the RTI Act is mandatory. The Information Officer shall, within five days of receiving the request for ‘third party information’ notify the relevant third party to whom the information relates or which had supplied it. The notice shall invite the third party to submit reasons (in writing or orally) as to whether or not the information sought should be disclosed. Section 11(2) provides the third party with a right to make a representation against the proposed disclosure within ten days of receiving the notice. The provision expressly mandates the Information Officer to take into consideration the objections of the third party when making a decision with respect to disclosure or non-disclosure of the information. It encapsulates the fundamental idea that a party whose personal information is sought to be disclosed is afforded the opportunity to contest disclosure. The proviso to sub section (1) of Section 11 permits disclosure where the “public interest” in

disclosure “outweighs” any possible harms in disclosure highlighted by the third party.

78. Sections 8 and 11 must be read together. Other than in a case where the information applicant seeks the disclosure of information which relates to the information applicant herself, information sought that falls under the category of “personal information” within the meaning of clause (j) of Section 8(1) is also “third party information” within the ambit of Section 11. Therefore, in every case where the information requested is “personal information” within the operation of clause (j) of sub section 1 of Section 8, the procedure of notice and objections under Section 11 must be complied with. The two provisions create a substantive system of checks and balances which seek to balance the right of the information applicant to receive information with the right of the third party to prevent the disclosure of personal information by permitting the latter to contest the proposed disclosure.

79. In **Arvind Kejriwal v Central Public Information Officer**⁷⁹ it was contended that the procedure for notifying the third party and inviting objections under Section 11 only applied to situations where the information sought was directly supplied by the third party, and not to situations where the information ‘related to’ the third party but was not supplied by it. Rejecting this contention, Justice Sanjeev Khanna, (as our learned Brother then was) speaking for a Division Bench of the Delhi High Court held:

⁷⁹ AIR 2012 Del 29

“13... On the other hand, in case the word ‘or’ is read as ‘and’, it may lead to difficulties and problems, including the invasion of right of privacy/confidentiality of a third party. **For example, a public authority may have in its records, medical reports or prescriptions relating to third person but which have not been supplied by the third person. If the interpretation given by the appellant is accepted then such information can be disclosed to the information seeker without following the procedure prescribed in Section 11(1) as the information was not furnished or supplied by the third person.** ... when information relates to a third party and can be prima facie regarded and treated as confidential, the procedure under Section 11(1) must be followed. Similarly, in case information has been provided by the third party and has been prima facie treated by the said third party as confidential, again the procedure under Section 11(1) has to be followed.

...

15. Section 11 also ensures that the principles of natural justice are complied with. Information which is confidential relating to a third party or furnished by a third party, is not furnished to the information seeker without notice or without hearing the third party’s point of view. **A third party may have reasons, grounds and explanations as to why the information should not be furnished, which may not be in the knowledge of the PIO/appellate authorities or available in the records.** The information seeker is not required to give any reason why he has made an application for information. **There may be facts, causes or reasons unknown to the PIO or the appellant authority which may justify and require denial of information. Fair and just decision is the essence of natural justice. Issuance of notice and giving an opportunity to the third party serves a salutary purpose and ensures that there is a fair and just decision.** In fact issue of notice to a third party may in cases curtail litigation and complications that may arise if information is furnished without hearing the third party concerned. Section 11 prescribes a fairly strict time schedule to ensure that the proceedings are not delayed.

(Emphasis supplied)

The procedure under Section 11 must be complied with not only in cases where information has been supplied to the public authority by a third party, but equally when the information which is held by the public authority “relates to” a third party. Section 11 is not merely a procedural provision, but a substantive

protection to third parties against the disclosure of their personal information held by public authorities, without their knowledge or consent. The mere fact that the public authority holds information relating to a third party does not render it freely disclosable under the RTI Act. A third party may have good reason to object to the disclosure of the information, including on the ground that the disclosure would constitute a breach of the right to privacy. By including the requirement of inviting objections and providing a hearing on the proposed disclosure of third party information to the very party who may be adversely impacted by the disclosure, Section 11 embodies the principles of natural justice.

80. In the present case, the information sought pertains to the declaration of assets of members of the judiciary and official file notings and correspondence with respect to the elevation of judges to the Supreme Court. The information sought with respect to the assets of judges is not generated by the Supreme Court itself, but is provided by individual judges to the Supreme Court. The file notings with respect to the elevation of judges do not merely contain information regarding the operation of the Supreme Court, but also relate to the individual judges being considered for elevation. Thus, the information sought both “relates to” and “has been supplied by” a third party and has been treated as confidential by that third party”. The procedure under Section 11 is applicable in regard to the information sought by the respondent and must be complied with.

Constitutional rights implicated

81. The RTI Act, although a statutory enactment, engages the rights contained in Part III of the Constitution of India. Article 19(1)(a) of the Constitution contains

the right to freedom of expression which grants all citizens not merely the right to free speech, but also the right to freely disseminate speech. The freedom of the press to disseminate speech has long been recognised under our Constitution.⁸⁰ An inherent component of the right to disseminate speech freely is the corresponding right of the audience to receive speech freely. The right to receive information disseminated has also been recognised as a facet of the freedom of expression protected by Article 19(1)(a) of the Constitution.⁸¹ In addition to the right to receive information already being disseminated in the public domain, Article 19(1)(a) includes a positive right to information. Contrasted with the negative content of the right to receive information, which prohibits the State from restricting a citizen's access to information already in the public domain, the right to information, as a facet of Article 19(1)(a), casts a positive duty on the State to make available certain information not already in the public domain.

82. In **State of Uttar Pradesh v Raj Narain**⁸², Chief Justice A N Ray, speaking for a Constitution Bench of this Court observed:

"74. 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. 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.** [See *New York Times Co. v. United States*, 29 L Ed 822: 403 US 713] 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

⁸⁰ **Express Newspaper v Union of India** 1959 SCR 12

⁸¹ **Bennet Coleman v Union of India** (1972) 2 SCC 788

⁸² (1975) 4 SCC 428

purpose of parties and politics or personal self-interest or bureaucratic routine...”

(Emphasis supplied)

These observations were reiterated by the seven judge Bench of this Court in case of **S P Gupta v Union of India**⁸³. Justice P N Bhagwati (as he then was) noted:

“64. Now it is obvious from the Constitution that we have adopted a democratic form of Government. Where a 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 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. “Knowledge” said James Madison, “will for ever govern ignorance and a people who mean to be their own governors must arm themselves with the power knowledge gives. **A popular Government without popular information or the means of obtaining it, is but a prologue to a force or tragedy or perhaps both**”. The citizens' right to know the facts, the true facts, about the administration of the country is thus one of the pillars of a democratic State...”

(Emphasis supplied)

The above-mentioned extract accurately and succinctly summarises the position of law and has been consistently followed by this Court.⁸⁴ The right to freedom of expression under Article 19(1)(a) casts both positive and negative obligations on the State. It restricts the State from interfering with the right of citizens to receive information and its freely disseminated. It also imposes an obligation on the State

⁸³ (1981) Supp SCC 87

⁸⁴ **People's Union for Civil Liberties v Union of India** (2003) 4 SCC 399; **Thalappalam Service Cooperative Bank Limited v State of Kerala** (2013) 16 SCC 82 and **Reserve Bank of India v Jayantilal Mistry** (2016) 3 SCC 525.

to provide citizens with information about the public functioning of government to ensure accountability and create an informed electorate.

