RIGHT TO KNOW IN A DEMOCRATIC REPUBLIC

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I. INTRODUCTION

> "Secrecy in a government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open discussion based on full information and debate on public issues are vital to our national health."
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> Justice Douglas

In modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the government which, having been elected by them, seeks to formulate sound policies of governance aimed at their welfare. True democracy cannot exist unless all citizens have a right to participate in the affairs of the polity of the country. The right to participate in the affairs of the country is meaningless unless the citizens are well informed on all sides of the issues, in respect of which they are called upon to express their views. Open government is a part of many Constitutions of the world. Many countries such as USA, Australia, Canada, Sweden, Denmark, Finland, Austria and France have expressly recognised this right.

The American Congress passed the Freedom of Information Act, 1966 which gives every citizen a legally enforceable right to access to government files and documents which the administrators may be tempted to keep confidential. If any person is denied this right, he can seek injunctive relief from the court.[1] However, this right recognises nine well-defined exceptions: (i) information specially required by executive order to be kept secret in the interest of national defence or foreign policy; (ii) information related solely to internal personal use of the agency; (iii) information specifically exempted from disclosure by statute; (iv) information relating to trade, commercial or financial secrets; (v) information relating to inter-agency or intra-agency memorandums or letters; (vi) information relating to personal medical files; (vii) information compiled for law

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1 *National Labour Relation Board* v. *Robbins Tyre and Rubber Co.*, 437 US 251 (1977).

enforcement agencies except to the extent available by law to a party other than the agency; (viii) information relating to agency regulation or supervision; (ix) information relating to geological and geophysical maps.

After investigating the operation of this Act, Congress in 1974 amended it. Amendments provided: *(i)* for disclosure of "any reasonably segregable portion" of otherwise exempted records; *(ii)* for mandatory time limit of 10 to 30 days for responding to information requests; *(iii)* for rationalised procedure for obtaining information, appeal and cost. Statistics show that maximum (80%) use of this Act is being made by business executives and their lawyers and editors, authors, reporters and broadcasters whose job is to inform the people have made very little use of this Act.[2]

The American judiciary shares the same concern of the Congress which is reflected in the Freedom of Information Act, 1966. In *New York Times* v. *U.S.*[3], the question was whether Supreme Court had power to issue an injunction restraining the publication of news having repercussions on the security of United States? The court negatived the claim for injunction of the government. According to Justice Black, the press was protected so that it could bare the secrets of government and inform the people, that only a free and unrestrained press could effectively expose deception in government, and that paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people. Appeal to security of the United States made by the counsel for the government did not impress him as, in his opinion, the word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the right to freedom of speech. Guarding of military and diplomatic secrets at the expense of informed representative government, according to him, provides no real security for the Republic. Justice Stewart, with whom Justice White joined, observed that in the "absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defence and international affairs may lie in an enlightened citizenry, in an informed and critical public opinion which alone can protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware and free, most

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2 I.P. Massey, ADMINISTRATIVE LAW (1995) at 458.
3 48 US 403.

vitally serves the basic purpose of the First Amendment." The case lays down the proposition that unless a clear case is made out that national security is in jeopardy, the press will not be enjoined from carrying out its historical duty of educating the public on all matters including even the management of military matters.

In order to provide access to Federal Government meetings, the Congress passed Sunshine Act, 1977 which mandates open meetings for regular session of federal agencies. However, closed door meetings are allowed in cases: *(i)* national defence and foreign policy; *(ii)* confidential commercial, financial information; *(iii)* invasion of privacy; *(iv)* law enforcement and criminal investigatory records; *(v)* pre-decisional discussions of general policy; *(vi)* bank examiners' record; and *(vii)* information which may lead to financial speculation. The Act provides that injunctive relief may be obtained to force a pending meeting to be open and to force closing of a meeting held in violation of law. After the enforcement of the Act, all meetings of federal agencies are to be open with at least one week's public notice unless prescribed exceptions are attracted.

In England the thrust of the legislation is not on 'information' but 'secrecy'. The present law is contained in the Official Secrets Acts of 1911, 1920, 1939 and 1989. Under Section 2 of the Act of 1911 it is an offence punishable with up to two years' imprisonment to retain without permission or failure to take reasonable care of information obtained as a result of one's present or future employment; or to *communicate* information so obtained, or entrusted to one in confidence by a person holding office under Her Majesty, or obtained in contravention of the Act, to anybody other than a person to whom one is authorized to convey it or to whom it is one's duty to impart it in the interests of State; or to receive such information, knowing or having reasonable cause to believe that it has been given in contravention of the Act. Under these wide-ranging prohibitions it may be an offence for a civil servant to pass on, or for a research worker to acquire from him, information even if such information has no bearing on security or is not classified as confidential.[4]

The section is indeed convoluted and abstruse. For instance, it is not clear whether guilty knowledge (*mens rea*) has to be proved for unauthorised

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[4] S.A. de Smith, CONSTITUTIONAL AND ADMINISTRATIVE LAW (1977) at 472.

