BEFORE THE CENTRAL INFORMATION COMMISSION

EXTRA SUBMISSIONS IN RESPECT OF COMPLAINT NO. **CIC/SM/C/2011/0838**

FOLLOWING FULL-BENCH HEARING HELD ON 26.09.2012

Following the joint hearing of the above-mentioned complaint, also with Complaints No. **CIC/SM/C/2011/001385 and 001386** filed by Shri Subhash Chandra Agrawal, I, Anil Bairwal of the Association for Democratic Reforms (ADR), would like to submit the following in support of my complaint to declare political parties as public authorities under the Right to Information Act, 2005.

1. **Political parties have a binding nexus with the populace**

1.1 The early years of the twenty-first century have witnessed an acute paradox. On the one hand democracy, both as an ideal and as a set of political institutions and practices, has triumphed in most countries of the world. Even in those where it has not, democracy forms the aspiration of many of their citizens. On the other hand, these years have also seen a widespread cynicism developing with the results of democracy in practice. Such disappointment as termed by Italian political theorist Norberto Bobbio -'broken promises' – the 'contrast between what was promised and what has actually come about'. It was in an effort to bridge the gap 'between what was promised and what has actually come about' that the Indian Parliament enacted the Right to Information Act, 2005.

1.2 Political parties today have a key role in addressing this paradox. As the central institution of democracy, they embody the will of the people in government, and carry all their expectations that democracy will be truly responsive to their needs and help solve the most pressing problems that confront them in their daily lives.

1.3 It is impossible to ignore the fact that, while individual parliamentary representatives at the constituency level may be respected, there is a growing cynicism about politicians as a group and political parties as entities. This is partly because as an institution, political parties seem more remote and inaccessible, especially in India where 'trust' is an essential attribute in the relationship between citizens and political parties.

1.4 Need for accountability and transparency in the functioning of political parties

1.4.1 Legislation which gives citizens access to information held by public bodies is an important democratic resource, which is also broadly endorsed by the 'right to seek information' provision given under article **19(1)(a) of the Constitution of India** as well as under International Covenant on Civil and Political Rights. **Article 25(a) of** the **International Covenant on Civil and Political Rights also** states that *every citizen shall*

have the right and the opportunity to take part in the conduct of public affairs, directly or through freely chosen representatives.

1.4.2 In para 28 of the this Commission's order CIC/AT/A/2007/01029 & 01263-01270, announced on 29.04.2008, it was held that

> "28. Political parties are an unique institution of the modern Constitutional State. These are essentially civil society institutions and are, therefore, nongovernmental. Their uniqueness lies in the fact that in spite of being nongovernmental, political parties come to wield or directly or indirectly influence, exercise of governmental power. It is this link between State power and political parties that has assumed critical significance in the context of the Right of Information — an Act which has brought into focus the imperatives of transparency in the functioning of State institutions. *It would be facetious to argue that transparency is good for all State organs, but not so good for the political parties, which control the most important of those organs*. For example, it will be a fallacy to hold that transparency is good for the bureaucracy, but not good enough for the political parties which control those bureaucracies through political executives" (Italics added).

1.4.3 Transparency in the functioning of political parties was recommended by the Law Commission of India in their 170th Report on "Reform of the Electoral Laws" submitted in May 1999. This is what the Law Commission said:

> "On the parity of the above reasoning, *it must be said that if democracy and accountability constitute the core of our constitutional system, the same concepts must also apply to and bind the political parties which are integral to parliamentary democracy*. It is the political parties that form the government, man the Parliament and run the governance of the country. *It is therefore, necessary to introduce internal democracy, financial transparency and accountability in the working of the political parties. A political party which does not respect democratic principles in its internal working cannot be expected to respect those principles in the governance of the country. It cannot be dictatorship internally and democratic in its functioning outside*" (Emphasis added) (Para 3.1.2.1).

2. **A Judicial backdrop of the RTI Act**

2.1 The opening paragraph of the judgment of delivered by Justice MS Sullar in the High Court of Punjab and Haryana in **Civil Writ Petition No.19224 of 2006**, is very pertinent in the context of the current complaint. The Learned Justice said,

> "As strange as it may seem, but strictly speaking, the tendency and frequency, of some of the Institutions, of not supplying and taking somersault in denying the informations, have been tremendously increasing day by day, leaving the public at large in general and the information seekers in particular, in lurch to damage the edifice of the democracy and larger public interest" (Para 1).

2.2 The object of RTI is to reinforce and give further effect to certain fundamental principles underlying the system of constitutional democracy, namely –

2.2.1 governmental accountability;
2.2.2 transparency; and
2.2.3 public participation in national decision-making, by granting the public a general right of access to official documents held by public authorities.

2.3 This very Commission in its order no. **CIC/AT/A/2007/01029 & 01263-01270** of 29.04.2008, also commented on the need for transparency in the finances of political parties. This is what the Commission said,

> "There is unmistakable public interest in knowing these funding details which would enable the citizen to make an informed choice about the political parties to vote for. The RTI Act emphasizes that "democracy requires an informed citizenry", and that transparency of information is vital to flawless functioning of constitutional democracy. It is nobody's case that, while all organs of the State must exhibit maximum transparency, no such obligation attaches to political parties. *Given that political parties influence the exercise of political power; transparency in their organization, functions and, more particularly, their means of funding is a democratic imperative, and, therefore, is in public interest*" (Para 38) (Italics added).

