

- 1) The issues that arise, formulated in the Order of this Court dated 24 October 2019 require examination in the backdrop of the constitutional jurisprudence that has evolved over the decades.
- 2) The core principles which today are part of the Indian constitutional jurisprudence are:
 - a) the positive dimension of fundamental rights;
 - b) the interrelation between Article 14, 19 and 21;
 - c) the recognition of dimensions of Article 21 such as the right to privacy, victims' rights *et cetera*.
- 3) The jurisprudence of fundamental rights enshrined in the Constitution generally, and the trilogy of Article 14, 19 and 21 in particular has considerably evolved over the decades, and these rights are now recognized as creating a positive obligation on the State to protect those rights.
- 4) The State is under a constitutional duty to ensure that the rights of its citizens are not violated and to create an ecosystem in which these rights can be enjoyed in their activist dimension.
- 5) A Constitution Bench of this Hon'ble Court in **State of West Bengal & Ors. v. Committee for Protection of Democratic Rights, West Bengal** (2010) 3 SCC 571 [upholding the power of a Constitutional Court to transfer an investigation to the CBI without the consent of the concerned State] emphasized the duty of the State to conduct a fair investigation as a dimension of a fundamental right of the victim under Article 21 as follows:

"68... (ii) Article 21 of the Constitution in its broad perspective seeks to protect the persons of their lives and personal liberties except according to the procedure established by law. The said article in its broad application not only takes within its fold enforcement of the rights of an accused but also the rights of the victim. The State has a duty to enforce the human rights of a citizen providing for fair and impartial investigation against any person accused of commission of a cognizable offence, which may include its own officers. In certain situations even a witness to the crime may seek for and shall be granted protection by the State."

- 6) The majority judgement in **K.S. Puttaswamy & Anr. v. Union of India & Ors.**, (2017) 10 SCC 1 enunciated a positive obligation of the State to ensure a meaningful exercise of the right of privacy thus:

"272... The protection of privacy by the Constitution liberates it, as it were, from the uncertainties of statutory law which, as we have noted, is subject to the range of legislative annulments open to a majoritarian government. Any abridgment must meet the requirements prescribed by Article 21, Article 19 or the relevant freedom. The constitutional right is placed at a pedestal which embodies both a negative and a positive freedom. The negative freedom protects the individual from unwanted intrusion. As a positive freedom, it obliges the State to adopt suitable measures for protecting individual privacy. An apt description of this facet is contained in the Max Planck Encyclopaedia of Comparative Constitutional Law, in its section on the right to privacy:

"2. The right to privacy can be both negatively and positively defined. The negative right to privacy entails the individuals are protected from unwanted intrusion by both the State and private actors into their private life, especially features that define their personal identity such as sexuality, religion and political affiliation i.e. the inner core of a person's private life....

The positive right to privacy entails an obligation of States to remove obstacles for an autonomous shaping of individual identities."

...

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

- 7) In **Pt. Parmanand Katara v. Union of India & Ors.**, (1989) 4 SCC 286 this Hon'ble Court found the doctors in government hospitals imbued with a constitutional obligation of the State under Article 21 and issued directions as follows :

"8. Article 21 of the Constitution casts the obligation on the State to preserve life. The provision as explained by this Court in scores of decisions has emphasised and reiterated with gradually increasing emphasis that position. A doctor at the government hospital positioned to meet this State obligation is, therefore, duty bound to extend medical assistance for preserving life. Every doctor whether at a government hospital or otherwise has the professional obligation to extend his services with due expertise for protecting life. No law or State action can intervene to avoid/ delay the discharge of the paramount obligation cast upon members of the medical profession. The obligation being total, absolute and

paramount, laws of procedure whether in statutes or otherwise which would interfere with the discharge of this obligation cannot be sustained and must, therefore, give way."

8) The State is also duty bound to protect its citizens in relation to fundamental rights which are available against the non-state actors, such as Article 15(2)(a) and (5), Article 17, Article 21, Article 23 and Article 24.

9) In **People's Union for Democratic Rights & Ors. v. Union of India & Ors.**, (1982) 3 SCC 235, rejecting the contention of the State that it was the obligation of the private party i.e. the contractor to uphold the relevant labour laws protecting the rights of the citizens, the Court clarified that the primary obligation to protect fundamental rights was that of the State even in the absence of an effective legislation as follows:

"6...But apart altogether from the requirement of Convention 59, we have Article 24 of the Constitution which provides that no child below the age of 14 shall be employed to work in any factory or mine or engaged in any other hazardous employment. This is a constitutional prohibition which, even if not followed up by appropriate legislation, must operate proprio vigore and construction work being plainly and indubitably a hazardous employment, it is clear that by reason of this constitutional prohibition, no child below the age of 14 years can be allowed to be engaged in construction work. There can therefore be no doubt that notwithstanding the absence of specification of construction industry in the Schedule to the Employment of Children Act, 1938, no child below the age of 14 years can be employed in construction work and the Union of India as also every State Government must ensure that this constitutional mandate is not violated in any part of the country.

