

BOOK REVIEW OF “THE RIGHT TO INFORMATION IN INDIA” BY SUDHIR NAIB

ABHINAV KUMAR, PRAKHAR BHARDWAJ*

This is a book review of The Right to Information in India by Sudhir Naib which is a valuable addition to the existing literature on the Right to Information. Its crisp, concise and reader-friendly format vindicates its description as a short introduction and establishes its value as a ready referencer on the Right to Information. After giving a short overview of the book, the authors put forth two primary critiques; first, regarding the author’s insufficient analysis of the legal content of ‘public authority’ – a term that has decisive importance in the scheme of the Act; and secondly, that the author’s critique of the Supreme Court order in Namit Sharma is flawed in principle. This review treats the criticisms of the book as a point of departure to probe deeper into critical questions that the right to information faces today.

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* Abhinav is a student of third year, pursuing B.P.Sc. LL.B. (Hons.) at the National Law University, Jodhpur. Prakhar is a student of fourth year, pursuing B.A. (Hons.) LL.B. (Hons.) at the National Law University, Jodhpur.

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I. INTRODUCTION

"The fight for the right to information is the fight for survival of democracy in India. The stakes are too high for us to ever give up. So we will never give up."

-Arvind Kejriwal

It is not often that a legislation holds a central place in a democracy, gets endorsed by the Prime Minister of the country,¹ or becomes the favourite tool of the civil society. It is perhaps this characteristic of the Right to Information ("RTI") that ensures that it will never disappear from public memory. The machinery under the Act has produced some remarkable orders giving citizens access to information related to CBSE Board papers,² accounts of political parties,³ and records of many public works programs which would have otherwise remained inaccessible to the public eye.

Its pride of place within the civil society has also had a veritable impact on legal academia, as is evidenced by the numerous volumes of concise, readable and non-exhaustive commentaries available on the subject today. The educative value of such writing is immense, and it goes a long way in aiding the people in the exercise of their rights. *The Right to Information in India* by Sudhir Naib,⁴ is one such attempt to bring the RTI Act closer to the people. Its crisp, concise and reader-friendly format vindicates its description as a short introduction, and establishes its value as a handy guide on the Right to Information.

¹ *Prime Minister Manmohan Singh's Independence Day Speech*, THE HINDU (August 15, 2013), available at <http://www.thehindu.com/news/resources/prime-minister-manmohan-singhs-independence-day-speech/article5025006.ece> ("Through the RTI Act, the common man now gets more information than ever before about the work of the government. This legislation is being used on a large scale at all levels. The Act frequently brings to light irregularities and corruption and opens the door for improvements.")

² *CBSE v. Aditya Bandopadhyaya*, (2011) 8 SCC 497 (Supreme Court of India).

³ *Subhash Chandra Agarwal v. Indian National Congress and Ors.*, File No. CIC/SM/C/2011/001386. (Central Information Commission).

⁴ Sudhir Naib, *THE RIGHT TO INFORMATION IN INDIA* (2013).

The present article aims to provide a holistic review of the book. In Part II, we shall provide an overview of the book, and its contribution to the ever-expanding body of literature on the Right to Information. We have attempted to examine the layout and logical flow of the book, followed by an in-depth analysis of its value *vis-à-vis* existing literature.

In Part III, we shall present our critique. The book has been critiqued on two principle grounds. First, that despite it being the lynchpin of the RTI Act, the term ‘public authority’, lacks proper analysis. In our attempt to fill this gap, we have provided the required analysis in terms of the RTI Act, Article 12 of the Constitution and relevant case law.

The second critique is closely tied to the recent judgment of *Namit Sharma v. Union of India*,⁵ wherein the Apex Court directed that since Information Commissions have the trappings of a court, they must have a judicial member. The author has criticized the judgment as a case of judicial activism, and has made a case for maintaining status quo, under which information officers are essentially administrative personnel.⁶ We have critiqued the author’s stand as flawed in principle. Thereafter, we have highlighted both, the problems with the status quo and the need for judicially trained information officers.

The article culminates with a conclusion, summing up our analysis of the book.

II. OVERVIEW AND CONTRIBUTIONS

Against the backdrop of the recently vociferous demands for transparency and accountability in governance, the RTI and allied topics are indeed emerging areas of study and debate. Any attempt to spread awareness in respect of the same is not only welcome, but also crucial in order to contribute to the progress of the debate in a principled and informed manner. The importance of the author’s contribution to the field may particularly be acknowledged in terms of the layout and content of the book.

A. CHAPTERISATION

The book is divided into 7 chapters. The first, titled ‘Freedom of Information: A Global Perspective’,⁷ provides a background by analysing information regimes throughout the world. Thereafter, the author traces the evolution of the right in the chapter titled

⁵ *Namit Sharma v. Union of India*, (2013) 1 SCC 45 (Supreme Court of India) [“*Namit Sharma*”].

⁶ Naib, *supra* note 4, at 216 (“The Union Government has filed a review petition before the Supreme Court. It is hoped that the Union of India will argue the case better in review than it did in the original petition and the Court will address the issues arising out of the earlier judgment as pendency of cases remains a big problem”).

⁷ *Id.*, at 1.