2.4 RTI Act more open-minded and harmonious than Article 12

That the RTI Act is more welcoming, friendly, open-minded, and broad in its nature and scope is clear from the judgment of the Punjab and Haryana High Court in what has come to be commonly known as **CWP No.19224 of 2006 alongwith 23 connected cases.** The Court held that

> "25. Above-all, the deep and pervasive control as required under Article 12, is not required and essential ingredient for invoking the provisions of RTI Act. The primary purpose of instrumentality of the State is in relation to enforcement of the fundamental rights through Courts, whereas *the RTI Act is intended to achieve, access to information and to provide an effective framework for effecting the right to information recognized under Article 19 of the Constitution*. The complainants are not claiming any kind of monetary benefits or property from the empire of the petitioner-institutions. To my mind, the enforcement of fundamental rights through Courts and the question of applicability of writ jurisdiction on an instrumentality of the State for the purpose of determination of substantive rights and liabilities of the parties are *altogether (entirely) different than that of the field of RTI Act, only meant to impart the information*. Hence, in my view, the ambit and

scope of phrase of instrumentality of the State under Article 12 of the Constitution is entirely different and distinct than that of the regime of RTI Act. *If the intention of the Legislature was to, so restrict the meaning to the expression of public authority, straightjacketing the same within the four corners of the State, as defined under Article 12, then there was no need/occasion to assign a specific broader definition of public authority under section 2(h) of RTI Act in this relevant connection*" (Para 25) (Italics added).

2.5 True spirit for the definition of Public Authority

2.5.1 Going by the definition of 'Public Authority", the key task is to determine, what constitutes the key elements in defining a public authority? Whether it is only a body constituted under the Constitution or formed under some law or notification; or an authority or non-government organization owned, controlled or substantially financed directly or indirectly by the appropriate government? Relying merely on the cosmetic lexis of the definition will actually tend to misplace the real intention, which is the "transparency and accountability". When the issue of larger public interest is in question, the narrow use of the words cannot be taken as a hindrance. The true spirit of the term "public authority" lies in the truth that how far it reaches to serve the bona fide rationale of the Right to Information Act.

2.5.2 The above view was held in the **High Court of Delhi** by Justice Ravinder Bhat in **WP (C) No.876/2007** in Indian Olympic Association v. Veerish Malik &others**,** Para 41**;**

> "The Act marks a legislative milestone, in the post independence era, to further democracy. It empowers citizens and information applicants, to demand and be supplied with information about public records; *Parliamentary endeavor is to extend it also to public authorities which impact citizens daily lives*. The Act mandates disclosure of all manner of information, and abolishes the concept of locus standi, of the information applicant; no justification for applying (for information) is necessary; Decisions and decision making processes, which affect lives of individuals and groups of citizens are now open to examination. *Parliamentary intention apparently was to empower people with the means to scrutinize* government and *public processes, and ensure transparency*" (Para 41) (Italics added).

2.6 Interpretation and intention of the whole RTI Act

2.6.1 The Legislature opens its mind in the form of certain language. It enacts a law with a definite purpose. The object of interpretation is to discover what the Legislature intended. This intention is to be ascertained from the text of the enactment. In case of possibility of more than one construction owing to ambiguity, the interpretation, which fulfills or furthers the object of the statute in

question, must be adopted. The interpretation which will defeat or frustrate the purpose of law must be rejected.

2.6.2 It is presumed that the legislature has used appropriate, clear and precise words to express itself. But where a word bears more than one meaning, the language of the statute might be understood in two or more senses, out of which only one may be in tune with the true intention of the Legislature. Therefore, it becomes necessary to determine what meaning is to be given to a word used in the legislation. It is this exercise which is subject matter of interpretation.

2.6.3 In **Balram Kumawat v. Union of India (2003) 7SCC628**, the Supreme Court held that the clauses of a statute should be construed with reference to the context vis-à-vis the other provisions so as to make a consistent enactment of the whole statute relating to the subject matter.

2.6.4 Also, in **Nathi Devi v. Radha Devi Gupta (2005) 2SCC271**, it was held that the interpretative function of the Court is to discover the true legislative intent. The courts always presume that the Legislature intention is that every part of the statute should have effect. A construction which attributes redundancy to the Legislature will not be accepted, except for compelling reasons such as obvious drafting errors.

2.7 Interpretation of the term "include"

2.7.1 The word 'include' under section 2(h) of the RTI Act, needs to be understood in its true spirit, and be administered in accordance with the intention with which the statute has been framed so as to advance the purpose of the statute. Every part of section 2(h) must be construed together, within the four corners of the RTI Act. No word should be interpreted in isolation. The definition given under section 2(h) must be read as a whole and construction should be put on all parts of the given definition.

2.7.2 Context plays a vital role in determining the meaning of the word. Therefore, the meaning of the particular term 'include' must be determined in the light of the context in which it has been used. The colour and content of the words are derived from their context and therefore every word used in section 2(h) of the RTI Act must be examined in this context. It may consist of other sections, the whole Act or even the scope of legislation. In order to give a broader and literal meaning to the term "include", the scope of the legislation needs to be seen.

2.7.3 In **WP(C) Nos. 876/2007, 1212/2007, & 1161/2007,** it was pointed out by Delhi High Court "So far, the writ petitioners' construction appears not only to be feasible, but the correct one; it could even be said that but for the extended definition- (the extension being the term "and includes" after which the express reference to non-governmental organizations is made), the petitioners' interpretation is the reasonable and correct one. However, the entire definition has

to be considered; *the extension by use of the term "and includes" acquires significance, in this context*" (Para 43)(Italics added).

2.7.4 Likewise, in Lord Watson in Dilworth v. Stamps Commr.3 as well as in Associated Indem Mechanical (P) Ltd. v. W.B. Small Industries Development Corpn. Ltd., (2007) 3SCC607, as also highlighted by Justice Ravinder Bhat in **WP (C) Nos. 876/2007, 1212/2007, & 1161/2007**, the Supreme Court held that:

> "The definition of premises in Section 2(c) uses the word "includes" at two places. It is well settled that the word "include" is generally used in interpretation clauses in order *to enlarge the meaning of the words or phrases occurring in the body of the statute; and when it is so used those words or phrases must be construed as comprehending, not only such things, as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include*. But the word 'include' is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to 'mean and include', and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions" (Para 44) (Italics added).