...

10...So far as Article 24 of the Constitution is concerned, it embodies a fundamental right which is plainly and indubitably enforceable against everyone and by reason of its compulsive mandate, no one can employ a child below the age of 14 years in a hazardous employment and since, as pointed out above, construction work is a hazardous employment, no child below the age of 14 years can be employed in construction work and therefore, not only are the contractors under a constitutional mandate not to employ any child below the age of 14 years, but it is also the duty of the Union of India, the Delhi Administration and the Delhi Development Authority to ensure that this constitutional obligation is obeyed by the contractors to whom they have entrusted the construction work of the various Asiad projects. The Union of India, the Delhi Administration and the Delhi Development Authority cannot fold their hands in despair and become silent spectators of the breach of a constitutional prohibition being committed by their own contractors."

10) In **S. Rangarajan v. P. Jagjivan Ram & Ors.**, (1989) 2 SCC 574 this Hon'ble Court held that the State cannot plead its inability to protect the fundamental rights of the citizens:

“51. We are amused yet troubled by the stand taken by the State Government with regard to the film which has received the National Award. We want to put the anguished question, what good is the protection of freedom of expression if the State does not take care to protect it? If the film, is unobjectionable and cannot constitutionally be restricted under Article 19(2), freedom of expression cannot be suppressed on account of threat of demonstration and processions or threats of violence. That would tantamount to negation of the rule of law and a surrender to blackmail and intimidation. It is the duty of the State to protect the freedom of expression since it is a liberty guaranteed against the State. The State cannot plead its inability to handle the hostile audience problem. It is its obligatory duty to prevent it and protect the freedom of expression.”

11) In the same vein, the majority (and a concurring opinion) in **K.S. Puttaswamy & Anr. v. Union of India & Ors.** (supra), elaborating on the duty of the State and non-state actors to protect the rights of citizens holds as under:

“328. Informational privacy is a facet of the right to privacy. The dangers to privacy in an age of information can originate not only from the State but from non-State actors as well. We commend to the Union Government the need to examine and put into place a robust regime for data protection. The creation of such a regime requires a careful and sensitive balance between individual interests and legitimate concerns of the State. The legitimate aims of the State would include for instance protecting national security, preventing and investigating crime, encouraging innovation and the spread of knowledge, and preventing the dissipation of social welfare benefits. These are matters of policy to be considered by the Union Government while designing a carefully structured regime for the protection of the data. Since the Union Government has informed the Court that it has constituted a Committee chaired by Honible Shri Justice B.N. Srikrishna, former Judge of this Court, for that purpose, the matter shall be dealt with appropriately by the Union Government having due regard to what has been set out in this judgment.

...

584. We are in an information age. With the growth and development of technology, more information is now easily available. The information explosion has manifold advantages but also some disadvantages. The access to information, which an individual may not want to give, needs the protection of privacy. The right to privacy is claimed qua the State and non-State actors. Recognition and enforcement of claims qua non-State actors may require legislative intervention by the State.

...

592. Thus, there is an unprecedented need for regulation regarding the extent to which such information can be stored, processed and used by non-State actors. There is also a need for protection of such information from the State. Our Government was successful in compelling Blackberry to give to it the ability to intercept data sent over Blackberry devices. While such interception may be desirable and permissible in order to ensure national security, it cannot be unregulated.³⁹⁷

593. The concept of “invasion of privacy” is not the early conventional thought process of “poking ones nose in another person’s affairs”. It is not so simplistic. In today’s world, privacy is a limit on the Government’s power as well as the power of private sector entities.³⁹³

...

644. The right to privacy is a fundamental right. It is a right which protects the inner sphere of the individual from interference from both State and non-State actors and allows the individuals to make autonomous life choices."