‘Towards the Right to Information in India’.⁸ Subsequently, the statute itself is analysed in ‘Right to Information Act 2005’.⁹ In the following two chapters, ‘Rights of Information Seekers’,¹⁰ and ‘Duties of Information Suppliers’,¹¹ the author has examined the scheme of rights and duties under the Act in considerable detail. The restrictions upon the right to information have been discussed in the penultimate chapter, titled ‘Information Exempted from Disclosure’.¹² In the final chapter, ‘Recommendations to Improve Implementation of Right to Information’,¹³ the author has expressed his views on the pitfalls in the implementation of the Act and made suggestions in respect of removing the same.

B. SUMMARY

At the outset, the book provides a global perspective on the freedom of information.¹⁴ To begin the book with a comparative analysis, without an engaging discussion about the Act itself is a puzzling beginning to a book with an otherwise logical and endearing flow. However, the author is successful in restoring the sense of familiarity to the topic in his next chapter, which traces the evolution of the right to information in India.¹⁵ After establishing the right as implicit in the scheme of Part III of the Constitution, he has embarked upon a description of the mass movement and civil society roots of the right, and traced the legislative process that has culminated in the passage of the RTI Act as we know it today. This is followed by a detailed overview of the provisions of the Act and its implementation.¹⁶ Thereafter, the author has presented a unique analysis of the Act in terms of the rights of information seekers and the corresponding duties of information providers. The practical and educative value of this part of the book is immense. First, it establishes the different aspects of the right in terms of the information that can be sought, the process for making a request for information and the appeal mechanism. Secondly, it examines the scope and obligations of ‘public authority’ under the Act and the duties and responsibilities of public information officers.

⁸ *Id.*, at 32.

⁹ *Id.*, at 60.

¹⁰ *Id.*, at 89.

¹¹ *Id.*, at 107.

¹² *Id.*, at 146.

¹³ *Id.*, at 198.

¹⁴ *Id.*, at 1.

¹⁵ *Id.*, at 32 (“Towards the Right to Information in India”).

¹⁶ *Id.*, at 60 (“The Right to Information Act, 2005”).

It is a well-established principle of law that no right is absolute in nature and the exercise of each right is subject to reasonable restrictions. The right to information is no exception and its exercise is subject to section 8 of the Act, which enumerates the classes of information that are exempt from disclosure. In the penultimate chapter,¹⁷ the author has dealt with section 8 in considerable detail. Each exemption has been dealt with individually, and supplemented with case law analysis wherever possible.

The RTI Act has come a long way since its inception as the basis of transparency and accountability in the scheme of Indian governance. While the provisions are all in place, there is a long way to go in terms of perfecting its implementation. In the final chapter,¹⁸ the author has identified a number of loopholes in this context. Moreover, he has made recommendations in respect of a number of aspects that require appropriate consideration, *inter alia* the disclosure of the file noting,¹⁹ the scope of ‘public authority’,²⁰ raising awareness about the RTI mechanism,²¹ training of information officers,²² and the need to protect RTI applicants and whistle-blowers.²³

C. CONTRIBUTION TO EXISTING LITERATURE

The academic literature on the RTI is presently flooded with short introductions. Indeed, writing an introduction seems to be a perfect compromise between regurgitating bare provisions and actually analysing their content. Notable among these short works is the introduction written by SP Sathe,²⁴ though it is riddled with its own methodological shortcomings.²⁵ Nonetheless, Sathe’s work far surpasses the mediocrity that is prevalent in rest of the available literature in the subject.²⁶ A useful contribution to literature is also made

¹⁷ *Id.*, at 146 (“Information Exempted from Disclosure”).

¹⁸ *Id.*, at 198 (“Recommendations to Improve the Implementation of Right to Information”).

¹⁹ *Id.*, at 200.

²⁰ *Id.*, at 202.

²¹ *Id.*, at 210.

²² *Id.*

²³ *Id.*, at 211.

²⁴ See generally S. P. Sathe, RIGHT TO INFORMATION (2006).

²⁵ Sathe’s work was released almost simultaneously with the enactment of the RTI Act. Hence, it is largely prospective in its outlook, in that, it tries to pre-empt the problems that might be faced in its future implementation. This becomes amply clear from the author’s own description of his work. *Id.*, at 1 (“This monograph deals with the law that is going to be enforced. This book is an attempt to focus on the Act, the judicial decisions on the right and the administrative problems that might be faced while implementing it.”).

²⁶ See N. K. Jain, RIGHT TO INFORMATION: CONCEPT, LAW AND PRACTICE, 16-51 (2007), where from pages 16-51 plainly lists out provisions from foreign legislations; See also, N. N. Mathur, EXHAUSTIVE

by Jaipurkar and Satpate's casebook,²⁷ which serves as a great ready-reference for anyone engaged in RTI litigation.

It is in this context that the relative merit of Naib's work is to be evaluated. This book serves as a valuable lodestar to any academic or practitioner who seeks to navigate the field of the right to information. Its crisp layout, coupled with its accessible language and tabular charts give a conceptual clarity that few other commentaries can deliver. The book makes at least three distinct contributions to literature.

First, it is written in simple language, thereby ensuring that the reader grasps the exact import of the key provisions of the Act. *Secondly*, the comprehensive nature of the chapter on exemptions makes it informative, thereby enabling a thorough understanding of the Act. *Thirdly*, the author also attempts to engage in a social impact assessment of the RTI Act, in a way that is both rare and valuable in its outlook.

D. IMPACT

Information is essentially the oxygen of democracy, and as such, the RTI Act is a major step towards making Indian democracy more transparent and accountable. However, in order to be effective, this legislation demands a populace which is well versed with its rights and knows how to exercise them.

