The Right to Receive Information: Conceptual Problems

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ABSTRACT: *This article studies the "right to receive information" or the "right to know", a judicially-recognised right under Article 19(1)(a) of the Constitution. It attempts to show, through an analysis of judgments of the Supreme Court and High Courts, that the right rests on a shaky philosophical foundation and that there are inconsistencies in how the right is judicially treated in terms of its structure and content.*

First, the article questions the logic that the "right to know" is implicit in Article 19(1)(a) merely because it makes the exercise of free speech more meaningful. Such a logic was authoritatively rejected by the 7-judge bench in Maneka Gandhi (1978).

Second, the article discusses judgments which have effectively enforced the right to know horizontally, without adequate justifications. The recent pronouncement of the Constitution Bench in Kaushal Kishore (2023) adds to the confusion.

Third, the article discusses judgments that have either included or excluded information from the scope of this right. It is submitted that no coherent principle is discernible from a study of the inclusions and the exclusions, and no such principle is forthcoming from the courts themselves. Before concluding, the article briefly discusses modern problems posed by technology and how the right to know could apply to them.

I. INTRODUCTION

The right to receive information, also called the right to know, has been held as "*emanating*"[1] from Article 19(1)(a) of the Constitution (the freedom of speech and expression).[2] Its utility aside, there are significant conceptual problems surrounding this right, which the existing scholarship has not considered in detail.[3] This paper highlights those conceptual problems by analysing judgments of the Supreme Court and High Courts. Following is an overview of these problems.

The first problem fundamentally relates to the very recognition of the right to know as implicit in Art. 19(1)(a). *Prima facie*, a right to "*speak*" cannot include the right to "*hear*" or "*know*", for speaking and knowing are completely different (though complementary) events. Of course, there are many implicit rights in the Indian Constitution. E.g., nobody would seriously dispute that Art. 19(1)(a) guarantees the freedom of the press,[4] even though the freedom is not expressly mentioned. But the question as to which rights can validly be held implicit in a constitutional provision is decided using a test prescribed by the Supreme Court in *Maneka Gandhi v Union of India* ('*Maneka Gandhi*').[5] As Part II shows, that test does not seem to support the recognition of the right to know in Art. 19(1)(a).

The second problem concerns the manner in which the courts have operationalized the right to know. Judgments of the Supreme Court and the High Courts are vague and/or inconsistent regarding two aspects of the right:

1. Structure: Is the right vertical or horizontal? In other words, is it enforceable only against the State or also against non-State actors?

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* Advocate, Supreme Court of India. I am grateful to Sukarm Sharma and Omkar Hemanth for their meaningful research assistance. I am also grateful to Aishwarya Kane, Anushka Pandey, Ayush Baheti, Saral Minocha, and Sarvjeet Singh Moond for offering their inputs when this paper was still at a proposal stage. Errors, if any, are mine alone.

[1] *Thalappalam Service Cooperative Bank Limited. v State of Kerala* [2013] 16 SCC 82 [[55].

[2] *Secy., Ministry of Information & Broadcasting, Govt. of India v Cricket Assn. of Bengal* [1995] 2 SCC 161 [82]; *Swapnil Tripathi v Supreme Court of India* [2018] 10 SCC 639 [3]; *Anuradha Bhasin v Union of India* [2020] 3 SCC 637 [23.1].

[3] Gautam Bhatia briefly discusses the ambivalent nature of the Supreme Court's approach to this right, calling it "*circumspect*". But a detailed critique of the principle is not offered. Gautam Bhatia, *OFFEND, SHOCK OR DISTURB: FREE SPEECH UNDER THE INDIAN CONSTITUTION*, Chapter Ten (OUP 2015).

[4] *Express Newspaper (P) Ltd. v Union of India* [1959] SCR 12 [119].

[5] *Maneka Gandhi v Union of India (Maneka)* [1978] 1 SCC 248 [29].

2. Substantive content and restrictions: Exactly *what* do citizens have a right to know? On what grounds (and by whom) can the right be restricted?

Existing literature does not address these theoretical issues in detail.

Part II of this paper discusses the fundamental problem of recognition of the right to know in Art. 19(1)(a). Part III discusses the jurisprudence on the structure of the right, and Part IV on its substantive content and grounds for restrictions. Part V indicates the implications of these inconsistencies on contemporary problems posed by technology. Part VI offers a brief comment and concludes.

II. RECOGNITION OF THE RIGHT TO KNOW: THE 'CONCOMITANCE' PROBLEM

Textually, Art. 19(1)(a) only recognizes the "*freedom of speech and expression*".[6] But the Constitution has been held as recognizing many implicit rights. In *Maneka Gandhi*,[7] the Supreme Court laid down the following formula to identify which implicit rights flow from a given constitutional provision:[8]

> What is necessary to be seen is, and that is the test which must be applied, whether the right claimed by the petitioner is *an integral part of* a named fundamental right or *partakes of the same basic nature and character* as the named fundamental right so that the exercise of such right is *in reality and substance nothing but an instance of the exercise of the named fundamental right.*
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> (emphasis added)

The Court applied this test and found that Art. 19(1)(a) includes the freedom of the press but does *not* include the right to travel abroad.[9] On both counts, the Court's conclusion seems unexceptionable. The press is *essentially* an industry that engages in speech and imparts information. But there is nothing essentially speech-y about foreign travel—indeed, one might even travel to an isolated place to *cut off* all communication. Put differently,

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[6] Constitution of India 1950, art 19(1)(a).
[7] *Maneka* (n 5)..
[8] ibid [29].
[9] ibid.

undertaking press-related activity is "*in reality and substance nothing but an instance of the exercise of*" free speech, while traveling abroad is not.