CONTENT OF THE RIGHT UNDER ARTICLE 19(1)(a)

- 12) A constitutional document has to be read as a whole. It is a basic principle of constitutional interpretation that the various provisions of the Constitution have to be read together so that each article can have full play without curtailing the width of the other. The Constitution being a living document has to be interpreted in a manner so as to accommodate the competing rights of the citizens to meet each emerging challenge which tends to disturb this balance. (**K.S. Puttaswamy & Anr. v. Union of India & Ors. (supra)** and **Maneka Gandhi v. Union of India**)
- 13) No constitutional right can be construed or understood in its splendid isolation. The constitutional document being a complex weave of arteries and veins of rights and liberties together with obligations and duties, the construction of the Constitution always requires an analysis of the scheme and structure of the rights and duties created under the paramount law.
- 14) Fundamental rights have to be interpreted in harmony with each other so that each right may be exercised without disabling other fellow citizens from enjoying their freedoms and liberties.
- 15) The trinity of Articles 14, 19 and 21 is the bedrock of our constitutional jurisprudence. These rights which have been held to be the heart of the doctrine of basic structure, have been interpreted over a period of time to recognise other inherent rights which are fundamental to the life of an individual. The right to food, shelter, dignity, reputation, health, fair investigation, fair trial and clean environment though not specified in the

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Constitution have been recognised to be fundamental to human existence. It would be impossible to interpret a right in a manner which takes away any of these fundamental rights enshrined in the Constitution. (I.R. Coelho v. State of T.N. (2007) 2 SCC 1)

16) Article 19(1)(a) is an individual right granted to the citizens and Article 19(2) imposes clearly defined restrictions on the exercise of the right. The assumption that the presence of Art. 19(2) suggests that the right under Art. 19(1)(a) is absolute, is misplaced. Art. 19(2) allows exceptions to the right conferred under Art. 19(1)(a)- it does not suggest that Art. 19(1)(a) stands above and beyond other constitutional rights of fellow citizens.

17) The right of free expression, the philosophical underpinning of the right of free speech, is undoubtedly a dimension of the basic civil liberties recognised by the Constitution. Equally the right to life, in its plenitude, is the heart and soul of a free constitution. It is inconceivable that the founding fathers fashioned Art. 19(1)(a) in such wide terms that it could impinge upon equally sensitive rights under other provisions.

18) One aspect of the harmony between the two rights is the interplay between the right to privacy and the right to free expression.

19) In **Thalappalam Service Cooperative Bank Ltd. & Ors. v. State of Kerala & Ors.**, (2013) 16 SCC 82, this Court has explained the need to balance the right to know under Article 19(1)(a) with the right to privacy under Article 21 so as to protect the competing interests of the individual and society at large in the following passage:

"61. The right to information and right to privacy are, therefore, not absolute rights, both the rights, one of which falls under Article 19(1)(a) and the other under Article 21 of the Constitution of India, can obviously be regulated, restricted and curtailed in the larger public interest. Absolute or uncontrolled individual rights do not and cannot exist in any modern State. Citizens' right to get

information is statutorily recognised by the RTI Act, but at the same time limitations are also provided in the Act itself, which is discernible from the Preamble and other provisions of the Act...

64. Recognising the fact that the right to privacy is a sacrosanct facet of Article 21 of the Constitution, the legislation has put a lot of safeguards to protect the rights under Section 8(j), as already indicated. If the information sought for is personal and has no relationship with any public activity or interest or it will not subserve larger public interest, the public authority or the officer concerned is not legally obliged to provide those information... Further, if the authority finds that information sought for can be made available in the larger public interest, then the officer should record his reasons in writing before providing the information, because the person from whom information is sought for, has also a right to privacy guaranteed under Article 21 of the Constitution."

20) This Court balanced the right of privacy [of bank account holders] under Article 21 with the citizens' right to know under 19(1)(a) in **Ram Jethmalani & Ors. v. Union of India & Ors.**, (2011) 8 SCC 1 to uphold the privacy of the account holders against whom no prima facie case was made out. The relevant extracts are reproduced hereunder:

"83. Right to privacy is an integral part of right to life. This is a cherished constitutional value, and it is important that human beings be allowed domains of freedom that are free of public scrutiny unless they act in an unlawful manner. We understand and appreciate the fact that the situation with respect to unaccounted for monies is extremely grave. Nevertheless, as constitutional adjudicators we always have to be mindful of preserving the sanctity of constitutional values, and hasty steps that derogate from fundamental rights, whether urged by Governments or private citizens, howsoever well meaning they may be, have to be necessarily very carefully scrutinised. The solution for the problem of abrogation of one zone of constitutional values cannot be the creation of another zone of abrogation of constitutional values.

84. The rights of citizens, to effectively seek the protection of fundamental rights, under clause (1) of Article 32 have to be balanced against the rights of citizens and persons under Article 21. The latter cannot be sacrificed on the anvil of fervid desire to find instantaneous solutions to systemic problems such as unaccounted for monies, for it would lead to dangerous circumstances, in which vigilante investigations, inquisitions and rabble rousing, by masses of other citizens could become the order of the day. The right of citizens to petition this Court for upholding of fundamental rights is granted in order that citizens, inter alia, are ever vigilant about the functioning of the State in order to protect the constitutional project. That right cannot be extended to being inquisitors of fellow citizens. An inquisitorial order, where citizens' fundamental right to privacy is breached by fellow citizens is destructive of social order. The notion of fundamental rights, such as a right to privacy as part of right to life, is not merely that the State is enjoined from derogating from them. It also includes the responsibility of the State to uphold them against the actions of others in the society, even in the context of exercise of fundamental rights by those others."

