REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 210 of 2012

Namit Sharma ... Petitioner

Versus

Union of India ... Respondent

J U D G M E N T

Swatanter Kumar, J.

1. The value of any freedom is determined by the extent to which the citizens are able to enjoy such freedom. Ours is a constitutional democracy and it is axiomatic that citizens have the right to know about the affairs of the Government which, having been elected by them, seeks to formulate some policies of governance aimed at their welfare. However, like any other freedom, this freedom also has limitations. It is a settled proposition that the Right to Freedom of Speech and Expression enshrined under Article 19(1)(a) of the Constitution of India (for

short 'the Constitution') encompasses the right to impart and receive information. The Right to Information has been stated to be one of the important facets of proper governance. With the passage of time, this concept has not only developed in the field of law, but also has attained new dimensions in its application. This court while highlighting the need for the society and its entitlement to know has observed that public interest is better served by effective application of the right to information. This freedom has been accepted in one form or the other in various parts of the world. This Court, in absence of any statutory law, in the case of *Secretary, Ministry of Information and Broadcasting, Government of India & Ors. v. Cricket Association of Bengal & Anr.* [(1995) 2 SCC 161] held as under :

> "The democracy cannot exist unless all citizens have a right to participate in the affairs of the polity of the country. The right to participate in the affairs of the country is meaningless unless the citizens are well informed on all sides of the issues, in respect of which they are called upon to express their views. One-sided information, disinformation, misinformation and non-information, all equally create an uninformed citizenry which makes democracy a farce when medium of information is monopolized either by a partisan central authority or by private individuals or oligarchy organizations. This

> is particularly so in a country like ours where about 65 per cent of the population is illiterate and hardly 1 ½ per cent of the population has an access to the print media which is not subject to pre-censorship."

2. The legal principle of 'A man's house is his castle. The midnight knock by the police bully breaking into the peace of the citizen's home is outrageous in law', stated by Edward Coke has been explained by Justice Douglas as follows:

> "The free State offers what a police state denies – the privacy of the home, the dignity and peace of mind of the individual. That precious right to be left alone is violated once the police enter our conversations."

3. The States which are governed by Policing and have a policy of greater restriction and control obviously restrict the enjoyment of such freedoms. That, however, does not necessarily imply that this freedom is restriction-free in the States where democratic governance prevails. Article 19(1)(a) of the Constitution itself is controlled by the reasonable restrictions imposed by the State by enacting various laws from time to time.

4. The petitioner, a public spirited citizen, has approached this Court under Article 32 of the Constitution stating that though

the Right to Information Act, 2005 (for short 'Act of 2005') is an important tool in the hands of any citizen to keep checks and balances on the working of the public servants, yet the criterion for appointment of the persons who are to adjudicate the disputes under this Act are too vague, general, *ultra vires* the Constitution and contrary to the established principles of law laid down by a plethora of judgments of this Court. It is the stand of the petitioner that the persons who are appointed to discharge judicial or quasi-judicial functions or powers under the Act of 2005 ought to have a judicial approach, experience, knowledge and expertise. Limitation has to be read into the competence of the legislature to prescribe the eligibility for appointment of judicial or quasi-judicial bodies like the Chief Information Commissioner, Information Commissioners and the corresponding posts in the States, respectively. The legislative power should be exercised in a manner which is in consonance with the constitutional principles and guarantees. Complete lack of judicial expertise in the Commission may render the decision making process impracticable, inflexible and in given cases, contrary to law. The availability of expertise of judicial members in the Commission would facilitate the decision-making to be

more practical, effective and meaningful, besides giving semblance of justice being done. The provision of eligibility criteria which does not even lay down any qualifications for appointment to the respective posts under the Act of 2005 would be unconstitutional, in terms of the judgments of this Court in the cases of *Union of India v. Madras Bar Association,* [(2010) 11 SCC 1]*; Pareena Swarup v. Union of India* [(2008) 14 SCC 107]; *L. Chandra Kumar v. Union of India* [(1997) 3 SCC 261]; *R.K. Jain v. Union of India* [(1993) 4 SCC 119]; *S.P. Sampath Kumar v. Union of India* [(1987) 1 SCC 124].

5. It is contended that keeping in view the powers, functions and jurisdiction that the Chief/State Information Commissioner and/or the Information Commissioners exercise undisputedly, including the penal jurisdiction, there is a certain requirement of legal acumen and expertise for attaining the ends of justice, particularly, under the provisions of the Act of 2005. On this premise, the petitioner has questioned the constitutional validity of sub-Sections (5) and (6) of Section 12 and sub-Sections (5) and (6) of Section 15 of the Act of 2005. These provisions primarily deal with the eligibility criteria for appointment to the posts of Chief Information Commissioners and Information

Commissioners, both at the Central and the State levels. It will be useful to refer to these provisions at this very stage.

> "Section 12 — (5) The Chief Information Commissioner and Information Commissioners shall be persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance.
>
> (6) The Chief Information Commissioner or an Information Commissioner shall not be a Member of Parliament or Member of the Legislature of any State or Union territory, as the case may be, or hold any other office of profit or connected with any political party or carrying on any business or pursuing any profession.
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> XXX XXX XXX
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> Section 15 (5) The State Chief Information Commissioner and the State Information Commissioners shall be persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance.
>
> (6) The State Chief Information Commissioner or a State Information Commissioner shall not be a Member of Parliament or Member of the Legislature of any State or Union territory, as the case may be, or hold any other office of profit or connected with any political party or carrying on any business or pursuing any profession.

6. The challenge to the constitutionality of the above provisions *inter alia* is on the following grounds :

(i) Enactment of the provisions of eligibility criteria for appointment to such high offices, without providing qualifications, definite criterion or even consultation with judiciary, are in complete violation of the fundamental rights guaranteed under Article 14, 16 and 19(1)(g) of the Constitution.

(ii) Absence of any specific qualification and merely providing for experience in the various specified fields, without there being any nexus of either of these fields to the object of the Act of 2005, is violative of the fundamental constitutional values.

(iii) Usage of extremely vague and general terminology like social service, mass media and alike terms, being indefinite and undefined, would lead to arbitrariness and are open to abuse.

(iv) This vagueness and uncertainty is bound to prejudicially affect the administration of justice by such Commissions or Tribunals which are vested with wide adjudicatory and penal powers. It may not be feasible for a person of

ordinary experience to deal with such subjects with legal accuracy.

(v) The Chief Information Commissioner and Information Commissioners at the State and Centre level perform judicial and/or quasi-judicial functions under the Act of 2005 and therefore, it is mandatory that persons with judicial experience or majority of them should hold these posts.

(vi) The fundamental right to equality before law and equal protection of law guaranteed by Article 14 of the Constitution enshrines in itself the person's right to be adjudged by a forum which exercises judicial power in an impartial and independent manner consistent with the recognised principles of adjudication.

(vii) Apart from specifying a high powered committee for appointment to these posts, the Act of 2005 does not prescribe any mechanism for proper scrutiny and consultation with the judiciary in order to render effective performance of functions by the office holders, which is against the basic scheme of our Constitution.

(viii) Even if the Court repels the attack to the constitutionality of the provisions, still, keeping in view the basic structure of the Constitution and the independence of judiciary, it is a mandatory requirement that judicial or quasi-judicial powers ought to be exercised by persons having judicial knowledge and expertise. To that extent, in any case, these provisions would have to be read down. Resultantly, limitation has to be read into the competence of the legislature to prescribe requisite qualifications for appointment of judicial or quasi-judicial bodies or tribunals.

Discussion

7. The Constitution of India expressly confers upon the courts the power of judicial review. The courts, as regards the fundamental rights, have been assigned the role of *sentinel on the qui vive* under Article 13 of the Constitution. Our courts have exercised the power of judicial review, beyond legislative competence, but within the specified limitations. While the court gives immense weightage to the legislative judgment, still it cannot deviate from its own duties to determine the

constitutionality of an impugned statute. Every law has to pass through the test of constitutionality which is stated to be nothing but a formal test of rationality.

8. The foundation of this power of judicial review, as explained by a nine-Judge's Bench in the case of *Supreme Court Advocates on Record Association & Ors. v. Union of India* [(1993) 4 SCC 441], is the theory that the Constitution which is the fundamental law of the land, is the 'will' of the 'people', while a statute is only the creation of the elected representatives of the people; when, therefore, the 'will' of the legislature as declared in the statute, stands in opposition to that of the people as declared in the Constitution - the 'will' of the people must prevail.

9. In determining the constitutionality or validity of a constitutional provision, the court must weigh the real impact and effect thereof, on the fundamental rights. The Court would not allow the legislature to overlook a constitutional provision by employing indirect methods. In *Minerva Mills Ltd. & Ors. v. Union of India & Ors.* [(1980) 3 SCC 625], this Court mandated without ambiguity, that it is the Constitution which is supreme in India and not the Parliament. The Parliament cannot damage the

Constitution, to which it owes its existence, with unlimited amending power.

10. An enacted law may be constitutional or unconstitutional. Traditionally, this Court had provided very limited grounds on which an enacted law could be declared unconstitutional. They were legislative competence, violation of Part III of the Constitution and reasonableness of the law. The first two were definite in their scope and application while the cases falling in the third category remained in a state of uncertainty. With the passage of time, the law developed and the grounds for unconstitutionality also widened. D.D. Basu in the '*Shorter Constitution of India*' (Fourteenth Edition, 2009) has detailed, with reference to various judgments of this Court, the grounds on which the law could be invalidated or could not be invalidated. Reference to them can be made as follows:-

> "Grounds of unconstitutionality . – A law may be unconstitutional on a number of grounds:
>
> i. Contravention of any fundamental right, specified in Part III of the Constitution. (Ref. Under Art. 143, (Ref. AIR 1965 SC 745 (145): 1965 (1) SCR 413)
>
> ii. Legislating on a subject which is not assigned to the relevant legislature by the

distribution of powers made by the 7th Sch., read with the connected Articles. (Ref. Under Art. 143, AIR 1965 SC 745)

iii. Contravention of any of the mandatory provisions of the Constitution which impose limitations upon the powers of a Legislature, e.g., Art. 301. (Ref. Atiabari Tea Co. v. State of Assam, AIR 1961 SC 232)

iv. In the case of a State law, it will be invalid in so far as it seeks to operate beyond the boundaries of the State. (State of Bombay v. Chamarbaughwala R.M.D., AIR 1957 SC 699)

v. That the Legislature concerned has abdicated its essential legislative function as assigned to it by the Constitution or has made an excessive delegation of that power to some other body. Hamdard Dawakhana Wakf v. Union of India, AIR 1960 SC 554 (568)

11. On the other hand, a law cannot be invalidated on the following grounds:

(a) That in making the law (including an Ordinance), the law-making body did not apply its mind (even though it may be a valid ground for challenging an executive act), (Ref. Nagaraj K. V. State of A.P., AIR 1985 SC 551 (paras 31, 36), or was prompted by some improper motive. (Ref. Rehman Shagoo v. State of J & K, AIR 1960 SC 1(6); 1960 (1) SCR 681)

(b) That the law contravenes some constitutional limitation which did not exist at the time of enactment of the law in question. (Ref. Joshi R.S. v. Ajit Mills Ltd., AIR 1977 SC 2279 (para 16)

(c) That the law contravened any of the Directive contained in Part IV of the Constitution. (Ref. Deep Chand v. State of U.P., AIR 1959 SC 648 (664)"

12. Since great emphasis has been placed on the violation of fundamental rights, we may notice that no prejudice needs to be proved in cases where breach of fundamental rights is claimed. Violation of a fundamental right itself renders the impugned action void {Ref. *A.R. Antulay v. R.S. Nayak & Anr.* [(1988) 2 SCC 602]}.

13. A law which violates the fundamental right of a person is void. In such cases of violation, the Court has to examine as to what factors the Court should weigh while determining the constitutionality of a statute. First and the foremost, as already noticed, is the competence of the legislature to make the law. The wisdom or motive of the legislature in making it is not a relative consideration. The Court should examine the provisions of the statute in light of the provisions of the Constitution (e.g. Part III), regardless of how it is actually administered or is

capable of being administered. In this regard, the Court may consider the following factors as noticed in *D.D. Basu* (supra).