Importantly, the Court applied this test by asking whether *every* instance of foreign travel would involve speech:[10]

> When a person goes abroad, he may do so for a variety of reasons and it may not necessarily and always be for exercise of freedom of speech and expression. Every travel abroad is not an exercise of right of free speech and expression and it would not be correct to say that whenever there is a restriction on the right to go abroad, ex necessitae it involves violation of freedom of speech and expression. It is no doubt true that going abroad may be necessary in a given case for exercise of freedom-of speech and expression, but that does not make it an integral part of the right of free speech and expression.

If that is the test, it is puzzling why the right to know is said to be implicit in Art. 19(1)(a). Speech and expression are not predicated on knowledge. Of course, more informed speech is *better* speech and makes communication more meaningful. But less informed speech is speech nonetheless. Readers would recall that a key philosophical justification for free speech is "*self-fulfilment*"—the idea that expressing oneself through speech allows one to take control of her destiny and grow as an individual—which is not contingent on the speaker being informed about the subject-matter.[11] It is hence tough to say that receipt of information is "*in reality and substance nothing but an instance of the exercise of*" free speech.

Courts have reasoned that the right to know is necessary to make the free speech right more meaningful;[12] in other words, the right to know is a "*necessary concomitant*" of free speech.[13] But in *Maneka Gandhi*, the Supreme Court had explicitly rejected these ideas as being

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[10] ibid.
[11] *Indian Express Newspapers (Bombay) (P) Ltd. v Union of India* [1985] 1 SCC 641 [68].
[12] *Union of India v Assn. for Democratic Reforms* [2002] 5 SCC 294 [[34]-[38].
[13] *Santosh Mittal v State of Rajasthan* [2004] SCC OnLine Raj 512 [12]; *Krishnamoorthy v Sivakumar* [2015] 3 SCC 467 [29].

sufficient to recognize a right as an implicit right. The 7-judge bench, speaking through Bhagwati J., held as under:[14]

> It is not enough that a right claimed by the petitioner flows or emanates from a named fundamental right *or that its existence is necessary in order to make the exercise of the named fundamental right meaningful and effective*. Every activity which facilitates the exercise of a named fundamental right is not necessarily comprehended in that fundamental right nor can it be regarded as such merely because it may not be possible otherwise to effectively exercise that fundamental right.

Hence, the mere fact that the right to know makes the exercise of free speech more effective and meaningful is insufficient to locate it in Art. 19(1)(a). So long as *Maneka Gandhi* continues to be good law on this point, the right to know rests on a shaky foundation.

III. STRUCTURE OF THE RIGHT TO KNOW

Is the right to know enforceable horizontally (against non-state actors) or only vertically (against state actors)? The earliest authority referenced in judicial discussions on the right to know is Justice K.K. Mathew's concurring view in *Raj Narain* (1975):

> The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing…. The responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption.[15]

This spirit of state suspicion and governmental accountability guided the Supreme Court's initial engagement with the right to know. Within six years of *Raj Narain*, Justice Krishna Iyer had described secrecy in governance as "*the armoury of dubious and arrogant power*".[16] Justice Bhagwati had declared the idea of "*open government*"—a government exposed to "*public gaze and scrutiny*"—as directly flowing from Article 19(1)(a) and the right to

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[14] *Maneka* (n 5) [29].
[15] *State of U.P. v Raj Narain* [1975] 4 SCC 428 [74] (Mathew, J. concurring).
[16] *Special Courts Bill, 1978, In re*, [1979] 1 SCC 380 [126] (Krishna Iyer, J. concurring).

know.[17] By 1988, Article 19(1)(a) guaranteed a public right to access judicial proceedings as well, for "*[t]he courts like other institutions also belong to people.*"[18]

But the scope of the right to know has since been expanded and non-state actors have been held bound by this right. Some such cases are discussed below. But they do not posit a clear proposition and leave open a vast grey area: exactly *when* are non-state actors bound to furnish information to other citizens?

A. BIRANGANA RELIGIOUS SOCIETY (CALCUTTA HIGH COURT, 1996)

In *Birangana*,[19] the State had refused to permit the use of loudspeakers and microphones by a religious society for amplifying the daily *pujas* and religious songs.[20] The society approached the Calcutta High Court alleging that the refusal violated its rights to religious freedom under Art.25(1) of the Constitution.[21]

The Court rejected the petition with the following reasoning. The right under Art.25(1) is "*subject to… other provisions of this Part*" including Art. 19(1)(a).[22] Since Art. 19(1)(a) includes the right to receive information, it must also include the right *not* to receive information (or the "*freedom not to listen*").[23] No citizen can be "*coerced to hear anything which he does not like or which he does not require*".[24] Hence the religious society cannot demand a license to amplify its audio content in a way to impinge on other citizens' right not to listen.[25]

In the Court's view, therefore, the right *not* to listen under Art. 19(1)(a) was available horizontally against non-state actors as well—even though it was enforced against such non-state actors only *indirectly*,[26] i.e., through the State.