communication to be an offence. When is communication authorised? What of 'leaks' by Ministers? According to official doctrine, Ministers 'authorise themselves' to convey information about matters of government and administration; civil servants have implied authorisation depending on the nature of their job and the circumstances of the case. All this is very vague. And in the absence of authorisation, when is it a journalist's duty 'in the interests of the State' to publicise official information? No intelligible answer has yet been produced.[5]

The Frank Committee[6] described Section 2 of 1911 Act as a 'catch-all' and a 'mess' and keeping in view the desirability of 'openness' of governmental affairs in a democratic society, made detailed proposals for a repeal of Section 2 of the 1911 Act and its replacement by the Official Information Act. The proposals restricted criminal sanctions to defined areas of major importance: wrongful disclosure of (i) information of major national importance in the field of defence, security, foreign relations, currency and reserves, (ii) cabinet documents, and (iii) information facilitating criminal activity or violating the confidentiality of information supplied to the government by or about individuals, and for use of information for private gains. Mere receipt of protected information would not be an offence under the Act, but communication by journalists and others would still be if the author or speaker had reasonable grounds for believing that it had been conveyed to him in breach of the Act. Only material classified as 'Top Secret' or 'Secret' or 'Defence Confidential' would be protected.

Though this whole recommendation has not been implemented, yet in 1989 another Official Secrets Act was passed which repealed Section 2 of the 1911 Act and decriminalised much that was previously criminal. However, in other matters it is still very restrictive.

In 1993, the government in England published a white paper on 'open government' and proposed a voluntary code of practice of providing information. This code is voluntary and thus cannot be equated to a statutory law on access to information. It provides policies and principles relating to disclosure of government information. The sanction behind code is moral and not legal. If a request for information has

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5 *Id.* at 473.

6 Cmnd 5104 (1972).

been refused then only a complaint can be made to the parliamentary Ombudsman through a Member of Parliament.

The Local Government (Access to Information) Act, 1985 is the only statutory law providing a legal right to information against local governments. The Act provides for greater public access to meetings and documents of the major local councils. However, this Act leaves much to the discretion of the councils and mentions at least fifteen categories of exempted information. Individual seeking information has no adequate legal redress. It is certainly strange that a democratic country should be so secretive.[7]

At international level right to know or right to information has been recognised as a human right. Universal Declaration of Human Rights in Article 19 included free flow of information as human rights essential for peace and development. Article 19 runs as follows:

> Every one has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Similarly, Article 19(1) and (2) of the International Covenant of Civil and Political Rights provide:

(1) Everyone shall have the right to hold opinions without interference.

(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of his choice.

Further Article 10 of the European Convention on Human Rights states:

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

The UNESCO Declaration, 1978 also provides for "the exercise of freedom of opinion, expression and information, recognised as an integral part of human rights and fundamental freedom".

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[7] *Supra* note 2 at 459.

Thus the right to get information in a democracy is recognised all throughout and it is natural right flowing from the concept of democracy. Now question arises – whether right to know has been recognised in India? If yes, what is the nature and scope of this right? How far Indian Judiciary has helped in the recognition and development of this right? What are the limitations on this right?

II. Nature and Scope of Right to Know in India

A. The Legislative Provisions and Right to Know

In India, the Official Secrets Act, 1923 makes all disclosures and use of official information a criminal offence unless expressly authorised. The Act broadly speaking falls into two parts. One concerns espionage and the other, which affects press, deals with unauthorised disclosure of official information. Section 5 of the Act lays down that if any person having in his possession any document or information which has been entrusted to him in confidence by any government official, or which he has obtained as an official communicates it to any person other than a person to whom he is authorised to communicate it, he shall be guilty of an offence. So also a person who receives such document or information 'knowing or having reason to believe' that it being communicated in breach of the Act. Later, the Act was amended to penalise disclosure of documents or even information, which is "likely to affect friendly relations with foreign States".

Section 5 is virtual reproduction of Section 2 of the British Official Secrets Act, 1911 which is now recognised as wholly inappropriate in the context of any modern democracy.[8] In England, Frank Committee condemned Section 2 and observed, "the main offence, which Section 2 creates is the unauthorised communication of official information (including documents) by a crown servant. The leading characteristic of this offence is its catch-all quality. It catches all official documents and information. It makes no distinctions of kind, and no distinction of degree. All information which a Crown servant learns in the course of his official duty is 'official' for the purpose of Section 2, whatever its nature, whatever its importance, and whatever its original source. A blanket is thrown over everything;

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[8] *Id.* at 461.

nothing escapes. The section catches all Crown servants as well as all official information. Consequently anyone, whether newsman or lay person, who receives such information is liable to punishment. Both the giver and the receiver of information are liable to imprisonment for a term, which may extend to three years.

However, the uniqueness of the Act is that ministers are, in effect, self authorising. They decide for themselves what to reveal. Senior civil servants exercise a considerable degree of personal judgment in deciding what disclosure of official information they may properly make, and to whom. Such communication is regarded as 'authorised'. The result is that official leaks, a fertile source of disinformation, are protected but their exposure by unravelling the whole truth is forbidden.[9]

It may be pointed out that Section 2 was drafted in haste in times of crisis. The Bill was put forward by the government as a measure which was aimed at spying and was essential on grounds of national security, therefore, passed without debate.[10] Consequently the Franks Committee recommended its repeal due to unsuitability to the recent times. The Committee also recommended the replacement of 'likelihood of harm' test by the 'strict proof' test while determining injury to the public interest. Section 2 of the Act has now been repealed by Official Secrets Act, 1989.