2.7.5 The Supreme Court in **Karnataka Power Transmission Corpn. vs Ashok Iron Works (P) Ltd. (2009) 3 SCC 240**, summarized the legal position thus: "17. It goes without saying that interpretation of a word or expression must depend on the text and the context. *The resort to the word 'includes' by the legislature often shows the intention of the legislature that it wanted to give extensive and enlarged meaning to such expression*. Sometimes, however, the context may suggest that word "includes" may have been designed to mean "means". The setting, context and object of an enactment may provide sufficient guidance for interpretation of the word "includes" for the purposes of such enactment" (Para 17) (Italics added).

2.7.6 Also, in **State of Bombay vs Hospital Mazdoor Sabha, AIR 1960 SC 610,** the Supreme Court emphasized that the term "includes" denotes legislative intent to widen the ambit and scope of the thing defined, to include other objects or things which do not fall within the ordinary scope of the expression:

> "…It is obvious that the words used in an inclusive definition *denote extension and cannot be treated as restricted in any sense*. Where we are dealing with an inclusive definition, it would be *inappropriate to put a restrictive interpretation upon terms of wider denotation*…" (Italics added).

2.7.7 The High Court of Punjab and Haryana, commenting specifically on the definition of "public authority" under the RTI Act and the use of the word "include", in **Civil Writ Petition No.19224 of 2006**, observed as follows:

> "It cannot possibly be disputed that the definition of 'public authority' as envisaged under *section 2(h) of the Act* has to be construed harmoniously and sub-clauses (i) & (ii) of clause (d) of this section have to be read independently. *The word 'includes' carry a significant meaning and importance in this regard, which suggests that wherever any subject matter is not expressed with the main part of legislation, prescription of such matters are brought within its fold by mollifying of rigors ingredients and the word 'includes' serves this purpose*. Therefore, to me, the RTI Act envisages the variety of categories of public authorities. All those authorities, bodies or institutions, self government organizations, which are established or constituted by or under the Constitution or by any other law made by the Parliament or State Legislature or by notification issued or order made by the appropriate Government, fall in the first category, whereas in second part, the "public authority" has been defined to include any body owned, controlled or non-government organization substantially financed by the funds provided directly or indirectly by the appropriate Government. *In this manner, the subsequent part of section 2(h) brings an independent and additional category of public authority within the meaning of RTI Act*" (Para 36) (Emphasis added).

2.7.8 Following the above, political parties would fall in this "independent and additional category of public authority within the meaning of the RTI Act".

2.8 Notification ***not necessarily*** required

2.8.1 In the hearing on 26.09.2012, it was strongly contended by the Respondents that political parties cannot be considered to "public authorities" since they are not an "authority or body or institution of self-government *established or constituted by notification issued or order made by the appropriate Government*." This very issue has been considered by the Delhi High Court and it has been held that such notification is *not really necessary* for a body to be considered to be a "public authority".

2.8.2 The issue came up in **WP(C) Nos. 876/2007,1212/2007&1161/2007**. Justice Ravindra Bhat held, on 07.01.2010 that:

> "Now, if the Parliamentary intention was to expand the scope of the definition "public authority" and not restrict it to the four categories mentioned in the first part, but to comprehend other bodies or institutions, the next question is whether that intention is coloured by the use of the specific terms, to be read along with the controlling clause 'authority…of self government' and 'established or constituted by or under' a

notification. A facial interpretation would indicate that even the bodies brought in by the extended definition:

> *(i) "….body owned, controlled or substantially financed;*
> *(ii) Non- Government organization substantially financed, directly or indirectly*
> *by funds provided by the appropriate Government."*

are to be constituted under, or established by a notification, issued by the appropriate government. If indeed such were the intention, sub-clause (i) is a surplusage, since the body would have to be one of self government, substantially financed, and constituted by a notification, issued by the appropriate government. Secondly – perhaps more importantly, it would be highly anomalous to expect a "non-government organization" to be constituted or established by or under a notification issued by the government. *These two internal indications actually have the effect of extending the scope of the definition "public authority"*; *it is thus not necessary that the institutions falling under the inclusive part have to be constituted, or established under a notification issued in that regard*" (Para 45) (Emphasis added).

2.8.3 Not only is the constitution or establishment under a notification not necessary, it may not even be possible or feasible but the body may still be held as a 'public authority' under the RTI Act. The following observation of the Delhi High Court in **WP(C) NOs 876/2007,1212/2007&1161/2007** comments precisely on this issue.

> "Another significant aspect here is that even in the inclusive part, Parliament has nuanced the term; sub-clause (i) talks of a "body, owned, controlled or substantially financed" by the appropriate government (the subject object relationship ending with sub-clause (ii)). In the case of control, or ownership, the intention here was that the irrespective of the constitution (i.e it might not be under or by a notification), if there was substantial financing, by the appropriate government, and ownership or control, the body is deemed to be a public authority. This definition would comprehend societies, co-operative societies, trusts, and other institutions where there is control, ownership, (of the appropriate government) or substantial financing. *The second class, i.e non-government organization, by its description, is such as cannot be "constituted" or "established" by or under a statute, or notification"* (Para 45) (Italics added).

2.8.4 After elucidating the structure and constitution of non-governmental organizations (NGOs), the learned Justice concluded:

> "In view of the above discussion, it has to be concluded that the requirement for an organization, which is not established by statute, or

under the Constitution, but is a nongovernment organization, *need not be constituted by or under a notification, due to the extended meaning of the expression "public authority"* in terms of Section 2 (h) of the Act."

2.9 Meaning of "substantially financed": Is a *quantative* test appropriate?

2.9.1 While admitting that though they do receive certain "facilities" from government, the respondents have stated that even the monetisation of these "facilities" does not make them "substantially financed" by the government as the percentage of such contribution by the government to their finances is negligible. It is in this context that it becomes important to arrive at the meaning of "substantially financed" and *whether a quantitative test for judging substantiality is necessary or even valid*.

2.9.2 The term "substantial" denotes something of consequence, and contrary to something that is insignificant or trivial. It implies a matter of some degree of seriousness.