> "(a) The possibility of abuse of a statute does not impart to it any element of invalidity.
>
> (b) Conversely, a statute which violates the Constitution cannot be pronounced valid merely because it is being administered in a manner which might not conflict with the constitutional requirements.
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> In the case of *Charan Lal Sahu v. UOI [(1990) 1 SCC 614 (667)* (para 13), MUKHERJEE, C.J. made an unguarded statement, *viz., that*
>
> > *"In judging the Constitutional validity of the Act, the subsequent events, namely, how the Act has worked out, have to be looked into."*
>
> It can be supported only on the test of 'direct and inevitable effect' and, therefore, needs to be explained in some subsequent decision.
>
> (c) When the constitutionality of a law is challenged on the ground that it infringes a fundamental right, what the Court has to consider is the 'direct and inevitable effect' of such law.
>
> (d) There is presumption in favour of constitutionality of statutes. The law courts can declare the legislative enactment to be an invalid piece of legislation only in the even of gross violation of constitutional sanctions."

14. It is a settled canon of constitutional jurisprudence that the doctrine of classification is a subsidiary rule evolved by courts to

give practical content to the doctrine of equality. Over-emphasis of the doctrine of classification or anxious or sustained attempt to discover some basis for classification may gradually and imperceptly erode the profound potency of the glorious content of equality enshrined in Article 14 of the Constitution. (*Ref. LIC of India v. Consumer Education & Research Centre* [(1995) 5 SCC 482]. It is not necessary that classification in order to be valid, must be fully carried out by the statute itself. The statute itself may indicate the persons or things to whom its provisions are intended to apply. Instead of making the classification itself, the State may lay down the principle or policy for selecting or classifying the persons or objects to whom its provisions are to apply and leave it to the discretion of the Government or administrative authority to select such persons or things, having regard to the principle or policy laid down by the Legislature.

15. Article 14 forbids class legislation but does not forbid reasonable classification which means :

(i) It must be based on reasonable and intelligible differentia; and

(ii) Such differentia must be on a rational basis.

(iii) It must have nexus to the object of the Act.

16. The basis of judging whether the institutional reservation, fulfils the above-mentioned criteria, should be a) there is a presumption of constitutionality; b) the burden of proof is upon the writ petitioners, the person questioning the constitutionality of the provisions; c) there is a presumption as regard the States' power on the extent of its legislative competence; d) hardship of few cannot be the basis of determining the validity of any statute.

17. The principles for adjudicating the constitutionality of a provision have been stated by this Court in its various judgments. Referring to these judgments and more particularly to the cases of *Ram Krishna Dalmia v. Justice S.R. Tendolkar* AIR 1958 SC 538 and *Budhan Chodhry v. State of Bihar* AIR 1955 SC 191, the author Jagdish Swarup in his book 'Constitution of India (2nd Edition, 2006) stated the principles to be borne in mind by the Courts and detailed them as follows:

> "(a) that a law may be constitutional even though it relates to a single individual if on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;

(b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;

(c) that it must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;

(d) that the legislature is free to recognize decrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;

(e) that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and

(f) that while good faith and knowledge of the existing conditions on the part of a Legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation."

18. These principles have, often been reiterated by this Court while dealing with the constitutionality of a provision or a statute. Even in the case of *Atam Prakash v. State of Haryana & Ors.* [(1986) 2 SCC 249], the Court stated that whether it is the Constitution that is expounded or the constitutional validity of a statute that is considered, a cardinal rule is to look to the Preamble of the Constitution as the guiding light and to the Directive Principles of State Policy as the Book of Interpretation. The Constitution being *sui generis*, these are the factors of distant vision that help in the determination of the constitutional issues. Referring to the object of such adjudicatory process, the Court said :

> "....we must strive to give such an interpretation as will promote the march and progress towards a Socialistic Democratic State. For example, when we consider the question whether a statute offends Article 14 of the Constitution we must also consider whether a classification that the legislature may have made is consistent with the socialist goals set out in the Preamble and the Directive Principles enumerated in Part IV of the Constitution."

19. Dealing with the matter of closure of slaughter houses in the case of *Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat*

& Ors. [(2008) 5 SCC 33], the Court while noticing its earlier judgment in the case of *Government of Andhra Pradesh & Ors. v. Smt. P. Laxmi Devi* [(2008) 4 SCC 720], introduced a rule for exercise of such jurisdiction by the courts stating that the Court should exercise judicial restraint while judging the constitutional validity of the statute or even that of a delegated legislation and it is only when there is clear violation of a constitutional provision beyond reasonable doubt that the Court should declare a provision to be unconstitutional. Further, in the case of *P. Lakshmi Devi* (supra), the Court has observed that even if two views are possible, one making the statute constitutional and the other making it unconstitutional, the former view must prevail and the Court must make efforts to uphold the constitutional validity of a statute, unlike a policy decision, where the executive decision could be rendered invalid on the ground of malafide, unreasonableness and arbitrariness alone.

20. In order to examine the constitutionality or otherwise of a statute or any of its provisions, one of the most relevant considerations is the object and reasons as well as the legislative history of the statute. It would help the court in arriving at a more objective and justful approach. It would be necessary for

the Court to examine the reasons of enactment of a particular provision so as to find out its ultimate impact *vis-a-vis* the constitutional provisions. Therefore, we must examine the contemplations leading to the enactment of the Act of 2005.

A) SCHEME, OBJECTS AND REASONS

21. In light of the law guaranteeing the right to information, the citizens have the fundamental right to know what the Government is doing in its name. The freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political growth. It is a safety valve. People are more ready to accept the decisions that go against them if they can in principle seem to influence them. In a way, it checks abuse of power by the public officials. In the modern times, where there has been globalization of trade and industry, the scientific growth in the communication system and faster commuting has turned the world into a very well-knit community. The view projected, with some emphasis, is that the imparting of information qua the working of the government on the one hand and its decision affecting the domestic and international trade and other activities

on the other, impose an obligation upon the authorities to disclose information.

OBJECTS AND REASONS

22. The Right to Information was harnessed as a tool for promoting development; strengthening the democratic governance and effective delivery of socio-economic services. Acquisition of information and knowledge and its application have intense and pervasive impact on the process of taking informed decision, resulting in overall productivity gains. It is also said that information and knowledge are critical for realising all human aspirations such as improvement in the quality of life. Sharing of information, for instance, about the new techniques of farming, health care facilities, hazards of environmental degradation, opportunities for learning and earning, legal remedies for combating gender bias etc., have overtime, made significant contributions to the well being of poor people. It is also felt that this right and the laws relating thereto empower every citizen to take charge of his life and make proper choices on the basis of freely available information for effective participation in economic and political activities.

23. Justice V.R. Krishna Iyer in his book "Freedom of Information" expressed the view:

> "The right to information is a right incidental to the constitutionally guaranteed right to freedom of speech and expression. The international movement to include it in the legal system gained prominence in 1946 with the General Assembly of the United Nations declaring freedom of information to be a fundamental human right and a touchstone for all other liberties. It culminated in the United Nations Conference on Freedom of Information held in Geneva in 1948.
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> Article 19 of the Universal Declaration of Human Rights says:
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> > "Everyone has the right to freedom of information 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."
>
> It may be a coincidence that Article 19 of the Indian Constitution also provides every citizen the right to freedom of speech and expression. However, the word 'information' is conspicuously absent. But, as the highest Court has explicated, the right of information is integral to freedom of expression.
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> > "India was a member of the Commission on Human Rights appointed by the Economic and Social Council of the United Nations which drafted the 1948 Declaration. As such it would have been eminently fit and proper if the right to information was included in the rights

> enumerated under Article 19 of our Constitution. Article 55 of the U.N. Charter stipulates that the United Nations 'shall promote respect for, and observance of, human rights and fundamental freedoms' and according to Article 56 'all members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55'."

24. Despite the absence of any express mention of the word 'information' in our Constitution under Article 19(1)(a), this right has stood incorporated therein by the interpretative process by this Court laying the unequivocal statement of law by this Court that there was a definite right to information of the citizens of this country. Before the Supreme Court spelt out with clarity the right to information as a right inbuilt in the constitutional framework, there existed no provision giving this right in absolute terms or otherwise. Of course, one finds glimpses of the right to information of the citizens and obligations of the State to disclose such information in various other laws, for example, Sections 74 to 78 of the Indian Evidence Act, 1872 give right to a person to know about the contents of the public documents and the public officer is required to provide copies of such public documents to

any person, who has the right to inspect them. Under Section 25(6) of the Water (Prevention and Control of Pollution) Act, 1974, every State is required to maintain a register of information on water pollution and it is further provided that so much of the register as relates to any outlet or effluent from any land or premises shall be open to inspection at all reasonable hours by any person interested in or affected by such outlet, land or premises, as the case may be. Dr. J.N. Barowalia in *'Commentary on the Right to Information Act'* (2006) has noted that the Report of the *National Commission for Review of Working of Constitution under the Chairmanship of Justice M.N.Venkatachaliah*, as he then was, recognised the right to information wherein it is provided that major assumption behind a new style of governance is the citizen's access to information. Much of the common man's distress and helplessness could be traced to his lack of access to information and lack of knowledge of decision-making processes. He remains ignorant and unaware of the process which virtually affects his interest. Government procedures and regulations shrouded in the veil of secrecy do not allow the litigants to know how their cases are being handled. They shy away from questioning the officers handling their cases

because of the latter's snobbish attitude. Right to information should be guaranteed and needs to be given real substance. In this regard, the Government must assume a major responsibility and mobilize skills to ensure flow of information to citizens. The traditional insistence on secrecy should be discarded.

25. The Government of India had appointed a Working Group on Right to Information and Promotion of Open and Transparent Government under the Chairmanship of Shri H.D. Shourie which was asked to examine the feasibility and need for either full-fledged Right to Information Act or its introduction in a phased manner to meet the needs of an open and responsive Government. This group was also required to examine the framework of rules with reference to the Civil Services (Conduct) Rules and Manual of Office Procedure. This Working Group submitted its report in May 1997.

26. In the Chief Ministers Conference on 'Effective and Responsive Government' held on 24th May, 1997, the need to enact a law on the Right to Information was recognized unanimously. This conference was primarily to discuss the measures to be taken to ensure a more effective and responsive

government. The recommendations of various Committees constituted for this purpose and awareness in the Government machinery of the significance and benefits of this freedom ultimately led to the enactment of the 'Freedom of Information Act, 2002' (for short, the 'Act of 2002'). The proposed Bill was to enable the citizens to have information on a statutory basis. The proposed Bill was stated to be in accord with both Article 19 of the Constitution of India as well as Article 19 of the Universal Declaration of Human Rights, 1948. This is how the Act of 2002 was enacted.

27. In terms of the Statement of Objects and Reasons of the Act of 2002, it was stated that this law was enacted in order to make the government more transparent and accountable to the public. It was felt that in the present democratic framework, free flow of information for citizens and non-Government institutions suffers from several bottlenecks including the existing legal framework, lack of infrastructure at the grass root level and an attitude of secrecy within the Civil Services as a result of the old framework of rules. The Act was to deal with all such aspects. The purpose and object was to make the government more transparent and accountable to the public and to provide freedom to every citizen

to secure access to information under the control of public authorities, consistent with public interest, in order to promote openness, transparency and accountability in administration and in relation to matters connected therewith or incidental thereto.

