Statement before the Department-related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, examining The Right to Information (Amendment) Bill, 2103 (Bill No. 112 of 2013), New Delhi, November 06, 2013, by Jagdeep S. Chhokar, Founder-Member, Association for Democratic Reforms

At the outset, I would like to thank the Hon'ble Committee Members on behalf of the Association for Democratic Reforms and National Election Watch, and my personal behalf, for acceding to our request to accord us this opportunity to make an oral presentation before the Committee.

We have already given a detailed written memorandum dated October 11, 2013, to the Committee. This memorandum contains details of the reasons we think that (a) political parties should be treated as public authorities under the Right to Information Act (RTI Act), 2005, and (b) the proposed Right to Information (Amendment) Bill, 2013 (Bill No.112 of 2013) should be withdrawn and given up. With the assumption that our written memorandum has, or will receive due consideration by the Hon'ble members of this Committee, during this oral presentation, I do not plan to repeat any of the details given in our written memorandum. I will also not present any legal arguments here, as those are most appropriate for a court of law. We look upon this Committee as the highest public forum of democracy, as it represents the Parliament which, in turn, represents "We, the People."

I will confine myself to a few basic, fundamental issues, the first of which is addresses the role of politics in a democratic society. I believe that **politics is the highest form of public service** in a democracy. A society has to find a way to govern itself and it is politics that performs that most vital function in a society. Freedom from the colonial rule was a political act in which politicians of the country led the people with distinction. Drawing up the Constitution was a political act, which members of the Constituent Assembly, representing all sections of society and of all political hues made a splendid contribution and gave the country a defining document of which all Indians are proud. Therefore, those who chose to perform this highest form of public service are worthy of appreciation.

In a large and complex society such as India, this supreme form of public service, politics, cannot be performed effectively by individuals operating alone, however well-intentioned they may be. It needs to be performed in somewhat of an organized fashion. That is why satisfactory performance of politics needs organizations which have come to be referred to as political parties, And if a society has chosen *representative* democracy (rather than *direct* democracy, or any of the other forms) as we, in India, have, the role of political parties becomes even more critical. Public opinion needs to be formed, mobilized, and consolidated on matters of pubic and national interest. This fundamental function in a representative democracy is performed by political parties. That is why the **existence and functioning of political parties is critical to the success of the functioning of a representative democracy**.

In addition to the above, political parties are the major players in the electoral process which is the basic root of the functioning of any democracy. Choice and selection of candidates to contest elections and then mobilizing voters in favour of the candidate supported by them provides not only what may be called the rough-and-tumble of a competitive electoral democracy but also the life and blood of a vibrant and alive democracy. By its very nature, this also happens to be the most visible part of the democratic process.

In addition to on-going mobilization of public opinion round the year, active period for political parties begins with the approach of elections, with selection and choice of candidates to represent their party in the election being the first concrete task that faces them. Different political parties have different ways of choosing their candidates, which is the way it should be. Once all the political parties who wish to contest the election from one particular constituency have all chosen their candidates, this becomes the slate of candidates that the voters *can*, possibly, vote for. This has been the situation so far till the recent Supreme Court judgment for putting a "None Of The Above" (NOTA) button on the electronic voting machines (EVMs), the implications of which are still not clear and need discussion. Also, while theoretically, it is possible for independent candidates to contest elections, it is well known that the number of independent candidates elected has been going down historically. The net result of this process is that the **choice that voters can make among candidates in a constituency is pre-constrained by the choices made collectively by all the political parties contesting the election in that constituency**.

Once candidates have been selected by political parties, and *voters have exercised their choice within this constraint of the prior choices by political parties*, elected representatives emerge. It is these "elected representatives" that are constitutionally authorised to make laws that govern, in the broadest of terms, how the society can, or should, function. Or, in other words, how can, or should, the citizens lead their lives. But then too, a question arises: Can an "elected representative", the MP or the MLA, vote in favour of or against a Bill presented in Parliament or State Assembly, depending on his/her opinion whether the Bill deserves to be passed or rejected, IF his/her opinion happens to be against the official view of the political party on whose symbol s/he has been elected? Or, in other words, can the "elected representative" make a free choice? The answer, as all the Hon'ble Members here know is "NO". The reason for this, as is well known, is the anti-defection law contained in Articles 102(2) and 191(2), and the Tenth Schedule of the Constitution brought in under the 42nd Amendment to the Constitution with effect from March 01, 1985. What this means, in simple words, is that **the choice an "elected representative" can make is *fully controlled by the political party* that s/he has been "set up by"**, as the Constitution says.

The above two need to be combined with the proposition that it is the political party which has the support of a majority of members in the legislature, the Lok Sabha or the State Legislative Assembly, or a combination, called a coalition, of political parties which can muster up the support of a majority of members in the legislature that forms

the government of the country or the State, to get an idea of the **degree of influence**, or may I say, **control political parties exercise on the formation of the government**.