All these criticisms are applicable to Section 5 of the Indian Official Secrets Act, 1923. The Act without defining what constitutes an 'official secret' has created an atmosphere of secrecy around all governmental activities and thereby has made it difficult for the public to obtain any information regarding the functioning of the government. It is only if people know how government is actively functioning they can participate in the deliberation of the country, which is the very core of democracy. The democratic form of government itself demands its citizens an active and intelligent participation in the affairs of the country. The public discussion with people's participation is a basic feature and a rational process of democracy, which distinguishes it from all other forms of government.[11]

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9 A.G. Noorani, *Secret Act: An Anachronism*, INDIAN EXPRESS, July 31, 1981.

10 *Ibid.*

11 *S. Rangarajan* v. *P. Jagjivan Ram*, (1989) 2 SCC 574; *Express Newspapers Pvt. Ltd.* v. *Union of India*, AIR 1986 SC 872.

Government openness is a sure technique to minimise administrative faults. Justice Krishna Iyer rightly said, "A government which revels in secrecy... not only acts against democratic decency but buries itself with its own burial.[12]

The harshness of the Act of 1923 has been mitigated to a limited extent by the courts. The courts in India and England have rejected the concept of conclusive right of government to withhold a document. Further Sections 123 and 124 of the Indian Evidence Act, 1872 protect from disclosure- documents and communication which are considered to be privileged.

Under Section 123, no one is permitted to give evidence 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.

Under Section 124, no public officer can be compelled to disclose communication, made to him in official confidence, when he considers that the public interest would suffer by the disclosure. Section 162 of the Evidence Act deals with the powers of the court regarding admissibility of documents. It states that the court, if it thinks fit, may inspect any document, unless it refers to matters of the State, or take other evidence to enable it to determine its admissibility.

The need to enact a law on right to information was recognised unanimously by the Chief Ministers Conference on "Effective and Responsive Government" held on 24th May, 1997 at New Delhi. In its 38th Report relating to Demands for Grants of Ministry of Personnel, Public Grievances and Pension, the Parliamentary Standing Committee on Home Affairs recommended that the government should take measures for enactment of such a legislation. A Bill to provide freedom to every citizen to secure access to information under the control of public authorities called Freedom of Information Bill, 1997 was introduced in the Lok Sabha, which got Presidential assent on 6th January, 2003 and titled as the Freedom of Information Act, 2002. The Act was enacted to enable the citizens to have an access to information on a statutory basis.

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[12] *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248 : AIR 1978 SC 597.

B. The Judicial Approach to Right to Know

The Indian Judiciary has played an important role in developing and recognising the right to know. The Supreme Court in India while recognising the efficacy of the 'right to know' which is a sine qua non of a really effective participatory democracy raised the simple 'right to know' to the status of a fundamental right.

The main hurdle in the way of court's recognising the right to know was the "State privilege" found in Sections 123 and 124 of the Indian Evidence Act. The "State privilege" owes its origin to the "Crown privilege" which can be traced to "Crown prerogative right" to prevent the disclosure of State secrets on the ground that their production would be contrary to the public interests and the important aspect of this Crown privilege is that it cannot be waived. The foundation of the rule is that the information cannot be disclosed without injury to the public interest, and not that documents are confidential or official, which alone is no reason for their non-production.[13]

The Indian Judiciary, therefore, had to first dilute the concept of State privilege to possible extent in upholding the right to freedom of information. While elaborating the scope of the relevant provisions of the Indian Evidence Act, the Supreme Court in State of Punjab v. Sukhdev Singh[14] laid down the following propositions:

(1) Disclosure of information relating to privileged documents is a private interest whereas the protection of such interest is a public interest.

(2) The courts could decide whether the documents relates to "affairs of State".

(3) Such documents relating to "affairs of State" can either be noxious (causing public injury) or innocuous (not causing public injury).

(4) If the court comes to the conclusion that the document does not relate to "affairs of State" then it should reject the claim for privilege and direct its production. If it comes to the conclusion that the document relates to the "affairs of State" then it should leave it to the head of the department to decide whether he should permit its production or not.

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[13] C.S. Emden, *Documents Privileged in Public Interest*, CLVI LAW QUARTERLY REVIEW, 476 at 479.

[14] AIR 1961 SC 493 at 504-06.

(5) The courts cannot decide whether documents relating to "affairs of State" were noxious. This can be decided only by the departmental head.

In State of Uttar Pradesh v. Raj Narain and Others[15] the main issue was whether privilege under Section 123 of Indian Evidence Act could be claimed by the Government of Uttar Pradesh in respect of unpublished blue book viz., the circulars regarding the security and tour arrangements of the Prime Minister, the instructions received from the Government of India and the Prime Minister's Secretariat on the basis of which police arrangements for constructions of rostrum, fixation of loud speakers, and other arrangements were made and the correspondence between the State Government and the Government of India and between the Chief Minister and the Prime Minister regarding police arrangements for meetings of the Prime Minister by State Government and in regard to their expenses.