28. After the Act of 2002 came into force, there was a definite attempt to exercise such freedom but it did not operate fully and satisfactorily. The Civil Services (Conduct) Rules and the Manual of the Office Procedure as well as the Official Secrets Act, 1923 and also the mindset of the authorities were implied impediments to the full, complete and purposeful achievement of the object of enacting the Act of 2002. Since, with the passage of time, it was felt that the Act of 2002 was neither sufficient in fulfilling the aspirations of the citizens of India nor in making the right to freedom of information more progressive, participatory and meaningful, significant changes to the existing law were proposed. The National Advisory Council suggested certain important changes to be incorporated in the said Act of 2002 to ensure smoother and greater access to information. After examining the suggestions of the Council and the public, the Government decided that the Act of 2002 should be replaced and, in fact, an attempt was made to enact another law for providing

an effective framework for effectuating the right to information recognized under the Article 19 of the Constitution. The Right to Information Bill was introduced in terms of its statements of objects and reasons to ensure greater and more effective access to information. The Act of 2002 needed to be made even more progressive, participatory and meaningful. The important changes proposed to be incorporated therein included establishment of an appellate machinery with investigative powers to review the decision of the Public Information Officer, providing penal provisions in the event of failure to provide information as per law, etc. This Bill was passed by both the Houses of the Parliament and upon receiving the assent of the President on 15th June, 2005, it came on the statute book as the Right to Information Act, 2005.

SCHEME OF ACT of 2005 (COMPARATIVE ANALYSIS OF ACT OF 2002 AND ACT OF 2005)

29. Now, we may deal with the comparative analysis of these two Acts. The first and the foremost significant change was the change in the very nomenclature of the Act of 2005 by replacing the word 'freedom' with the word 'right' in the title of the statute. The obvious legislative intent was to make seeking of prescribed

information by the citizens, a right, rather than a mere freedom. There exists a subtle difference when people perceive it as a right to get information in contra-distinction to it being a freedom. Upon such comparison, the connotations of the two have distinct and different application. The Act of 2005 was enacted to radically alter the administrative ethos and culture of secrecy and control, the legacy of colonial era and bring in a new era of transparency and accountability in governance. In substance, the Act of 2005 does not alter the spirit of the Act of 2002 and on the contrary, the substantive provisions like Sections 3 to 11 of both the Acts are similar except with some variations in some of the provisions. The Act of 2005 makes the definition clause more elaborate and comprehensive. It broadens the definition of public authority under Section 2(h) by including therein even an authority or body or institution of self-government established or constituted by a notification issued or order made by the appropriate Government and includes any body owned, controlled or substantially financed by the Government and also non-governmental organization substantially financed by the appropriate Government, directly or indirectly. Similarly, the expression 'Right to Information' has been defined in Section 2(j)

to include the right to inspection of work, documents, records, taking certified samples of material, taking notes and extracts and even obtaining information in the form of floppies, tapes, video cassettes, etc. This is an addition to the important step of introduction of the Central and State Information Commissions and the respective Public Information Officers. Further, Section 4(2) is a new provision which places a mandatory obligation upon every public authority to take steps in accordance with the requirements of clause (b) of sub-Section (1) of that Section to provide as much information *suo moto* to the public at regular intervals through various means of communication including internet so that the public have minimum resort to use of this Act to obtain information. In other words, the aim and object as highlighted in specific language of the statute is that besides it being a right of the citizenry to seek information, it was obligatory upon the State to provide information relatable to its functions for the information of the public at large and this would avoid unnecessary invocation of such right by the citizenry under the provisions of the Act of 2005. Every authority/department is required to designate the Public Information Officers and to appoint the Central Information Commission and State

Information Commissions in accordance with the provisions of Sections 12 and 15 of the Act of 2005. It may be noticed that under the scheme of this Act, the Public Information Officer at the Centre and the State Levels are expected to receive the requests/applications for providing the information. Appeal against decision of such Public Information Officer would lie to his senior in rank in terms of Section 19(1) within a period of 30 days. Such First Appellate Authority may admit the appeal after the expiry of this statutory period subject to satisfactory reasons for the delay being established. A second appeal lies to the Central or the State Information Commission, as the case may be, in terms of Section 19(3) within a period of 90 days The decision of the Commission shall be final and binding as per Section 19(7). Section 19 is an exhaustive provision and the Act of 2005 on its cumulative reading is a complete code in itself. However, nothing in the Act of 2005 can take away the powers vested in the High Court under Article 226 of the Constitution and of this Court under Article 32. The finality indicated in Sections 19(6) and 19(7) cannot be construed to oust the jurisdiction of higher courts, despite the bar created under Section 23 of the Act. It always has to be read and construed

subject to the powers of the High Court under Article 226 of the Constitution. Reference in this regard can be made to the decision of a Constitution Bench of this Court in the case of *L. Chandra Kumar vs. Union of India and Ors.* [(1997) 3 SCC 261].

30. Exemption from disclosure of information is a common provision that appears in both the Acts. Section 8 of both the Acts open with a non-obstante language. It states that notwithstanding anything contained in the respective Act, there shall be no obligation to give any citizen the information specified in the exempted clauses. It may, however, be noted that Section 8 of the Act of 2005 has a more elaborate exemption clause than that of the Act of 2002. In addition, the Act of 2005 also provides the Second Schedule which enumerates the intelligence and security organizations established by the Central Government to which the Act of 2005 shall not apply in terms of Section 24.

31. Further, under the Act of 2002, the appointment of the Public Information Officers is provided in terms of Section 5 and there exists no provision for constituting the Central and the State Information Commission. Also, the Act does not provide any qualifications or requirements to be satisfied before a person

can be so appointed. On the other hand, in terms of Section 12 and Section 15 of the Act of 2005, specific provisions have been made to provide for the constitution of and eligibility for appointment to the Central Information Commission or the State Information Commission, as the case may be.

32. Section 12(5) is a very significant provision under the scheme of the Act of 2005 and we shall deal with it in some elaboration at a subsequent stage. Similarly, the powers and functions of the Authorities constituted under the Act of 2005 are conspicuous by their absence under the Act of 2002, which under the Act of 2005 are contemplated under Section 18. This section deals in great detail with the powers and functions of the Information Commissions. An elaborate mechanism has been provided and definite powers have been conferred upon the authorities to ensure that the authorities are able to implement and enforce the provisions of the Act of 2005 adequately. Another very significant provision which was non-existent in the Act of 2002, is in relation to penalties. No provision was made for imposition of any penalty in the earlier Act, while in the Act of 2005 severe punishment like imposition of fine upto Rs.250/- per day during which the provisions of the Act are violated, has been

provided in terms of Section 20(1). The Central/State Information Commission can, under Section 20(2), even direct disciplinary action against the erring Public Information Officers. Further, the appropriate Government and the competent authority have been empowered to frame rules under Sections 27 and 28 of the Act of 2005, respectively, for carrying out the provisions of the Act. Every rule made by the Central Government under the Act has to be laid before each House of the Parliament while it is in session for a total period of 30 days, if no specific modifications are made, the rules shall thereafter have effect either in the modified form or if not annulled, it shall come into force as laid.

33. Greater transparency, promotion of citizen-government partnership, greater accountability and reduction in corruption are stated to be the salient features of the Act of 2005. Development and proper implementation of essential and constitutionally protected laws such as Mahatma Gandhi Rural Guarantee Act, 2005, Right to Education Act, 2009, etc. are some of the basic objectives of this Act. Revelation in actual practice is likely to conflict with other public interests, including efficiency, operation of the government, optimum use of limited

fiscal resources and the preservation of confidentiality of sensitive information. It is necessary to harness these conflicting interests while preserving the parameters of the democratic ideal or the aim with which this law was enacted. It is certainly expedient to provide for furnishing certain information to the citizens who desire to have it and there may even be an obligation of the state authorities to declare such information *suo moto.* However, balancing of interests still remains the most fundamental requirement of the objective enforcement of the provisions of the Act of 2005 and for attainment of the real purpose of the Act.

34. The Right to Information, like any other right, is not an unlimited or unrestricted right. It is subject to statutory and constitutional limitations. Section 3 of the Act of 2005 clearly spells out that the right to information is subject to the provisions of the Act. Other provisions require that information must be held by or under the control of public authority besides providing for specific exemptions and the fields to which the provisions of the Act do not apply. The doctrine of severability finds place in the statute in the shape of Section 10 of the Act of 2005.

35. Neither the Act of 2002 nor the Act of 2005, under its repeal provision, repeals the Official Secrets Act, 1923. The Act of 2005 only repeals the Freedom of Information Act, 2002 in terms of Section 31. It was felt that under the Official Secrets Act, 1923, the entire development process had been shrouded in secrecy and practically the public had no legal right to know as to what process had been followed in designing the policies affecting them and how the programmes and schemes were being implemented. Lack of openness in the functioning of the Government provided a fertile ground for growth of inefficiency and corruption in the working of the public authorities. The Act of 2005 was intended to remedy this widespread evil and provide appropriate links to the government. It was also expected to bring reforms in the environmental, economic and health sectors, which were primarily being controlled by the Government.

36. The Central and State Information Commissions have played a critical role in enforcing the provisions of the Act of 2005, as well as in educating the information seekers and providers about their statutory rights and obligations. Some section of experts opined that the Act of 2005 has been a useful statutory instrument in achieving the goal of providing free and

effective information to the citizens as enshrined under Article 19(1)(a) of the Constitution. It is true that democratisation of information and knowledge resources is critical for people's empowerment especially to realise the entitlements as well as to augment opportunities for enhancing the options for improving the quality of life. Still of greater significance is the inclusion of privacy or certain protection in the process of disclosure, under the right to information under the Act. Sometimes, information ought not to be disclosed in the larger public interest.

37. The courts have observed that when the law making power of a State is restricted by a written fundamental law, then any law enacted, which is opposed to such fundamental law, being in excess of fundamental authority, is a nullity. Inequality is one such example. Still, reasonable classification is permissible under the Indian Constitution. Surrounding circumstances can be taken into consideration in support of the constitutionality of the law which is otherwise hostile or discriminatory in nature, but the circumstances must be such as to justify the discriminatory treatment or the classification, subserving the object sought to be achieved. Mere apprehension of the order being used against some persons is no ground to hold it illegal or

unconstitutional particularly when its legality or constitutionality has not been challenged. {Ref. *K. Karunakaran* v. *State of Kerala & Anr.* [(2000) 3 SCC 761]}. To raise the plea of Article 14 of the Constitution, the element of discrimination and arbitrariness has to be brought out in clear terms. The Courts have to keep in mind that by the process of classification, the State has the power of determining who should be regarded as a class for the purposes of legislation and in relation to law enacted on a particular subject. The power, no doubt, to some degree is likely to produce some inequality but if a law deals with liberties of a number of individuals or well defined classes, it is not open of the charge of denial of equal protection on the ground that has no application to other persons. Classification, thus, means segregation in classes which have a systematic relation usually found in common properties and characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily, as already noticed. The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a *nexus* between them. The basis of testing constitutionality, particularly on the ground of discrimination,

should not be made by raising a presumption that the authorities are acting in an arbitrary manner. No classification can be arbitrary. One of the known concepts of constitutional interpretation is that the legislature cannot be expected to carve out classification which may be scientifically perfect or logically complete or which may satisfy the expectations of all concerned. The Courts would respect the classification dictated by the wisdom of the Legislature and shall interfere only on being convinced that the classification would result in pronounced inequality or palpable arbitrariness tested on the touchstone of Article 14 of the Constitution. {Ref. *Welfare Association of Allottees of Residential Premises, Maharashtra* v. *Ranjit P. Gohil* [(2003) 9 SCC 358]}.

38. The rule of equality or equal protection does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all, and particularly with respect to social welfare programme. So long as the line drawn, by the State is rationally supportable, the Courts will not interpose their judgment as to the appropriate stopping point. A statute is not invalid because it might have gone further than it did, since the legislature need not strike at all evils at the same time and may

address itself to the phase of the problem which seemed most acute to the legislative mind. A classification based on experience was a reasonable classification, and that it had a rational nexus to the object thereof and to hold otherwise would be detrimental to the interest of the service itself. This opinion was taken by this Court in the case of *State of UP & Ors.* v. *J.P. Chaurasia & Ors.* [(1989) 1 SCC 121]. Classification on the basis of educational qualifications made with a view to achieve administrative efficiency cannot be said to rest on any fortuitous circumstances and one has always to bear in mind the facts and circumstances of the case in order to judge the validity of a classification. In the case of *State of Jammu & Kashmir v. Sh. Triloki Nath Khosa & Ors.* [(1974) 1 SCC 19], it was noted that intelligible differentia and rational nexus are the twin tests of reasonable classification.