21) In **Subramanian Swamy v. Union of India**, (2016) 7 SCC 221 this Court [upholding S. 499 of the Indian Penal Code] dismissed the contention¹ that free speech under Article 19(1)(a) was a higher right than the right to reputation under Article 21. The relevant discussion is extracted below:

"136. To appreciate what we have posed hereinabove, it is necessary to dwell upon balancing the fundamental rights. It has been argued by the learned counsel for the petitioners that the right conferred under Article 19(1)(a) has to be kept at a different pedestal than the individual reputation which has been recognised as an aspect of Article 21 of the Constitution. In fact the submission is that right to freedom of speech and expression which includes freedom of press should be given higher status and the individual's right to have his/her reputation should yield to the said right. In this regard a passage from Sakal Papers (P) Ltd. has been commended to us. It says: (AIR pp. 313-14, para 36)

"36. ... Freedom of speech can be restricted only in the interests of the security of the State, friendly relations with foreign State, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. It cannot, like the freedom to carry on business, be curtailed in the interest of the general public. If a law directly affecting it is challenged, it is no answer that the restrictions enacted by it are justifiable under clauses (3) to (6). For, the scheme of Article 19 is to enumerate different freedoms separately and then to specify the extent of restrictions to which they may be subjected and the objects for securing which this could be done. A citizen is entitled to enjoy each and every one of the freedoms together and clause (1) does not prefer one freedom to another. That is the plain meaning of this clause. It follows from this that the State cannot make a law which directly restricts one freedom even for securing the better enjoyment of another freedom."

(emphasis supplied)

137. Having bestowed our anxious consideration on the said passage, we are disposed to think that the above passage is of no assistance to the petitioners, for the issue herein is sustenance and balancing of the separate rights, one under Article 19(1)(a) and the other, under Article 21. Hence, the concept of equipoise and counterweighing fundamental rights of one with other person. It is not a case of mere better enjoyment of another freedom..."

22) Article 21 lies at the heart of Constitution. As observed in **Minerva Mills Ltd. & Ors. v. Union of India & Ors.**, (1980) 3 SCC 625 *"Three Articles of our Constitution, and only three, stand between the heaven of freedom into which Tagore wanted his country to awake and the abyss of unrestrained power. They are Articles 14, 19 and 21."*

~~4/23~~ 23) The contours of the content of Article 19 (1) (a) have to be delineated in a manner that preserves and furthers the harmony between the

¹ Sought to be founded on the judgment in **Sakal** ((1962) 3 SCR 842)

constitutional trilogy of articles.

MINISTERS RIGHTS UNDER ARTICLE 21

24) The Oath of Office administered to constitutional office holders is not ceremonial-it encapsulates the basic duties of the holder of such office. In relation to a minister, the oath requires him to swear that he or she would *“do right to all manner of people in accordance with the Constitution and the law...”*². In addition, the minister is personally bound by the oath of his office to bear true faith and allegiance to the Constitution of India under Articles 75(4) and 164(3) of the Constitution.

25) Article 19 embodies rights which are generally characterised as individual rights. There may be situations where the holder of a constitutional office, who has taken an oath to do right to all manner of people in accordance with the Constitution, has to exercise his right of free speech consistent with his constitutional oath.

26) In **State of Maharashtra & Ors. v. Sarangdharsingh Shivdassingh Chavan & Anr.**, (2011) 1 SCC 577 where the Chief Minister was found to be interfering with an investigation, this Court held the action of the Chief Minister unconstitutional and imposed a cost of Rs. ten lakhs on the State. The relevant extracts are reproduced hereunder:

“38. This being the ground reality, as the Chief Minister of the State and as holding a position of great responsibility as a high constitutional functionary, Mr Vilasrao Deshmukh certainly acted beyond all legal norms by giving the impugned directions to the Collector to protect members of a particular family who are dealing in moneylending business from the normal process of law. This amounts to bestowing special favour to some chosen few at the cost of the vast number of poor people who as farmers have taken loans and who have come to the authorities of law and order to register their complaints against torture and atrocities by the moneylenders. The instructions of the Chief Minister will certainly impede their access to legal redress and bring about a failure of the due process.