The Supreme Court, elaborating the scope of Sections 123 and 162 of the Indian Evidence Act held that injury to public interest is the reason for the exclusion from disclosure of documents whose contents if disclosed would injure public and national interest. Public interest, which demands that evidence be withheld, is to be weighed against the public interest in the administration of justice that courts should have fullest possible access to all relevant materials. When the first public interest outweighs the latter, the evidence cannot be admitted. The court will proprio motu exclude evidence the production of which is contrary to public interest. It is in public interest that confidentiality shall be safeguarded. The reason is that such documents become subject to privilege by reason of their contents. Confidentiality is not a head of privilege. It is a consideration to be borne in mind. It is not that the contents contain material, which it would be damaging to the national interest to divulge, but rather that the documents would be of class which demand protection. To illustrate the class of documents would embrace cabinet papers, foreign office dispatches, papers regarding the security of the State and high level inter-departmental minutes.[16]

The documents in respect of which exclusion from production was claimed in the present case were the Blue Book containing rules and

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[15] AIR 1975 SC 865 : (1975) 4 SCC 428.

[16] *Id.* at 866.

instructions for the protection of the Prime Minister when on tour and travel. The Chief Secretary filed an affidavit claiming privilege in respect of the Blue Book on the ground that the document related to affairs of the State and should, therefore be excluded from production. Reading sections 123 and 162 together, the court held that it cannot hold an inquiry into the possible injury to public interest which may result from disclosure of the document in question. That is a matter for the authority concerned to decide, but the court is competent, and indeed is bound, to hold a preliminary inquiry and determine the validity of the objections to its production, and that necessarily involves an inquiry into the question as to whether the evidence relates to an affair of the State under Section 123 or not. The court has to consider two things; whether the document relates to secret affairs of State; and whether the refusal to permit evidence derived from it being given was in public interest. No doubt, the words used in Section 123 "as he thinks fit" confer an absolute discretion on the head of the department to give or withhold such permission. An overriding power in express terms is conferred on the court under Section 162 to decide finally on the validity of the objection. The court will disallow the objection if it comes to the conclusion that the document does not relate to affairs of State or that the public interest does not compel its non-disclosure or that the public interest served by the administration of justice in a particular case overrides all other aspects of public interest.[17]

It was further held that if on inspection, the court holds that any part of the Blue Book or other document does not relate to affairs of State and that the disclosure will not injure public interest, the court will be free to disclose that part and uphold the objection as regards the rest provided that this will not give a misleading impression. The principle of the rule of non-disclosure of records relating to affairs of State is the concern for public interest and the rule will be applied no further than the attainment of that objective requires.[18]

Thus the Supreme Court in Raj Narain case has diluted the rigidity of the concept of privileged document by stating that a mere label given to a document by the executive is not conclusive in respect of the question – whether it relates to affairs of State or not. The privilege status should

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[17] *Id.* at 882.
[18] *Id.* at 886-87.

be accorded to any documents of the government not merely because they are labeled as government documents but according to the contents of the documents. If the contents of the documents do not relate to any affairs of the State then the documents are not entitled to protection and the rule of non-disclosure will not be applicable to more documents.

The court observed that 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. The court pertinently observed:

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 public way, by their public functionaries they are entitled to know the particulars of every public transaction in all its bearing.[19]

Thus the Supreme Court not only acknowledged the citizen's right to know but also found that it emerges from freedom of speech and expression.

Again, the Supreme Court in *Indian Express Newspapers (Bombay) Private Ltd. and Others* v. *Union of India*[20] held that the fundamental principle invested in freedom of speech and expression is people's right to know. Freedom of expression, as the court observed has four broad social purposes to serve[21] :

(i) it helps an individual to attain self-fulfillment,
(ii) it assists in the discovery of truth,
(iii) it strengthens the capacity of an individual in participating in decision making, and
(iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change.

Having regard to the decisions cited above, it appears that the right of freedom of expression includes several specific rights, which are bound together and through which a common string passes. These include:

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19 *Id.* at 884.
20 AIR 1986 SC 515 : (1985) 1 SCC 641.
21 *Id.* at 540.

(1) Right to voice one's opinion.

(2) Right to seek information and ideas.

(3) Right to receive information.

(4) Right to impart information *etc.*

It also appears that the State is under obligation to create conditions in which the aforesaid rights flowing from Article 19(1)(a) can be effectively and efficiently enjoyed by the citizens. All members of the society should be able to form their own beliefs and communicate them freely to others. Right to seek, receive and impart information can be through words of mouth, in writing or in print, in form of art or through television, radio, *etc.*

The right to know was further elaborated by Justice Bhagwati in *S.P. Gupta and Others* v. *Union of India and Others*[22] popularly known as *Judges Transfer* case. The case is generally considered as having broken new ground and having added a fresh, liberal dimension to the need for increased disclosure in matters relating to public affairs. In this case, the consensus that emerged amongst the judges was that in regard to the functioning of government, disclosure of information must be the ordinary rule while secrecy must be an exception, justifiable only when it is demanded by the requirement of public interest. The court overruling the *Sukhdev Singh* case decided firstly that the right to disclosure is not a private interest but public interest. Secondly, whether or not the disclosure of documents relating to "affairs of the State" is in public interest could be decided by the court. Thirdly, the court also decided that the documents relating to the "affairs of the State" could be ordered to be disclosed even though they would cause injury to public interest, if the court came to the conclusion that the competing public interest of disclosure was superior in the facts and circumstances of the case.