39. If the law deals equally with members of a well defined class, it is not open to the charge of denial of equal protection. There may be cases where even a single individual may be in a class by himself on account of some special circumstances or reasons applicable to him and not applicable to others. Still such

law can be constitutional. [Ref. *Constutional Law of India* by H.M. Seervai (Fourth Edition) Vol.1]

40. In *Maneka Gandhi* v. *Union of India & Anr.* [(1978) 1 SCC 248] and *Charanlal Sahu* v. *Union of India* (supra), the Court has taken the view that when the constitutionality of a law is challenged on the ground that it infringes a fundamental right, what the Court has to consider is the 'direct and inevitable effect' of such law. A matter within the legislative competence of the legislature has to be left to the discretion and wisdom of the framers, so long as it does not infringe any constitutional provision or violate any fundamental right. The law has to be just, fair and reasonable. Article 14 of the Constitution does not prohibit the prescription of reasonable rules for selection or of qualifications for appointment, except, where the classification is on the face of it, unjust.

41. We have noticed the challenge of the petitioner to the constitutionality of Section 12(5) and (6) and Section 15(5) and (6) of the Act of 2005. The challenge is made to these provisions stating that the eligibility criteria given therein is vague, does not specify any qualification, and the stated 'experience' has no

nexus to the object of the Act. It is also contended that the classification contemplated under the Act is violative of Article 14 of the Constitution. The petitioner contends that the legislative power has been exercised in a manner which is not in consonance with the constitutional principles and guarantees and provides for no proper consultative process for appointment. It may be noted that the only distinction between the provisions of Sections 12(5) and 12(6) on the one hand and Sections 15(5) and 15(6) on the other, is that under Section 12, it is the Central Government who has to make the appointments in consonance with the provisions of the Act, while under Section 15, it is the State Government which has to discharge similar functions as per the specified parameters. Thus, discussion on one provision would sufficiently cover the other as well.

42. Sub-Section (5) of Section 12 concerns itself with the eligibility criteria for appointment to the post of the Chief Information Commissioner and Information Commissioners to the Central Information Commission. It states that these authorities shall be persons of eminence in public life with wide knowledge and experience in law, science and technology, social

service, management, journalism, mass media or administration and governance.

43. Correspondingly, Sub-Section (6) of Section 12 states certain disqualifications for appointment to these posts. If such person is a Member of Parliament or Member of the legislature of any State or Union Territory or holds any other office of profit or connected with any political party or carrying on any business or pursuing any profession, he would not be eligible for appointment to these posts.

44. In order to examine the constitutionality of these provisions, let us state the parameters which would finally help the Court in determining such questions.

(a) Whether the law under challenge lacks legislative competence?

(b) Whether it violates any Article of Part III of the Constitution, particularly, Article 14?

(c) Whether the prescribed criteria and classification resulting therefrom is discriminatory, arbitrary and has no nexus to the object of the Act?

(d) Lastly, whether it a legislative exercise of power which is not in consonance with the constitutional guarantees and does not provide adequate guidance to make the law just, fair and reasonable?

45. As far as the first issue is concerned, it is a commonly conceded case before us that the Act of 2005 does not, in any form, lack the legislative competence. In other words, enacting such a law falls squarely within the domain of the Indian Parliament and has so been enacted under Entry 97 (residuary powers) of the Union List. Thus, this issue does not require any discussion.

46. To examine constitutionality of a statute in its correct perspective, we have to bear in mind certain fundamental principles as afore-recorded. There is presumption of constitutionality in favour of legislation. The Legislature has the power to carve out a classification which is based upon intelligible differentia and has rational nexus to the object of the Act. The burden to prove that the enacted law offends any of the Articles under Part III of the Constitution is on the one who questions the

constitutionality and shows that despite such presumption in favour of the legislation, it is unfair, unjust and unreasonable.

47. Another most significant canon of determination of constitutionality is that the courts would be reluctant to declare a law invalid or *ultra vires* on account of unconstitutionality. The courts would accept an interpretation which would be in favour of the constitutionality, than an approach which would render the law unconstitutional. Declaring the law unconstitutional is one of the last resorts taken by the courts. The courts would preferably put into service the principle of 'reading down' or 'reading into' the provision to make it effective, workable and ensure the attainment of the object of the Act. These are the principles which clearly emerge from the consistent view taken by this court in its various pronouncements.

48. The provisions of Section 12(5) do not discuss the basic qualification needed, but refer to two components: (a) persons of eminence in public life; and (b) with wide knowledge and experience in the fields stated in the provision. The provision, thus, does not suffer from the infirmity of providing no criteria resulting in the introduction of the element of arbitrariness or

discrimination. The provisions require the persons to be of eminence and with knowledge in the stated fields. Knowledge and experience in these fields normally shall be preceded by a minimum requisite qualification prescribed in that field. For example, knowledge and experience in the field of law would pre-suppose a person to be a law graduate. Similarly, a person with wide knowledge and experience in the field of science and technology would invariably be expected to be at least a graduate or possess basic qualification in science & technology. The vagueness in the expression 'social service', 'mass media' or 'administration and governance' does create some doubt. But, certainly, this vagueness or doubt does not introduce the element of discrimination in the provision. The persons from these various walks of life are considered eligible for appointment to the post of Chief Information Commissioner and Information Commissioners in the respective Information Commissions. This gives a wide zone of consideration and this alleged vagueness can always be clarified by the appropriate government in exercise of its powers under Section 27 and 28 of the Act, respectively.

Constitutional Validity of Section 12(6)

49. Similarly, as stated above, sub-Section (6) of Section 12 creates in a way a disqualification in terms thereof. This provision does have an element of uncertainty and indefiniteness. Upon its proper construction, an issue as to what class of persons are eligible to be appointed to these posts, would unexceptionally arise. According to this provision, a person to be appointed to these posts ought not to have been carrying on any business or pursuing any profession. It is difficult to say what the person eligible under the provision should be doing and for what period. The section does not specify any such period. Normally, the persons would fall under one or the other unacceptable categories. To put it differently, by necessary implication, it excludes practically all classes while not specifying as to which class of persons is eligible to be appointed to that post. The exclusion is too vague, while inclusion is uncertain. It creates a situation of confusion which could not have been the intent of law. It is also not clear as to what classification the framers of the Act intended to lay down. The classification does not appear to have any nexus with the object of the Act. There is no intelligible differentia to support such classification. Which

class is intended to be protected and is to be made exclusively eligible for appointment in terms of Sections 12(5) and (6) is something that is not understandable. Wherever, the Legislature wishes to exercise its power of classification, there it has to be a reasonable classification, satisfying the tests discussed above. No Rules have been brought to our notice which even intend to explain the vagueness and inequality explicit in the language of Section 12(6). According to the petitioner, it tantamounts to an absolute bar because the legislature cannot be stated to have intended that only the persons who are ideal within the terms of Sub-section (6) of Section 12, would be eligible to be appointed to the post. If we read the language of Sections 12(5) and 12(6) together, the provisions under sub-Section (6) appear to be in conflict with those under sub-Section (5). Sub-Section (5) requires the person to have eminence in public life and wide knowledge and experience in the specified field. On the contrary, sub-Section (6) requires that the person should not hold any office of profit, be connected with any political party or carry on any business or pursue any profession. The object of sub-section (5) stands partly frustrated by the language of sub-Section (6). In other words, sub-section (6) lacks clarity, reasonable

classification and has no nexus to the object of the Act of 2005 and if construed on its plain language, it would result in defeating the provisions of sub-Section (5) of Section 12 to some extent.

50. The legislature is required to exercise its power in conformity with the constitutional mandate, particularly contained in Part III of the Constitution. If the impugned provision denies equality and the right of equal consideration, without reasonable classification, the courts would be bound to declare it invalid. Section 12(6) does not speak of the class of eligible persons, but practically debars all persons from being appointed to the post of Chief Information Commissioner or Information Commissioners at the Centre and State levels, respectively.

51. It will be difficult for the Court to comprehend as to which class of persons is intended to be covered under this clause. The rule of disqualification has to be construed strictly. If anyone, who is an elected representative, in Government service, or one who is holding an office of profit, carrying on any business or profession, is ineligible in terms of Section 12(6), then the question arises as to what class of persons would be eligible? The Section is silent on that behalf.

52. The element of arbitrariness and discrimination is evidenced by the language of Section 12(6) itself, which can be examined from another point of view. No period has been stated for which the person is expected to not have carried on any business or pursued any profession. It could be one day or even years prior to his nomination. It is not clear as to how the persons falling in either of these classes can be stated to be differently placed. This uncertainty is bound to bring in the element of discrimination and arbitrariness.

53. Having noticed the presence of the element of discrimination and arbitrariness in the provisions of Section 12(6) of the Act, we now have to examine whether this Court should declare this provision *ultra vires* the Constitution or read it down to give it its possible effect, despite the drawbacks noted above. We have already noticed that the Court will normally adopt an approach which is tilted in favour of constitutionality and would prefer reading down the provision, if necessary, by adding some words rather than declaring it unconstitutional. Thus, we would prefer to interpret the provisions of Section 12(6) as applicable post-appointment rather than pre-appointment of the Chief Information Commissioner and Information Commissioners. In

other words, these disqualifications will only come into play once a person is appointed as Chief Information Commissioner/ Information Commissioner at any level and he will cease to hold any office of profit or carry any business or pursue any profession that he did prior to such appointment. It is thus implicit in this provision that a person cannot hold any of the posts specified in sub-section (6) of Section 12 simultaneous to his appointment as Chief Information Commissioner or Information Commissioner. In fact, cessation of his previous appointment, business or profession is a condition precedent to the commencement of his appointment as Chief Information Commissioner or Information Commissioner.

Constitutional Validity of Section 12(5)

54. The Act of 2005 was enacted to harmonise the conflicting interests while preserving the paramountcy of the democratic ideal and provide for furnishing of certain information to the citizens who desire to have it. The basic purpose of the Act is to set up a practical regime of right to information for the citizens to secure and access information under the control of the public authorities. The intention is to provide and promote transparency

and accountability in the functioning of the authorities. This right of the public to be informed of the various aspects of governance by the State is a pre-requisite of the democratic value. The right to privacy too, is to be protected as both these rival interests find their origin under Article 19(1)(a) of the Constitution. This brings in the need for an effective adjudicatory process. The authority or tribunals are assigned the responsibility of determining the rival contentions and drawing a balance between the two conflicting interests. That is where the scheme, purpose and the object of the Act of 2005 attain greater significance.

55. In order to examine whether Section 12(5) of the Act suffers from the vice of discrimination or inequality, we may discuss the adjudicatory functions of the authorities under the Act in the backdrop of the scheme of the Act of 2005, as discussed above. The authorities who have to perform adjudicatory functions of quasi-judicial content are:-

1. The Central/State Public Information Officer;

2. Officers senior in rank to the Central/State Public Information Officer to whom an appeal would lie under Section 19(1) of the Act; and

3. The Information Commission (Central/State) consisting of Chief Information Commissioner and Information Commissioners.

56. In terms of Section 12(5), the Chief Information Commissioner and Information Commissioners should be the persons of eminence in public life with wide knowledge in the prescribed fields. We have already indicated that the terminology used by the legislature, such as 'mass-media' or 'administration and governance', are terms of uncertain tenor and amplitude. It is somewhat difficult to state with exactitude as to what class of persons would be eligible under these categories.

57. The legislature in its wisdom has chosen not to provide any specific qualification, but has primarily prescribed 'wide knowledge and experience' in the cited subjects as the criteria for selection. It is not for the courts to spell out what ought to be the qualifications or experience for appointment to a particular

post. Suffices it to say, that if the legislature itself provides 'knowledge and experience' as the basic criteria of eligibility for appointment, this *per se,* would not attract the rigors of Article 14 of the Constitution. On a reasonable and purposive interpretation, it will be appropriate to interpret and read into Section 12(5) that the 'knowledge and experience' in a particular subject would be deemed to include the basic qualification in that subject. We would prefer such an approach than to hold it to be violative of Article 14 of the Constitution. Section 12(5) has inbuilt guidelines to the effect that knowledge and experience, being two distinct concepts, should be construed in their correct perspective. This would include the basic qualification as well as an experience in the respective field, both being the pre-requisites for this section. Ambiguity, if any, resulting from the language of the provision is insignificant, being merely linguistic in nature and, as already noticed, the same is capable of being clarified by framing appropriate rules in exercise of powers of the Central Government under Section 27 of the Act of 2005. We are unable to find that the provisions of Section 12(5) suffer from the vice of arbitrariness or discrimination. However, without hesitation, we would hasten to add that certain requirements of law and

procedure would have to be read into this provision to sustain its constitutionality.