2.9.3 When faced with this issue, the Central Information Commission, in its order **CIC/SG/A/2011/003380/18563** of 23.04.2012, pointed that "Though the term 'financed' as appearing in Section 2(h)(d)(i) of the RTI Act is qualified by 'substantial', Section 2(h) of the RTI Act does not lay down what actually constitutes 'substantial financing'. In the considered view of this Commission, it is akin to "material" or "important" or "of considerable value" and would depend on the facts and circumstances of the case."

2.9.4 The Punjab and Haryana High Court had occasion to apply itself to this issue. Mr. Justice Mehinder Singh Sullar while disposing **CWP No.19224 of 2006 alongwith 23 connected cases**, observed on 09.05.2011, as follows:

> "76. Taken in the context of public larger interest, the funds which the Government deals with, are public funds. They belong to the people. In that eventuality, *wherever public funds are provided, the word "substantially financed" cannot possibly be interpreted in narrow and limited terms of mathematical, calculation and percentage (%)*. Wherever the public funds are provided, the word "substantial" has to be construed in contradistinction to the word "trivial" and *where the funding is not trivial to be ignored as pittance, then to me, the same would amount to substantial funding coming from the public funds*. Therefore, whatever benefit flows to the petitioner-institutions in the form of share capital contribution or subsidy, land or any other direct or *indirect funding from different fiscal provisions* for fee, duty, *tax* etc. as depicted hereinabove *would amount to substantial finance by the funds provided directly or indirectly by the appropriate Government for the purpose of RTI Act in this behalf*" (Para 76) (Emphasis added).

2.9.5 A similar issue came up for the consideration of the Delhi High Court in 2010 in **WP(C) Nos. 876/2007, 1212/2007, & 1161/2007**. The Court concluded, on 07.01.2010, as follows:

> "60. This court therefore, concludes that what amounts to "substantial" financing cannot be straight-jacketed into rigid formulae, of universal application. Of necessity, each case would have to be examined on its own facts. That the percentage of funding is not "majority" financing, or that the body is an impermanent one, are not material. Equally, *that the institution or organization is not controlled, and is autonomous is irrelevant*; indeed, *the concept of non-government organization means that it is independent of any manner of government control in its establishment, or management*. That the organization does not perform – or pre-dominantly perform – "public" duties too, may not be material, as long as *the object for funding is achieving a felt need of a section of the public, or to secure larger societal goals*" (Para 60) (Emphasis added).

2.9.6 One of the more comprehensive observations on this issue has been made by the Kerala High Court in the case Thalapalam Service Cooperative Bank v. Union of India **2009(3) C.C.C. 273 = 2010 (5) RCR (Civil) 133.** After interpreting the word "substantial", the Court ruled as follows:

> "27….*Such a spectrum of substantial wisdom essentially advises that the provision under consideration has to be looked into from the angle of the purpose of the legislation in hand and the objects sought to be achieved thereby, that is, with a purposive approach*. What is intended is the protection of the larger public interests as also private interests. *The fundamental purpose is to provide transparency, to contain corruption and to prompt accountability*. Taken in that context, funds which the Government deal with, are public funds. They essentially belong to the Sovereign, "We, the People". The collective national interest of the citizenry is always against pilferage of national wealth. This includes the need to ensure complete protection of public funds. In this view of the matter, wherever funds, including all types of public funding, are provided, the word "substantial" has to be understood in contradistinction to the word "trivial" and *where the funding is not trivial to be ignored as pittance, the same would be "substantial" funding because it comes from the public funds*. Hence, whatever benefit flows to the societies in the form of share capital contribution or subsidy, or any other aid including provisions for writing off bad debts, as also exemptions granted to it from different fiscal provisions for fee, duty, tax etc. amount to substantial finance by funds provided by the appropriate Government, for the purpose of Section 2(h) of the RTI Act" (Para 27) (Emphasis added).
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> 30…. Such finance may trickle by any mode without even any contribution by the Government, from out of its own funds, over which it

has title. The Government is the machinery through which the finance reaches the societies, either by way of credits, subsidies, *exemptions*, other privileges including writing off of bad debts, *which would otherwise have to be paid back into public funds*. Having regard to the object sought to be achieved by the RTI Act, it is impermissible to presume to the contrary, particularly when transparency is a matter to be ensured even in the co-operative sector. It needs to be remembered that the promotion of societies by the State, including by its legislative support, is with a view to provide for the orderly development of the co-operative sector by organising the co-operative societies as *self governing democratic institutions to achieve the objects of equality, social justice and economic development*, as envisaged in the Directive Principles of State Policy of the Constitution of India. *The RTI Act has become operational propounding the need of a democracy to have an informed citizenry. Containing corruption is absolutely essential for a vibrant democracy*. Transparency and accountability in societies have necessarily to be provided for. *The legislative provision in hand, therefore, requires a purposive construction in the above manner* " (Para 30) (Emphasis added).

2.9.7 CAG's definition of "substantial funding"

2.9.7.1 One of the more popularly cited definitions of "substantial funding" comes from the CAG Act (1971). According to Section 14(1) of CAG Act (1971when the loan or grant by the government to a body/authority is not less than Rs 25 lakhs and the amount of such loan or grant is not less than 75% of the total expenditure of that body/authority, then such body/authority shall be deemed to be substantially financed by such grants/loans. Direct funding could be by way of cash grants, reimbursement of expenses etc., and indirect funding could be meeting the expenses directly or in kind.

2.9.7.2 There have been several decisions overruling the use of the CAG definition. One of the earlier observations was by the Supreme Court of India as far back as 1985 in ***M/s MSCO Ltd. vs Union of India*** **[1985 (1) SCC 551]**, that:

> "But while construing a word which occurs in a statute or a statutory instrument in the absence of any definition in that very document *it must be given the same meaning which it receives in ordinary parlance or understood in the sense in which people conversant with the subject matter of the statute or statutory instrument understand it. It is hazardous to interpret a word in accordance with its definition in another statute or statutory instrument and more so when such statute or statutory instrument is not dealing with any cognate subject*" (Italics added).