The court was of the view that the disclosure of documents relating to the affairs of State involves two competing dimensions of public interest, namely, the right of the citizens to obtain disclosure of information, which competes with the right of the State to protect the information relating to its crucial affairs. It was further held that, in deciding whether or not to disclose the contents of a particular document, a judge must balance the competent interests and make his final case.

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[22] AIR 1982 SC 149 : 1981 Supp SCC 87.

Though it is true that a successful democracy posits an 'aware' citizenry, but it is equally important to be alive to the dangers that lie ahead. It is important to realise that undue popular pressure brought to bear on decision-makers in government can have frightening side-effects. As the Supreme Court observed in *Dinesh Trivedi* v. *Union of India*[23] that if every action taken by the political or executive functionary is transformed into a public controversy and made subject to an inquiry to soothe popular sentiments, it will undoubtedly have a chilling effect on the independence of the decision-maker who may find it safer not to take any decision. It will paralyse the entire system and bring it to a grinding halt. So we have two conflicting situations almost enigmatic and test is to maintain a fine balance, which would serve public interest.

Same test was applied by the Rajasthan High Court in *L.K. Koolwal* v. *State of Rajasthan*[24] while considering the public interest petition filed by a citizen seeking protection against the neglect of sanitation by the State which led to pollution hazards, it was held that a citizen has a right to know about the activities of the State, the instrumentalities, the departments and the agencies of the State. The privilege of secrecy, which existed in the old times that the State is not bound to disclose the facts to the citizens or the State cannot be compelled by the citizens to disclose the facts, does not survive now to a great extent. Under Article 19(1)(a) of the Constitution there exists the right of freedom of speech. Freedom of speech is based on the foundation of the freedom of right to know. The State can impose and should impose the reasonable restrictions in the matter like other fundamental rights where it affects the national security and any other allied matter affecting the nation's integrity. But in the matter of sanitation and other allied matter every citizen has a right to know how the State is functioning and why the State is withholding such information in such matters.

In *Dinesh Trivedi* case[25], the Supreme Court while dealing with a petition for disclosure of Vohra Committee Report held that to ensure the continued participation of the people in the democratic process, they must be kept informed of the vital decisions taken by the government and basis

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[23] (1997) 4 SCC 306 at 314.
[24] AIR 1988 Raj 2.
[25] *Supra* note 24.

thereof. Democracy, therefore, expects openness and openness is a concomitant of free society. Sunlight is the best disinfectant.

Having been established that right to know is a part of the freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution, the Indian Judiciary has started giving new dimensions to this right. In *Secretary, Ministry of Information and Broadcasting, Government of India and Others* v. *Cricket Association of Bengal and Others*[26], the Supreme Court extended further the right to know to right to telecast sports events. The court commenting on the scope of Article 19(1)(a) held that the freedom of speech and expression includes right to acquire information and to disseminate it. Freedom of speech and expression is necessary for self-fulfillment. It enables people to contribute to debate 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 range of ideas can circulate. It is 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.*[27]

While dealing with the right to telecast, the court took the view that in a team event such as cricket, football, hockey *etc.,* there is both individual and collective expression. It may be true that what is protected by Article 19(1)(a) is an expression of thought and feeling and not of the physical or intellectual powers or skill. It is also true that a person desiring to telecast sports events when he is not himself a participant in the game, does not seek to exercise his right to self-expression. However, the right to freedom of speech and expression also includes the right to educate, to inform and to entertain and also the right to be educated, informed and entertained. The former is the right of the telecaster and the latter that of the viewers. The right to telecast sporting event will therefore also include the right to educate and inform the present and the prospective sportsmen interested in the particular game and also to inform and entertain the lovers of the game and entertainment is a facet, a part of free speech. Hence, when a

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[26] AIR 1995 SC 1236 : (1995) 2 SCC 161.
[27] *Id.* at 1259.

telecaster desires to telecast a sporting event, it is incorrect to say that the free speech element is absent from his right.[28]

Again, in *TATA Press Ltd.* v. *Mahanagar Telephone Nigam Ltd.*,[29] holding that "commercial speech" is a part of freedom of speech and expression under Article 19(1)(a), the Supreme Court explained the importance of "advertisements" in our democratic economy. It was held that advertising is considered to be the corner-stone of our economic system. Low prices for consumers are dependent upon mass production, mass production is dependent upon volume sales, and volume sales are dependent upon advertising. Advertising as a "commercial speech" has two facets. Advertising which is no more than a commercial transaction, is nonetheless dissemination of information regarding the product-advertised. Public at large is benefitted by the information made available through the advertisement. An advertisement giving information regarding a life saving drug may be of much more importance to general public than to the advertiser who may be having purely a trade consideration.