83. Parliament enacted the RTI Act in pursuance of the State's positive obligation to provide citizens with information about the functioning of government. It is a statute to operationalise the right of citizens to access information, otherwise only held by the government, under the 'right to know' or 'right to information' as protected by Article 19(1)(a). In requesting for information under the provisions of the RTI Act, a citizen engages certain statutory rights and duties under its provisions, but simultaneously also engages the 'right to know' under the Article 19(1)(a) of the Constitution. The 'right to know' is not absolute. The RTI Act envisages certain restrictions on the 'right to know' in the form of exemptions enumerated in clause (1) to Section 8. Crucially, restrictions on the disclosure of information under the RTI Act also constitute restrictions on the information applicant's 'right to know' which is protected under Article 19(1)(a) of the Constitution. The constitutional permissibility of the statutory restrictions on disclosure contained within the RTI Act is not in challenge before this Court. But it is trite to state that any restrictions on the disclosure of information would necessarily need to comport with the existing law on the protection of the 'right to know' as a facet of the freedom of expression. In the decision in **Thalappalam Service Cooperative Bank Limited v State of Kerala**⁸⁵ Justice Radhakrishnan, speaking for a two judge Bench of this Court, noted:

"56. The Right to Information Act, 2005 is an Act which provides for setting up the practical regime of right to information for citizens to secure access to information under the control of public authorities in order to promote

⁸⁵ (2013) 16 SCC 82

transparency and accountability in the working of every public authority. The Preamble of the Act also states that the democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed. Citizens have, however, the right to secure access to information of only those matters which are “under the control of public authorities”, the purpose is to hold “the Government and its instrumentalities” accountable to the governed. **Consequently, though right to get information is a fundamental right guaranteed under Article 19(1)(a) of the Constitution, limits are being prescribed under the Act itself, which are reasonable restrictions within the meaning of Article 19(2) of the Constitution of India.”**

(Emphasis supplied)

The court expressly acknowledged that the RTI Act was enacted to fulfil the positive content of the right to know that existed under Article 19(1)(a). Further, restrictions on the disclosure of information under the RTI Act constitute restrictions on the ‘right to know’ as a facet of Article 19(1)(a).

84. Clause (j) of sub section (1) of Section 8 uses the phrases “personal information” and “unwarranted invasion of the privacy of the individual”. In interpreting the harm to be caused in disclosing personal information, this Court must be cognisant that the privacy of the individual is the subject of constitutional protection. In **K S Puttaswamy v Union of India**⁸⁶ a nine judge bench of this Court unanimously held that there exists a constitutional right to privacy located within Part III of the Constitution. Justice D Y Chandrachud, speaking for a plurality of four judges, held:

“250. ... The nine primary types of privacy are, according to the above depiction:

(i) bodily privacy which reflects the privacy of the physical body. Implicit in this is the negative freedom of being able to

⁸⁶ (2017) 10 SCC 1

prevent others from violating one's body or from restraining the freedom of bodily movement;

(ii) spatial privacy which is reflected in the privacy of a private space through which access of others can be restricted to the space; intimate relations and family life are an apt illustration of spatial privacy;

...

(ix) **informational privacy which reflects an interest in preventing information about the self from being disseminated and controlling the extent of access to information.**

...

320. **Privacy is a constitutionally protected right** which emerges primarily from the guarantee of life and personal liberty in Article 21 of the Constitution. Elements of privacy also arise in varying contexts from the other facets of freedom and dignity recognised and guaranteed by the fundamental rights contained in Part III.

...

323. **Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognises the plurality and diversity of our culture.** While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being.

...

325. **Like other rights which form part of the fundamental freedoms protected by Part III, including the right to life and personal liberty under Article 21, privacy is not an absolute right. A law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights.** In the context of Article 21 an invasion of privacy must be justified on the basis of a law which stipulates a procedure which is fair, just and reasonable. The law must also be valid with reference to the encroachment on life and personal liberty under Article 21. **An invasion of life or personal liberty must meet the threefold requirement of (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate State aim; and (iii) proportionality which ensures a**

rational nexus between the objects and the means adopted to achieve them.

326. Privacy has both positive and negative content. The negative content restrains the State from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the State to take all necessary measures to protect the privacy of the individual.

327. Decisions rendered by this Court subsequent to *Kharak Singh* upholding the right to privacy would be read subject to the above principles."

(Emphasis supplied)

Justice R F Nariman in his separate concurring opinion made the following observations:

"521. In the Indian context, a fundamental right to privacy would cover at least the following three aspects:

- Privacy that involves the person i.e. when there is some invasion by the State of a person's rights relating to his physical body, such as the right to move freely;
- **Informational privacy which does not deal with a person's body but deals with a person's mind, and therefore recognises that an individual may have control over the dissemination of material that is personal to him. Unauthorised use of such information may, therefore lead to infringement of this right;** and
- The privacy of choice, which protects an individual's autonomy over fundamental personal choices....

...

536. This reference is answered by stating that the inalienable fundamental right to privacy resides in Article 21 and other fundamental freedoms contained in Part III of the Constitution of India. *M.P. Sharma* [*M.P. Sharma v. Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077] and the majority in *Kharak Singh* [*Kharak Singh v. State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332] , to the extent that they indicate to the contrary, stand overruled. The later judgments of this Court recognising privacy as a fundamental right do not need to be revisited.

(Emphasis supplied)

85. The right to privacy is a constitutional right emanating from the right to life and personal liberty in Article 21 of the Constitution and from the facets of

freedom and dignity embodied in Part III of the Constitution. Any restriction on the right to privacy by the State must be provided for by law, pursue a legitimate aim of the State and satisfy the test of proportionality. The requirement of proportionality is satisfied when the nature and extent of the abridgement of the right is proportionate to the legitimate aim being pursued by the State. The constitutional protection of privacy encompasses not merely personal intimacies but also extends to decisional and informational autonomy. An individual has a constitutionally protected right to control the dissemination of personal information. The unauthorised use of information abridges a citizen's right to privacy.

86. The information disclosed under the RTI Act may include personal information relating to individuals. The RTI Act does not contain any restrictions on the end-use of the information disclosed under its provisions. The information disclosed by an Information Officer of the State pursuant to a right to information application may subsequently be widely disseminated. Clause (j) of sub section (1) of Section 8 provides that, in certain situations, even personal information of an individual may be disclosed under the RTI Act. Where the RTI Act contemplates the disclosure of "personal information", the right to privacy of the individual is engaged. The Act recognise that the absolute or unwarranted disclosure of an individual's personal information under the RTI Act would constitute an "unwarranted invasion of the right to privacy" under the statutory provisions of the RTI Act and also abridge the individual's constitutional right to privacy. However, the RTI Act has various checks and balances to guard against the unadulterated disclosure of personal information under the RTI Act.