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[17] *S.P. Gupta v Union of India* [1981] Supp SCC 87 [67] (P.N. Bhagwati, J.).
[18] *Kehar Singh v State (Delhi Admn.)* [1988] 3 SCC 609 [195]. *See also Reliance Petrochemicals Ltd. v Proprietors of Indian Express Newspapers Bombay (P) Ltd*. [1988] 4 SCC 592.
[19] *Birangana Religious Society v State* [1996] SCC OnLine Cal 132.
[20] ibid [[1]-[2].
[21] ibid[13].
[22] ibid [[18], [24].
[23] ibid [12].
[24] ibid [18].
[25] ibid.
[26] See Ashish Chugh, "*Fundamental Rights—Vertical or Horizontal?*" (2005) 7 SCC (J) 9.

B. MR. 'X' V. HOSPITAL 'Z' (SUPREME COURT, 1998)

In *X v. Z*,[27] Mr. X had donated blood in Hospital Z. After Mr. X's marriage was fixed with Ms. Y, at Ms. Y's request, Hospital Z conducted a blood test and revealed to Ms. Y that Mr. X was HIV+. This led to Mr. X lodging a consumer complaint against Hospital Z for the breach of confidentiality and medical ethics.

The Supreme Court viewed this case as involving a conflict between Mr. X's right to privacy and Ms. Y's right to be informed,[28] and found that Ms. Y's right to be informed must take precedence.[29] Pertinently, however, the Court traced the right to be informed to Art.21—linking Ms. Y's right to be informed with her right to health—and not Art. 19(1)(a).[30] Nonetheless, rights in the Indian Constitution are overlapping,[31] and a common justification offered by the Supreme Court for recognising the right to know is that it helps informed and meaningful choice-making.[32] Given the vital nature of medical information vis-à-vis informed decision-making, it is likely that courts would apply Art. 19(1)(a) to cases like X v. Z as well.

C. MOTION PICTURE ASSOCIATION (SUPREME COURT, 1999)

In *Motion Picture*,[33] a license condition was imposed on cinema owners that they must exhibit a scientific or educational film (pre-approved by the Central Government) before every show.[34] The cinema owners challenged this condition as being "*compelled speech*" and hence violative of their freedom of speech under Art. 19(1)(a).[35]

The Supreme Court refused to quash the license condition, holding that since the condition was designed to ensure dissemination of important information, it *furthered* rather than curtailed the freedom of speech, and hence did not amount to a restriction within the meaning

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[27] *Mr. 'X' v Hospital 'Z'* [1998] 8 SCC 296.
[28] ibid [27].
[29] ibid [44].
[30] ibid [44].
[31] *Maneka* (n 5) [6].
[32] *Resurgence India v Election Commission of India* [2014] 14 SCC 189; *Kisan Shankar Kathore v Arun Dattatray Sawant* [2014] 14 SCC 162; *Mairembam Prithviraj v Pukhrem Sharatchandra Singh* [2017] 2 SCC 487.
[33] *Union of India v Motion Picture Assn*. [1999] 6 SCC 150.
[34] ibid [10].
[35] ibid [12].

of Art. 19(2).[36] This judgment is perhaps better understood within the framework of the doctrine of balancing—the Court balanced the cinema owners' right to free speech with the citizens' right to receive educational information, and held that the former must give way to the latter. In this perspective, the Court holds that citizens have a right to receive educational information even from non-state actors; although, even in this case, this right is enforced indirectly through the state.

D. Association of Democratic Reforms (Supreme Court, 2002)

In *ADR*,[37] the Supreme Court held that voters have a fundamental right to know all relevant information (including criminal antecedents) about political candidates. The Court's argument was as follows. By casting a vote, voters express their choice of political candidate. Hence, casting a vote is a form of expression for the purposes of Art. 19(1)(a). To make this expression meaningful and effective, voters must be equipped with the relevant information about the candidates they must choose from.[38] Information about the criminal antecedents of candidates is an example of such relevant information.[39] Candidates must disclose this information to the Returning Officer.[40]

Since *ADR*, this obligation has been significantly enlarged. Today, Returning Officers can "*compel*"[41] candidates to furnish their educational qualifications,[42] assets owned by them, their spouse or their children,[43] and their financial background as well as that of their "*associates*".[44] This is another instance of indirect horizontal application of the right to know, for even though political candidates (and their family and associates) are proximate to the state in a way that other private citizens are not, they are not state entities.

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[36] ibid [17].
[37] *Union of India v Assn. for Democratic Reforms* [2002] 5 SCC 294.
[38] ibid. [[34], [38].
[39] ibid [38].
[40] ibid [46].
[41] *Resurgence India v Election Commission of India* [2014] 14 SCC 189 [29.2].
[42] *Mairembam Prithviraj v Pukhrem Sharatchandra Singh* [2017] 2 SCC 487.
[43] *Kisan Shankar Kathore v Arun Dattatray Sawant* [2014] 14 SCC 162.
[44] *Lok Prahari v Union of India* [2018] 4 SCC 699.