² Third Schedule to the Constitution

39. The aforesaid action of the Chief Minister is completely contrary to and inconsistent with the constitutional promise of equality and also the Preambular resolve of social and economic justice. As the Chief Minister of the State Mr Deshmukh has taken a solemn oath of allegiance to the Constitution but the directions which he gave are wholly unconstitutional and seek to subvert the constitutional norms of equality and social justice.

40. The argument that some of the cases in which complaints were filed against the family of Sananda, were investigated and charge-sheets were filed, is a poor consolation and does not justify the issuing of the wholly unauthorised and unconstitutional instructions to the Collector. It is not known to us in how many cases investigation has been totally scuttled in view of the impugned directions.

...
46. This Court is extremely anguished to see that such an instruction could come from the Chief Minister of a State which is governed under a Constitution which resolves to constitute India into a socialist, secular, democratic republic. The Chief Minister's instructions are so incongruous and anachronistic, being in defiance of all logic and reason, that our conscience is deeply disturbed. We condemn the same in no uncertain terms.

47. We affirm the order of the High Court and direct that the instruction of the Chief Minister to the Collector dated 5-6-2006 has no warrant in law and is unconstitutional and is quashed.

48. We dismiss this appeal with costs of Rs.10,00,000 (rupees ten lakhs) to be paid by the appellant in favour of the Maharashtra State Legal Services Authority. This fund shall be earmarked by the Authority to help the cases of poor farmers. Such costs should be paid within a period of six weeks from date."

27) The concurring opinion emphasizes the responsibility that the Oath of Office casts on the minister under the Constitution as extracted below:

"55. Under the Constitution, the executive power of the State vests in the Governor and is required to be exercised by him either directly or through officers subordinate to him in accordance with the Constitution [Article 154(1)]. Article 163 mandates that there shall be a Council of Ministers with the Chief Minister as the head to aid and advise the Governor in the exercise of his functions, except insofar as he is by or under the Constitution required to exercise his functions or any of them in his discretion.

56. Article 164 lays down that:

"164. Other provisions as to Ministers. (1) The Chief Minister shall be appointed by the Governor and the other Ministers shall be appointed by the Governor on the advice of the Chief Minister, and the Ministers shall hold office during the pleasure of the Governor."

Article 164(3) lays down that the Governor shall before a Minister enters upon his office, administer to him the oath of office and secrecy according to the form set out in the Third Schedule, in terms of which, the Minister is required to take oath that he shall discharge his duties in accordance with the Constitution and the law without fear or favour, affection or ill will. However, the cases involving pervasive misuse of public office for private gains, which have come to light in the last few decades tend to shake the peoples' confidence and one is constrained to think that India has freed itself from British colonialism only to come in the grip of a new class, which tries to rule on the same colonial principles. Some members of the political class who are entrusted with greater responsibilities and who take oath to do their duties in accordance with the Constitution and the law without fear or favour, affection or

ill will, have by their acts and omissions demonstrated that they have no respect for a system based on the rule of law."

28) The importance of the Oath of Office under the Constitution was also emphasized by the Constitution Bench in **Manoj Narula v. Union of India**, (2014) 9 SCC 1. The relevant observations of the Court are reproduced hereunder:

"100. Thus, while interpreting Article 75(1), definitely a disqualification cannot be added. However, it can always be legitimately expected, regard being had to the role of a Minister in the Council of Ministers and keeping in view the sanctity of oath he takes, the Prime Minister, while living up to the trust reposed in him, would consider not choosing a person with criminal antecedents against whom charges have been framed for heinous or serious criminal offences or charges of corruption to become a Minister of the Council of Ministers. This is what the Constitution suggests and that is the constitutional expectation from the Prime Minister. Rest has to be left to the wisdom of the Prime Minister. We say nothing more, nothing less.

*...
152. No doubt, it is not for the Court to issue any direction to the Prime Minister or the Chief Minister, as the case may be, as to the manner in which they should exercise their power while selecting the colleagues in the Council of Ministers. That is the constitutional prerogative of those functionaries who are called upon to preserve, protect and defend the Constitution. But it is the prophetic duty of this Court to remind the key duty holders about their role in working the Constitution. Hence, I am of the firm view, that the Prime Minister and the Chief Minister of the State, who themselves have taken oath to bear true faith and allegiance to the Constitution of India and to discharge their duties faithfully and conscientiously, will be well advised to consider avoiding any person in the Council of Ministers, against whom charges have been framed by a criminal court in respect of offences involving moral turpitude and also offences specifically referred to in Chapter III of the Representation of the People Act, 1951."*