87. The constitutional validity of the RTI Act as a measure abridging the right to privacy is not in question before this Court. But it is trite to say that the RTI Act satisfies the test of legality (by virtue of being a legislation) and also pursues a legitimate state aim of ensuring, transparency and accountability of government and an informed electorate. By requiring the Information Officer to balance the public interest in disclosure against the privacy harm caused, clause (j) creates a legislatively mandated measure of proportionality to ensure that the harm to the individual's right to privacy is not disproportionate to the aim of securing transparency and accountability.

A balancing of interests

88. The RTI Act is a legislative enactment which contains a finely tuned balancing of interests between the privacy right of individuals whose information may be disclosed and the broader public interest in ensuring transparency, accountability and an informed electorate. Both these interests have significant implications as they engage constitutional rights under Part III. The overarching scheme of the RTI Act, and in particular Sections 3, 4 and 7 constitutes a mandate to fulfil the positive content of the 'right to information' as a facet of Article 19(1)(a) of the Constitution. The privacy interest protected by clause (j) to sub section (1) of Section 8 engages the principle of informational privacy as a facet of the constitutional privacy as recognised by this Court in **K S Puttaswamy**. Neither the 'right to information' as a facet of Article 19(1)(a) nor the right to informational privacy as a facet to the right to privacy are absolute. The rights under Article 19(1)(a) may be restricted on the grounds enumerated in

clause (2) of Article 19. The right to privacy and its numerous facets may be permissibly restricted where the abridgement is provided by law, pursues a legitimate State objective and complies with the principle of proportionality.

89. Clause (j) of sub section (1) of Section 8 requires the Information Officer to first determine whether the information sought falls within the meaning of “personal information”. Where the information sought falls within the scope of “personal information” and has “no relationship to any public activity or interest” the information is exempt from disclosure under the RTI Act. However, where there exists a ‘public interest’ in the disclosure of the information sought, the test to be applied by the Information Officer is different. The Information Officer must evaluate whether the “larger public interest” justifies the disclosure of the information notwithstanding the fact that the information is “personal information”. In doing so, the Information Officer must balance the privacy interest of the individual whose personal information will be disclosed with the right to information of the public to know the information sought. The substantive content of the terms “personal information” and “public interest” must be informed by the constitutional standards applicable to the ‘right to know’ and the ‘right to privacy’ as disclosure and non-disclosure under the RTI Act directly implicate these constitutional rights. In striking a balance within the framework of the RTI Act, the Information Officer must be cognisant of the substantive contents of these rights and the extent to which they can be restricted within our constitutional scheme. It is also crucial for the standard of proportionality to be applied to ensure that neither right is restricted to a greater extent than necessary to fulfil the legitimate

interest of the countervailing interest in question. It is now necessary to examine the content of “personal information” and “public interest”.

Defining Personal Information

90. To understand the scope of information which is protected from disclosure under the RTI Act, it is of relevance to identify the nature of information which may be regarded as “personal information”. The RTI Act does not put forth a definition of the term “personal information”. However, “personal information” has been defined under other statutory frameworks. These definitions obviously do not bind the interpretation of the RTI Act but are useful sources of guidance in understanding the amplitude of the expression. We must of course read them with a caveat because the context of usage is not the same.

Section 2(i) of the Information Technology (Reasonable Security Practices And Procedures And Sensitive Personal Data Or Information) Rules, 2011

defines the term “personal information” in the following terms:

“Personal information means any information that relates to a natural person, which, either directly or indirectly, in combination with other information available or likely to be available with a body corporate, is capable of identifying such person.”

Thus, any information which is capable of identifying a natural person is classified as personal information.

91. **Article 4(1) of the EU General Data Protection Regulation (GDPR)**

defines personal data in similar terms:

“Personal data’ means any information relating to an identified or identifiable natural person (‘data subject’); an

identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.”

The data protection regime in the European Union regards information such as the name and surname, home address, location data, data held by a hospital or doctor and identification card number of an individual as personal data.⁸⁷ Courts from the jurisdiction have interpreted the term “personal data” broadly to even include information relating to the professional life of an individual.

In **Worten v Autoridade para as Condições de Trabalho**⁸⁸, the European Court of Justice held the work timings of an employee constitute personal data:

“19. In that respect, it suffices to note that, as maintained by all of the interested parties who submitted written observations, the data contained in **a record of working time** such as that at issue in the main proceedings, which concern, in relation to each worker, the **daily work periods and rest periods**, constitute personal data within the meaning of Article 2(a) of Directive 95/46, because they represent ‘information relating to an identified or identifiable natural person’”

(Emphasis supplied)

In **Rechnungshof v Österreichischer Rundfunk**,⁸⁹ the European Court of Justice held that details of professional income received by employees from an organisation subject to regulation by the Austrian Court of Audit amounts to “personal data”. It was held:

“It should be noted, to begin with, that the data at issue in the main proceedings, which relate both to the monies paid by

⁸⁷ What is personal data?, Official Website of the European Union https://ec.europa.eu/info/law/law-topic/data-protection/reform/what-personal-data_en

⁸⁸ C-342/12 dated 30 May 2013

⁸⁹ Joined cases (C-465/00), (C-138/01) and (C-139/01) dated 20 May 2003

certain bodies and the recipients, constitute personal data within the meaning of Article 2(a) of Directive 95/46, being information relating to an identified or identifiable natural person. **Their recording and use by the body concerned, and their transmission to the Rechnungshof and inclusion by the latter in a report intended to be communicated to various political institutions and widely diffused, constitute processing of personal data within the meaning of Article 2(b) of the directive.**

(Emphasis supplied)

92. **The Protection of Personal Information Act, 2013** of South Africa

contains an illustrative and comprehensive definition of personal information:

“personal information” means information relating to an identifiable, living, natural person, and where it is applicable, an identifiable, existing juristic person, including, but not limited to—

- (a) information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the person;
- (b) information relating to the education or the medical, financial, criminal or employment history of the person;
- (c) any identifying number, symbol, e-mail address, physical address, telephone number, location information, online identifier or other particular assignment to the person;
- (d) the biometric information of the person;
- (e) the personal opinions, views or preferences of the person;
- (f) correspondence sent by the person that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence;
- (g) the views or opinions of another individual about the person; and
- (h) the name of the person if it appears with other personal information relating to the person or if the disclosure of the name itself would reveal information about the person.”

Protection from disclosure of personal information has been recognised as a facet of the right to privacy in South Africa. In **National Media Limited v**

Jooste⁹⁰, it was alleged by the respondent that intimate details of her personal life had been published by the appellant publishers without her consent. The information published included details of her child as well as her relationship with the father of the child. Justice Harms elucidated the right to privacy in the following terms:

“A right to privacy encompasses the competence to determine the destiny of private facts. The individual concerned is entitled to dictate the ambit of disclosure e g to a circle of friends, a professional adviser or the public. He may prescribe the purpose and method the disclosure. Similarly, I am of the view that a person is entitled to decide when and under what conditions private facts may be made public...”