E. SANTOSH MITTAL (RAJASTHAN HIGH COURT, 2004)

In *Santosh Mittal*,[45] a writ petition was filed seeking certain directions to private companies that manufactured the carbonated drinks *Pepsi* and *Coca-Cola*. The main direction sought was that the manufacturers should specify all ingredients and composition of the drink, including a description of the pesticides and chemicals present in it, on the bottle or package. The High Court allowed the petition and found that Art. 19(1)(a) and Art. 21 obliged the manufacturers to make these disclosures clearly on the packaging.[46] Such a disclosure, the Court reasoned, would enable consumers to make an "*informed choice*" before buying these beverages.[47] Accordingly, the Court directed "*the respondent companies namely Pepsi-Co and Coca-Cola, and all other manufacturers of carbonated beverages and soft drinks*" to make the said disclosures.[48]

This is a case of direct horizontal application of the right to know since the Court issued a direction to private companies without the state's involvement as an intermediary. Note that *Santosh Mittal* is similar to *X v. Z*—in both cases, the right to know was linked to the right to health. But while the Court traced the right to know in Art. 19(1)(a) in the former, it did not do so in the latter.

F. HINDUSTAN UNILEVER (MADRAS HIGH COURT, 2008)

In *Hindustan Unilever*,[49] the High Court was concerned with a civil suit filed by a private manufacturer of bleach-based toilet cleaner praying that the defendants (other private companies) be restrained from running advertisements that disparage the plaintiff's products.[50] The defendants were advertising their acid-based toilet cleaners and portraying that bleach-based cleaners were inferior in quality (without explicitly naming the plaintiff's product).

The Court dismissed the suit. It found that the public at large had a right to know about the comparative merits and demerits of acid-based and bleach-based products.[51] Free commercial

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[45] *Santosh Mittal v State of Rajasthan* [2004] SCC OnLine Raj 512.
[46] ibid [21].
[47] ibid [20].
[48] ibid [22].
[49] *Hindustan Unilever Ltd. v Reckitt Benckiser (India) Ltd.* [2008] SCC OnLine Mad 1514.
[50] ibid [2].
[51] ibid [[72]-[76].

speech, the Court held, was in public interest because it advanced the dissemination of information and enabled consumers to make informed decisions while buying products.[52] Since the plaintiff had not shown that the advertisements were false, no restraining order could be passed.[53]

This is another example of direct horizontal application of the right to know. Without the involvement of any state entity, the Court invokes and applies the right to know to settle a purely private commercial dispute.

G. STAR INDIA (DELHI HIGH COURT, 2013)

In *Star*,[54] the plaintiff in a commercial suit alleged that it was assigned exclusive rights by the Board of Cricket Control of India (BCCI) to dissemination information regarding ongoing cricket matches; however, the defendants were disseminating ball-by-ball written updates of the matches on their platforms.[55] The High Court found the need to balance two sets of competing rights: on the one hand was "*the right of the organiser of an event to monetize his own event*" and on the other hand were "*the right of the public to receive information regarding such event and the right of the media to provide access to such information demanded*".[56] Though the Court ultimately found that dissemination of ball-by-ball updates was not included in the right to receive information, it held that "*news*" concerning a cricket match could be propagated and could not be restricted.[57]

In effect, the Court held that two private parties could not contractually agree to restrict the public's right to receive information about a cricketing event. This is, once again, an implicit recognition of a horizontal right to know.

H. THE BROADER QUESTION OF HORIZONTALITY

On the broader question whether the rights under Art. 19 and Art. 21 are enforceable against non-state actors, a Constitution Bench of the Supreme Court in *Kaushal Kishor* has recently

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[52] ibid
[53] ibid [83].
[54] *Star India Pvt. Ltd. v Piyush Agarwal* [2013] SCC OnLine Del 1030.
[55] ibid [1].
[56] ibid [41].
[57] ibid [50].

held in the affirmative.[58] This judgment is, however, in apparent contradiction with two earlier Constitution Bench judgments, namely *P.D. Shamdasani*[59] and *Vidya Verma*,[60] both of which held that the rights under Arts. 19 & 21 are purely vertical and can only be enforced against state actors. It was held in these decisions that private disputes in respect of property must be resolved in civil courts, not in writ courts by invoking the fundamental right to property.[61]

Kaushal Kishor is grossly insufficient on many counts and fails to explain as to how the horizontal application of Arts. 19 & 21 is to be operationalized. A detailed critique of it is not within the scope of this paper. Indicatively, however, one may note the objections raised by Nagarathna J. in her dissent:

i. Numerous Supreme Court judgments have previously engaged with the meaning of the word 'State' in Art.12 of the Constitution.[62] At least one judgment expressly notes that writ petitions under Articles 32 & 226 for the enforcement of fundamental rights can only be filed against the 'State'.[63] Given this, the Court's sudden *volte face* in *Kaushal Kishor* is hard to understand and defend.

ii. Even otherwise, it is settled that writ courts do not entertain complex questions of fact.[64] In this light, the question arises as to whether *Kaushal Kishor* is an academic pronouncement, since disputes between private individuals are bound to entail such questions.

iii. It is a well-established principle that a writ petition is generally not entertained where an alternate remedy is available.[65] With regard to private disputes, the existence of an alternate remedy, i.e., the civil court, is a given. Consequently, once again, the purpose of stating that Arts. 19 & 21 are horizontal is not clear.