C. *Recent Developments : Judicial and Legislative*

More recently the Indian judiciary has made an important innovation and held that the right to know must be secured to the citizens with reference to elections as well. In Association for Democratic Reforms v. Union of India and Another[30] , Delhi High Court ruled that right to information acquires great significance in the context of elections. It will be a farce if a citizen casts his vote in ignorance, without knowing the background of the candidate. It will not amount to intelligent and rational voting. Therefore, it is imperative to ensure the availability of the right to a citizen to receive the information so essential for casting his vote. For making a right choice it is essential that the past of the candidate should not be kept in dark as it is not in the interest of the democracy and well being of the country. The antecedents of a person standing for election must be placed under public gaze and that is possible only when all wraps covering information about him are cast away. For the survival of democracy it is essential that the voter casts an educated vote based upon his knowledge derived from information supplied to him about the candidates.

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28 *Id.* at 1266.
29 AIR 1995 SC 2438.
30 AIR 2001 Del 126 at 136, 137.

Parliamentary democracy is a part of basic structure of the Constitution. Fundamental right to receive information, which springs forth from the right of freedom of speech and expression enshrined in Article 19(1)(a), is also a part of basic structure of the Constitution. This right must be secured to the citizens with reference to the elections as well. This right along with other fundamental rights constituting the core of our Constitution will not acquire its full potential till the voter is posted with right information for making a right choice.

The court further observed that if criminalisation of politics is to be prevented and purity in the system of governance is to be infused, the right needs to be enforced. This will ensure in the real sense the continued participation of the people in the democratic process. The grave danger posed by the criminalisation of politics as highlighted by Vohra Committee Report could be eliminated provided the voters are made aware of the criminal propensities and activities of the candidate. To keep such activities under a veil of secrecy will perpetuate and aggravate the situation and will not arrest the trend towards criminalisation of politics. Therefore, an elector ought to know whether or not a candidate has criminal record. He must know about the competence and suitability of the candidate for high office of the Member of Parliament or the State Legislature including his educational qualifications. The aforesaid information is a sine qua non for a meaningful, effective and vibrant democracy. The process would also make the voters aware of the value and worth of the ballot paper. This may ultimately lead to rooting out some of the ills that have taken roots in the parliamentary system.[31]

In appeal[32] the Supreme Court accepted the view taken by the Delhi High Court. It was held that democracy cannot survive without free and fair election, without free and fairly informed voters. Votes cast by uninformed voters in favour of X or Y candidate would be meaningless. One-sided information, disinformation, misinformation and non-information all equally create an uninformed citizenry, which makes democracy a farce. Therefore, casting of a vote by misinformed and non-informed voter or a voter having one-sided information only is bound to affect the democracy seriously.[33]

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[31] *Id.* at 137, 138.

[32] *Union of India* v. *Association for Democratic Reforms*, AIR 2002 SC 2112.

[33] *Id.* at 2127.

The court further held that Article 19(1)(a) provides for freedom of speech and expression. Voter's speech or expression in case of election would include casting of votes, that is to say, voter speaks out or expresses by casting vote. For this purpose, information about the candidate to be selected is must. The Supreme Court directed the Election Commission to issue a notification making it compulsory for those who contest elections to make available information about their education, assets, liabilities and criminal antecedents for the benefit of the voters. The Election Commission acted upon the order of the court and issued the notification making it compulsory to provide above information before filling their nominations for contesting elections.[34]

It is submitted that the aforesaid decision of the Constitution Bench unreservedly lays down that in democracy the little man, the voter, has overwhelming importance and he should not be hijacked from the course of free and fair elections by subtle perversion of discretion of casting votes.

Parliament, instead of welcoming this decision of seminal importance, chose to amend the Representation of the People Act, 1951 by inserting Section 33-B through the Representation of the People (Third Amendment) Act, 2002. Section 33-B of the amended Act provided 'notwithstanding anything contained in any judgment of any court or any order of the Election Commission, no candidate shall be liable to disclose or furnish any such information, in respect of his election, which is not required to be disclosed or furnished under this Act or the rules made thereunder'. Thus, the amended Act provided that only the candidates who are elected are required to give details of their assets and liabilities to the concerned presiding officers of the Houses, and not the candidates who are not elected. The object of the said new section was to undo the effect of the judgment of the Supreme Court in the aforesaid case and the subsequent notification of the Election Commission. However, the PUCL moved the Supreme Court challenging the constitutional validity of the newly inserted section 33-B.[35] The Supreme Court struck down section 33-B as being violative of citizen's right to information under Article 19(1)(a) of the Constitution. The court held that Parliament has no competence to direct the State or its instrumentality to disobey the orders of the court. The

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[34] *Id.* at 2130, 2131.

[35] *Peoples' Union for Civil Liberties* v. *Union of India,* (2003) 4 SCC 399.

Parliament cannot declare that the law declared by the Supreme Court is not binding. Keeping the amendment in mind the court asked whether there is any necessity to keep the voters in dark about any murder, dacoity or like committed by a candidate or about his ill-gotten money, which could be used for elections. Shah J. observed that the judgment was aimed at cleansing the democracy of unwanted elements and gave the country a competent legislature. The court thus resorted to its 2002 verdict and directed the Election Commission to issue a fresh notification for the implementation of its judgment.