The author has been successful in providing a concise yet comprehensive overview of the Act, its exposition and its practical functioning. It is thus that the educative value of his book is immense. The said value operates on a number of levels. The book has the potential to empower information-seekers i.e. a citizenry often accused of ignorance and indifference. Further, it can easily serve the purpose of educating the basic cadre of information-providers (Public Information Officers) as to the effective discharge of their duties. Lastly, the book also stands to benefit academics, scholars and students wishing to get a firm grasp of the subject in a short period of time. Thus, the book vindicates its purpose of providing a useful introduction to the right to information in India.

The author has made an honest attempt to wrest the RTI Act from the incomprehensible realm of legal jargon and to explain it in layman's terms. Such an attempt is crucial in order to educate the common man as to the value and potential of the Act as an effective tool to make Indian democracy more transparent and accountable. The clear and

COMMENTARY ON THE RIGHT TO INFORMATION (2005), where the author spends 71 pages on general principles of statutory interpretation as commentary to the preamble of the Act.

²⁷ Divya Jyoti Jaipurkar and Jayshree Satpate, LEADING CASES ON RIGHT TO INFORMATION (2009).

lucid manner in which the Act has been presented is commendable. A clear testament to the same is the author’s superb use of figures,²⁸ and tables,²⁹ to break down the entire RTI machinery into a few straightforward and easily comprehensible steps. Simple tools such as a tabular analysis can go a long way in supplementing governmental efforts to create awareness as to people’s rights and the relative ease with which they can be exercised.

Section 8 of the Act states the exemptions from the right to information, and in order to facilitate an effective understanding of the Act, the reader must be made aware of the limits within which the right operates. In this context, another aspect of the book that must be appreciated is the comprehensive analysis of the exceptions to the right to information. The author has explained, in some detail, the nature of the information exempted from disclosure under the Act,³⁰ supplemented with case law analysis wherever possible.

No piece of legislation is perfect, and each suffers from its own set of loopholes. The hallmark of a good legislative analysis is the ability to identify these loopholes and offer a principled critique and corresponding suggestions. The author discharges this requirement in the concluding chapter of his book, wherein he highlights the important shortcomings of the Act, and makes recommendations on improving its implementation. In highlighting important issues such as the scope of information to be disclosed, the scope of ‘public authority’ and the need to widen the same, the need for digitization of information and for continuous proactive disclosure, the training of officials and the protection of RTI applicants and whistle-blowers, the author is asking all the right questions to the authorities responsible for implementing the Act.

Lastly, the author is able to draw freely from non-legal sources to demonstrate the ground realities of the operation of the law. He begins by tracing the evolution of the movement from the founding of the *Mazdoor Kisan Shakti Sangathan*,³¹ to its reformulation by the Parliamentary Standing Committee;³² thus providing an insight into its legislative history. In the section titled ‘How the RTI Act has Helped: Success Stories’,³³ the author has summarized studies by Ivy League researchers and prominent organizations such as the

²⁸ Naib, *supra* note 4, at 106 (“Application and Appeal Process Through RTI”); Naib, *Id.*, at 134 (“Procedure for Disposal of Request by PIO”); Naib, *Id.*, at 144 (“Involvement of Third Party”).

²⁹ *Id.*, at 138 (“Time Limit for Disposal of Applications”); Naib, *Id.*, at 143 (“Time Period for Supply of Information when Third Party is Involved”).

³⁰ *Id.*, at 146 (“Information Exempted from Disclosure”).

³¹ *Id.*, at 41-45.

³² *Id.*, at 51.

³³ *Id.*, at 70.

Centre for Media Studies to showcase the workings of the Act. In doing so, the author collates important information that would have otherwise gone unnoticed. There is a dire need for such studies, especially in the context of the formulation of rights under Article 21 by the Supreme Court,³⁴ with reckless disregard for the actual hazards related to the implementation and realization of rights.

III. CRITIQUE

The above part has outlined the value that this book has added to the academic literature on RTI. Although nothing contained in this section would take away from that fact, there is still plenty that the author could have improved. The two major critiques that have been dealt with below best showcase his tendency to deal with complex questions of law with blanket statements. Apart from the primary critiques, there are also reservations as to the method employed by the author in some parts.

The excessive attention that has been devoted to the ‘Global Perspective’ on the RTI,³⁵ needs some serious examination. It is difficult to understand the underlying purpose behind delving into global information regimes without prior reference to the Indian scheme of things. Moreover, providing a highly detailed analysis of the information laws of Europe,³⁶ the Americas,³⁷ Asia Pacific,³⁸ the Middle East and Africa,³⁹ and a comparative analysis,⁴⁰ right at the outset of the book would cause a sense of bewilderment in the layman unfamiliar with the ‘information jargon’.

This is not to say that foreign legal material is irrelevant. However, before citing any such legislation or judgment, some analysis on the lines of historical association of the countries, cognate legal systems and analogous nature of constitutional institutions involved must be undertaken.⁴¹ While it is not expected that a short introduction would delve in the

³⁴See Durga Das Basu, *SHORTER CONSTITUTION OF INDIA*, 377-383 (2011), where the author talks about the many socio-economic rights read into Article 21 including the right to freedom from malnutrition, reasonable residence, decent environment etc.

³⁵Naib, *supra* note 4, at 1-32.

³⁶*Id.*, at 3.

³⁷*Id.*, at 10.

³⁸*Id.*, at 14.

³⁹*Id.*, at 16.

⁴⁰*Id.*, at 17.