2.9.7.3 The Delhi High Court, in a more recent judgment on 07.01.2010, also commented on the applicability of the CAG definition "substantial financing",

in its order for **WP(C) Nos. 876/2007, 1212/2007, & 1161**. This is what the Court said:

> "57. That brings the court to the question as to what is "substantial financing*". It is apparent that Parliament was aware of previous enactments and laws* (obvious because of reference to other Acts, such as Official Secrets Act, and rights under other laws such as intellectual property laws, etc). *Yet, there was no deliberate attempt to define "substantial" financing for the purpose of discerning whether any institution or body was a public authority. Had it been so intended, Parliament could have clarified that "substantial financing" had the same meaning as in Explanation to Section 14 (1) of the CAG Act.* Here, one may recollect that in the absence of a clearly manifested legislative intent, the meaning of a term, not defined in one enactment, should not be deduced or borrowed, with reference to another enactment. Thus, the Supreme Court quoting the following passage from *Craies* on Statutes (Sixth Edition, p. 164):
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> > 'In construing a word in an Act caution is necessary in adopting the meaning ascribed to the word in other Acts. "It would be a new terror in the construction of Acts of Parliament if we were required to limit a word to an unnatural sense because in some Act which is not incorporated or referred to such an interpretation is given to it for the purposes of that Act alone." (Macbeth & Co. v.Chislett (1910 AC 220, 223 : 79 LJKB 376 : 102 LT 82 (HL))'" (Italics added).

2.9.7.4 The learned High Court continued as follows:

> "57….This construction was followed in *State of Kerala –vs- Mathai Verghese* 1986 (4) SCC 746. *It is therefore, held that this court* ***cannot*** *accept the petitioner's contention that the meaning of the term "substantial financing" has to be gathered from the provisions of the CAG Act*.
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> 58. In a previous section of this judgment, this court noted the meanings of "substantial" and "financing". To discover the meaning of the expression, since it is undefined, the common parlance test, as well as the contextual setting (of the term), having regard to objects of the Act, are to be examined. *There is no yardstick, in this context to determine what is meant by "financing". As discussed earlier, the expression has wide import. It is not inhibited by considerations such as "revenue" or "capital" funding*. An organization may be infused with public funds, the character of which is such that the vital functioning of the institution depends on it. *It may be also the recipient of special attention, together with funds, which is otherwise unavailable to organizations or institutions* of a similar class.

Likewise, the fact that financing is by way of a loan, is immaterial, if the conditions for such advance are not available to others or organizations involved in the same activity. *The quantitative test may not be appropriate*. For instance, in a project for Rs. 10,000 crore, if the Central Government commits, and infuses Rs. 1000 crore, *such amount cannot be termed insubstantial, because it is a small percentage of the overall value* of the project. In the ultimate analysis, the funding or financing, (if not a part of uniform policy measures, such as price support to agriculturists, farm subsidies, etc) by the Government would be a significant factor in determining whether the recipient is a public authority. *Public funds, for whatever reasons, retain their imprint or character as an obligation of fruition of the purposes for which the amounts are given. There is therefore, the imperative in the value of ensuring transparency, to secure such ends*.

3. Indirect financing (though *quantification is not necessary*)

3.1 All political parties claim to work for the people and in the national interest. Income tax returns of political parties, obtained by ADR using the RTI Act, reveal that on an average only about 20 per cent of the income of political parties comes from donations that they disclose to the Election Commission under section 29C of the Representation of People Act. The sources of the remaining 80 per cent of the income are shrouded in mystery. This is what gives rise to all kinds of speculation about the pernicious influence of illegal money.

3.2 After various RTI applications filed to the central agencies, it was discovered that political parties enjoy a number of "facilities" provided to them by the government. This is a clear instance of being "financed indirectly by funds provided by the appropriate government" which puts political parties squarely under the definition of "public authority" as provided for in section 2(h)(d)(ii) of the RTI Act.

3.3 In addition to the 100% exemption on income under section 13A of the Income Tax Act, all the major political parties have been provided "facilities" for residential and official use by Directorate of Estates (DOE), Government of India in New Delhi. They have been given offices and residential accommodations at prime locations in New Delhi (Lutyens' Delhi) such as Akbar Road, Raisina Road, Chanakyapuri. The rentals charged are a fraction of the market rent. These facilities are not just provided to them at nominal rates but their maintenance, upgradation, modernization, renovation, etc. are also done at State expense. *Similar "facilities" are also provided at various State capitals, details of which are extremely difficult to obtain*.

3.4 Money is also spent by Election Commission of India on political parties for providing "facilities" to political parties such as free electoral rolls. Doordarshan and All India Radio also provide free broadcast facilities to the political parties at

election time which results in loss of revenue in terms of *air time which has a market value*.

3.5 If closely monitored and totaled, the total of public funds spent on political parties would possibly amount to hundreds of crores.

3.6 There have several **judicial pronouncements and also decisions by the Central Information Commission** that have held that allotment of real estate, rental on subsidized rated, exemption from tax of various types including income tax amount to "indirect financing" in terms of section 2(h)(d)(ii) of the RTI Act. A few of the more useful citations are given below.

3.6.1 **Land**: The case that is relevant here is **Civil Writ Petition No.16750 of 2010,** The Sutlej Club vs State Information Commission and another, decided on 09.05.2011, commonly referred to as **CWP No.19224 of 2006 alongwith 23 connected cases**. The Punjab and Haryana High Court held as follows:

> "72. Now adverting to the financial help of petitioner-Sutlej Club, Ludhiana (at Sr.No.15) is concerned, the SIC mentioned *that as per revenue record, the land owned by the Provincial Government is given to the Club, which amounts to substantial financial assistance by the State Government. The fact that the valuable land, upon which, the Club was constructed, belongs to the Government and no rent/lease is paid by it to the Government shows that there is a substantial financial assistance by the State* to the Club. The cost of prime land provided to the club would be much more than its normal revenue expenditure. *Apart from land provided for construction* of the club building, *the Government has also incurred a part of expenditure on its construction*….In my view, the SIC has recorded the correct finding of fact based on the material on record, by virtue of impugned order dated 8.7.2010 (Annexure P15)" (Para 72) (Emphasis added).