(Emphasis supplied)

In **NM v Smith**⁹¹, the names of three women who were HIV positive were disclosed in a biography. It was alleged by the women that their names had been disclosed without any prior consent and their rights to privacy, dignity and psychological integrity had been violated by the disclosure. The opinion of four judges in Puttaswamy noted the two conceptions of privacy that emerged from the judgement of the Constitutional Court of South Africa which recognised the value of privacy in medical information:

“According to the decision in *Smith case*, there are two interrelated reasons for the constitutional protection of privacy—one flows from the “constitutional conception of what it means to be a human being” and the second from the “constitutional conception of the State”:

“An implicit part of [the first] aspect of privacy is the right to choose what personal information of ours is released into the public space. **The more intimate that information, the more important it is in fostering privacy, dignity and autonomy that an individual makes the primary decision whether to release the information. That decision should not be**

⁹⁰ 1996 (3) SA 262 (SCA)

⁹¹ [2007] ZACC 6

made by others. This aspect of the right to privacy must be respected by all of us, not only the state.

... Secondly, we value privacy as a necessary part of a democratic society and as a constraint on the power of the State... In authoritarian societies, the state generally does not afford such protection. People and homes are often routinely searched and the possibility of a private space from which the state can be excluded is often denied. The consequence is a denial of liberty and human dignity. In democratic societies, this is impermissible.”

....

On the interrelationship between the right to privacy, liberty and dignity, the Court observed that:

“The right to privacy recognises the importance of protecting the sphere of our personal daily lives from the public. In so doing, it **highlights the interrelationship between privacy, liberty and dignity as the key constitutional rights which construct our understanding of what it means to be a human being. All these rights are therefore interdependent and mutually reinforcing.** We value privacy for this reason at least—that the constitutional conception of being a human being asserts and seeks to foster the possibility of human beings choosing how to live their lives within the overall framework of a broader community.”

(Emphasis supplied)

93. In **Australian Broadcasting Corporation v Lenah Game Meats**⁹², the Australian High Court heard an appeal with regard to an application for an interlocutory injunction to restrain the broadcasting of a film depicting the activities of the Respondent. The Respondent was a processor and supplier of game meat and sold possum meat for export. Unknown persons had entered the respondent's premises and installed hidden cameras. The possum-killing operations were filmed without the knowledge or consent of the respondent. It was claimed that the film was made surreptitiously and unlawfully and supplied to

⁹² [2001] HCA 63

the appellant with the intention that the appellant would broadcast the film. In determining the Respondent Corporation's claim to privacy, Chief Justice Gleeson made the following observations:

"42. There is no bright line which can be drawn between what is private and what is not. Use of the term "public" is often a convenient method of contrast, but there is a large area in between what is necessarily public and what is necessarily private. An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it has such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford. **Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved. The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private.**"

(Emphasis supplied)

94. In **Campbell v MGN Limited**⁹³, the claimant was a supermodel who had instituted proceedings against a publication called the 'Mirror' for publishing details of her efforts to overcome her drug addiction along with pictures of her attending meetings of the 'Narcotics Anonymous'. The appeal was before the House of Lords. In her opinion, Baroness Hale noted:

"145. It has always been accepted that information about a person's health and treatment for ill-health is both private and confidential. This stems not only from the confidentiality of the

⁹³ [2003] 1 All ER 224

doctor-patient relationship but from the nature of the information itself...”

....

147. I start, therefore, from the fact - indeed, it is common ground - **that all of the information about Miss Campbell's addiction and attendance at NA which was revealed in the Daily Mirror article was both private and confidential, because it related to an important aspect of Miss Campbell's physical and mental health and the treatment she was receiving for it. It had also been received from an insider in breach of confidence. That simple fact has been obscured by the concession properly made on her behalf that the newspaper's countervailing freedom of expression did serve to justify the publication of some of this information.** But the starting point must be that it was all private and its publication required specific justification.

(Emphasis supplied)

95. Courts in India have interpreted the scope of information which constitutes “personal information” under the RTI Act. In **Girish Ramchandra Deshpande v Central Information Commissioner**⁹⁴, the petitioner sought copies of memos, show-cause notices and punishments awarded to the third respondent by his employer along with details of movable and immovable properties, investments, lending and borrowing from banks and other financial institutions. The petitioner also sought the details of gifts stated to have been accepted by the third respondent. A large portion of the information sought was located in the income tax returns of the third respondent. A two judge bench of the Court classified the information sought as “personal information” and held:

“12. ... The performance of an employee/officer in an organisation is primarily a matter between the employee and the employer and normally those aspects are governed by the service rules which fall under the expression “personal information”, the disclosure of which has no relationship to any public activity or public interest. On the other hand, the disclosure of which would cause unwarranted invasion of

⁹⁴ (2013) 1 SCC 212

privacy of that individual. Of course, in a given case, if the Central Public Information Officer or the State Public Information Officer or the appellate authority is satisfied that the larger public interest justifies the disclosure of such information, appropriate orders could be passed but the petitioner cannot claim those details as a matter of right.

13. The details disclosed by a person in his income tax returns are “personal information” which stand exempted from disclosure under clause (j) of Section 8(1) of the RTI Act, unless involves a larger public interest and the Central Public Information Officer or the State Public Information Officer or the appellate authority is satisfied that the larger public interest justifies the disclosure of such information.”

Thus, even in cases where information may be classified as “personal information”, the CPIO is required to undertake an enquiry on a case to case basis to determine if the disclosure of information is justified.

96. In **R K Jain v Union of India**⁹⁵, the appellant’s application to the Chief Information Commissioner seeking copies of note-sheets and files relating to a member of CESTAT, was rejected. The two-judge bench of this Court placed reliance on the holding in **Girish Deshpande** and rejected the appellant’s claim for inspection of documents relating to the Annual Confidential Reports of the member of CESTAT, including documents relating to adverse entries in the Annual Confidential Reports and the “follow-up action” taken. In **Canara Bank v C S Shyam**⁹⁶, the respondent was employed by the appellant bank as clerical staff and had asked for information relating to the transfer and posting of other clerical staff employed by the bank. This information sought included personal details such as the date of joining, designation of employee, details of promotion

⁹⁵ (2013) 14 SCC 794

⁹⁶ (2018) 11 SCC 426

earned, date of joining to the branch. Speaking for a two-judge Bench of this Court, Justice A M Sapre considered the holding in **Girish Deshpande** and held

“14. In our considered opinion, the aforementioned principle of law applies to the facts of this case on all force. It is for the reasons that, firstly, the information sought by Respondent 1 of individual employees working in the Bank was personal in nature; secondly, it was exempted from being disclosed under Section 8(1)(j) of the Act and lastly, neither Respondent 1 disclosed any public interest much less larger public interest involved in seeking such information of the individual employee nor was any finding recorded by the Central Information Commission [*C.S. Shyam v. Canara Bank*, 2007 SCC OnLine CIC 626] and the High Court [*Canara Bank v. CIC*, 2007 SCC OnLine Ker 659] as to the involvement of any larger public interest in supplying such information to Respondent 1.”