⁴¹Gautam Swarup, *Why Indian Judges would Rather be Originalist: Debunking Practices of Comparative Constitutional Law*, 5(1) *INDIAN JOURNAL OF CONSTITUTIONAL LAW*, 55-76.

depths of comparative analysis, perhaps the legislative survey could have restricted itself to prominent jurisdictions that India has some history of borrowing from.

A second tendency of the author that considerably takes away from the narrative is the lack of conclusions drawn at the end of each section. This is specifically important in areas that have seen rapid change of law with court orders being overturned by superior courts. A prime example of the same is the sub-section on the ‘disclosure of answer sheets’.⁴² Right after mentioning the Supreme Court order on the issue,⁴³ the author has highlighted the order of the CIC where it ‘took a different stand’.⁴⁴ Such a statement of the law is enough to confuse any reader who is not well versed with the doctrine of *stare decisis*. A brief concluding remark would have, hence, gone a long way in clarifying the current position of law, and making the information contained in the book a lot more accurate.

The section below will deal with two major substantive points of law that require more analysis. These are the questions relating to the legal content of ‘public authority’ – a term that has decisive importance in the scheme of the Act, and the author’s critique of the Supreme Court order in *Namit Sharma*.⁴⁵ The following section will treat the criticisms of the book as a point of departure to probe deeper into critical questions that the right to information faces today.

A. INSUFFICIENT ANALYSIS ON THE DEFINITION OF ‘PUBLIC AUTHORITY’

Section 2(h) of the Right to Information Act, 2005 defines ‘public authority’ for the purpose of the Act. The term has been defined in four parts. The first three parts comprise of authorities or bodies or institutions of self-government constituted by or under the Constitution, by any other law made by the Parliament or the states. However, it is the fourth part of the definition that has received the maximum judicial scrutiny. Consequently, it has been creatively interpreted in a number of contexts.⁴⁶

The definition of ‘public authority’ is the lynchpin of the RTI Act.⁴⁷ As one of the central terms in the Act, it directly affects the obligations of the respondents in most cases

⁴² Naib, *supra* note 4, at 169- 172.

⁴³ *CBSE v. Aditya Bandopadhyaya*, (2011) 8 SCC 497 (Supreme Court of India).

⁴⁴ *Manoj Kumar Pathak v. CBSE*, Decision No. CIC/OK/A/2008/00832/SG/0677 Appeal No. CIC/OK/A/2008/00832/ (Central Information Commission).

⁴⁵ *Namit Sharma*, *supra* note 5.

⁴⁶ *See infra* notes 55-57.

⁴⁷ The phrase ‘public authority’ occurs in several critical sections in the Act. Sec. 2(j) defines the “right to information” as information held by or under the control of a ‘public authority’. Sec. 4 lays down the obligations regarding pro-active disclosure of information by public authorities. Similarly, Sec. 5 lays

and has a definitive impact on the coverage of the Act. Definitions have a notorious stature in the hall of fame of judicially active statutory interpretation, as the margin of error in the interpretation of the definitions is even smaller. This is so because the *ratio decidendi* would then apply to each and every case that falls within that Act. For example, the interpretation of ‘consultation’ in Art. 124(2),⁴⁸ would only have ramifications on the appointment of Judges to the Supreme Court. However, an interpretation of ‘industry’,⁴⁹ under Section 2(j) of the Industrial Disputes Act, 1947 would have an impact, on every case that comes under the given statute.

It is this fundamental problem that we also see unfurl in the arena of RTI litigation. Compared to its nucleic importance under the Act, the author provides insufficient analysis of the term and the many implications that surround its interpretation. In Chapter 5, titled ‘Duties of Information Suppliers’, the author firstly deals with precedents related to the meaning of the term ‘authority’, ‘body’ and ‘institution of self-government’. Thereafter, he has provided a collection of important decisions with regard to the scope of the term ‘public authority’.⁵⁰ Instead of treating the section one clause at a time, ‘authority’, ‘body’ and ‘institution of self-government’ are used as euphemisms, which ambiguously covers the scope of each clause. As a consequence, there is a lack of clarity as to some of the most fundamental principles of law laid down by the CICs and the High Courts over the course of many precedents.⁵¹

There are at least two issues that remain unaddressed after reading the abovementioned chapter. *First*, what are the implications of Section 2(h)(d) and what are the exact touchstones to judge whether a given body falls within the definition? *Secondly*, what is the relation between bodies under Article 12 of the Constitution and ‘public authorities’ under Section 2(h) of the Act? We will consider these questions one by one.

down that each public authority shall designate a Central Public Information Officer and Sec. 6 prescribes the “request for obtaining information” along the same lines.

⁴⁸ See *Sankalchand Himatlal Sheth v. Union of India*, (1977) 40 SCC (Supreme Court of India), *S.P. Gupta v. President of India*, (1981) Supp SCC 87 (Supreme Court of India), *Supreme Court Advocates on Record v. Union of India*, (1993) 4 SCC 441 (Supreme Court of India).

⁴⁹ Readers would be familiar with the judicial uncertainty that surrounds the meaning of ‘industry’ after *Bangalore Water Supply & Sewage Board v. Rajappa*, AIR1978 SC 548 (Supreme Court of India); See E. M. Rao, *INDUSTRIAL JURISPRUDENCE: A CRITICAL COMMENTARY*, 696-705 (2008).

⁵⁰ Naib, *supra* note 4, at 107-16.

⁵¹ *Infra* notes 55-57.