3.6.2 **Land and Income Tax concessions**: A directly relevant case here, dealing with both, land and income tax, was decided by the Central Information Commission on 11.01.2012. It was **Mr. Tilak Raj Tanwar vs Government of NCT Of Delhi, file no. CIC/AD/A/2011/001699**. After considering all aspects of the issue, the commission decided as follows:

> "12. The Commission while relying upon the various decisions given hereinabove is convinced that the Mount St. Mary's School *may be considered as being*

"substantially financed" by the appropriate Government, in view of the 5 acres of prime land granted to it at subsidized rates and income tax concessions being enjoyed by the school and that therefore it can be declared as a Public Authority" (Para 12) (Emphasis added).

3.6.3 **Exemption from tax**: The case that is relevant here is **Civil Writ Petition No. 16086 of 2008,** Punjab Cricket Association, SAS Nagar (Mohali) vs State Information Commission, Punjab and another, decided on 09.05.2011, commonly referred to as **CWP No.19224 of 2006 alongwith 23 connected cases**. The Punjab and Haryana High Court held as follows:

"68. Now adverting to the case of petitioner-PCA (at Sr.No.12), it is *admitted position that it is enjoying tax exemption from entertainment tax, which is an direct financial aid by the State to it*. Although the SIC has negatived the plea of the complainant-information seeker, but to my mind, the SIC has slipped into deep legal error in this regard, because *the PCA is saving heavy amount from exemption of entertainment tax, which naturally is an incidence of financial aid by the Government* (Para 68) (Emphasis added).

3.6.4 **Tax exemption and nominal rent**: Another case relevant here is Board of Control for Cricket, India and another vs Netaji Cricket Club and others **[2005 AIR (SC) 592]**. The Supreme Court observed as follows:

"80. The Board is a society registered under the Tamil Nadu Societies Registration Act. It enjoys a monopoly status as regard regulation of the sport of cricket in terms of its Memorandum of Association and Articles of Association. It controls the sport of cricket and lays down the law therefor. *It inter alia enjoys benefits by way of tax exemption and right to use stadia at nominal annual rent*" (Para 80) (Emphasis added).

3.7 While it may well be argued that the above quoted decisions refer to institutions such as schools, clubs which, in some characteristics, are different from political parties but *these decisions do recognize, accept, and establish the principle that exemption from tax and allotment or permission to use land and other real estate, is an accepted form of "financing" though it may be considered "indirect" as it is not in the physical form of money*. And this principle is one of the factors that makes political parties come under the definition of "public authority" as given in section 2(h) of the RTI Act.

4 Constitutional and statutory status of Political parties

4.1 The Forty Second Amendment of the Constitution with effect from 01.03.1985 which introduced Articles 102(2) and 191(2), and **The Tenth Schedule to the Constitution**, has made political parties a constitutional entity and even more critical, important, and powerful in the functioning of democracy in the country, as rightly argued by Senior Advocate Mr. Prashant Bhushan during the hearing on 26.09.2012. The Tenth Schedule gives a most noteworthy right to the political parties so as to decide whether an MP should be in the Parliament or not. The representatives have to vote as well as work according to the directions of the party to which they belong. Therefore, the political parties have the power over their elected MPs and this power is not confined only to the manner of voting but it also extends to their conduct.

4.1.1 The relevant provision of the Tenth Schedule is reproduced below:

> "**2. Disqualification on ground of defection**—(1) Subject to the provisions of paragraphs 3, 4 and 5, a member of a House belonging to any political party shall be disqualified for being a member of House—
> (a) if he has voluntarily given up his membership of such political party; or
> (b) if he *votes or abstains from voting in such House contrary to any direction issued by the Political party to which he belongs* or by any person or authority authorized by it in this behalf, without obtaining, in either case, the prior permission of such political party, person or authority and such voting or abstention has not been condoned by such political party, person or authority within fifteen days from the date of such voting or abstention" (Italics added).

4.1.2 The primacy of political parties that the Tenth Schedule has formalized, has also been recognized and upheld by the Supreme Court. In **Kihota Hollohon v. Zachilhu (AIR1993SC412)**, explaining the rationale underlying the tenth schedule, the Supreme Court has stated that "these provisions of the Tenth Schedule give recognition to the role of political parties in the political process. A political party goes before the electorate with a particular programme; it sets up candidates at the election on the basis of such programme; a candidate is therefore elected on the basis of the party programme. The provisions of Paragraph 2(1)(a) proceed on the premise that *political propriety and morality* demand that if such a person, after the election, changes his affiliation and leaves the political party which had set him up as a candidate at the election, then he should give up his Membership of the legislature and go back to the electorate" (Para 6) (Italics added).

4.2 **Representation of the People Act**: It is often said that any one can form a political party. This is, of course, not entirely true. While any one can, indeed, form or a body or entity that s/he can call a political party but that body or entity does not become a political party in the formal and legal sense unless and until it is "registered" by the Election Commission of India under the provisions of section 29A of the Representation of the People Act , 1951. In pursuance of section 29A, the Election Commission has devised a detailed "Application Format", running into 21 pages, detailing the information that a body wishing to get itself registered as a political party has to provide.

4.2.1 Sub-sections (7) and (8) of section 29A read as follows:

"(7) After considering all the particulars as aforesaid in the possession and any other necessary and relevant factors and after giving the representatives of the association or body reasonable opportunity of being heard, the Commission shall decide either to register the association or body as a political party for the purposes of this Part, or not so to register it; and the Commission shall Communicate its decision to the association or body:

Provided that no association or body shall be registered as a political party under this sub-section unless the memorandum or rules and regulations of such association or body conform to the provisions of sub-section (5).