58. It is a settled principle of law, as stated earlier, that courts would generally adopt an interpretation which is favourable to and tilts towards the constitutionality of a statute, with the aid of the principles like 'reading into' and/or 'reading down' the relevant provisions, as opposed to declaring a provision unconstitutional. The courts can also bridge the gaps that have been left by the legislature inadvertently. We are of the considered view that both these principles have to be applied while interpreting Section 12(5). It is the application of these principles that would render the provision constitutional and not opposed to the doctrine of equality. Rather the application of the provision would become more effective.

59. Certainty to vague expressions, like 'social service' and 'mass media', can be provided under the provisions which are capable of being explained by framing of proper rules or even by way of judicial pronouncements. In order to examine the scope of this provision and its ramifications on the other parts of the Act of 2005, it is important to refer back to the scheme of the Act.

Under the provisions of the Act, particularly, Sections 4, 12, 18, 19, 20, 22, 23 and 25, it is clear that the Central or State Information Commission, as the case may be, not only exercises adjudicatory powers of a nature no different than a judicial tribunal but is vested with the powers of a civil court as well. Therefore, it is required to decide a *lis*, where information is required by a person and its furnishing is contested by the other. The Commission exercises two kinds of penal powers: firstly, in terms of Section 20(1), it can impose penalty upon the defaulters or violators of the provisions of the Act and, secondly, Section 20(2) empowers the Central and the State Information Commission to conduct an enquiry and direct the concerned disciplinary authority to take appropriate action against the erring officer in accordance with law. Hence, the Commission has powers to pass orders having civil as well as penal consequences. Besides this, the Commission has been given monitoring and recommendatory powers. In terms of Section 23, the jurisdiction of Civil Courts has been expressly barred.

60. Now, let us take an overview of the nature and content of the disputes arising before such Commission. Before the Public Information Officers, the controversy may fall within a narrow

compass. But the question before the First Appellate Authority and particularly, the Information Commissioners (Members of the Commission) are of a very vital nature. The impact of such adjudication, instead of being tilted towards administrative adjudication is specifically oriented and akin to the judicial determinative process. Application of mind and passing of reasoned orders are inbuilt into the scheme of the Act of 2005. In fact, the provisions of the Act are specific in that regard. While applying its mind, it has to dwell upon the issues of legal essence and effect. Besides resolving and balancing the conflict between the 'right to privacy' and 'right to information', the Commission has to specifically determine and return a finding as to whether the case falls under any of the exceptions under Section 8 or relates to any of the organizations specified in the Second Schedule, to which the Act does not apply in terms of Section 24. Another significant adjudicatory function to be performed by the Commission is where interest of a third party is involved. The legislative intent in this regard is demonstrated by the language of Section 11 of the Act of 2005. A third party is not only entitled to a notice, but is also entitled to hearing with a specific right to raise objections in relation to the disclosure of information. Such

functions, by no stretch of imagination, can be termed as 'administrative decision' but are clearly in the domain of 'judicial determination' in accordance with the rule of law and provisions of the Act. Before we proceed to discuss this aspect in any further elaboration, let us examine the status of such Tribunal/Commissions and their functions.

B) TRIBUNAL/COMMISSIONS AND THEIR FUNCTIONS :

61. Before dwelling upon determination of nature of Tribunals in India, it is worthwhile to take a brief account of the scenario prevalent in some other jurisdictions of the world.

62. In United Kingdom, efforts have been made for improvising the system for administration of justice. The United Kingdom has a growing human rights jurisprudence, following the enactment of the Human Rights Act, 1998, and it has a well-established ombudsman system. The Tribunals have been constituted to provide specialised adjudication, alongside the courts, to the citizens dissatisfied from the directives made by the Information Commissioners under either of these statutes. The Tribunals, important cogs in the machinery of administration of justice, have recently undergone some major reforms. A serious

controversy was raised whether the functioning of these Tribunals was more akin to the Government functioning or were they a part of the Court-attached system of administration of justice. The Donoughmore Committee had used the term 'ministerial tribunals', and had regarded them as part of the machinery of administration. The Franks Report saw their role quite differently:

> "Tribunals are not ordinary courts, but neither are they appendages of Government Departments. Much of the official evidence… appeared to reflect the view that tribunals should properly be regarded as part of the machinery of administration, for which the Government must retain a close and continuing responsibility. Thus, for example, tribunals in the social services field would be regarded as adjuncts to the administration of the services themselves. We do not accept this view. *We consider that tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration.* The essential point is that in all these cases Parliament has deliberately provided for a decision outside and independent of the Department concerned, either at first instance…. or on appeal from a decision of a Minister or of an official in a special statutory position….Although the relevant statutes do not in all cases expressly enact that tribunals are to consist entirely of persons outside the Government service, the use of the term 'tribunal' in legislation undoubtedly bears this connotation, and the intention of the Parliament

to provide for the independence of tribunals is clear and unmistakable."

63. Franks recommended that tribunal chairmen should be legally qualified. This was implemented in respect of some categories of tribunal, but not others. But one of the most interesting issues arising from the Franks exercise is the extent to which the identification of tribunals as part of the machinery of adjudication led the Committee, in making its specific recommendations, down the road of increased legal formality and judicialisation. *(Refer : "The Judicialisation of 'Administrative' Tribunals in the UK : from Hewart to Leggatt" by Gavin Drewry).*

64. In the United Kingdom, the Tribunals, Courts and Enforcement Act, 2007 (for short, the 'TCEA') explicitly confirmed the status of Tribunal Judges (as the legally qualified members of the Tribunals are now called) as part of the independent judicial system, extending to them the same guarantees of independence as apply to the judges in the ordinary courts.

65. From the analysis of the above system of administrative justice prevalent in United Kingdom, a very subtle and clear distinction from other laws is noticeable in as much as the

sensitive personal data and right of privacy of an individual is assured a greater protection and any request for access to such information firstly, is subject to the provisions of the Act and secondly, the members of the Tribunals, who hear the appeals from a rejection of request for information by the Information Commissioners under the provisions of either of these Acts, include persons qualified judicially and having requisite experience as Judges in the regular courts.

66. In United States of America, the statute governing the subject is 'Freedom of Information Act, 1966' (for short, the 'FOIA'). This statute requires each 'agency' to furnish the requisite information to the person demanding such information, subject to the limitations and provisions of the Act. Each agency is required to frame rules. A complainant dissatisfied from non-furnishing of the information can approach the district courts of the United States in the district in which the complainant resides or the place in which the agency records are situated. Such complaints are to be dealt with as per the procedure prescribed and within the time specified under the Act.

67. In New South Wales, under the Privacy and Government Information Legislation Amendment Bill, 2010, amendments were made to both, the Government Information (Public Access) Act, 2009 and the Personal and Privacy Information Act, 1998, to bring the Information Commissioner and the Privacy Commissioner together within a single office. This led to the establishment of the Information and Privacy Commission.

68. On somewhat similar lines is the law prevalent in some other jurisdictions including Australia and Germany, where there exists a unified office of Information and Privacy Commissioner. In Australia, the Privacy Commissioner was integrated into the office of the Australian Information Commissioner in the year 2010.

69. In most of the international jurisdictions, the Commission or the Tribunals have been treated to be part of the court attached system of administration of justice and as said by the Donoughmore Committee, the 'ministerial tribunals' were different and they were regarded as part of machinery of the administration. The persons appointed to these Commissions

were persons of legal background having legally trained mind and judicial experience.

(a) NATURE OF FUNCTION

70. The Information Commission, as a body, performs functions of wide magnitude, through its members, including adjudicatory, supervisory as well as penal functions. Access to information is a statutory right. This right, as indicated above, is subject to certain constitutional and statutory limitations. The Act of 2005 itself spells out exempted information as well as the areas where the Act would be inoperative. The Central and State Information Commissioners have been vested with the power to decline furnishing of an information under certain circumstances and in the specified situations. For disclosure of Information, which involves the question of prejudice to a third party, the concerned authority is required to issue notice to the third party who can make a representation and such representation is to be dealt with in accordance with the provisions of the Act of 2005. This position of law in India is in clear contrast to the law prevailing in some other countries where information involving a third party cannot be disclosed without consent of that party. However, the

authority can direct such disclosure, for reasons to be recorded, stating that the public interest outweighs the private interest. Thus, it involves an adjudicatory process where parties are required to be heard, appropriate directions are to be issued, the orders are required to be passed upon due application of mind and for valid reasons. The exercise of powers and passing of the orders by the authorities concerned under the provisions of the Act of 2005 cannot be arbitrary. It has to be in consonance with the principles of natural justice and the procedure evolved by such authority. Natural justice has three indispensable facets, i.e., grant of notice, grant of hearing and passing of reasoned orders. It cannot be disputed that the authorities under the Act of 2005 and the Tribunals are discharging quasi-judicial functions.

71. In the case of *Indian National Congress (I)* v. *Institute of Social Welfare* & Ors. [(2002) 5 SCC 685], the Court explained that where there are two or more parties contesting each other's claim and the statutory authority is required to adjudicate the rival claims between the parties, such a statutory authority can be held to be quasi-judicial and the decision rendered by it as a quasi judicial order. Thus, where there is a *lis* between the two

contesting parties and the statutory authority is required to decide such a dispute, in absence of any other attributes of a quasi-judicial authority, such a statutory authority is a quasi-judicial authority. The legal principles which emerge from the various judgments laying down when an act of a statutory authority would be a quasi-judicial act are that where (a) a statutory authority empowered under a statute to do any act (b) which would prejudicially affect the subject (c) although there is no *lis* or two contending parties and the contest is between the authority and the subject and (d) the statutory authority is required to act judicially under the statute, the decision of the said authority is quasi-judicial.

72. In other words, an authority is described as quasi judicial when it has some attributes or trappings of judicial provisions but not all. In the matter before us, there is a *lis*. The request of a party seeking information is allowed or disallowed by the authorities below and is contested by both parties before the Commission. There may also be cases where a third party is prejudicially affected by disclosure of the information requested for. It is clear that the concerned authorities particularly the Information Commission, possess the essential attributes and

trappings of a Court. Its powers and functions, as defined under the Act of 2005 also sufficiently indicate that it has adjudicatory powers quite akin to the Court system. They adjudicate matters of serious consequences. The Commission may be called upon to decide how far the right to information is affected where information sought for is denied or whether the information asked for is 'exempted' or impinges upon the 'right to privacy' or where it falls in the 'no go area' of applicability of the Act. It is not mandatory for the authorities to allow all requests for information in a routine manner. The Act of 2005 imposes an obligation upon the authorities to examine each matter seriously being fully cautious of its consequences and effects on the rights of others. It may be a simple query for information but can have far reaching consequences upon the right of a third party or an individual with regard to whom such information is sought. Undue inroad into the right to privacy of an individual which is protected under Article 21 of the Constitution of India or any other law in force would not be permissible. In *Gobind v. State of Madhya Pradesh & Anr.* [(1975) 2 SCC 148] this Court held that privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown

to be superior. In *Ram Jethmalani & Ors. v. Union of India* [(2011) 8 SCC 1] this Court has observed that the right to privacy is an integral part of the right to life. Thus, the decision making process by these authorities is not merely of an administrative nature. The functions of these authorities are more aligned towards the judicial functions of the courts rather than mere administrative acts of the State authority.