97. In **Subhash Chandra Agarwal v Registrar, Supreme Court of India**⁹⁷, the appellant had filed an application under the RTI Act seeking information relating to the details of the medical facilities availed by the Judges of the Supreme Court and their family members in the preceding three years, including information relating to expenses on private treatment in India or abroad. The Court held that disclosure of information regarding medical facilities availed by judges amounts to an invasion of privacy:

“11. The information sought by the appellant includes the details of the medical facilities availed by the individual Judges. The same being personal information, we are of the view that providing such information would undoubtedly amount to invasion of the privacy. We have also taken note of the fact that it was conceded before the learned Single Judge by the learned counsel for the appellant herein that no larger public interest is involved in seeking the details of the medical facilities availed by the individual Judges. It may also be mentioned that the total expenditure incurred for the medical treatment of the Judges for the period in question was already furnished by the CPIO by his letter dated 30-8-2011 and it is

⁹⁷ (2018) 11 SCC 634

not the case of the appellant that the said expenditure is excessive or exorbitant. That being so, we are unable to understand how the public interest requires disclosure of the details of the medical facilities availed by the individual Judges. In the absence of any such larger public interest, no direction whatsoever can be issued under Section 19(8)(a)(iv) of the Act by the appellate authorities. Therefore on that ground also the order passed by the CIC dated 1-2-2012 is unsustainable and the same has rightly been set aside by the learned Single Judge.”

Thus, it emerges from the discussion that certain category of information such as medical information, details of personal relations, employee records and professional income can be classified as personal information. The question of whether such information must be disclosed has to be determined by the CPIO on a case to case basis, depending on the public interest demonstrated in favour of disclosure.

Public Interest

98. The right to information and the need for transparency in the case of elected officials is grounded in the democratic need to facilitate better decision making by the public. Transparency and the right to information directly contribute to the ability of citizens to monitor and make more informed decisions with respect to the conduct of elected officials. Where the misconduct of an elected representative is exposed to the public, citizens can choose not to vote for the person at the next poll. In this manner, the democratic process coupled with the right to information facilitates better administration and provides powerful incentives for good public decision making. In the case of judges, citizens do not possess a direct agency relationship. Therefore, the ‘public interest’ in disclosing

information in regard to a judge cannot be sourced on the need for ensuring democratic accountability through better public decision making but must be located elsewhere.

99. In common law countries, public interest has always been understood to operate as an interest independent to that of the State. Public interest operates equally against the State as it does against non-State actors. This is of significance in the context of the RTI Act as the right to information seeks to bring about disclosure of information previously held exclusively by the State. Public interest therefore operates as a standalone viewpoint independent of whether the interest of the State favours disclosure or non-disclosure. At its core, the objective test for 'public interest' is far broader than democratic decision making and takes into consideration both shared conceptions of the common good in society at any given point and yet recognises that such conceptions are always the product of contestation and disagreement, necessitating a robust set of viewpoints to facilitate the self-fulfilment of the individual and the search for truth.

100. In **Secy., Ministry of Information & Broadcasting, Govt. of India v Cricket Assn. of Bengal**⁹⁸ Justice P B Sawant speaking for a three judge bench of this Court observed:

"43. We may now summarise the law on the freedom of speech and expression under Article 19(1)(a) as restricted by Article 19(2). The freedom of speech and expression includes right to acquire information and to disseminate it. Freedom of speech and expression is necessary, for self-expression which is an important means of free conscience and self-fulfilment. It enables people to contribute to debates on social and moral issues. It is the best way to find a truest model of anything, since it is only through it that the widest possible

⁹⁸ (1995) 2 SCC 161

range of ideas can circulate. It is the only vehicle of political discourse so essential to democracy. Equally important is the role it plays in facilitating artistic and scholarly endeavours of all sorts. The right to communicate, therefore, includes right to communicate through any media that is available whether print or electronic or audio-visual such as advertisement, movie, article, speech etc. That is why freedom of speech and expression includes freedom of the press. The freedom of the press in terms includes right to circulate and also to determine the volume of such circulation. This freedom includes the freedom to communicate or circulate one's opinion without interference to as large a population in the country, as well as abroad, as is possible to reach.”

The right to information is not solely premised on improving the quality of democratic decision making but also finds its roots in other bases of freedom of expression, including the self-fulfilment of the individual, the introduction of competing views into the ‘marketplace of ideas’ and the autonomy and dignity of the individual. Limiting the term ‘public interest’ to information that allows individuals to make better public choices with respect to public officials fails to take into consideration the powerful benefits that the dissemination of information held by public authorities may have on the development of discourse, private decision making and the nourishment of the individual.

101. We have already observed that the accountability of the judiciary to the citizenry is inherent in the office of the judge. The administration of justice in our country is a vast, crucial and expensive endeavour that impacts millions of citizens on a daily basis. The contention that merely because a judge cannot be elected out of office, the conduct of judges and their general administration is not a matter of great public interest cannot be countenanced. The disclosure of information about the conduct of judges and their administration is necessary to ensure that the broader societal goals in the administration of justice are

achieved. The disclosure of information can highlight areas where robust mechanisms of oversight and accountability are required. Lastly, the disclosure of information with respect to the judiciary also facilitates the self-fulfilment of the freedom of expression of individuals engaged in reporting, critiquing and discussing the activities of the court. The freedom of the press in exercising its role as a 'public watchdog' is also facilitated by the disclosure of information.

102. The factors that weigh in favour of disclosure in the 'public interest' are specific to each unique case. However, over the years several authorities have given shape to the concept of public interest and provided indicative factors that weigh in favour of the disclosure of information. In an article titled "**Freedom of information and the public interest: the Commonwealth experience**"⁹⁹ the authors lay down several factors that, when found to exist in any given case, would weigh in favour of disclosure. The authors state:

"It is generally accepted that the public interest is not synonymous with what is of interest to the public, in the sense of satisfying public curiosity about some matter. For example, the UK Information Tribunal has drawn a distinction between 'matters which were in the interest of the public to know and matters which were merely interesting to the public (ie which the public would like to know about, and which sell newspapers, but ... are not relevant)'

Factors identified as favouring disclosure include the public interest in: contributing to a debate on a matter of public importance; accountability of officials; openness in the expenditure of public funds, the performance by a public authority of its regulatory functions, the handling of complaints by public authorities; exposure of wrongdoing, inefficiency or unfairness; individuals being able to refute allegations made against them; enhancements of scrutiny of decision-making; and protecting against danger to public health or safety."

⁹⁹ Moira Paterson and Maeve McDonagh, Freedom of information and the public interest: the Commonwealth experience, Oxford University Commonwealth Law Journal, 17:2, 189-210 pp. 201.

The factors identified fulfil a significantly broader gamut of goals than merely holding democratically elected officials accountable. The contribution made by the disclosure of information to debate on matters of public importance is in itself a factor in favour of disclosure. Where the disclosure of documents casts a light on the adequate performance of public authorities and any *mala fide* actions or wrongdoings by public figures, facilitating the broader goal of accountability, there exists a public interest in favour of disclosure.