1. INTERPRETATION OF ‘PUBLIC AUTHORITIES’ UNDER SECTION 2(H)(D)

Section 2(h)(d) states that ‘public authority’ means any authority, body or institution of self-government established or constituted by the notification issued or order made by the appropriate Government, and includes any body owned, controlled or substantially financed; or a Non-Governmental Organization (“NGO”) substantially financed, directly or indirectly by funds provided by the appropriate government.

A plain reading of this provision will bring forth many issues. First, are authorities not established or constituted by notification to be included within the ambit of the term ‘public authority’? Secondly, what is the scope of ‘indirect funding’ by the government?

With regards to the interpretational issues that surround this section, the author merely mentions that “clause (ii) has been interpreted to include private non-governmental bodies that are substantially financed.”⁵² This explanation is plainly insufficient, specifically after considering the volume of judicial dicta dedicated to this section.

The CIC’s orders over a long period of time have essentially used three main factors in judging whether an NGO is a ‘public authority’: the nature of function and whether the same qualifies to be a ‘public function’,⁵³ the funding given by the Government and whether the same amounts to ‘substantial funding’,⁵⁴ and lastly, the nature of the organization itself.⁵⁵ However, these three factors have not proved enough to guide reasoned decisions on the scope of the term. Indeed, most judgments of the CIC amount to a pragmatic calculation of ‘public interest’ which lies in the favour of the citizen with a thread-bare analysis on the three factors outlined above.

⁵² *Id.*, at 112.

⁵³ *See* DAV College Trust and Management Society v. Director of Public Instruction, AIR 2008 P&H 117 (Punjab and Haryana High Court), where the Court held that a 45% grant-in-aid did not constitute substantial funding, but the college was a ‘public authority’ under the Act because it performed a ‘public function’.

⁵⁴ *See* Lt. Col Anil Heble v. Airport Authority of India, CIC/OK/C/2006/00125 (Central Information Commission), where the Court held that 26 % funding of the DIAL amounted to substantial funding. Also *see* Indian Olympic Association v. V Malik and Anr, (2010) ILR 4 Delhi 1 (High Court of Delhi), wherein it was held that substantial funding was not equivalent to majority funding.

⁵⁵ *See* Shri Roshan Lal v. Delhi Transco Ltd, CIC/WB/2006/01061 (Central Information Commission), where the CIC held that Power Distribution Companies which were created on a public-private partnership were ‘public authorities’ because of financing by the state. Also *see* Diamond Jubilee Higher Secondary School v. Union of India, (2007) 3 MLJ 77 (High Court of Judicature at Madras), where the Court rejected the contention that a substantially financed English speaking School would be a ‘public authority’ despite its purely private nature.

For instance, in *MP Verghese*,⁵⁶ the Court held that a private-aided University was controlled by the government since it had to abide by the Kerala University Act, 1974. Therefore, rather than meaning influence over decision making processes, ‘control’ has been interpreted to be synonymous with statutory compliance. By the same token, an industry which complies with all the environmental regulations should be considered a ‘public authority’. Such a conclusion would be patently absurd. It is thus perhaps that it has been held that a mere notification under the Co-operative Societies Act, does not render a body a ‘public authority’.⁵⁷

These doctrinal tensions best displayed themselves when the CIC recently found itself in the midst of a politically charged litigation where the petitioner had requested for receipts, payments and manifesto promises of all national parties.⁵⁸ The Commission finally based its opinion on the fact that land given at concessional rates and exemption from taxation amounted to substantial funding, performance of a public duty and constitutional/legal provisions vesting political parties with rights and liabilities.⁵⁹ Of these, the last element is the most dubious – while substantial funding has a clear textual basis, and the public function test derives itself from the fact that an authority must be ‘public’ to be a ‘public authority’, it is tough to fathom where this third consideration draws its basis from. It would have been an altogether different scenario had the statutes or constitution established political parties, but they merely give recognition. Therefore, the latest order only complicates matters. The questions regarding the relation within these three elements and whether they are disjunctive or conjunctive are yet to be answered.

2. ‘STATE’ UNDER ARTICLE 12 VIS-À-VIS ‘PUBLIC AUTHORITY’

On a plain reading of Section 2, the first sub-heading prescribes that bodies established or authorized by or under the Constitution are ‘public authorities’. One might wonder then as to the exact scope for any ambiguity to arise as a result of which there might arise a need to interpret this Section. Indeed, it is a settled proposition of law that the definition of the term ‘public authority’ is wider than the scope of the term ‘state’ as defined in Article 12 of the Constitution. This definition is wide and covers even those organizations

⁵⁶ *MP Verghese v. Mahatma Gandhi University*, AIR 2007 Ker 230 (High Court of Kerala).

⁵⁷ *Bidar District Central Co-op bank Ltd. v. Karnataka Information Commission*, ILR 2008 KAR 3830 (High Court of Karnataka).

⁵⁸ *Subhash Chandra Agarwal v. Indian National Congress and Ors.*, File No. CIC/SM/C/2011/001386 (Central Information Commission).