(8) The decision of the Commission shall be final."

4.3 **Election Symbols (Reservation and Allotment) Order, 1968**, was promulgated by the Election Commission on 31.08.1968, in exercise of its powers **under Article 324 of the Constitution** and **Rules 5 and 10 of the Conduct of Elections Rules, 1961** which, themselves, have been made under the provisions of the Representation of the People Act, 1951. The purpose of the Order was "to provide for specification, reservation, choice and allotment of symbols at elections in Parliamentary and Assembly Constituencies, for the recognition of political parties in relation thereto and for matters connected therewith." It, *inter alia*, also deals with withdrawal or suspension of recognition and consequent withdrawal of reserved symbol in the case of a recognized political party. Para 16A of the Order reads:

"**16A. POWER OF COMMISSION TO SUSPEND OR WITHDRAW RECOGNITION OF A RECOGNISED POLITICAL PARTY FOR ITS FAILURE TO OBSERVE MODEL CODE OF CONDUCT OR FOLLOW LAWFUL DIRECTIONS AND INSTRUCTIONS OF THE COMMISSION**

Notwithstanding anything in this Order, if the Commission is satisfied on information in its possession that a political party, recognised either as a National party or as a State party under the provisions of this Order, has failed or has refused or is refusing or has shown or is showing defiance by its conduct or otherwise (a) to observe the provisions of the 'Model Code of Conduct for Guidance of Political Parties and Candidates' as issued by the Commission in January, 1991 or as amended by it from time to time, or (b) to follow or carry out the lawful directions and instructions of the Commission given from time to time with a view to furthering the conduct of free, fair and peaceful elections or safeguarding the interests of the general public and the electorate in particular, *the Commission may*, after taking into account all the available facts and circumstances of the case and after giving the party reasonable opportunity of showing cause in relation to the action proposed to be taken against it, *either suspend, subject to such terms as the Commission may deem appropriate, or withdraw the recognition of such party* as the National Party or, as the case may be, the State Party" (Italics added).

4.4 Taking the overarching sense of the above paragraphs, it will be clear that maintaining that political parties are independent of the Constitution or are not under "any law made by Parliament" is not correct. On the contrary, the foregoing paragraphs make it unambiguously clear that *political parties are a creature of, and under, the Constitution and the Representation of the People Act, 1951*.

4.5 The specific mention of *political propriety and morality* by the Supreme Court in the **Kihota Hollohon v. Zachilhu (AIR1993SC412)** case, referred to above in para 4.1.2 is of great significance as an guide to how political parties in an effective democracy should function.

4. Public function, Public Purpose, and Larger Public Interest

4.1 Any organisation performing any public function, working for any public purpose, and in the larger public interest, cannot claim to be independent from public inspection and scrutiny. This is because of the basic reason for their existence involves the public. Political parties fall squarely in this category. All of them claim that they work for the people and their well-being. It is hard to imagine some other institution working for public purpose and performing pubic function than political parties. *These very characteristics make them most appropriate focus of the twin objectives of the RTI Act, transparency and accountability, to the populace at large.*

4.2 The link between State power and political parties is evident and does not need any proof. It is this link that has assumed critical significance in the context of the Right of Information — an Act which has brought into focus the imperatives of transparency in the functioning of State institutions. As quoted earlier in para 1.4.2, "It would be facetious to argue that transparency is good for all State

organs, but not so good for the political parties, which control the most important of those organs."

4.3 Issues related to public function, public purpose, and larger public interest have engaged the attention of superior judiciary over the years. A few of the more relevant decisions are cited below:

4.3.1 The question whether a "private body" can be considered to be performing a "public function" came be considered by the Supreme Court in **Binny Ltd. & Anr. v. V.V. Sadasivan, 2005 (6) SCC 657**. While considering the issue, the Court observed, on pages 4 and 5 of its judgment,

> "Judicial review is designed to prevent the cases of abuse of power and neglect of duty by public authorities. However, under our Constitution, Article 226 is couched in such a way that a writ of mandamus could be issued even against a private authority. However, such private authority must be discharging a public function and that the decision sought to be corrected or enforced must be in discharge of a public function. The role of the State expanded enormously and attempts have been made to create various agencies to perform the governmental functions. Several corporations and companies have also been formed by the government to run industries and to carry on trading activities. These have come to be known as Public Sector Undertakings. However, in the interpretation given to Article 12 of the Constitution, this Court took the view that many of these companies and corporations could come within the sweep of Article 12 of the Constitution. At the same time, *there are private bodies also which may be discharging public functions. It is difficult to draw a line between the public functions and private functions when it is being discharged by a purely private authority. A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest*. In a book on Judicial Review of Administrative Action (Fifth Edn.) by de Smith, Woolf & Jowell in Chapter 3 para 0.24, it is stated thus:

"*A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest*. This may happen in a wide variety of ways. For instance, a body is performing a public function when it provides "public goods" or other collective services, such as health care, education and personal social services, from funds raised by taxation. A body may perform public functions in the form of adjudicatory services (such as those of the criminal and civil courts and tribunal system). They also do so if they regulate commercial and professional activities to ensure compliance with proper standards. For all these purposes, a range of legal and administrative techniques may be deployed, including: rule-making, adjudication (and other forms of dispute resolution); inspection; and licensing. *Public functions need not be the exclusive domain of the state*. Charities, self-regulatory organizations and other nominally private institutions (such as universities, the Stock Exchange, Lloyd's of London, churches) may in reality also perform some types of public function. As Sir John Donaldson M.R. urged, *it is important for the courts to "recognize the realities of executive power" and not allow "their vision to be clouded by the subtlety and sometimes complexity of the way in which it can be exerted"*. Non-governmental bodies such as these are just as capable of abusing their powers as is government" (Emphasis added).