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[58] *Kaushal Kishor v State of U.P.* (Kaushal Kishor) [2023] 4 SCC 1.
[59] *PD Shamdasani v Central Bank of India*[1951] SCC 1237..
[60] *Vidya Verma v Dr. Shiv Narain Verma* [1955] 2 SCR 983.
[61] ibid [7].
[62] *See* e.g. *Rajasthan State Electricity Board v Mohan Lal* [1967] 3 SCR 377; *Sukhdev Singh v Bhagatram Sardar Singh Raghuvanshi* [1975] 1 SCC 421; *Ajay Hasia v Khalid Mujib Sehravardi* [1981] 1 SCC 722; *Pradeep Kumar Biswas v Indian Institute of Chemical Biology* [2002] 5 SCC 111.
[63] *Pradeep Kumar Biswas v Indian Institute of Chemical Biology* [2002] 5 SCC 111 [[8], [70], [71].
[64] *Himmat Singh v State of Haryana* [2006] 9 SCC 256.
[65] U.*P. State Spinning Co. Ltd. v R.S. Pandey* [2005] 8 SCC 264.

More clarity will hopefully emerge in future judgments of the Supreme Court.

IV. RESTRICTIONS ON THE RIGHT TO KNOW

The earliest Supreme Court judgments that focused on governmental accountability envisioned a right to know about "*public act[s]… done in a public way, by… public functionaries*";[66] a right to access information related to "the functioning of Government and the processes of Government".[67] But these dry phrases hardly convey the scope of the colourful right to information that exists today. Citizens now have the right to "be entertained" by watching cricket on TV,[68] get information related to news and science,[69] consume art and literature,[70] and feel a sense of "expansive connectivity" by surfing the web,[71] all as part of Article 19(1)(a). The right also has some bearing in adversarial proceedings involving the State – in writ petitions, Article 19(1)(a) imposes an obligation upon state authorities to supply to the petitioner all information necessary for deciding the rights challenge;[72] in disciplinary proceedings, Article 19(1)(a) mandates that the delinquent be supplied a reasoned order for the action taken against her.[73]

While laying down the test for identifying implicit rights, the Court in *Maneka Gandhi* had explained why it was propounding such a strict test:[74]

> "The contrary construction would lead to incongruous results and the entire scheme of Article 19(1) which confers different rights and sanctions different restrictions according to different standards depending upon the nature of the right will be upset."

For instance, Art. 19(2) lists nine grounds on which the State can restrict free speech,[75] and the Supreme Court has repeatedly held it cannot be restricted on any tenth ground.[76] The

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[66] *State of U.P. v Raj Narain* [1975] 4 SCC 428 [74] (Mathew, J. concurring).
[67] *S.P. Gupta v Union of India* [1981] Supp SCC 87 [66] (P.N. Bhagwati, J.).
[68] *Secy., Ministry of Information & Broadcasting v Cricket Assn. of Bengal (Secy. MIB)* [1995] 2 SCC 161 [75].
[69] *Union of India v Motion Picture Assn.* [1999] 6 SCC 150.
[70] *Shreya Singhal v Union of India* (Shreya Singhal) [2015] 5 SCC 1 [21].
[71] *Sabu Mathew George v Union of India* [2017] 7 SCC 657 [24].
[72] *Ram Jethmalani v Union of India* [2011] 8 SCC 1.
[73] *Akhil Chandra Khan v State of West Bengal* [2009] SCC OnLine Cal 1628; *Shefali Mondal v State of West Bengal* [2010] SCC OnLine Cal 2322.
[74] *Maneka* (n 5) [29].
[75] Constitution of India 1950, art 19(2).

Constitution framers would have identified these nine grounds with "*speech and expression*" in mind. If Art. 19(1)(a) is read more expansively than originally envisioned, restricting the newly-identified rights might become impossible due to the absence of requisite grounds in Art. 19(2).

This warning appears to have been realized in context of the right to know. Being a species of the right to free speech, the right to know should be subject to the same limitations, i.e., those listed in Article 19(2). Indeed, the Supreme Court has restricted the right to know in the interests of the security of the State (an Article 19(2) ground)[77] as well as to resolve conflict with the right to fair trial.[78] But the Court has travelled further and restricted the right on unknown grounds.