So, it could be seen that the courts in India are taking initiatives in promoting the right to know. The Indian judiciary acknowledging that the participatory role of the public can be fulfilled in any democracy only if it is an open government, has played a positive role in developing and recognising the right to know in Indian republic.

In order to make the government more transparent, and accountable to the public, the Indian Legislature has enacted the Freedom of Information Act, 2002. The Act entitles every citizen to have access to information controlled by public authorities. Under the Act, it is obligatory upon authority to provide information and maintain records consistent with its operational needs. These records would have to be duly catalogued, indexed and published at such intervals as may be prescribed by appropriate government or the competent authority.

The object of the Act is to promote openness, transparency and accountability in administration. A person desirous of obtaining information shall make a request in writing or through electronic means to the concerned Public Information Officer specifying the particulars of information sought by him.[36]

The Act makes provision for appointment of Public Information Officers.[37] Every Public Information Officer shall deal with requests for information and shall render assistance to any person seeking such information. When a request for information is received the Public Information Officer shall, as expeditiously as possible, and in any case within thirty days either provide the information required on payment of

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[36] Section 6, Freedom of Information Act, 2002.
[37] Section 5, *id.*

prescribed fee or reject the request for any reasons specified in Sections 8 or 9. But where the information sought for concerns the life and liberty of a person, the same should be provided within forty-eight hours of receipt of the request. If the request is rejected the Public Information Officer shall communicate the person making request, reasons for such rejection. Section 8 provides for exemptions from disclosure of information relating to certain matters. If a person is aggrieved by a decision of the Public Information Officer he can prefer an appeal to such authority as may be prescribed.[38]

However, in order to ensure greater and more effective access to information, the Government resolved that the Freedom of Information Act, 2002 needs to be made more progressive, participatory and meaningful. The National Advisory Council on the National Common Minimum Programme deliberated on the issue and introduced the Right to Information Bill, 2004 on the last day of the winter session of the Parliament i.e. on December 23, 2004. The new Bill suggests certain important changes to be incorporated in the existing Act to ensure smoother and greater access to information.

The important changes proposed to be incorporated, inter alia, include establishment of an appellate machinery with investigating powers to review decisions of the Public Information Officer; penal provisions for failure to provide information as per law; provisions to ensure maximum disclosure and minimum exemptions consistent with the constitutional provisions and effective mechanisms for access to information and disclosure by authorities, etc. In view of significant changes proposed in the existing Act, the new Bill also seeks to repeal the Freedom of Information Act, 2002.

III. Limitations on Right to Know

No right can be absolute. Like all other rights, even the right regarding disclosure of all public matters has its recognised limitations. Though it is true that in a republic, there have to be very few secrets in the government, but there are certain matter which cannot be made public without causing danger to the security of the State or irreparable damage to private citizens.

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[38] Section 12, *id.*

[39] K.K. Mathew, *The Nature and Scope of the Right to Know in a Democratic Republic*, (1979) 2 SCC (Jour) 19 at 24.

It is perhaps elementary that successful conduct of international diplomacy and maintenance of effective national defence require both confidentiality and secrecy. Other nations can hardly deal with this country in an atmosphere of mutual trust unless they are assured that their confidence will be kept.[39]

It was held by the Rajasthan High Court in *L.K. Koolwal* case[40] that the State can impose and should impose the reasonable restrictions in the matter like other fundamental rights where it affects the national security and any other allied matter affecting, the nation's integrity. Similarly in *Dinesh Trivedi* case[41] the Supreme Court opined that in transactions which have serious repercussions on public security, secrecy could legitimately be claimed because it would then be in the public interest that such matters are not publicly disclosed or discriminated. The Freedom of Information Act, 2002 also provides for exemptions from disclosure of information to protect national interest, sovereignty and integrity of India, public safety, and friendly relations with foreign States.[42]

In *S.P. Gupta* case[43] the Supreme Court tried to explain with the help of illustrations the scope of right to know. It was held that there are certain classes of documents which are necessarily required to be protected, *e.g.*, Cabinet Minutes, documents concerning the national safety, documents which affect diplomatic relations relate to some State secrets of the highest importance, and the like in respect of which the court would ordinarily uphold government's claim of privilege. *However, even these documents have to be tested against the basic guiding principle which is that wherever it is clearly contrary to public interest for a document to be disclosed, only then it is in law immune from disclosure.*

In *Raj Narain* case[44], the Supreme Court held that the right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary when secrecy is claimed for transactions which can at any rate have no repercussion on public security. To cover with the veil of secrecy the common routine business is not in the interest of public. It is generally desired for purpose of parties and politics or personal self-interest or bureaucratic routine.

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40 *Supra* note 25 at 4.
41 *Supra* note 24 at 313.
42 See section 8.
43 *Supra* note 23 at 238, 641.
44 *Supra* note 16 at 884.