⁵⁹ *Id.*, at ¶ 62.

that do not enjoy a constitutional monopoly.⁶⁰ This is further evidenced by the fact a lot of bodies that were declared to be ‘public authorities’ were in fact not adjudged to be ‘state’ under Article 12. Indeed, while the Board of Control for Cricket in India was held not to be state,⁶¹ the Indian Olympic Association, with similar facts and circumstances was adjudged to be a ‘public authority’ by the Delhi HC.⁶² Similarly, many schools and colleges have also been held to be covered under the Act,⁶³ because the school was performing a public function and received substantial grants-in-aid from the Government.⁶⁴

The interpretation of the first sub-part may, however, seem problematic when a specific contingency is considered. For example, an organization may be adjudged ‘state’ under Article 12 but is nonetheless unfit to be called a ‘public authority’ under Section 2(h)(d)(ii). Such a unique instance was provided by an order by the Delhi High Court earlier this year, which held that the private news television channel *Aaj Tak* was amenable to writ jurisdiction.⁶⁵ Further it awarded five lakh rupees to the petitioner, a rape victim, for violations of her right to privacy and confidentiality as the respondent news channel had revealed her name.⁶⁶

From the principles stated in the previous sub-part, it becomes clear that a private news channel would have never qualified as a ‘public authority’ under Section 2(h)(d). It has no constitutional or statutory status, it does not enjoy substantial grants-in-aid and it performs a function that is almost exclusively performed by private empires today. This possibility leads to many perplexing questions. Are all bodies that are amenable to writ jurisdiction ‘public authorities’ under Section 2(h)(a)? While the literal interpretation of the statute may point towards an obvious affirmative answer, the above case clearly displays an anomaly.

⁶⁰ *Supra* note 27.

⁶¹ *Zee Telefilms v. Union of India*, (2005) 4 SCC 694 (Supreme Court of India).

⁶² *Indian Olympic Association v. V Malik and Ors.*, (2010) ILR 4 Delhi 1 (High Court of Delhi).

⁶³ *Supra* note 56.

⁶⁴ *Id.*

⁶⁵ *ABC v. Police Commissioner*, W.P. (C.) No. 12730/2005 and C.M. Nos. 9505/2005, 13315/2005 & 12222/2007 (High Court of Delhi). For a justification of the rationale of the decision, see Vishnu S. Warrior, *Redefining the Definition of “State” under Article 12 of the Constitution*, 1(2) CONSTITUTIONAL AND ADMINISTRATIVE LAW QUARTERLY, 39-46 (2013) for a view that criticizes the judgment; see Prashant Reddy, *The Fourth Estate as the State? A Troubling Precedent by the Supreme Court*, (February 15, 2013), LAW AND OTHER THINGS, available at <http://lawandotherthings.blogspot.in/2013/02/the-fourth-estate-as-state-troubling.html>.

⁶⁶ *Id.*

When Section 2(h) is supposed to be wider than state under Article 12, how can a body under Article 12 not be a ‘public authority’ under Section 2(h)? Further, if it is a body, are private news agencies to have Central Public Information Officers? Lastly, does that affect their right to freedom of speech and expression?⁶⁷ Would an RTI application to reveal confidential sources of information be acceptable? The above discussion points towards the need to look at the RTI movement from different vantage points. One only realizes such tensions once the RTI Act is seen through a constitutional lens. Therefore, in omitting to mention the general relationship between Article 12 and Section 2(h)(d), the author misses out a key relationship in understanding the right to information. However, as we have seen in this section, understanding that one is broader than the other is not necessarily the dead-end to the road of inquiry.

B. AUTHOR’S CRITIQUE OF *NAMIT SHARMA* FLAWED IN PRINCIPLE

In the epilogue to the book, the author discusses the ramifications of the Supreme Court’s judgment in *Namit Sharma v. Union of India*,⁶⁸ in some detail. His stand on the judgment becomes clear by his characterization of the directives of the Supreme Court as a case of judicial activism,⁶⁹ and his apparent desire for a different outcome in the review petition that has been filed by the Union of India and at the time of writing, is pending before the Apex Court.⁷⁰

1. THE ANOMALY

Before giving a brief summary of the judgment, it is important to understand the textual anomaly that underlies this writ petition. Sections 12 and 15 of the Act deal with the composition of the Central and State Information Commissions respectively. Section 12(5) states that the CIC and ICs shall be persons of eminence in public life with wide knowledge and experience in certain stated fields, such as law, science and technology, social service, management, journalism, mass media or administration and governance.

⁶⁷ If a restriction has a direct impact on a corporation’s ability to send and receive information, the same is understood to be violative of the right to freedom of speech and expression. *See* generally *Bennett Coleman v. Union of India*, AIR 1973 SC 106 (Supreme Court of India); *Express Newspapers v. Union of India*, AIR 1958 SC 578 (Supreme Court of India); *Sakal Newspapers v. Union of India*, AIR 1962 SC 305 (Supreme Court of India).

⁶⁸ *Namit Sharma*, *supra* note 5.

⁶⁹ *Naib*, *supra* note 4, at 215.

⁷⁰ *Id.*, at 216, (“The Union Government has filed a review petition before the Supreme Court. It is hoped that the Union of India will argue the case better in review than it did in the original petition and the Court will address the issues arising out of the earlier judgment as pendency of cases remains a big problem”).

The imprecise nature of this provision is supplanted by the utterly puzzling language of Section 12(6), which disqualifies from the posts mentioned under Section 12(5) any MP, MLA, or holder of any other office of profit or person connected with any political party, or carrying on any business or pursuing any profession. From the text of Section 12(6), it appears that the disqualifications contained therein operate before the appointment is made. That being the case, they debar virtually everyone from holding the offices of CIC and ICs. Thereby, if the two provisions are read in succession, the latter defeats the former. The same language is reproduced in Section 15.