A. INDIRA JAISING (SUPREME COURT, 2003)

In *Jaising*,[79] the Petitioner had sought publication of an inquiry report made by a judicial committee in respect of certain allegations against sitting High Court judges. Without giving many details, the judgment describes the information sought as:[80]

> "[T]he inquiry report made by a Committee consisting of two Chief Justices and a Judge of different High Courts in respect of certain allegations of alleged involvement of sitting Judges of the High Court of Karnataka in certain incidents…"

Predictably, the Court rejected the petition. It reasoned that the matter was "*exceptional*" in nature; the report was "*confidential and discreet*" and was "*only for the purpose of [the Chief Justice's] information and not for the purpose of disclosure to any other person*".[81] With this singular observation, the principles laid down in earlier cases concerning the right to know were held inapplicable to this case.[82] The judgment cites no precedent authorizing such an exception, and other than its *ipse dixit*, does not offer any argument as to why the public does

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[76] *Romesh Thappar v State of Madras* [1950]SCC 436; *Sakal Papers (P) Ltd. v Union of India* [1962] 3 SCR 842. The sole exception is that Art. 19(1)(a) can be "*balanced*" against other fundamental rights. See e.g., *Noise Pollution (V), In re*, [2005] 5 SCC 733; *Sahara India Real Estate Corpn. Ltd. v SEBI* [2012] 10 SCC 603.
[77] *People's Union for Civil Liberties v Union of India* [2004] 2 SCC 476.
[78] *Sahara India Real Estate Corpn. Ltd. v SEBI* [2012] 10 SCC 603.
[79] *Indira Jaising v Supreme Court of India* [2003] 5 SCC 494.
[80] ibid [1].
[81] ibid [4].
[82] ibid

not have the right to access inquiry reports pertaining to serious allegations against persons holding high constitutional offices.

B. OZAIR HUSSAIN (SUPREME COURT, 2013)

In *Ozair*,[83] the petitioner before the Delhi High Court had sought a direction to the Central Government that the packaging of every drug must clearly specify whether its ingredients are of "*vegetarian*" or "*non-vegetarian*" origin.[84] The High Court agreed with the petitioner and held that Art. 19(1)(a) envisaged a fundamental right to know the origins of the ingredients used in the drugs.[85] The High Court held:[86]

> "In case a vegetarian consumer does not know the ingredients of cosmetics, drugs or food products which he/she wishes to buy, it will be difficult for him or her to practise vegetarianism. In the aforesaid context, freedom of expression enshrined in Article 19(1)(a) can serve two broad purposes — (1) it can help the consumer to discover the truth about the composition of the products, whether made of animals including birds and fresh water or marine animals or eggs, and (2) it can help him to fulfil his belief or opinion in vegetarianism."

But the Supreme Court reversed this judgment in appeal. Rejecting the argument premised on Art. 19(1)(a), the Supreme Court held that though there was a right to know, information could be furnished only "*to the extent it is available and possible*".[87] Otherwise, the Court exclaimed, the various kinds of vegetarians in India (Jains, 'eggetarians' etc.) could also demand information about "*the origin of a vegetarian ingredient*".[88] But it did not state whether, and if yes how, Article 19(1)(a) could be limited by such considerations of *expediency*. Though the Court also made a fleeting reference to the "*fundamental right of others*",[89] it identified no specific fundamental right that was being violated by the

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[83] *Indian Soaps & Toiletries Makers Assn. v Ozair Husain* [2013] 3 SCC 641.
[84] ibid [[1]-[2].
[85] ibid [3].
[86] *Ozair Husain v Union of India* [2002] SCC OnLine Del 1265[10].
[87] Indian Soaps & Toiletries Makers Assn. v Ozair Husain (n 83)[29].
[88] ibid [32].
[89] ibid [29].

petitioner's request. Finally, the Court declared—as an *ipse dixit*—that it would not be proper to allow vegetarians the choice of rejecting drugs thereby jeopardizing their health.[90]

C. JAYANTILAL MISTRY (SUPREME COURT, 2016)

In *Jayantilal*,[91] the Supreme Court was called upon to interpret the exemption clauses under the Right to Information Act, 2005 ('RTI Act'). Readers would know that the RTI Act was passed to effectuate and streamline the right to know under Art. 19(1)(a).[92] However, it allows public authorities to withhold certain kinds of information, some of which are not traceable to Art. 19(2).[93] One such category is information that prejudicially affects the "*economic interests of the State*".[94] The Court in *Jayantilal* was invited, *inter alia*, to interpret the meaning of this exception.

The Court held that the exemption would allow the Reserve Bank of India (RBI) to withhold sensitive financial information, but not the "*lower level*" information:[95]

> And when it comes to national economic interest, disclosure of information about currency or exchange rates, interest rates, taxes, the regulation or supervision of banking, insurance and other financial institutions, proposals for expenditure or borrowing and foreign investment could in some cases harm the national economy, particularly if released prematurely. However, lower level economic and financial information, like contracts and departmental budgets should not be withheld under this exemption.

Though the Court was not hearing a constitutional challenge to the exemption clause of the RTI Act, this judgment is illustratively important to understand that the RTI Act allows restrictions on the right to know over and above what is provided in Art. 19(2). [Readers may note that this judgment has recently been questioned on the ground that it permits the RBI to

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[90] ibid [31].
[91] *RBI v Jayantilal N. Mistry* [2016] 3 SCC 525.
[92] *Chief Information Commr. v State of Manipur* [2011] 15 SCC 1 [9].
[93] Right to Information Act 2005, s 8.
[94] ibid s 8(1)(a).
[95] *RBI v Jayantilal N. Mistry* (n 91)[77].

solicit customers' personal information from banks, which violates the right to privacy of the customers.[96] A final decision on the issue awaited.]