The impact upon the efficiency of the functioning of the executive on account of secrecy, as Justice Mathew[45] said, has always to be weighed against its simultaneous effect upon its responsiveness to public control. In a democracy the application of rules and procedures for maintaining secrecy cannot be measured entirely by the degree to which they contribute to the competence with which the task of government is performed. Responsiveness, no less than competency, is the hallmark of a successfully functioning bureaucracy. And a practice of secrecy may so weaken the responsiveness of government machinery to popular control, that no gain that it may appear to afford to administrative efficiency is worth the price, taking into account that the gain may often be illusory. Here, as elsewhere, lies the necessity for finding a balance among the competing claims.

IV. Conclusion and Suggestions

Information has many splendoured virtues. Its potential when channelised is capable of banishing ignorance, poverty, hunger and want. It plays significant role in every walk and sphere of life, including the field of politics and democracy. It can transform democratic institutions and the governance of the country.

The fundamental significance of the freedom of information has been stressed by Indian Judiciary in a large number of decisions. Freedom of speech and expression, it has been held repeatedly, is basic to and indivisible from a democratic polity. It encompasses freedom of press. It includes right to impart and receive information. However, this right could not get itself included in the list of fundamental rights directly. The Official Secrets Act, 1923 and the Sections 123, 124 and 162 of the Indian Evidence Act were the main hurdles in the way of court's recognising this right. The Indian courts first had to break open the privilege shield that protected all the governmental actions by saying that the privilege status should be given not to all government documents irrespective of their contents. Then the Indian judiciary developed and established the citizen's right to know. Not only this, it has started giving new dimensions to the right to know in the context of elections, right to telecast sports events *etc.* Thus the Indian judiciary has successfully made right to know, a fundamental right.

The right to know the people's business has been denied by the executive not only in respect of foreign and military affairs but at all levels

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[45] *Supra* note 40.

except where it has been granted as a matter of grace or yielded as an unwilling concession.[46] In India bureaucrats place serious difficulties in the way of the public's legitimate access to information.[47] The reason for this can be found in colonial heritage. Even after Independence, a government official feels that he is acting on behalf of the President and the Governor and not on behalf of the public.[48] Hence he has to remain anonymous and his action should remain secret for the convenience of the government in power. The secrecy which begins as a means to achieve organisational efficiency becomes an end in itself, and it is sought as a result of conscious desire on the part of bureaucracy to insulate itself from effective outside control.[49] Secrecy in government, when it reaches a point where it seriously constricts the availability of information of public affairs, threatens the vitality of democracy itself. Nothing so diminishes democracy as secrecy. Information is the bloodstream of democracy. To diminish information to people is to diminish their participation in government. "There is a strong public feeling against secrecy of any kind in administration of government", said President Polak. The secrecy system has become much less a means by which government protects national security than a means by which government safeguard its reputation, dissembles its purpose, buries its mistakes, manipulates its citizens, and maximises its power and corrupts itself.[50] What is given out is dependent on the whims of government. The result is that there is no debate on important matters and no feedback to the government on the reaction of people. The stronger the efforts of secrecy, the greater the chance of abuse of authority by functionaries.

Public discussion is a political duty in a republican form of government. To fulfil this duty the people must have the necessary information, for they cannot carry on discussion in void. It is this duty which generates the political right to know. The effective performance of this duty depends upon the extent to which the right has been actually realised. As discussed above the Indian Judiciary has made it clear that in a democratic country like India, right to know is a must for smooth functioning of the democratic process and this right flows from the right to freedom of speech and expression. Thus the seed of right to know has been planted but it requires careful nurturing by the Parliament and the executive.

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46 *Id.* at 20.
47 *Supra* note 2 at 464.
48 *Ibid.*
49 *Supra* note 40 at 20.
50 *Ibid.*

It is the duty of the Parliament and the State Legislatures in India to insist upon the maximum disclosure of all affairs of State to themselves and also to public. Because of the constraints of the Official Secrets Act, 1923, which was drafted to suit the needs of a foreign rule in India, the government had unlimited powers to classify documents as confidential and impugnity. In this regard, enactment of Freedom of Information Act, 2002 is a welcome step on the part of the Indian Parliament. It will make the government responsible to 'justify secrecy'. Such insistence alone will make the right of the people to know meaningful. This will not only strengthen the concept of open government, but also introduce accountability in the system of government. Outside the government, there is no justification for secrecy in public undertakings except within a very limited area of 'economic espionage'. The press, as agent of the people, has to be vigilant against every attempt of the executive to envelop public affairs in secrecy. The vigilance must extend to all phases of government activity except perhaps in certain sensitive areas like military and diplomatic matters where the security of the country would be in jeopardy.

In sum, the right to know should receive a generous support from all those who believe in the participation of people in the administration. In a democracy the citizen's right to know is assumed rather than guaranteed. In fact the right is derived from the government's accountability and answerability to the people. Therefore, no government should think that people must be told only that much which it thinks to be good for the people and safe to itself.

It is expected that once enacted, the Right to Information Bill, 2004 as proposed by National Advisory Council will remove all the weaknesses of the Freedom of Information Act, 2002 and provide an effective framework for effectuating the right to information recognized under Article 19(1)(a) of the Constitution of India.