103. In **Campbell v MGN Limited**¹⁰⁰ the House of Lords was called upon to balance the freedom of expression with the right to privacy. The claimant was a model who had been photographed leaving a drug rehabilitation meeting. The photographs were published, and the claimant claimed compensation for a breach of confidentiality. While the claimant admitted that there existed a public interest in the photographs of her attending the drug rehabilitation therapy, in evaluating the right of the defendant to publish the information Baroness Hale made the following observations:

“148. What was the nature of the freedom of expression which was being asserted on the other side? There are undoubtedly different types of speech, just as there are different types of private information, some of which are more deserving of protection in a democratic society than others. **Top of the list is political speech. The free exchange of information and ideas on matters relevant to the organisation of the economic, social and political life of the country is crucial to any democracy.** Without this, it can scarcely be called a democracy at all. This includes revealing information about public figures, especially those in elective office, which would otherwise be private but is relevant to their participation in public life. **Intellectual and educational speech and expression are also important in a democracy, not least because they enable the development of individuals' potential to play a full part in**

¹⁰⁰ [2004] UKHL 22

society and in our democratic life. Artistic speech and expression is important for similar reasons, in fostering both individual originality and creativity and the free-thinking and dynamic society we so much value. No doubt there are other kinds of speech and expression for which similar claims can be made.”

(Emphasis supplied)

As a facet of the freedom of expression, the ‘public interest’ element of the right to information has several jurisprudential bases. The public interest in disclosure extends to information which informs political debate and the organisation of “economic, social and political life”. There also exists public interest in information which is “intellectual or educational” and furthers the development of the individual. Lastly, public interest would also cover information which is of artistic relevance or fosters and nourishes the individual.

104. The opinion of Baroness Hale indicates a priority of interests in the determination of whether speech is in the ‘public interest’ and is deserving of protection. However, this Court should caution against such an approach. The freedom of expression protects a broad range of ideas, including those that ‘offend, shock and disturb’. In deciding whether information should be disclosed in the public interest, it is not for the Court to sit in judgement of society and make a determination on whether society would be ‘better off’ or ‘worse off’ if the information is disclosed. In the prescient words of Justice Tugendhat: “It is not for the judge to express personal views on such matters, still less to impose whatever personal views he might have.”¹⁰¹ It is well established that ‘public interest’ does not amount to what the public may find interesting. However, where the information sought to be disclosed falls within the various fields

¹⁰¹ Terry (previously ‘LNS’) v Persons Unknown [2010] EWHC 119

discussed above, including the promotion of public debate, intellectual or educational information or artistic information, the information possesses a 'public interest' connotation in favour of disclosure.

105. Section 11B of the Australian Freedom of Information Act 1982 provides a list of indicative factors that may be used by courts to determine whether a document should be disclosed in the "public interest". Section 11B is as under:

"11B Public interest exemptions – factors

(1) This section applies for the purpose of working out whether access to a conditionally exempt document would, on balance, be contrary to the public interest under subsection 11A(5).

(2) This section does not limit subsection 11A(5).

Factors favouring access

(3) Factors favouring access to the document in the public interest include whether access to the document would do any of the following:

(a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);

(b) inform public debate on a matter of public importance;

(c) promote effective oversight of public expenditure;

(d) allow a person to access his or her own personal information."

The Australian statute notes that "public interest" must be interpreted as the factors and circumstances that promote the objectives of the legislation. In addition to these objectives, crucial factors weighing in favour of public interest are the promotion of public debate and matters relating to public expenditure.

106. The understanding that, in interpreting the phrase 'public interest' courts should pay heed to the objects of the legislation has been adopted in our country as well. In **Bihar Public Service Commission v Saiyed Hussain Abbas**

Rizwi¹⁰², Justice Swatanter Kumar speaking for a two judge bench of this Court made the following observations:

“22. The expression “public interest” has to be understood in its true connotation so as to give complete meaning to the relevant provisions of the Act. The expression “public interest” must be viewed in its strict sense with all its exceptions so as to justify denial of a statutory exemption in terms of the Act. In its common parlance, the expression “public interest”, like “public purpose”, is not capable of any precise definition. It does not have a rigid meaning, is elastic and takes its colour from the statute in which it occurs, the concept varying with time and state of society and its needs (State of Bihar v. Kameshwar Singh [AIR 1952 SC 252]). It also means the general welfare of the public that warrants recognition and protection; something in which the public as a whole has a stake [Black’s Law Dictionary (8th Edn.).]”

(Emphasis supplied)

The Court noted that the phrase ‘public interest’ must be understood within the context of the enactment the phrase is used in. In the present case, the use of the phrase ‘public interest’ must be understood in light of the object and purpose of the RTI Act. The Court in **Bihar Public Service Commission** observed that the existence of certain exemptions from disclosure under clause (1) of Section 8 would lead to a narrow reading of the phrase “public interest”. This is not the correct approach. As noted previously in this judgement, the overarching principle of the RTI Act is to operationalise the disclosure of information held by public authorities in furtherance of the right to information under Article 19(1)(a) of the Constitution. Merely because the provisions of the RTI Act contain certain restrictions on the disclosure of information cannot lead to a conclusion that the phrase “public interest” under the RTI Act must be construed narrowly. Rather, under the scheme of clause (j) of clause (1) of Section 8, “public interest” is the

¹⁰² (2012) 13 SCC 61

measure of factors favouring the disclosure of information, which is subsequently weighed against the factors of privacy which weight in favour of non-disclosure. The existence of the balancing test creates a restriction on disclosure under the RTI Act but does not affect the wide meaning independently accorded to “public interest” understood as emanating from the freedom of speech and expression.

107. Clause (j) of clause (1) of Section 8 requires the Information Officer to weigh the “public interest” in disclosure against the privacy harm. The disclosure of different documents in different circumstances will give rise to unique “public interest” factors in favour of disclosure. However, a few broad principles may be laid out as to how the phrase “public interest” is to be understood. Where factors fall within this interpretation “public interest” so interpreted, they are factors that weigh in favour of disclosure. The principles are as follows:

- (i) Public interest is not limited to information which directly promotes the democratic accountability of elected officials;
- (ii) There exists public interest in the disclosure of information where the information sought informs political debate, is educational or intellectual or serves artistic purposes;
- (iii) Where the information sought will promote public debate on political, economic or social issues, there exists a public interest in disclosure;
- (iv) Judges and Information Officers should not pass a value judgement on whether the speech in question furthers their own conception of societal good or interest for it to satisfy the test of public interest;

- (v) As an indicative list, information concerning the accountability of officials, public expenditure, the performance of public duties, the handling of complaints, the existence of any wrongdoing by a public official, inefficiency in public administration and unfairness in public administration all possess public interest value, their relative strength to be determined on a case by case basis;
- (vi) Where the disclosure of information would promote the aims and objectives of the RTI Act, there exists a “public interest” in disclosing such information; and
- (vii) The object and purpose of the RTI Act is the fulfilment of the positive obligation on the State to provide access to information under Article 19(1)(a) of the Constitution and the existence of the restrictions on the disclosure of information does not restrict the meaning of “public interest” under the Act.