D. ANJALI BHARDWAJ (SUPREME COURT, 2022)

In the recent judgment of *Anjali Bhardwaj*,[97] the Supreme Court upheld its Public Information Officer's decision to refuse to provide—in response to a RTI query—the agenda of and decision taken in a collegium meeting dated 12 December 2018.[98] While the Court did not discuss Art. 19(1)(a) and the right to know, some of its observations are pertinent to the foregoing discussion. The Court held that there was no requirement to publish the "*tentative*" decisions of the Collegium; it is only once the final decision is taken that the same is required to be published on the Supreme Court's website.[99] The Court gives no reasons as to why the tentative decisions or preliminary discussions cannot be disclosed to the public.

V. IMPLICATIONS ON TECHNOLOGY

The right to know has significant implications for modern challenges posed by technology. Four potential challenges are indicatively discussed below.

One challenge arises from the fact that large social media entities like WhatsApp and Facebook collect vast amounts of data from their users, without users being fully aware of what information is being collected, how it is stored, and with whom it is shared.[100] In an ongoing case before the Supreme Court, WhatsApp and Facebook contended that users agree to the storage and sharing of their data with third parties by accepting the "*terms and conditions*" and "*privacy policy*" when they start using their services.[101] But the users' consent may not be fully informed. Many WhatsApp users may struggle to read and comprehend the complex terms and conditions, which are written in technical language. Even if users are equipped to do so, it may not be practical to expect them to review such lengthy

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[96] *HDFC Bank Ltd. v Union of India* [2023]5 SCC 627..
[97] *Anjali Bhardwaj v CPIO*[2023] 4 SCC784.
[98] ibid [11].
[99] ibid [8].
[100] For a detailed discussion on data processing and misuse, see Vrinda Bhandari and Renuka Sane, 'Towards a Privacy Framework for India in the Age of the Internet' (*National Institute of Public Finance and Policy*, October 2016) <https://macrofinance.nipfp.org.in/PDF/1LEPCPr_BhandariSane20160926.pdf> accessed17 March 2023.
[101] Supreme Court Observer, 'WhatsApp Privacy Policy Day #2: Bench Decides to Hear Case in April' <https://www.scobserver.in/reports/whatsapp-privacy-policy-day-2-bench-decides-to-hear-case-in-april/> accessed 17 March 2023.

documents and fully understand their rights.[102] In fact, users experience "*consent fatigue*" by periodically signing standard form contracts, which leads to "*diminished consent*".[103]

Following the Supreme Court's decision that Articles 19 and 21 are horizontal,[104] the right to access information should be enforceable horizontally as well. It will be intriguing to see if the Court addresses the question of whether the right to be informed includes the right of users to be *adequately* informed about the crucial terms and conditions in contracts with social media companies. This will then raise the question of whether social media companies have a responsibility to highlight and clearly display to the user, in simple and perhaps even in local languages,[105] what they are doing with user data.[106]

A second challenge concerning the right to know is related to intellectual property/ proprietary information and the resultant competitive advantage. If the right to access information horizontally includes access to scientific and literary information, [107] a constitutional challenge may lie to the entire copyright law framework. Indian copyright law allows for the use of a copyrighted work if, *inter alia*, it is fair use for research purposes.[108] However, if individuals have a right to access information about scientific advancements and valuable knowledge generated globally (without paying a high price for it),[109] then the question arises as to what restrictions can be placed on that right under Article 19(2) of the Constitution or by balancing it against another fundamental right.[110] A preliminary question that must be addressed is whether copyright is solely a property right under Art. 300-A of the

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[102] Cameron F. Kerry, 'Why protecting privacy is a losing game today—and How to Change the Game', (*The Brookings Institution* 12 July 2018) <https://www.brookings.edu/research/why-protecting-privacy-is-a-losing-game-today-and-how-to-change-the-game/> accessed17 March 2023.

[103] Rahul Matthan, 'Beyond Consent – A New Paradigm for Data Protection, Takshashila Discussion Document 2017-03' (*The Takshashila Institution*) <https://takshashila.org.in/research/discussion-document-beyond-consent-new-paradigm-data-protection> accessed 17 March 2023.

[104] *Kaushal Kishor* (n 58)..

[105] For a fuller discussion on vernacular languages and Art. 19(1)(a), *see* Shrutanjaya Bhardwaj, 'Courtroom Language and Article 19(1)(a)' (2020) 6(2) Journal of National Law University Delhi 126.

[106] Dr. Arghya Sengupta makes a similar suggestion in his 2018 lecture. *See* Dr. Arghya Sengupta, 'Vidhi Centre | Data Protection Report: 2018 | Nalsar University of Law (Video)' (18 Aug 2018_) <https://www.youtube.com/watch?v=eie1V2HfMKc> accessed 15 March 2023.

[107] *Shreya Singhal* (n 70).

[108] *See* Copyright Act 1957, s 52.

[109] *See* Kate Murphy, 'Should All Research Papers Be Free?' *New York Times* (12 Mar 2016) <https://www.nytimes.com/2016/03/13/opinion/sunday/should-all-research-papers-be-free.html?smid=url-share> accessed15 March 2023.