One may say, and indeed it has been said sometimes if not often, that only the party or the coalition in power exercise control over the government and not those in the opposition. This is not really true. The party or the coalition in power is not really at full liberty to do what it likes. One of the legitimate and more important roles of the political parties who are not in power is that of oversight and to keep a check on the functioning of the government. Those "on the opposition benches" have a responsibility not only to their electors but actually to the nation and the state, as the case may be, to be vigilant about the way the party or the coalition in power is functioning and to prevent it from doing anything that might not be in the best national or public interest, or the interest of the state. Thus, those in opposition also have an important role to influence government policy and, as experience has shown, do exercise it with very good effect.

The net result of the above is that **political parties do exercise a controlling effect on the government**.

We now come to the Right to Information Act. The Act passed in 2005 by this very Parliament has the following Preamble:

> *"WHEREAS the Constitution of India has established democratic Republic;*
>
> *AND WHEREAS democracy requires an informed citizenry and transparency of information which are vital to its governing and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed;*
>
> *AND WHEREAS revelation of information in actual practice is likely to conflict with other public interests including efficient operations of the Governments, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information;*
>
> *AND WHEREAS it is necessary to harmonise these conflicting interests while preserving the paramountcy of the democratic ideal;*
>
> *Now. THEREFORE, it is expedient to provide for furnishing certain information to citizens who desire to have it.*
>
> ***BE** it enacted by Parliament in the Fifty-sixth Year of the Republic of India as follows:--"*(Underlining added).

While it is obviously possible to interpret different provisions differently and to give different emphases to different parts, I do not think it can be reasonably disputed that "informed citizenry", transparency of information", " to hold Governments and their

instrumentalities accountable to the governed", and "preserving the paramountcy of the democratic ideal" are some of the key concepts that the Act is designed to promote.

Views have been expressed that political parties are different from government and therefore RTI should not be applicable to them. In this context, I seek permission to quote from the 170th report of the Law Commission of India. The Law Commission, as the Hon'ble Members know, was set up in 1955 with the then Attorney-General of India, Mr. M. C. Setalvad, as its Chairman. The 170th Report of the Commission was titled "Reform of the Electoral Laws" and was submitted to the then Law Minister in May 1999. This is what the Law Commission said in Para 3.1.2.1:

> "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)

I believe it can be seen totally unambiguously from the above that while the applicability or otherwise of the RTI Act to political parties can be discussed if one focuses exclusively on the letter of the law but if even a modicum of attention is paid to the *spirit of the law*, there can be no doubt whatsoever that RTI Act should be, and in fact is, applicable to political parties who, as the learned Law Commission has said "form the government".

The next major issue is whether political parties are like any other private body or association or do they have a special status and does this special status exempt them from the RTI Act or in fact bring them under it. For this, we need to go back to the Constitution again. The Supreme Court of India enunciated the now well-known "Basic Structure Doctrine" for the Constitution in the famous *Kesavananda Bharati* case {H.H. Kesavananda Bharati Sripadagalavaru vs State of Kerala [1973 (4) SCC 225ff]}.

Quite a few "basic features" of the Constitution have been identified by the Supreme Court over the years, out of which "parliamentary democracy based on rule of law and free and fair elections" are two of the most important. Though the expression "political party" does not find mention in the main text of the Constitution (it is only to be found in the Tenth Schedule, referred to earlier, wherein Section 1(a) defines "legislature party", and Section 1(c) defines "original political party"), political parties have been recognized as an inherent part of the basic structure of the Constitution since 2006, when a Constitution Bench of the Supreme Court, in the *Kuldip Nayar* case [Kuldip Nayar vs Union of India and Ors. (2006) 7 SCC1] unanimously held, in paragraph 195, that "Parliamentary Democracy and multi party system are an inherent part of the basic

structure of Indian Constitution. It is political parties that set up candidates at an election who are predominantly elected as Members of the State Legislatures."

For entities that are "an inherent part of the basic features of the Constitution" to want, and claim, to be exempt from a basic law such as the RTI Act is, in my humble opinion, is incongruous indeed.

Please allow me, now, to comment of some of the concerns mentioned in the "Statement of Objects and Reasons" of the proposed Bill to amend the RTI Act.

Item 4 of the "Objects and Reasons" expresses the concern that if political parties become public authorities under the RTI Act, their "smooth internal working" will be hampered, and that "the political rivals may misuse the provisions of RTI Act, thereby adversely affecting the functioning of the political parties." Let me deal with these two separately.

The RTI Act has been in force since October 12, 2005, and thousands upon thousands of public authorities in the country have been under it and all of them have continued to function despite the RTI Act having come into force. The same apprehension that the "smooth internal working" of all these public authorities will be hampered, was raised repeatedly before the RTI Act was passed but the experience of the last eight years has proved it to be completely baseless. On the other hand, the working of several public authorities has been strengthened with the use of the RTI Act and the transparency and public accountability that it has brought in.