73. 'Quasi judicial' is a term which may not always be used with utmost clarity and precision. An authority which exercises judicial functions or functions analogous to the judicial authorities would normally be termed as 'quasi-judicial'. In the '*Advanced Law Lexicon*' (3rd Edn., 2005) by P. Ramanathan Aiyar, the expression 'quasi judicial' is explained as under :

> "Of, relating to, or involving an executive or administrative official's adjudicative acts. Quasi-judicial acts, which are valid if there is no abuse of discretion, often determine the fundamental rights of citizens. They are subject to review by Courts. (Blacm, 7th Edn., 1999)
>
> 'Quasi-judicial is a term that is …. Not easily definable. In the United States, the phrase often covers judicial decisions taken by an administrative agency – the test is the nature of the tribunal rather than what it is

doing. In England quasi-judicial belongs to the administrative category and is used to cover situations where the administrator is bound by the law to observe certain forms and possibly hold a public hearing but where he is a free agent in reaching the final decision. If the rules are broken, the determination may be set aside, but it is not sufficient to show that the administration is biased in favour of a certain policy, or that the evidence points to a different conclusion..' (George Whitecross Paton, *A Textbook of Jurisprudence* 336 (G.W. Paton & Davit P Derham eds., 4th ed. (1972)

Describing a function that resembles the judicial function in that it involves deciding a dispute and ascertaining the facts and any relevant law, but differs in that it depends ultimately on the exercise of an executive discretion rather than the application of law (*Oxford Law Dictionary 5th Edn. 2003*)

When the law commits to an officer the duty of looking into certain facts not in a way which it specially directs, but after a discretion in its nature judicial, the function is quasi judicial.

Of or relating to the adjudicative acts of an executive or administrative officials.

Sharing the qualities of and approximating to what is judicial; essentially judicial in character but not within the judicial power or function nor belonging to the judiciary as constitutionally defined. [S.128(2)(i), C.P.C. (5 of 1908)]."

74. This Court in the case of *State of Himachal Pradesh & Ors.* v. *Raja Mahendra Pal & Anr.* [1995 Supp (2) SCC 731], held that the expression 'quasi judicial' has been termed to be one which stands midway a judicial and an administrative function. If the authority has any express statutory duty to act judicially in arriving at the decision in question, it would be deemed to be *quasi*-judicial. Where the function to determine a dispute is exercised by virtue of an executive discretion rather than the application of law, it is a quasi-judicial function. A quasi-judicial act requires that a decision is to be given not arbitrarily or in mere discretion of the authority but according to the facts and circumstances of the case as determined upon an enquiry held by the authority after giving an opportunity to the affected parties of being heard or wherever necessary of leading evidence in support of their contention. The authority and the Tribunal constituted under the provisions of the Act of 2005 are certainly quasi-judicial authority/tribunal performing judicial functions.

75. Under the scheme of the Act of 2005, in terms of Section 5, every public authority, both in the State and the Centre, is required to nominate Public Information Officers to effectuate

and make the right to information a more effective right by furnishing the information asked for under this Act. The Information Officer can even refuse to provide such information, which order is appealable under Section 19(1) to the nominated senior officer, who is required to hear the parties and decide the matter in accordance with law. This is a first appeal. Against the order of this appellate authority, a second appeal lies with the Central Information Commission or the State Information Commission, as the case may be, in terms of Section 19(3) of the Act of 2005. The Legislature, in its wisdom, has provided for two appeals. Higher the adjudicatory forum, greater is the requirement of adherence to the rule of judiciousness, fairness and to act in accordance with the procedure prescribed and in absence of any such prescribed procedure, to act in consonance with the principles of natural justice. Higher also is the public expectation from such tribunal. The adjudicatory functions performed by these bodies are of a serious nature. An order passed by the Commission is final and binding and can only be questioned before the High Court or the Supreme Court in exercise of the Court's jurisdiction under Article 226 and/or Article 32 of the Constitution, respectively.

76. If one analyses the scheme of the Act of 2005 and the multi-farious functions that the Information Commission is expected to discharge in its functioning, following features become evident :

1. It has a *lis* pending before it which it decides. *'Lis',* as per Black's Law Dictionary (8th Edition) means 'a piece of litigation; a controversy or a dispute'. One party asserting the right to a particular information, the other party denying the same or even contesting that it was invasion into his protected right gives rise to a *lis* which has to be adjudicated by the Commission in accordance with law and, thus, cannot be termed as 'administrative function' *simpliciter*. It, therefore, becomes evident that the appellate authority and the Commission deal with *lis* in the sense it is understood in the legal parlance.

2. It performs adjudicatory functions and is required to grant opportunity of hearing to the affected party and to record reasons for its orders. The orders of the Public Information Officer are appealable to first appellate authority and those of the First Appellate Authority are appealable to the Information Commission, which are then open to challenge

before the Supreme Court or the High Court in exercise of its extraordinary power of judicial review.

3. It is an adjudicatory process not akin to administrative determination of disputes but similar in nature to the judicial process of determination. The concerned authority is expected to decide not only whether the case was covered under any of the exceptions or related to any of the organizations to which the Act of 2005 does not apply, but even to determine, by applying the legal and constitutional provisions, whether the exercise of the right to information amounted to invasion into the right to privacy. This being a very fine distinction of law, application of legal principles in such cases becomes very significant.

4. The concerned authority exercises penal powers and can impose penalty upon the defaulters as contemplated under Section 20 of the Act of 2005. It has to perform investigative and supervisory functions. It is expected to act in consonance with the principles of natural justice as well as those applicable to service law jurisprudence, before it can make a report and recommend disciplinary

action against the defaulters, including the persons in service in terms of Section 20(2).

5. The functioning of the Commission is quite in line with the functioning of the civil courts and it has even expressly been vested with limited powers of the civil Court. Exercise of these powers and discharge of the functions discussed above not only gives a colour of judicial and/or quasi-judicial functioning to these authorities but also vests the Commission with the essential trappings of a civil Court.

77. Let us now examine some other pre-requisites of vital significance in the functioning of the Commission. In terms of Section 22 of this Act, the provisions of the Act are to be given effect to, notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 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. This Act is, therefore, to prevail over the specified Acts and even instruments. The same, however, is only to the extent of any inconsistency between the two. Thus, where the provisions of any other law can be applied

harmoniously, without any conflict, the question of repugnancy would not arise.

78. Further, Section 23 is a provision relating to exclusion of jurisdiction of the Courts. In terms of this Section, no Court shall entertain any suit, application or other proceedings in respect of any order made under this Act and no such order shall be called in question otherwise than by way of an appeal provided for under this Act. In other words, the jurisdiction of the Court has been ousted by express language. Nevertheless, it is a settled principle of law that despite such excluding provision, the extraordinary jurisdiction of the High Court and the Supreme Court, in terms of Articles 226 and 32 of the Constitution, respectively, cannot be divested. It is a jurisdiction incapable of being eroded or taken away by exercise of legislative power, being an important facet of the basic structure of the Constitution. In the case of *L. Chandra Kumar* (supra), the Court observed that the constitutional safeguards which ensure independence of the Judges of the superior judiciary not being available for the Members of the Tribunal, such tribunals cannot be considered full and effective substitute to the superior judiciary in discharging the function of constitutional interpretation. They

can, however, perform a supplemental role. Thus, all decisions of the Tribunals were held to be subject to scrutiny before the High Court under Article 226/227 of the Constitution. Therefore, the orders passed by the authority, i.e., the Central or the State Information Commissions under the Act of 2005 would undoubtedly be subject to judicial review of the High Court under Article 226/227 of the Constitution.

79. Section 24 of the Act of 2005 empowers the Central Government to make amendments to the Second Schedule specifying such organization established by the Government to which the Act of 2005 would not apply. The 'appropriate Government' [as defined in Section 2(a)] and the 'competent authority' [as defined in Section 2(e)] have the power to frame rules for the purposes stated under Sections 27 and 28 of the Act of 2005. This exercise is primarily to carry out the provisions of the Act of 2005.

80. Once it is held that the Information Commission is essentially quasi-judicial in nature, the Chief information Commissioner and members of the Commission should be the persons possessing requisite qualification and experience in the

field of law and/or other specified fields. We have discussed in some detail the requirement of a judicial mind for effectively performing the functions and exercising the powers of the Information Commission. In the case of *Bharat Bank Ltd., Delhi* v. *Employees of Bharat Bank & Ors.* [1950 SCR 459 : AIR 1950 SC 188], this Court took the view that the functions and duties of the Industrial Tribunal are very much like those of a body discharging judicial functions, although it is not a court in the technical sense of the word. In *S.P. Sampath Kumar* v. *Union of India* [(1987) 1 SCC 124], again this Court held that in the case of Administrative Tribunals, the presence of a Judicial member was the requirement of fair procedure of law and the Administrative Tribunal must be so manned as to inspire confidence in the public mind that it is a highly competent and expert mechanism with judicial approach and objectivity. It was also observed that we have, in our country, brilliant civil servants who possess tremendous sincerity, drive and initiative and who have remarkable capacity to resolve and overcome administrative problems of great complexity. But what is needed in a judicial tribunal which is intended to supplant the High Court is legal training and experience. Similar view was also expressed in the

case of *Union of India* v. *Madras Bar Association* [(2010) 11 SCC 1].

81. Further, in the case of *L. Chandra Kumar* (supra) where this Court was concerned with the orders and functioning of the Central Administrative Tribunal and scope of its judicial review, while holding that the jurisdiction of the High Court under Article 226 of the Constitution was open and could not be excluded, the Court specifically emphasised on the need for a legally trained mind and experience in law for the proper functioning of the tribunal. The Court held as under :

> "88. Functioning of Tribunals
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> XXX XXX XXX
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> 8.65 A Tribunal which substitutes the High Court as an alternative institutional mechanism for judicial review must be no less efficacious than the High Court. *Such a tribunal must inspire confidence and public esteem that it is a highly competent and expert mechanism with judicial approach and objectivity. What is needed in a tribunal, which is intended to supplant the High Court, is legal training and experience, and judicial acumen, equipment and approach.* When such a tribunal is composed of personnel drawn from the judiciary as well as from services or from amongst experts in the field, any weightage in favour of the service members or expert members and value-discounting the judicial members would

> render the tribunal less effective and efficacious than the High Court. The Act setting up such a tribunal would itself have to be declared as void under such circumstances. The same would not at all be conducive to judicial independence and may even tend, directly or indirectly, to influence their decision-making process, especially when the Government is a litigant in most of the cases coming before such tribunal. (*See S.P. Sampath Kumar v. Union of India.*) The protagonists of specialist tribunals, who simultaneously with their establishment want exclusion of the writ jurisdiction of the High Courts in regard to matters entrusted for adjudication to such tribunals, ought not to overlook these vital and important aspects. *It must not be forgotten that what is permissible to be supplanted by another equally effective and efficacious institutional mechanism is the High Courts and not the judicial review itself*. Tribunals are not an end in themselves but a means to an end; even if the laudable objectives of speedy justice, uniformity of approach, predictability of decisions and specialist justice are to be achieved, the framework of the tribunal intended to be set up to attain them must still retain its basic judicial character and inspire public confidence. Any scheme of decentralisation of administration of justice providing for an alternative institutional mechanism in substitution of the High Courts must pass the aforesaid test in order to be constitutionally valid."

82. In India, the Central or the State Information Commission, as the case may be, is vested with dual jurisdiction. It is the

appellate authority against the orders passed by the first appellate authority, the Information Officer, in terms of Section 19(1) of the Act of 2005, while additionally it is also a supervisory and investigative authority in terms of Section 18 of the Act wherein it is empowered to hear complaints by any person against the inaction, delayed action or other grounds specified under Section 18(1) against any State and Central Public Information Officer. This inquiry is to be conducted in accordance with the prescribed procedure and by exercising the powers conferred on it under Section 18(3). It has to record its satisfaction that there exist reasonable grounds to enquire into the matter.

83. Section 20 is the penal provision. It empowers the Central or the State Information Commission to impose penalty as well as to recommend disciplinary action against such Public Information Officers who, in its opinion, have committed any acts or omissions specified in this section, without any reasonable cause. The above provisions demonstrate that the functioning of the Commission is not administrative *simpliciter* but is quasi-judicial in nature. It exercises powers and functions which are adjudicatory in character and legal in nature. Thus, the

requirement of law, legal procedures, and the protections would apparently be essential. The finest exercise of quasi-judicial discretion by the Commission is to ensure and effectuate the right of information recognized under Article 19 of the Constitution vis-a-vis the protections enshrined under Article 21 of the Constitution.