[110] For a fuller discussion on copyright law and Art. 19(1)(a), *see* Saral Minocha, 'Copyright and the Sci-Hub/Libgen Case: A Constitutional Query' (*Spicy IP*, 30 December 2020) <https://spicyip.com/2020/12/copyright-and-the-scihub-libgen-case-a-constitutional-query.html> accessed 15 March 2023.

Constitution[111] or if it is also a part of a fundamental right in Part III of the Constitution (and if yes, which).[112] [*Prima facie*, the Delhi High Court's position, that copyright ownership has roots in Art. 19(1)(a),[113] seems incorrect. Its apparent premise is that one has a right not only to speak but also to decide the terms on which her speech is released into the world. That interpretation of Art. 19(1)(a) seems doubtful to me. However, this issue would require a fuller discussion, which is beyond the scope of this paper.]

A third challenge concerns misinformation. As the Supreme Court declared in 1992, "*[o]ne-sided information, disinformation, misinformation and non-information all equally create an uninformed citizenry which makes democracy a farce when medium of information is monopolised either by a partisan central authority or by private individuals or oligarchic organisations.*"[114] The following questions arise: How does a horizontal right to receive information treat misinformation? Is there a right to receive misinformation (or what the State/ a private actor *believes to be* misinformation)? Consequently, is there a right to spread it? Conversely, is there a right *against* misinformation—i.e., a right to accuracy in information?

The fourth challenge concerns the 'black-box' problem of artificial intelligence ('AI') platforms.[115] Essentially, it refers to the opacity with which AI works. Consider, for instance, the recently-hyped 'ChatGPT'.[116] The user barely knows the underlying process by which the AI program is generating information. The program could have its own biases that may discriminate against and harm vulnerable populations.[117] Generally, the program could provide wrong information without accountability, assist in plagiarism, and enable impersonation of another writer, among other problems.[118] The question that arises is whether

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[111] *Entertainment Network (India) Ltd. v Super Cassette Industries Ltd.* [2008] 13 SCC 30 [[118], [121].
[112] *Prasar Bharti v Sahara TV Network Pvt. Ltd.* [2005] SCC OnLine Del 1444 [59].
[113] ibid.
[114] *Secy. MIB* (n 68).
[115] For a detailed explanation of the black-box problem, see *Yavar Bathaee*, 'The Artificial Intelligence Black Box and the Failure of Intent and Causation' (2018) 31(2) Harvard Journal of Law & Technology.889 <https://jolt.law.harvard.edu/assets/articlePDFs/v31/The-Artificial-Intelligence-Black-Box-and-the-Failure-of-Intent-and-Causation-Yavar-Bathaee.pdf> accessed 15 March 2023.
[116] OpenAI, ChatGPT <https://chat.openai.com> accessed15 March 2023.
[117] Chinmayi Arun, 'AI and the Global South: Designing for Other Worlds', in Markus D. Dubber, Frank Pasquale and Sunit Das (eds.), *Oxford Handbook of Ethics and AI*, Ch. 31, pp.588-606 (OUP 2020).
[118] Alex Hern, 'AI-assisted plagiarism? ChatGPT bot says it has an answer for that' *The Guardian* (31 December 2022 <https://www.theguardian.com/technology/2022/dec/31/ai-assisted-plagiarism-chatgpt-bot-says-it-has-an-answer-for-that> accessed15 March 2023.

a horizontal right to know would imply a right to accountability and transparency as to the process by which the AI generates information.

These and other challenges are likely to be posed on the constitutional plane. When they are, courts will first be called upon to resolve the inconsistencies in the jurisprudence on the right to know. Is the right horizontal or vertical, after all? Can private corporations be held to account under the Constitution? On what grounds can the right be restricted? On what parameters would competing rights be balanced?

VI. CONCLUSION

In sum, case law is unclear/ inconsistent on two questions, i.e. (i) whether the right to know is vertical or horizontal, and (ii) what the substantive content and limits of the right are. At a broader level, what emerges is an *ad hoc* approach of decision making wherein an *abstract* notion (the '*right to know*') is invoked by the courts to justify *concrete* outcomes (people have a right to watch cricket and know about the criminal antecedents of political candidates, e.g.) without supplying a principled link between the two.

At a more fundamental level, the recognition of the right to know in Art. 19(1)(a) is itself marred with difficulties. The right to know does not "*partake of the same basic nature*" as free speech; neither is every receipt of information an exercise of speech.

These serious inconsistencies harm the principle of rule of law. Like in any area of unprincipled adjudication, they create an impression that the Court decides issues of the right to know on an *ad hoc* basis, which is unfair, and that the Court's decision in one case is like "*a restricted railroad ticket, good for this day and train only*".[119] Going forward, therefore, the Supreme Court must fill these gaps and lay down a coherent framework governing the right to know. The framework should address the following:

1. Foundational justifications of the right to know, and its link with Art. 19(1)(a),
2. The structural nature of the right to know,
3. The kind of information to which citizens are entitled, and
4. The grounds on which the right to know can be restricted.

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[119] *Smith v Allwright* [1944] 321 US 649 [669] (Roberts, J dissenting).