29) In **Secretary, Jaipur Development Authority, Jaipur v. Daulat Mal Jain & Ors.**, (1997) 1 SCC 35 dealing with a case involving the misuse of public office by a minister, this Court elaborated on the responsibility and liability of the ministerial office under the Constitution thus:

"11. The Minister holds public office though he gets constitutional status and performs functions under the Constitution, law or executive policy. The acts done and duties performed are public acts or duties as the holder of public office. Therefore, he owes certain accountability for the acts done or duties performed. In a democratic society governed by rule of law, power is conferred on the holder of the public office or the authority concerned by the Constitution by virtue of appointment. The holder of the office, therefore, gets opportunity to abuse or misuse the office. The politician who holds public office must perform public duties with the sense of purpose, and a sense of direction, under rules or sense of priorities. The purpose must be genuine in a free democratic society governed by the rule of law to further socio-economic democracy. The Executive Government should frame its policies to maintain the social order, stability, progress and morality. All actions of the Government are performed

through/by individual persons in collective or joint or individual capacity. Therefore, they should morally be responsible for their actions.

12. When a Government in office misuses its powers figuratively, we refer to the individual Minister/Council of Ministers who are constituents of the Government. The Government acts through its bureaucrats, who shape its social, economic and administrative policies to further the social stability and progress socially, economically and politically. Actions of the Government, should be accounted for social morality. Therefore, the actions of the individuals would reflect on the actions of the Government. The actions are intended to further the goals set down in the Constitution, the laws or administrative policy. The action would, therefore, bear necessary integral connection between the "purpose" and the end object of public welfare and not personal gain. The action cannot be divorced from that of the individual actor. The end is something aimed at and only individuals can have and shape the aims to further the social, economic and political goals. The ministerial responsibility thereat comes into consideration. The Minister is responsible not only for his actions but also for the job of the bureaucrats who work or have worked under him. He owes the responsibility to the electors for all his actions taken in the name of the Governor in relation to the Department of which he is the head. If the Minister, in fact, is responsible for all the detailed workings of his Department, then clearly ministerial responsibility must cover a wider spectrum than mere moral responsibility: for no Minister can possibly get acquainted with all the detailed decisions involved in the working of his department. The ministerial responsibility, therefore, would be that the Minister must be prepared to answer questions in the House about the actions of his department and the resultant enforcement of the policies. He owes them moral responsibility. But for actions performed without his concurrence also, he will be required to provide explanations and also bear responsibility for the actions of the bureaucrats who work under him. Therefore, he bears not only moral responsibility but also in relation to all the actions of the bureaucrats who work under him bearing actual responsibility in the working of the department under his ministerial responsibility."

30) The Constitution creates legislative chambers i.e. the Parliament and the State assemblies, in a model that resembles the Westminster model. One of the basic characteristics of this model is the collective responsibility of ministers. The division of departments between the ministers is a matter of administrative convenience – in the matter of accountability, all the ministers share collective responsibility.³

31) One of the solemn duties of any government established by the Constitution and the laws is preserving the integrity of the criminal justice system. Indian jurisprudence recognizes the State as the sole repository of all powers and duties relating to enforcement of criminal law and prosecution of crimes. This correspondingly casts a heavy constitutional

³ Art. 75(3) and Art. 164(2).

duty upon the state to ensure that the rights of victims of crimes is fully protected. Free and fair criminal investigation is one of the relatively important functions of a constitutional government.

- 32) It must necessarily follow that any comments made by a member of the Cabinet of the government which tends to interfere with the course of an investigation-or even is capable of creating a public perception of the absence of fairness in the investigation-is a gross violation both of Article 21 as well as of the constitutional oath of office where the comments are attributable to a Minister.
- 33) Article 19 (1) (a) does not confer upon a Minister an independent right to make statements that would emasculate a significant element of Article 21.
- 34) This interpretation would be in consonance with the earlier decisions of this Court which have limited the Article 21 rights of privacy and defamation of public figures and public servants in larger public interest. In the **Rajagopal Case** the protection of defamation which is available to a citizen under Article 19(2), was read down in the case of a public servant or a public figure in larger public interest. Similarly, in **PUCI** the right of privacy of the contesting candidates in election was subordinated in public interest to the citizens' right to know. In both the cases the rights of privacy or reputation of a public servant or a public figure under Article 21 were made to yield to the citizen's right to know under Article 19(1) (a).
- 35) The relevant extracts from **R. Rajagopal & Anr. v. State of T.N. & Ors.**, (1994) 6 SCC 632 are reproduced below:

"26 (3)...In the case of public officials, it is obvious, right to privacy, or for that matter, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and

statements which are not true, unless the official establishes that the publication was made (by the defendant) with reckless disregard for truth. In such a case, it would be enough for the defendant (member of the press or media) to prove that he acted after a reasonable verification of the facts; it is not necessary for him to prove that what he has written is true. Of course, where the publication is proved to be false and actuated by malice or personal animosity, the defendant would have no defence and would be liable for damages. It is equally obvious that in matters not relevant to the discharge of his duties, the public official enjoys the same protection as any other citizen, as explained in (1) and (2) above. It needs no reiteration that judiciary, which is protected by the power to punish for contempt of court and Parliament and legislatures protected as their privileges are by Articles 105 and 104 respectively of the Constitution of India, represent exceptions to this rule."