84. The Information Commission has the power to deal with the appeals from the First Appellate Authority and, thus, it has to examine whether the order of the appellate authority and even the Public Information Officer is in consonance with the provisions of the Act of 2005 and limitations imposed by the Constitution. In this background, no Court can have any hesitation in holding that the Information Commission is akin to a Tribunal having the trappings of a civil Court and is performing quasi-judicial functions.

85. The various provisions of this Act are clear indicators to the unquestionable proposition of law that the Commission is a judicial tribunal and not a ministerial tribunal. It is an important cog in and is part of court attached system of administration of justice unlike a ministerial tribunal which is

more influenced and controlled and performs functions akin to machinery of administration.

(b)REQUIREMENT OF LEGAL MIND

86. Now, it will be necessary for us to dwell upon somewhat controversial but an aspect of greater significance as to who and by whom such adjudicatory machinery, at its various stages under the provisions of the Act of 2005 particularly in the Indian context, should be manned.

87. Section 5 of the Act of 2005 makes it obligatory upon every public authority to designate as many officers, as Central Public Information Officers and State Information Public Officers in all administrative units or offices, as may be necessary to provide information to the persons requesting information under the Act of 2005. Further, the authority is required to designate Central Assistant Public Information Officer and State Assistant Public Information Officer at the sub-divisional or sub-district level. The Assistant Public Information Officers are to perform dual functions – (1) to receive the applications for information; and (2) to receive appeals under the Act. The applications for information are to be forwarded to the concerned Information

Officer and the appeals are to be forwarded to the Central Information Commission or the State Information Commission, as the case may be. It was contemplated that these officers would be designated at all the said levels within hundred days of the enactment of the Act. There is no provision under the Act of 2005 which prescribes the qualification or experience that the Information Officers are required to possess. In fact, the language of the Section itself makes it clear that any officer can be designated as Central Public Information Officer or State Public Information Officer. Thus, no specific requirement is mandated for designating an officer at the sub-divisional or sub-district level. The appeals, under Section 19(1) of the Act, against the order of the Public Information Officer are to be preferred before an Officer senior in the rank to the Public Information Officer. However, under Section 19(3), a further appeal lies to the Central or the State Information Commission, as the case may be, against the orders of the Central or State Appellate Officer. These officers are required to dispose of such application or appeal within the time schedule specified under the provisions of the Act. There is also no qualification or experience required of these designated officers to whom the first appeal would lie.

However, in contradistinction, Section 12(5) and Section 15(5) provide for the experience and knowledge that the Chief Information Commissioner and the Information Commissioners at the Centre and the State levels, respectively, are required to possess. This provision is obviously mandatory in nature.

88. As already noticed, in terms of Section 12(5), the Chief Information Commissioner and Information Commissioners are required to be persons of eminence in public life with wide knowledge and experience in law, science and technology or any of the other specified fields. Further, Sub-Section (6) of Sections 12 and 15 lays down the disqualifications for being nominated as such. It is provided that the Chief Information Commissioner or Information Commissioners shall not be a Member of Parliament or Member of the Legislative Assembly of any State or Union Territory or hold any other office of profit or connected with any political party or carrying on any business or pursuing any profession.

89. The requirement of legal person in a quasi-judicial body has been internationally recognized. We have already referred, amongst others, to the relevant provisions of the respective

Information Acts of the USA, UK and Canada. Even in the Canadian Human Rights Tribunal, under the Canadian Human Rights Act, the Vice-Chairman and Members of the Tribunal are required to have a degree in law from a recognized university and be the member of the bar of a province or a Chamber *des notaires du Quebec* for at least 10 years. Along with this qualification, such person needs to have general knowledge of human rights law as well as public law including Administrative and Constitutional Laws. The Information Commissioner under the Canadian Law has to be appointed by the Governor in Council after consultation with the leader of every recognized party in the Senate and the House of Commons. Approval of such appointment is done by resolution of the Senate and the House of Commons. It is noted that the Vice-Chairperson plays a pre-eminent role within this Administrative Tribunal by ensuring a fair, timely and impartial adjudication process for human rights complaints, for the benefit of all concerned.

90. As already noticed, in the United Kingdom, the Information Rights Tribunal and the Information Commissioners are to deal with the matters arising from both, the FOIA as well as the Data Protection Act, 1998. These tribunals are discharging quasi-

judicial functions. Appointments to them are dealt with and controlled by the TCEA. These appointments are treated as judicial appointments and are covered under Part 2 of the TCEA. Section 50 provides for the eligibility conditions for judicial appointment. Section 50(1)(b) refers to a person who satisfies the judicial-appointment eligibility condition on an N-year basis. A person satisfies that condition on N-year basis if (a) the person has a relevant qualification and (b) the total length of the person's qualifying periods is at least N years. Section 52 provides for the meaning of the expression 'gain experience in law' appearing in Section 50(3)(b). It states that a person gains experience in law during a period if the period is one during which the person is engaged in law-related activities. The essence of these statutory provisions is that the concerned person under that law is required to possess both a degree as well as experience in the legal field. Such experience inevitably relates to working in that field. Only then, the twin criteria of requisite qualification and experience can be satisfied.

91. It may be of some relevance here to note that in UK, the Director in the office of the Government Information Service, an authority created under the Freedom of Information Act, 2000

possesses a degree of law and has been a member of the Bar of the District of Columbia and North Carolina in UK. The Principal Judge of Information Rights Jurisdiction in the First-tier Tribunal, not only had a law degree but were also retired solicitors or barristers in private practice.

92. Thus, there exists a definite requirement for appointing persons to these posts with legal background and acumen so as to ensure complete faith and confidence of the public in the independent functioning of the Information Commission and for fair and expeditious performance of its functions. The Information Commissions are required to discharge their functions and duties strictly in accordance with law.

93. In India, in terms of sub-Section (5), besides being a person of eminence in public life, the necessary qualification required for appointment as Chief Information Commissioner or Information Commissioner is that the person should have wide knowledge and experience in law and other specified fields. The term 'experience in law' is an expression of wide connotation. It pre-supposes that a person should have the requisite qualification in law as well as experience in the field of law. However, it is

worthwhile to note that having a qualification in law is not equivalent to having experience in law and vice-versa. 'Experience in law', thus, is an expression of composite content and would take within its ambit both the requisite qualification in law as well as experience in the field of law. A person may have some experience in the field of law without possessing the requisite qualification. That certainly would not serve the requirement and purpose of the Act of 2005, keeping in view the nature of the functions and duties required to be performed by the Information Commissioners. Experience in absence of basic qualification would certainly be insufficient in its content and would not satisfy the requirements of the said provision. Wide knowledge in a particular field would, by necessary implication, refer to the knowledge relatable to education in such field whereas experience would necessarily relate to the experience attained by doing work in such field. Both must be read together in order to satisfy the requirements of Sections 12(5) of and 15(5) the Act of 2005. Similarly, wide knowledge and experience in other fields would have to be construed as experience coupled with basic educational qualification in that field.

94. Primarily it may depend upon the language of the rules which govern the service but it can safely be stated as a rule that experience in a given post or field may not necessarily satisfy the condition of prescribed qualification of a diploma or a degree in such field. Experience by working in a post or by practice in the respective field even for long time cannot be equated with the basic or the prescribed qualification. In absence of a specific language of the provision, it is not feasible for a person to have experience in the field of law without possessing a degree in law. In somewhat different circumstances, this Court in the case of *State of Madhya Pradesh* v. *Dharam Bir* [(1998) 6 SCC 165], while dealing with Rule 8(2) of the Madhya Pradesh Industrial Training (Gazetted) Service Recruitment Rules, 1985, took the view that the stated qualification for the post of Principal Class I or Principal Class II were also applicable to appointment by promotion and that the applicability of such qualification is not restricted to direct appointments. Before a person becomes eligible for being promoted to the post of Principal, Class II or Principal, Class-I, he must possess a Degree or Diploma in Engineering, as specified in the Schedule. The fact that the person had worked as a Principal for a decade would not lead to

a situation of accepting that the person was qualified to hold the post. The Court held as under :

> "32. "Experience" gained by the respondent on account of his working on the post in question for over a decade cannot be equated with educational qualifications required to be possessed by a candidate as a condition of eligibility for promotion to higher posts. If the Government, in exercise of its executive power, has created certain posts, it is for it to prescribe the mode of appointment or the qualifications which have to be possessed by the candidates before they are appointed on those posts. The qualifications would naturally vary with the nature of posts or the service created by the Government.
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> 33. The post in question is the post of Principal of the Industrial Training Institute. The Government has prescribed a Degree or Diploma in Engineering as the essential qualification for this post. No one who does not possess this qualification can be appointed on this post. The educational qualification has a direct nexus with the nature of the post. The Principal may also have an occasion to take classes and teach the students. A person who does not hold either a Degree or Diploma in Engineering cannot possibly teach the students of the Industrial Training Institute the technicalities of the subject of Engineering and its various branches."

95. Thus, in our opinion, it is clear that experience in the respective field referred to in Section 12(5) of the Act of 2005

would be an experience gained by the person upon possessing the basic qualification in that field. Of course, the matter may be somewhat different where the field itself does not prescribe any degree or appropriate course. But it would be applicable for the fields like law, engineering, science and technology, management, social service and journalism, etc.

96. This takes us to discuss the kind of duties and responsibilities that such high post is expected to perform. Their functions are adjudicatory in nature. They are required to give notice to the parties, offer them the opportunity of hearing and pass reasoned orders. The orders of the appellate authority and the Commission have to be supported by adequate reasoning as they grant relief to one party, despite opposition by the other or reject the request for information made in exercise of a statutory right.

97. It is not only appropriate but is a solemn duty of every adjudicatory body, including the tribunals, to state the reasons in support of its decisions. Reasoning is the soul of a judgment and embodies one of the three pillars on which the very foundation of natural justice jurisprudence rests. It is

informative to the claimant of the basis for rejection of his claim, as well as provides the grounds for challenging the order before the higher authority/constitutional court. The reasons, therefore, enable the authorities, before whom an order is challenged, to test the veracity and correctness of the impugned order. In the present times, since the fine line of distinction between the functioning of the administrative and quasi-judicial bodies is gradually becoming faint, even the administrative bodies are required to pass reasoned orders. In this regard, reference can be made to the judgments of this Court in the cases of *Siemens Engineering & Manufacturing Co. of India Ltd.* v. *Union of India & Anr.* [(1976) 2 SCC 981]; and *Assistant Commissioner, Commrcial Tax Department Works Contract and Leasing, Kota* v. *Shukla & Brothers* [(2010) 4 SCC 785].

98. The Chief Information Commissioner and members of the Commission are required to possess wide knowledge and experience in the respective fields. They are expected to be well versed with the procedure that they are to adopt while performing the adjudicatory and quasi judicial functions in accordance with the statutory provisions and the scheme of the Act of 2005. They are to examine whether the information required by an applicant

falls under any of the exemptions stated under Section 8 or the Second Schedule of the Act of 2005. Some of the exemptions under Section 8, particularly, sub-sections (e), (g) and (j) have been very widely worded by the Legislature keeping in mind the need to afford due protection to privacy, national security and the larger public interest. In terms of Section 8(1)(e), (f), (g), (h) and (i), the authority is required to record a definite satisfaction whether disclosure of information would be in the larger public interest or whether it would impede the process of investigation or apprehension or prosecution of the offenders and whether it would cause unwarranted invasion of the privacy of an individual. All these functions may be performed by a legally trained mind more efficaciously. The most significant function which may often be required to be performed by these authorities is to strike a balance between the application of the freedom guaranteed under Article 19(1)(a) and the rights protected under Article 21 of the Constitution. In other words, the deciding authority ought to be conscious of the constitutional concepts which hold significance while determining the rights of the parties in accordance with the provisions of the statute and the Constitution. The legislative scheme of the Act of 2005 clearly

postulates passing of a reasoned order in light of the above. A reasoned order would help the parties to question the correctness of the order effectively and within the legal requirements of the writ jurisdiction of the Supreme Court and the High Courts.