4.3.2 After reviewing a catena of judgments, the Delhi High Court in **WP(C) Nos. 876/2007, 1212/2007, & 1161/2007**, concluded as follows:

> "56…These decisions, as well as previous judgments in India, have demonstrated that attempts have been made to account for actions of bodies that broadly perform "public" functions, through judicial review. The court is mindful that such attempts are part of the larger move to make such bodies accountable. *In the case of coverage of the Act, however, the only value is transparency. It is not as if the*

actions of bodies which fall within its provisions, are otherwise judicially reviewable, if they are not "state" under Article 12, or not "authorities" under Article 226. The objective is to ensure information dissemination, so that members of the public are empowered in the decisions that they take, and the manner in which they wish to decide how policies should be made by the state, in granting largesse, aid, or finance to such bodies" (Para 56) (Emphasis added).

4.3.3 Going by the detailed discussion above, it should be clear that since the essential *raison d'etre* of the existence of political parties is public purpose, to say that they should not be subject to public scrutiny just does not stand to reason.

5. Other submissions

5.1 **Opening a Pandora's Box:** One of the respondents claimed that if political parties were to be declared as public authorities, it will be like opening a Pandora's Box. The exact language used is "then almost the entire population of the Country will become a Public Authority within the meaning of this Act." It is submitted that if the view of the respondent were to be accepted, the entire RTI Act will need to be scrapped because the essential purpose of the RTI Act is to make information available freely to citizens so that transparency and accountability can be promoted. If this means getting more and more entities to provide information to citizens, it will only further the basic objectives of the Act.

5.1 **Political parties are unique organizations and evoke immense interest of citizens**: Political parties cannot claim to be regular organizations, like many others working in the country. The claim of some of the respondents that a political party is like any other independent, ordinary organization, is just not tenable. This is because *political parties have a determining influence of the lives of ordinary citizens, for whom the RTI Act has actually been enacted*. In addition, a representative democracy such as India, cannot function without political parties. Operating as they do in both the spheres of government and civil society, they serve as an essential bridge between the two. Parties are expected to reflect the concerns of citizens, aggregate and mediate diverse interests, project a vision of a society and develop policy options accordingly.

5.2 Political parties are the institution through which the **will of the people** is mobilized, consolidated, and expressed, and through which popular self-government is realized in practice. As agents of the people, political parties represent them in dealings with the other branches of government, and with various international and sub-national bodies. How well they fulfill this mediating role, and how representative of the people in all their diversity, is an important

consideration for a democratic society which obviously cannot be exhausted until and unless the actions of political parties are brought into public scrutiny.

5.3 **Role of citizen in democracy and Rule of law:** The role of citizens in a democracy is not just exhausted by the act of electing their MP or MLA, who, in turn, plays a role in the formation of the government is accordance with the directions of the party on whose ticket s/he has been elected. A fundamental dimension of a democracy consists of representative and accountable government, which together determine the laws and policies for society and secure respect for the '**Rule of law**.' Since it is political parties who, in effect, control, the working of the elected representatives, citizens have right to know about the functioning of political parties.

5.4 **Prerequisite for a lively democracy:** Political parties are at the heart of a modern political and electoral system and are essential to a vibrant and viable democratic system. In most democratic countries it is accepted that the public role of politicians should make them more open to public scrutiny, and tolerant of a much wider range of comment and criticism, than might be reasonable for private persons. This assumption has also been endorsed in international jurisprudence on the freedom of expression.

5.5 **Fundamental but not so visible role of political parties in governance:**

5.5.1 Common citizens are under the theoretically correct but practically erroneous impression that they "elect" their government. In fact, their actual choice during elections is limited to, or constrained by, decisions that have been taken by political parties before the actual election. And these are decisions about who will contest the election. Barring a few independents, whose numbers have been declining over the years, all candidates that citizens can vote for are "pre-selected" by political parties.

5.5.2 Not only this, once a person does get elected, s/he is not free to vote for or against a proposed legislation because s/he has to vote in accordance with the directions of the party, lest s/he gets disqualified under the provisions of the Tenth Schedule.

5.5.3 It should be clear from the above that political parties have a complete stranglehold on the entire system of governance in the country. And if the Preamble of the RTI Act says that the purpose of the Act is "to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability…AND WHEREAS democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold

> Governments and their instrumentalities accountable to the governed;" and that is why "NOW, THEREFORE, it is expedient to provide for furnishing certain information to citizens who desire to have it," then there is no reason why political parties should not be public authorities for the purposes of the RTI Act.

6. Conclusion

6.1 It is not out of place to invite the Commission's attention to para 82 of **CWP No.19224 of 2006 alongwith 23 connected cases** in the Punjab and Haryana High Court at Chandigarh, in which the Court held as follows:

> "82. In the light of aforesaid reasons and thus seen from any angle, it is clearly established and is hereby held, not only that the petitioner-Institutions are the bodies owned and controlled by the State Government, in view of the provisions of the relevant Acts/Rules, but *the same are the authorities substantially financed by the funds provided directly or indirectly by the appropriate Government as well, particularly when the complainants, who are public spirited persons, are not claiming any monetary/proprietary rights or any kind of share from their empire. They are only praying for the informations. Strange enough to observe that why the petitioner-institutions are feeling shy and are so scared in imparting the informations to them (complainants). Hence, they are the public authorities within the meaning of RTI Act, which serves a larger public interest*" (Para 82) (Emphasis added).

6.2 The complainants in this instance are also "public spirited persons, are not claiming any monetary/proprietary rights or any kind of share from their empire. They are only praying for the informations. Strange enough to observe that why the (respondents) are feeling shy and are so scared in imparting the informations to them."

6.3 It is, therefore, submitted before this Commission that political parties be declared as public authorities under the RTI Act as that would promote transparency and encourage public debate. Political parties being an integral part of the larger governance structure in a democracy, a democratic governance set up is not likely to succeed unless and until they are accountable to the public. Hence, there is a need to attain more transparency regarding the functioning of political parties.

7. Annexures:

7.1 A revised, partial, list of "facilities" provided by the government to political parties is attached.

7.2 A note on the benefits arising out of the income tax exemption will be submitted subsequently.

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(on behalf of)

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