Balancing interests in disclosure with privacy interests

108. We have adverted to the substantive content of “personal information” and “public interest” as distinct factors to be considered by the Information Officer when arriving at a determination under clause (j) of clause (1) of Section 8. In the present case, the information sought by the respondent raises both considerations of “public interest” and “personal information”. The text of clause (j) requires the Information Officer to make a determination whether the “larger public interest justifies the disclosure” of personal information sought. The

Information Officer must conduct balancing or weighing of interests in making a determination in favour of disclosure or non-disclosure. The Information Officer must be cognisant that any determination under clause (j) of clause (1) of Section 8 implicates the right to information and the right to privacy as constitutional rights. Reason forms the heart of the law and the decision of the Information Officer must provide cogent and articulate reasons for the factors considered and conclusions arrived at in balancing the two interests. In answering the third referral question in its entirety, this Court would be remiss in not setting out the analytical approach to be applied by the Information Officer in balancing the interests in disclosure with the countervailing privacy interests. Justice S C Agrawal speaking for a Constitution Bench of this Court in **S N Mukherjee v Union of India**¹⁰³ observed:

“9. The object underlying the rules of natural justice “is to prevent miscarriage of justice” and secure “fair play in action”. As pointed out earlier **the requirement about recording of reasons for its decision by an administrative authority exercising quasi-judicial functions achieves this object by excluding chances of arbitrariness and ensuring a degree of fairness in the process of decision-making.** Keeping in view the expanding horizon of the principles of natural justice, we are of the opinion, that **the requirement to record reason can be regarded as one of the principles of natural justice which govern exercise of power by administrative authorities.** The rules of natural justice are not embodied rules.

(Emphasis supplied)

The requirement to record reasons is a principle of natural justice and a check against the arbitrary exercise of power by judicial and quasi-judicial bodies. In making a determination under clause (j) of clause (1) of Section 8 in a given case, it would not be satisfactory if an Information Officer were merely to record

¹⁰³ (1990) 4 SCC 495

that the privacy interest outweighed the public interest. Something more is required. By providing an analytical framework to address the two interests to be weighed and requiring the Information Officer record detailed reasons within this framework, the arbitrary exercise or discretion of the Information Officer is guarded against.

109. In the prescient words of Lord Denning:

“...each man should be free to develop his own personality to the full: and the only duties which should restrict this freedom are those which are necessary to enable everyone else to do the same.”¹⁰⁴

Neither the right to information nor the right to privacy are absolute rights under the framework of the RTI Act. Where the right to information of an information applicant in requesting information touches upon the right to privacy of the person whose information is sought, the RTI Act calls upon the Information Officer to weigh the two interests and determine which is stronger. In **Thalappalam Service Coop. Bank Ltd. v State of Kerala**¹⁰⁵ Justice K S P Radhakrishnan, speaking for a two judge bench of this Court, noted:

“61. The right to information and right to privacy are, therefore, not absolute rights, both the rights, one of which falls under Article 19(1)(a) and the other under Article 21 of the Constitution of India, can obviously be regulated, restricted and curtailed in the larger public interest. Absolute or uncontrolled individual rights do not and cannot exist in any modern State. Citizens' right to get information is statutorily recognised by the RTI Act, but at the same time limitations are also provided in the Act itself, which is discernible from the Preamble and other provisions of the Act.... The citizens, in that event, can always claim a

¹⁰⁴ Lord Denning, Freedom Under the Law (Hamlyn Lectures) 1968 (Sweet & Maxwell).

¹⁰⁵ (2013) 16 SCC 82

right to privacy, the right of a citizen to access information should be respected, so also a citizen's right to privacy.”

(Emphasis supplied)

110. In setting out the precise approach to be adopted by the Information Officer in making a determination under clause (j) of clause (1) of Section 8 it is worth adverting to the decision of **Campbell v MGM Limited**¹⁰⁶ the facts of which have already been discussed above. In that case, the House of Lords was called upon to balance the privacy rights of the claimant, being photographed leaving a ‘Narcotics Anonymous’ meeting, under Article 8 of the European Convention of Human Rights¹⁰⁷ and the right of the defendant to publish the information under Article 10 of the ECHR which provides for the freedom of expression. Although not a case with respect to the disclosure of documents, the House of Lords makes several notable observations about balancing privacy and free speech interests. Lord Nicholls observed:

“20. I should take this a little further on one point. **Article 8(1) recognises the need to respect private and family life.** Article 8(2) recognises there are occasions when intrusion into private and family life may be justified. One of these is where the intrusion is necessary for the protection of the rights and freedoms of others. **Article 10(1) recognises the importance of freedom of expression.** But article 10(2), like article 8(2), recognises there are occasions when protection of the rights of others may make it necessary for freedom of expression to give way. **When both these articles are engaged a difficult question of proportionality may arise. This question is distinct from the initial question of whether the published information engaged article 8 at all by being within the sphere of the complainant's private or family life.**”

(Emphasis supplied)

¹⁰⁶ [2004] UKHL 22
¹⁰⁷ “ECHR”

The first question of significance is whether the right to privacy of the person whose information is sought is engaged. This approach was subsequently applied by the Court of Appeal in **HRH Prince of Wales v Associated Newspapers Ltd**¹⁰⁸. The text of clause (j) of clause (1) of Section 8 also articulates this threshold. For clause (j) to be engaged at the first instance, the information sought must constitute “personal information”. This is an inquiry independent to the question of how the privacy interest should be balanced with the free speech interest.

111. Where the information sought is “personal information” the court must next balance the interest in disclosure or dissemination with the privacy interest at stake. Baroness Hale in her opinion in **Campbell** stated:

“137. It should be emphasised that the ‘reasonable expectation of privacy’ is a threshold test which brings the balancing exercise into play. It is not the end of the story. Once the information is identified as ‘private’ in this way, the court must balance the claimant’s interest in keeping the information private against the countervailing interest of the recipient in publishing it. Very often, it can be expected that the countervailing rights of the recipient will prevail.

...

140. The application of the proportionality test is more straightforward when only one Convention right is in play: the question then is whether the private right claimed offers sufficient justification for the degree of interference with the fundamental right. **It is much less straightforward when two Convention rights are in play, and the proportionality of interfering with one has to be balanced against the proportionality of restricting the other. As each is a fundamental right, there is evidently a “pressing social need” to protect it.**

141. Both parties accepted the basic approach of the Court of Appeal in *In re S* [2003] 3 WLR 1425, 1451-1452, at paras 54 to 60. This involves looking **first at the comparative importance of the actual rights being claimed in the individual case; then at the justifications for interfering**

¹⁰⁸ [2006] EWHC Civ 1776

with or restricting each of those rights; and applying the proportionality test to each. The parties in this case differed about whether the trial judge or the Court of Appeal had done this, the appellant arguing that the Court of Appeal had assumed primacy for the Article 10 right while the respondent argued that the trial judge had assumed primacy for the Article 8 right.

(Emphasis supplied)

112. Once the information sought has been identified as “personal information” the Information Officer must identify the actual rights being claimed in the individual case. In setting out the substantive content of ‘public interest’ and ‘privacy’ various facets of these concepts have been set out. In any given case, the Information Officer must identify the precise interests weighing in favour of ‘public interest’ disclosure, and those interests weighing in favour of ‘privacy’ and non-disclosure. The Information Officer must then examine the justifications for restricting each right and whether they are countenanced under the scheme of RTI Act and in law generally. The ground of confidentiality simpliciter is not a ground to restrict the right to information under the RTI Act or Article 19(1)(a) of the Constitution. Lastly, the Information Officer must employ the principle of proportionality. As observed by Baroness Hale, both the right to privacy and the right to information are legitimate aims. In applying the principle of proportionality, the Information Officer must ensure that the abridgement of a right is not disproportionate to the legitimate aim sought to be achieved by enforcing the countervailing right.