99. 'Persons of eminence in public life' is also an expression of wide implication and ramifications. It takes in its ambit all requisites of a good citizen with values and having a public image of contribution to the society. Such person should have understanding of concepts of public interest and public good. Most importantly, such person should have contributed to the society through social or allied works. The authorities cannot lose sight of the fact that ingredients of institutional integrity would be applicable by necessary implication to the Commissions and their members. This discussion safely leads us to conclude that the functions of the Chief Information Commissioner and Information Commissioners may be better performed by a legally qualified and trained mind possessing the requisite experience. The same should also be applied to the designation of the first appellate authority, i.e., the senior officers to be designated at the Centre and State levels. However, in view of language of Section

5, it may not be necessary to apply this principle to the designation of Public Information Officer.

100. Moreover, as already noticed, the Information Commission, is performing quasi-judicial functions and essence of its adjudicatory powers is akin to the Court system. It also possesses the essential trappings of a Court and discharges the functions which have immense impact on the rights/obligations of the parties. Thus, it must be termed as a judicial Tribunal which requires to be manned by a person of judicial mind, expertise and experience in that field. This Court, while dealing with the cases relating to the powers of the Parliament to amend the Constitution has observed that every provision of the Constitution, can be amended provided in the result, the basic structure of the Constitution remains the same. The dignity of the individual secured by the various freedoms and basic rights contained in Part III of the Constitution and their protection itself has been treated as the basic structure of the Constitution.

101. Besides separation of powers, the independence of judiciary is of fundamental constitutional value in the structure of our Constitution. Impartiality, independence, fairness and

reasonableness in judicial decision making are the hallmarks of the Judiciary. If 'Impartiality' is the soul of Judiciary, `Independence' is the life blood of Judiciary. Without independence, impartiality cannot thrive, as this Court stated in the case of *Union of India v. R. Gandhi, President, Madras Bar Association* [(2010) 11 SCC 17].

102. The independence of judiciary *stricto sensu* applies to the Court system. Thus, by necessary implication, it would also apply to the tribunals whose functioning is quasi-judicial and akin to the court system. The entire administration of justice system has to be so independent and managed by persons of legal acumen, expertise and experience that the persons demanding justice must not only receive justice, but should also have the faith that justice would be done.

103. The above detailed analysis leads to an *ad libitum* conclusion that under the provisions and scheme of the Act of 2005, the persons eligible for appointment should be of public eminence, with knowledge and experience in the specified fields and should preferably have a judicial background. They should possess judicial acumen and experience to fairly and effectively

deal with the intricate questions of law that would come up for determination before the Commission, in its day-to-day working. The Commission satisfies abecedarians of a judicial tribunal which has the trappings of a court. It will serve the ends of justice better, if the Information Commission was manned by persons of legal expertise and with adequate experience in the field of adjudication. We may further clarify that such judicial members could work individually or in Benches of two, one being a judicial member while the other being a qualified person from the specified fields to be called an expert member. Thus, in order to satisfy the test of constitutionality, we will have to read into Section 12(5) of the Act that the expression 'knowledge and experience' includes basic degree in that field and experience gained thereafter and secondly that legally qualified, trained and experienced persons would better administer justice to the people, particularly when they are expected to undertake an adjudicatory process which involves critical legal questions and niceties of law. Such appreciation and application of legal principles is a *sine qua non* to the determinative functioning of the Commission as it can tilt the balance of justice either way. *Malcolm Gladwell* said, "the key to good decision making is not

knowledge. It is understanding. We are swimming in the former. We are lacking in the latter". The requirement of a judicial mind for manning the judicial tribunal is a well accepted discipline in all the major international jurisdictions with hardly with any exceptions. Even if the intention is to not only appoint people with judicial background and expertise, then the most suitable and practical resolution would be that a 'judicial member' and an 'expert member' from other specified fields should constitute a Bench and perform the functions in accordance with the provisions of the Act of 2005. Such an approach would further the mandate of the statute by resolving the legal issues as well as other serious issues like an inbuilt conflict between the Right to Privacy and Right to Information while applying the balancing principle and other incidental controversies. We would clarify that participation by qualified persons from other specified fields would be a positive contribution in attainment of the proper administration of justice as well as the object of the Act of 2005. Such an approach would help to withstand the challenge to the constitutionality of Section 12(5).

104. As a natural sequel to the above, the question that comes up for consideration is as to what procedure should be adopted

to make appointments to this august body. Section 12(3) states about the High-powered Committee, which has to recommend the names for appointment to the post of Chief Information Commissioner and Information Commissioners to the President. However, this Section, and any other provision for that matter, is entirely silent as to what procedure for appointment should be followed by this High Powered Committee. Once we have held that it is a judicial tribunal having the essential trappings of a court, then it must, as an irresistible corollary, follow that the appointments to this august body are made in consultation with the judiciary. In the event, the Government is of the opinion and desires to appoint not only judicial members but also experts from other fields to the Commission in terms of Section 12(5) of the Act of 2005, then it may do so, however, subject to the riders stated in this judgment. To ensure judicial independence, effective adjudicatory process and public confidence in the administration of justice by the Commission, it would be necessary that the Commission is required to work in Benches. The Bench should consist of one judicial member and the other member from the specified fields in terms of Section 12(5) of the Act of 2005. It will be incumbent and in conformity with the

scheme of the Act that the appointments to the post of judicial member are made 'in consultation' with the Chief Justice of India in case of Chief Information Commissioner and members of the Central Information Commission and the Chief Justices of the High Courts of the respective States, in case of the State Chief Information Commissioner and State Information Commissioners of that State Commission. In the case of appointment of members to the respective Commissions from other specified fields, the DoPT in the Centre and the concerned Ministry in the States should prepare a panel, after due publicity, empanelling the names proposed at least three times the number of vacancies existing in the Commission. Such panel should be prepared on a rational basis, and should inevitably form part of the records. The names so empanelled, with the relevant record should be placed before the said High Powered Committee. In furtherance to the recommendations of the High Powered Committee, appointments to the Central and State Information Commissions should be made by the competent authority. Empanelment by the DoPT and other competent authority has to be carried on the basis of a rational criteria, which should be duly reflected by recording of appropriate reasons. The advertisement issued by

such agency should not be restricted to any particular class of persons stated under Section 12(5), but must cover persons from all fields. Complete information, material and comparative data of the empanelled persons should be made available to the High Powered Committee. Needless to mention that the High Powered Committee itself has to adopt a fair and transparent process for consideration of the empanelled persons for its final recommendation. This approach, is in no way innovative but is merely derivative of the mandate and procedure stated by this Court in the case of *L. Chandra Kumar* (supra) wherein the Court dealt with similar issues with regard to constitution of the Central Administrative Tribunal. All concerned are expected to keep in mind that the Institution is more important than an individual. Thus, all must do what is expected to be done in the interest of the institution and enhancing the public confidence. A three Judge Bench of this Court in the case of *Centre for PIL and Anr.* v. *Union of India & Anr.* [(2011) 4 SCC 1] had also adopted a similar approach and with respect we reiterate the same.

105. Giving effect to the above scheme would not only further the cause of the Act but would attain greater efficiency, and accuracy

in the decision-making process, which in turn would serve the larger public purpose. It shall also ensure greater and more effective access to information, which would result in making the invocation of right to information more objective and meaningful.

106. For the elaborate discussion and reasons afore-recorded, we pass the following order and directions:

1. The writ petition is partly allowed.

2. The provisions of Sections 12(5) and 15(5) of the Act of 2005 are held to be constitutionally valid, but with the rider that, to give it a meaningful and purposive interpretation, it is necessary for the Court to 'read into' these provisions some aspects without which these provisions are bound to offend the doctrine of equality. Thus, we hold and declare that the expression 'knowledge and experience' appearing in these provisions would mean and include a basic degree in the respective field and the experience gained thereafter. Further, without any peradventure and veritably, we state that appointments of legally qualified, judicially trained and experienced persons would certainly manifest in more effective serving of the ends of justice as well as ensuring

better administration of justice by the Commission. It would render the adjudicatory process which involves critical legal questions and nuances of law, more adherent to justice and shall enhance the public confidence in the working of the Commission. This is the obvious interpretation of the language of these provisions and, in fact, is the essence thereof.

3. As opposed to declaring the provisions of Section 12(6) and 15(6) unconstitutional, we would prefer to read these provisions as having effect 'post-appointment'. In other words, cessation/termination of holding of office of profit, pursuing any profession or carrying any business is a condition precedent to the appointment of a person as Chief Information Commissioner or Information Commissioner at the Centre or State levels.

4. There is an absolute necessity for the legislature to reword or amend the provisions of Section 12(5), 12(6) and 15(5), 15(6) of the Act. We observe and hope that these provisions would be amended at the earliest by the legislature to avoid any ambiguity or impracticability and

to make it in consonance with the constitutional mandates.

5. We also direct that the Central Government and/or the competent authority shall frame all practice and procedure related rules to make working of the Information Commissions effective and in consonance with the basic rule of law. Such rules should be framed with particular reference to Section 27 and 28 of the Act within a period of six months from today.

6. We are of the considered view that it is an unquestionable proposition of law that the Commission is a 'judicial tribunal' performing functions of 'judicial' as well as 'quasi-judicial' nature and having the trappings of a Court. It is an important cog and is part of the court attached system of administration of justice, unlike a ministerial tribunal which is more influenced and controlled and performs functions akin to the machinery of administration.

7. It will be just, fair and proper that the first appellate authority (i.e. the senior officers to be nominated in terms of Section 5 of the Act of 2005) preferably should be the

persons possessing a degree in law or having adequate knowledge and experience in the field of law.

8. The Information Commissions at the respective levels shall henceforth work in Benches of two members each. One of them being a 'judicial member', while the other an 'expert member'. The judicial member should be a person possessing a degree in law, having a judicially trained mind and experience in performing judicial functions. A law officer or a lawyer may also be eligible provided he is a person who has practiced law at least for a period of twenty years as on the date of the advertisement. Such lawyer should also have experience in social work. We are of the considered view that the competent authority should prefer a person who is or has been a Judge of the High Court for appointment as Information Commissioners. Chief Information Commissioner at the Centre or State level shall only be a person who is or has been a Chief Justice of the High Court or a Judge of the Supreme Court of India.

9. The appointment of the judicial members to any of these posts shall be made 'in consultation' with the Chief Justice

of India and Chief Justices of the High Courts of the respective States, as the case may be.

10. The appointment of the Information Commissioners at both levels should be made from amongst the persons empanelled by the DoPT in the case of Centre and the concerned Ministry in the case of a State. The panel has to be prepared upon due advertisement and on a rational basis as afore-recorded**.**

11. The panel so prepared by the DoPT or the concerned Ministry ought to be placed before the High-powered Committee in terms of Section 12(3), for final recommendation to the President of India. Needless to repeat that the High Powered Committee at the Centre and the State levels is expected to adopt a fair and transparent method of recommending the names for appointment to the competent authority.

12. The selection process should be commenced at least three months prior to the occurrence of vacancy.

13. This judgment shall have effect only prospectively.

14. Under the scheme of the Act of 2005, it is clear that the orders of the Commissions are subject to judicial review before the High Court and then before the Supreme Court of India. In terms of Article 141 of the Constitution, the judgments of the Supreme Court are law of the land and are binding on all courts and tribunals. Thus, it is abundantly clear that the Information Commission is bound by the law of precedence, i.e., judgments of the High Court and the Supreme Court of India. In order to maintain judicial discipline and consistency in the functioning of the Commission, we direct that the Commission shall give appropriate attention to the doctrine of precedence and shall not overlook the judgments of the courts dealing with the subject and principles applicable, in a given case.

It is not only the higher court's judgments that are binding precedents for the Information Commission, but even those of the larger Benches of the Commission should be given due acceptance and enforcement by the smaller Benches of the Commission. The rule of precedence is

equally applicable to intra appeals or references in the hierarchy of the Commission.

107. The writ petition is partly allowed with the above directions, however, without any order as to costs.

.....,J.
[A.K. Patnaik]

.....,J.
[Swatanter Kumar]

New Delhi;
September 13, 2012