36) The relevant extracts from **People's Union for Civil Liberties (PUCL)**

& Anr. v. Union of India & Anr., (2003) 4 SCC 399 are extracted below:

"119...If the right to information is to be meaningful and if it is to serve its avowed purpose, I am of the considered view that the candidate entering the electoral contest should be required to disclose the assets and liabilities (barring articles of household use). A Member of Parliament or State Legislature is an elected representative occupying high public office and at the same time, he is a "public servant" within the meaning of the Prevention of Corruption Act as ruled by this Court in the case of P.V. Narasimha Rao v. State⁴⁶. They are the repositories of public trust. They have public duties to perform. It is borne out by experience that by virtue of the office they hold there is a real potential for misuse.

*...
121. It has been contended with much force that the right to information made available to the voters/citizens by judicial interpretation has to be balanced with the right of privacy of the spouse of the contesting candidate and any insistence on the disclosure of assets and liabilities of the spouse invades his/her right to privacy which is implied in Article 21. After giving anxious consideration to this argument, I am unable to uphold the same...*

By calling upon the contesting candidate to disclose the assets and liabilities of his/her spouse, the fundamental right to information of a voter/citizen is thereby promoted. When there is a competition between the right to privacy of an individual and the right to information of the citizens, the former right has to be subordinated to the latter right as it serves the larger public interest. The right to know about the candidate who intends to become a public figure and a representative of the people would not be effective and real if only truncated information of the assets and liabilities is given. It cannot be denied that the family relationship and social order in our country is such that the husband and wife look to the properties held by them as belonging to the family for all practical purposes, though in the eye of law the properties may distinctly belong to each of them. By and large, there exists a sort of unity of interest in the properties held by spouses. The property being kept in the name of the spouse benami is not unknown in our country. In this situation, it could be said that a countervailing or paramount interest is involved in requiring a candidate who chooses to subject himself/herself to public gaze and scrutiny to furnish the details of assets and liabilities of the spouse as well."

CONSTITUTIONAL TORT

37) The failure of the State to discharge its constitutional obligation would constitute a Constitutional tort and make it liable for damages under public law. Similarly the Minister, a Constitutional functionary would, by the same token, be liable for damages if he commits a Constitutional tort by violating the fundamental rights of a citizen.

38) The classic exposition on Constitutional torts was propounded by this Court in **Nilabati Behera v. State of Orissa**, (1993) 2 SCC 746 as follows:

“10...It would, however, be appropriate to spell out clearly the principle on which the liability of the State arises in such cases for payment of compensation and the distinction between this liability and the liability in private law for payment of compensation in an action on tort. It may be mentioned straightaway that award of compensation in a proceeding under Article 32 by this Court or by the High Court under Article 226 of the Constitution is a remedy available in public law, based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available as a defence in private law in an action based on tort. This is a distinction between the two remedies to be borne in mind which also indicates the basis on which compensation is awarded in such proceedings.

...
*17. It follows that ‘a claim in public law for compensation’ for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is ‘distinct from, and in addition to, the remedy in private law for damages for the tort’ resulting from the contravention of the fundamental right. The defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental right is claimed by resort to the remedy in public law under the Constitution by recourse to Articles 32 and 226 of the Constitution. This is what was indicated in *Rudul Sah*¹ and is the basis of the subsequent decisions in which compensation was awarded under Articles 32 and 226 of the Constitution, for contravention of fundamental rights.*

...
20. We respectfully concur with the view that the court is not helpless and the wide powers given to this Court by Article 32, which itself is a fundamental right, imposes a constitutional obligation on this Court to forge such new tools, which may be necessary for doing complete justice and enforcing the fundamental rights guaranteed in the Constitution, which enable the award of monetary compensation

in appropriate cases, where that is the only mode of redress available. The power available to this Court under Article 142 is also an enabling provision in this behalf. The contrary view would not merely render the court powerless and the constitutional guarantee a mirage, but may, in certain situations, be an incentive to extinguish life, if for the extreme contravention the court is powerless to grant any relief against the State, except by punishment of the wrongdoer for the resulting offence, and recovery of damages under private law, by the ordinary process. If the guarantee that deprivation of life and personal liberty cannot be made except in accordance with law, is to be real, the enforcement of the right in case of every contravention must also be possible in the constitutional scheme, the mode of redress being that which is appropriate in the facts of each case. This remedy in public law has to be more readily available when invoked by the have-nots, who are not possessed of the wherewithal for enforcement of their rights in private law, even though its exercise is to be tempered by judicial restraint to avoid circumvention of private law remedies, where more appropriate."