This contradiction was addressed by the Apex Court in the matter of *Namit Sharma v. Union of India*,⁷¹ a public interest litigation which challenged the constitutionality of the impugned provisions, on the principal grounds that the eligibility criteria for appointment to a quasi-judicial office under Sections 12(5) and 15(5) were extremely vague and inconsistent with the judicial bent of mind required to successfully perform an adjudicatory function.

However, the Court was inclined to favour the constitutionality of the statute, and thereby upheld the same.⁷² Yet, in a detailed order, it stated that appointment of legally qualified, judicially trained and experienced persons would ensure a more effective and just dispute resolution mechanism under the RTI Act. Consequently, the Court directed that Information Commissions were to operate in benches of two, with each Bench having a ‘judicial member’ with proficiency and experience in the law, appointed in consultation with the relevant Chief Justice, and an ‘expert member’ in consonance with the stated fields in Sections 12(5) and 15(5). The vires of Sections 12(6) and 15(6) were upheld by reading into the provisions that the said disqualifications would be operative only post-appointment, so that CICs and ICs would not concurrently hold any other office.

2. JUDICIAL ACTIVISM AND THE SEPARATION OF POWERS

The author has successfully pointed out the practical difficulties with the implementation of the impugned directives, *inter alia* pendency of appeals while such unique benches are constituted, and the same have been partially (albeit grudgingly) recognized by the Supreme Court *vide* its partial stay order dated 16th April 2013.⁷³

⁷¹ *Namit Sharma*, *supra* note 5.

⁷² Per Swatanter Kumar, J, *Namit Sharma*, *supra* note 5, at ¶ 58.

⁷³ *Union of India v. Namit Sharma*, 2013 (5) SCALE 736 (Supreme Court of India). In this review petition, the Court, through A. K. Patnaik and Arjan Kumar Sikri, JJ., stated that it was not inclined to stay the operation of the entire judgment in *Namit Sharma v. Union of India*. However, it directed that the operation of two prior orders *viz.* constitution of Information Commissions as special benches of two

Yet, it is argued here that his case for judicial activism is unconvincing at best. The primary flaw is that it is deduced on the strength of practical difficulties rather than in principle and suffers from a lack of analysis. Thereby, we purport to show that when analysed in principle, directives of the Apex Court are sound and will ensure a more meaningful implementation of the Act: a conclusion diametrically opposite to that reached by the author.

In order to support or oppose the case for judicial intervention in the issue at hand, it becomes imperative to delve into the very doctrine of separation of powers between the three organs of government⁷⁴. In its classical sense, the doctrine advocates a complete delineation of the respective functions of legislation, implementation and adjudication, which are not meant to overlap in any circumstance whatsoever. However, in contemporary times, this approach has attracted criticism for being dogmatic and practically unworkable, as no government can run on a strict separation of powers.⁷⁵ Therefore, it is not a case of impassable barriers and unalterable frontiers but of mutual restraint in the exercise of powers by the 3 organs of the State.⁷⁶ Hence, the doctrine may be more appropriately christened *division*, rather than the separation, of powers, and this leads to the irresistible conclusion that the lines of demarcation between the three organs and their functions have become more porous than ever.

However, the classical doctrine yet holds merit in the modern world. The underlying logic is that of polarity so that the centralization of authority is dispersed in order to avoid absolutism.⁷⁷ Some interaction is considered inevitable; yet, it is possible for the essential distinction between the three functions of legislation, policy-making and implementation,

with one judicial and one 'expert' member, and the appointment of the judicial members in consultation with the judiciary, would be stayed during the pendency of the review petition.

⁷⁴ This is so because any critique on judicial activism rests on a criticism that the judiciary is overstepping its boundaries in making binding regulations or entering into the making of a policy decision, which is the exclusive realm of the legislature and executive respectively. For a typical critique of judicial activism, See T. R. Andhyarujina, *Disturbing Trends in Judicial Activism*, THE HINDU (August 6, 2012) available at <http://www.thehindu.com/opinion/lead/disturbing-trends-in-judicial-activism/article3731471.ece>, where the author comments "Unless the parameters of PIL are strictly formulated by the Supreme Court and strictly observed, PIL which is so necessary in India, is in danger of becoming diffuse, unprincipled, encroaching into the functions of other branches of government and ineffective by its indiscriminate use." Also see generally S. P. Sathe, *JUDICIAL ACTIVISM: TRANSGRESSING BORDERS AND ENFORCING LIMITS* (2002).

⁷⁵ IP Massey, *ADMINISTRATIVE LAW*, (2008) at 43.

⁷⁶ Massey, *Id.*, at 45.

⁷⁷ *Id.*

and adjudication, to co-exist with the said interaction between the organs themselves. In particular, the freedom of information, demands that a distinction be maintained between the tasks of administration and that of adjudication. This ensures that neither cadre of personnel undertakes to perform the tasks that must, by their very nature, vest in the other.

3. ROLE OF INFORMATION COMMISSIONS

In order to put this statement in proper context, one question is of supreme importance: what is the true nature of the dispute resolution mechanism under the RTI Act? The essential query is whether decisions made by Information Commissions come closer to administrative decisions or judicial determination based on the rule of law. This determination requires a close scrutiny of the role of the Information Commissions.

It is essentially clear that an Information Commission is required to decide a *lis*, wherein information is required by one person and its furnishing is contested by the other.⁷⁸ In the course of such determination, matters of serious consequences are adjudicated upon. It may be a simple query for information but can have far reaching consequences upon the right of a third party or an individual with regard to whom such information is sought.⁷⁹ Therefore, the Commission may be called upon to resolve the tussle between the right to information under Article 19(1)(a) and the right to privacy under Article 21 or to determine whether the information sought falls under any of the exemptions enumerated in Section 8 of the Act.