113. Take the example of where an information applicant sought the disclosure of how many leaves were taken by a public employee and the reasons for such leave. The need to ensure accountability of public employees is of clear public

interest in favour of disclosure. The reasons for the leave may also include medical information with respect to the public employee, creating a clear privacy interest in favour of non-disclosure. It is insufficient to state that the privacy interest in medical records is extremely high and therefore the outcome should be blanket non-disclosure. The principle of proportionality may necessitate that the number of and reasons for the leaves be disclosed and the medical reasons for the leave be omitted. This would ensure that the interest in accountability is only abridged to the extent necessary to protect the legitimate aim of the privacy of the public employee.

114. Having adverted to the analytical test to be applied by the Information Officers in balancing the two interests, it is also worth setting out certain factors that should not be considered in such a balancing. Section 11B of the **Australian Freedom of Information Act 1982** lays down certain 'Irrelevant factors' that should not be considered in determining whether to disclose information. Section 11B is as under:

"...Irrelevant factors

(4) The following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest:

(a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;

(b) access to the document could result in any person misinterpreting or misunderstanding the document;

(c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;

(d) access to the document could result in confusion or unnecessary debate."

The factors set out above are not relevant or permissible restrictions on the right to information and should not be considered in determining whether or not to disclose information under the RTI Act. Clause (2) of Section 6 of the RTI Act provides that an information applicant need not provide any reason as to why the information is sought. It would not be open for an Information Officer to deny the disclosure of information on the ground that the information would lead to confusion, embarrassment or unnecessary debate in the public sphere. By enumerating the grounds on which information may be exempted from the general obligation to disclose, clause (1) of Section 8 negates the notion that information may be withheld on the sole ground of confidentiality.

I Conclusion

115. The information sought by the respondent pertains to (1) the correspondence and file notings relating to the elevation of three judges to the Supreme Court, (2) information relating to the declaration of assets made by judges pursuant to the 1997 resolution, and (3) the identity and nature of disciplinary proceedings instituted against the lawyer and judge named in the newspaper report. The third referral question requires this Court to determine whether the disclosure of the information sought is exempt under clause (j) of clause (1) of Section 8. In arriving at a determination on whether the information sought is exempt under clause (j), it is necessary to (i) determine whether the information sought is “personal information” and engages the right to privacy, (ii) identify, in the facts of the present case, the specific heads of public interest in favour of disclosure and the specific privacy interests claimed, (iii) determine the

justifications for restricting such interests and (iv) apply the principle of proportionality to ensure that no right is abridged more than required to fulfil the legitimate aim of the countervailing right. The process under Section 11 of the RTI must be complied with where the information sought is 'third party information'. The substantive content of the terms 'personal information' and 'public interest' have also been set out in the present judgement.

J Directions

116. The information sought in Civil Appeal No 2683 with respect to which judges of the Supreme Court have declared their assets does not constitute the "personal information" of the judges and does not engage the right to privacy. The contents of the declaration of assets would fall within the meaning of "personal information" and the test set out under clause (j) of clause (1) of Section 8 would be applicable along with the procedure under Section 11 of the RTI Act. In view of the above observations, Civil Appeal No. 2683 of 2010 is dismissed and the judgement of the Delhi High Court dated 12 January 2010 in LPA No 501 of 2009 is upheld.

117. Civil Appeals Nos 10044 and 1045 of 2010 are remanded to the CPIO, Supreme Court of India to be examined and a determination arrived at, after applying the principles set out in the present judgement. The information sought in these appeals falls within the meaning of 'third party information' and the procedure under Section 11 must be complied with in arriving at a determination.

Brother Justice Sanjiv Khanna has observed that:

“Transparency and openness in judicial appointments juxtaposed with confidentiality of deliberations remain one of the most delicate and complex areas. Clearly, the position is progressive as well as evolving as steps have been taken to make the selection and appointment process more transparent and open. Notably, there has been a change after concerns were expressed on disclosure of the names and the reasons for those who had not been approved. The position will keep forging new paths by taking into consideration the experiences of the past and the aspirations of the future”

I wish to add a few thoughts of my own on the subject. The collegium owes its birth to judicial interpretation. In significant respects, the collegium is a victim of its own birth – pangs. Bereft of information pertaining to both the criteria governing the selection and appointment of judges to the higher judiciary and the application of those criteria in individual cases, citizens have engaged the constitutional right to information, facilitated by the RTI Act.

If the content of the right and the enforcement of the statute are to possess a meaningful dimension in their application to the judiciary – as it must, certain steps are necessary. Foremost among them is that the basis for the selection and appointment of judges to the higher judiciary must be defined and placed in the public realm. This is the procedure which is followed in making appointments but also in terms of the substantive norms which are adopted while making judicial appointments. There can be no denying the fact that there is a vital element of public interest in knowing about the norms which are taken into consideration in selecting candidates for higher judicial officer and making judicial appointments. Knowledge is a powerful instrument which secures consistency in application and

generates the confidence that is essential to the sanctity of the process of judicial appointments. This is essentially because the collegium system postulates that proposals for appointment of judges are initiated by the judges themselves.

Essential substantial norms in regard to judicial appointments include:

- (i) The basis on which performance of a member of the Bar is evaluated for the purpose of higher judicial office;
- (ii) The criteria which are applied in determining whether a member of the Bar fulfils requirements in terms of:
 - a) Experience as reflected in the quantum and nature of the practice;
 - b) Domain specialization in areas which are geared to the evolving nature of litigation and the requirements of each court;
 - c) Income requirements, if any, having regard to the nature of the practice and the circumstances prevailing in the court or region concerned;
 - d) The commitment demonstrated by a candidate under consideration to the development of the law in terms of written work, research and academic qualifications; and
 - e) The social orientation of the candidate, defined in terms of the extent of *pro bono* or legal aid work;
- (iii) The need for promoting the role of the judiciary as an inclusive institution and its diversity in terms of gender, representation to minorities and the marginalised, orientation and other relevant factors.

The present judgment does not seek to define what the standards for judicial appointments should be. However, what needs to be emphasised is that the substantive standards which are borne in mind must be formulated and placed in the public realm as a measure that would promote confidence in the appointments process. Due publicity to the norms which have been formulated and are applied would foster a degree of transparency and promote accountability in decision making at all levels within the judiciary and the government. The norms may also spell out the criteria followed for assessing the judges of the district judiciary for higher judicial office. There is a vital public interest in disclosing the basis on which those with judicial experience are evaluated for elevation to higher judicial office particularly having regard to merit, integrity and judicial performance. Placing the criteria followed in making judicial appointments in the public domain will fulfil the purpose and mandate of Section 4 of the RTI Act, engender public confidence in the process and provides a safeguard against extraneous considerations entering into the process.

.....J
[Dr Dhananjaya Y Chandrachud]

**New Delhi;
November 13, 2019.**