The second concern, that of "political rivals" misusing the provision of the RTI Act is equally surprising. Like everything else, including atomic energy, it is certainly possible to "misuse" the RTI Act, and no one will ever say that its misuse has not been attempted. But the question arises whether putting institutions critical to the functioning of democracy out of its purview will help or hurt democracy in the country.

The other critical issue that is worth bringing to the attention of Hon'ble Members in this context is ***who*** is expected to misuse it? The answer that the proposed amendment bill under consideration specifically mentions is "political" rivals.

A question that disturbs confused citizens is: "What is the most appropriate way to prevent "misuse" of a very good Act by one set of politicians against another?"…because that is what the expression "political rivals" means. Isn't making the RTI Act inapplicable to all political parties something like throwing the baby out with the bathwater, or might it be more appropriate for all the political parties to mutually agree not to misuse it, whether for political purposes or otherwise, and set an example to society at large? Citizens also wonder how and why can all political parties agree to put themselves above a very effective and democracy- and transparency-friendly law, but cannot agree not to misuse the same law against one another.

To sum up, here we have an Act duly passed by Parliament, assented to by the President, notified by the Government that has been in operation for eight years. The competent

authority under the Act has come to a reasoned conclusion that certain bodies satisfy the definition of a “pubic authority” under the Act. What is the correct course of action for anyone who is not in agreement with the decision of the competent authority? The question becomes one of who is the appropriate authority under the Constitutional scheme of the country to interpret an existing law. The answer has been provided by the distinguished jurist Justice P.N. Bhagwati, in paragraph 80 of the judgment in the case State Of Rajasthan & Ors. Etc. Etc vs Union Of India Etc. Etc [1977 AIR 1361, 1978 SCR (1) 1]:

> “It will, therefore, be seen that merely because a question has a political colour, the Court cannot fold its hands in despair and as a question arises whether an authority under the constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. Indeed it would be its constitutional obligation to do so. It is necessary to assert in the clearest terms, particularly in the context of recent history, that the Constitution is *Suprema lex*, the paramount law of the land, and there is no department or branch of government above or beyond it. Every organ of government, be it the Executive or the Legislature or the Judiciary, derives its authority from the Constitution and it has to act within the limits of its authority. No one howsoever highly placed and no authority howsoever lofty can claim that it shall be the sole judge of the extent of its power under the Constitution or whether its action is within the confines of such power laid down in the Constitution. This Court is the ultimate interpreter of the Constitution and to this Court is assigned the delicate task of determining what is the power conferred on each branch of government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits. It is for this Court to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law. To quote the words of Mr. Justice Brennan in Baker v. Carr, "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government or whether the action of that branch exceeds whatever authority has been committed to it, is itself a delicate exercise in constitutional interpretation and is a responsibility of this Court as ultimate interpreter of the Constitution". Where there is manifestly unauthorised exercise of power under the Constitution, it is the duty of the Court to intervene. Let it not be forgotten, that to this Court as much as to other branches of government, is committed the conservation and furtherance of democratic values. The Court's task is to identify those values in the constitutional plan and to work them into life in the cases that reach the Court. "Tact and wise restraint ought to tamper any power but courage and the acceptance of responsibility have their place too". The Court cannot and should not shirk this responsibility, because it has sworn the oath of allegiance to the Constitution and is also accountable to the people of this Country. There are indeed numerous decisions of this Court where constitutional issues have been adjudicated upon though enmeshed in questions of religious tenets, social practices, economic doctrines or educational policies. The Court has in these cases adjudicated not upon the social, religious, economic, or other issues, but solely on the constitutional questions brought before it and in doing so, the Court

has not been deterred by the fact that these constitutional questions may have such other overtones or facets."

It is clear from the above that if any of the political parties are affected adversely by the decision of the competent authority, in this case, the Central Information Commission (CIC), they should seek a remedy from the court of law. Alternatively, if the Executive, the government, feels aggrieved, they should first go to the court of law to get the decision and interpretation of the CIC corrected rather than rush in with an amendment of the proven and effective law.

It is with this backdrop that **we request and urge the Hon'ble Members of this Committee to recommend to the government to withdraw this proposed Act to amend the RTI Act**.

Optimists, and I humbly submit that there are plenty among the citizenry, believe that there are people in political parties who are unhappy with the current state of affairs and would like things to change drastically for the better. While most such people belong to the rank and file, there is also speculation that some of the very top functionaries of some of the parties want things in their parties to change. Be that as it may, the CIC's decision of June 03, 2013 provides political parties an opportunity to make a start toward changing how they have come to work. Following the observation of Louis D. Brandeis, a justice of the US Supreme Court from 1916 to 1939, that "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman," political parties will do well to let sunlight fall on their internal functioning so that any infections there can be removed. It will be in the interest of the political parties themselves, in the interest of democracy, the nation, and the people. All these interests ***are*** in alignment and not in conflict.

I thank you for your patient listening and giving me this opportunity to share my views with you.