39) The concurring opinion further elaborates on the position as follows:

"33. The old doctrine of only relegating the aggrieved to the remedies available in civil law limits the role of the courts too much as protector and guarantor of the indefeasible rights of the citizens. The courts have the obligation to satisfy the social aspirations of the citizens because the courts and the law are for the people and expected to respond to their aspirations.

34. The public law proceedings serve a different purpose than the private law proceedings. The relief of monetary compensation, as exemplary damages, in proceedings under Article 32 by this Court or under Article 226 by the High Courts, for established infringement of the indefeasible right guaranteed under Article 21 of the Constitution is a remedy available in public law and is based on the strict liability for contravention of the guaranteed basic and indefeasible rights of the citizen. The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting "compensation" in proceedings under Article 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making "monetary amends" under the public law for the wrong done due to breach of public duty, of not protecting the fundamental rights of the citizen. The compensation is in the nature of "exemplary damages" awarded against the wrongdoer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and prosecute the offender under the penal law."

40) In **Common Cause, A Registered Society v. Union of India & Ors.**,

(1999) 6 SCC 667 this position was reaffirmed as follows:

"55. Thus, where public functionaries are involved and matter relates to the violation of fundamental rights or the enforcement of public duties etc., the remedy would lie, at the option of the petitioner, under the public law notwithstanding that damages are also claimed in those proceedings.

...

65. There is, therefore, not much of a difference between the powers of the court exercised here in this country under Article 32 or Article 226 and those exercised in England for judicial review. Public law remedies are available in both the countries and the courts can award damages against public

authorities to compensate for the loss or injury caused to the plaintiff/petitioner, provided the case involves, in this country, the violation of fundamental rights by the Government or other public authorities or that their action was wholly arbitrary or oppressive in violation of Article 14 or in breach of statutory duty and is not a purely private matter directed against a private individual."

41) The Court has enforced this public law remedy even against non-state actors when their acts have violated the fundamental rights of other citizens. In **Bodhisattwa Gautam v. Subhra Chakraborty**, (1996) 1 SCC 490, this Hon'ble Court awarded interim compensation against the accused pending trial, holding that rape was a violation of Article 21 right:

"6. This Court, as the highest Court of the country, has a variety of jurisdiction. Under Article 32 of the Constitution, it has the jurisdiction to enforce the Fundamental Rights guaranteed by the Constitution by issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari. Fundamental Rights can be enforced even against private bodies and individuals. Even the right to approach the Supreme Court for the enforcement of the Fundamental Rights under Article 32 itself is a Fundamental Right. The jurisdiction enjoyed by this Court under Article 32 is very wide as this Court, while considering a petition for the enforcement of any of the Fundamental Rights guaranteed in Part III of the Constitution, can declare an Act to be ultra vires or beyond the competence of the legislature and has also the power to award compensation for the violation of the Fundamental Rights (See: Rudul Sah v. State of Bihar¹; Peoples' Union for Democratic Rights v. Police Commr., Delhi Police HQs.²)"

42) In **M.C. Mehta v. Kamal Nath & Ors.**, (2000) 6 SCC 213 this Hon'ble Court awarded damages against a private individual for violation of the right to clean environment under Article 21. The relevant extract is as follows:

"9. In the matter of enforcement of rights under Article 21 of the Constitution, this Court, besides enforcing the provisions of the Acts referred to above, has also given effect to fundamental rights under Articles 14 and 21 of the Constitution and has held that if those rights are violated by disturbing the environment, it can award damages not only for the restoration of the ecological balance, but also for the victims who have suffered due to that disturbance. In order to protect "life", in order to protect "environment" and in order to protect "air, water and soil" from pollution, this Court, through its various judgments has given effect to the rights available, to the citizens and persons alike, under Article 21 of the Constitution. The judgment for removal of hazardous and obnoxious industries from the residential areas, the directions for closure of certain hazardous industries, the directions for closure of slaughterhouse and its relocation, the various directions issued for the protection of the Ridge area in Delhi, the directions for setting up effluent treatment plants to the industries located in Delhi, the directions to tanneries etc., are all judgments which seek to protect the environment."