The Information Commissioners are obliged under the Act to approach each matter seriously and with caution, and to take cognizance of the consequences of disclosure or secrecy upon the rights of others.⁸⁰ Since orders passed by the Commission may have civil as well as penal consequences, it is expected to act in consonance with the principles of natural justice as well as those applicable to service law jurisprudence.⁸¹ Such an approach clearly demands adjudication upon intricate issues of legal essence and effect, which in their turn must insist upon application of mind and the passing of reasoned orders.⁸² The Information

⁷⁸ Namit Sharma, *supra* note 5, at ¶ 59.

⁷⁹ *Id.*, at ¶ 72. Section 11 of the Act provides that when an Information Officer intends to disclose information that relates to or has been supplied by a third party intending to keep it confidential, such third party is statutorily entitled to written notice of such intention and shall be allowed to make a written or oral submission as to whether the information should be disclosed. The Information Officer is bound to take the submission into consideration while deciding about the disclosure of the information.

⁸⁰ *Id.*

⁸¹ Namit Sharma, *supra* note 5, at ¶ 76.

⁸² *Id.*, at ¶ 60.

Commissioners are therefore essentially required to adjudicate upon a *lis* in accordance with the law, and such a function cannot be termed as an administrative function *simpliciter*.⁸³ The exercise of the powers mentioned above and the decision-making process not only gives the color of judicial and/or quasi-judicial functioning to these authorities but also vests the Commissions with the essential trappings of a civil Court.⁸⁴

Moreover, the various provisions of this Act are clear indicators of the unquestionable proposition of law that the Commission is a judicial tribunal and not a ministerial tribunal. It is an important cog in and is part of the court attached system of the administration of justice, unlike a ministerial tribunal which is more influenced, controlled and performs functions akin to the machinery of administration.⁸⁵ This complex function of maintaining the precarious balance between conflicting interests in law may be performed more efficiently by a legally trained mind.⁸⁶ The legislative scheme of the Act clearly envisions the passing of a reasoned order.⁸⁷ Therefore, the conclusion that the functions performed by Information Commissions are based on the process of judicial determination is inevitable. Hence, providing Information Commissioners with judicial training and experience will go a long way in enhancing the success of the RTI in India.

4. VINDICATING NAMIT SHARMA

It is in this respect that it is argued that adjudication of a judicial nature ought to be left to those with the requisite training to discharge the same, and not sacrificed at the altar of administrative indifference as it is under the present regime. The directives made by the Supreme Court in *Namit Sharma* stand vindicated by a principled reasoning, though its practical implementation poses a genuine quandary for the authorities. One can hope that the same will be resolved, and a new cadre of judicially enlightened Information Commissions will pave the way for smoother and more consistent dispute resolution under the Act.

It may be argued that the above reasoning is inherently contradictory, as it places limits on administrative decision-making but condones disproportionate judicial activism, which some would, in light of the impugned Supreme Court directives, even term judicial legislation. Indeed, the author states in no uncertain terms that the Court has not only

⁸³ *Id.*, at ¶ 76.

⁸⁴ *Id.*

⁸⁵ *Id.*, at ¶ 85.

⁸⁶ *Id.*, at ¶ 98.

⁸⁷ *Id.*

breached the scope of the Act (which in his opinion, is limited to making information available to the public as conveniently as possible), but has also completely rewritten the provisions regarding eligibility criteria.⁸⁸ However, this is a rebuttable assertion.

What the author is essentially arguing is that the Court has usurped the legislative function. However, it is a settled principle of Indian constitutional jurisprudence that any law that permits arbitrary action violates Article 14 and is liable to be struck down upon judicial review.⁸⁹ The present RTI regime with its vague eligibility criteria has created a cadre of Information Commissioners with qualifications that do not equip them to satisfactorily discharge the essentially judicial nature of their duties. This creates the possibility of arbitrary decision-making, which would violate the right to equality, and fail the test of arbitrariness evolved under Article 14. As such, the current regime threatens to trespass the order of constitutionality into the wilderness of unconstitutionality.

This is a two-pronged argument. First, the right to know has been globally recognized as the lifeblood of participatory democracy, and as a fundamental right under Article 19(1)(a) of the Constitution in India. Thereby, the functions discharged by the Information Commissions have a tremendous impact upon the rights and obligations of the parties involved. An arbitrary order passed by a judicially ignorant Information Commission would be a gross violation of both the right to information and the protection from arbitrary action guaranteed by Article 14 of the Constitution.⁹⁰

Secondly, as has been deduced, the Information Commissions form part of an elaborate court system whose independence and impartiality itself forms part of one of the fundamental tenets of our constitution. Having administrative personnel at the helm of a judicial system constitutes a clear threat to its impartiality, as they would lack the training of persons of legal acumen, expertise and experience. Moreover, in the present scheme of things under the RTI Act, there is always the possibility of institutional bias,⁹¹ which threatens the efficient administration of justice. Thereby, the case for Information Commissioners with a judicial bent of mind is indeed a very strong one.

⁸⁸ Naib, *supra* note 4, at 214.

⁸⁹ E. P. Royappa v. State of Tamil Nadu, (1974) 4 SCC 3 (Supreme Court of India).

⁹⁰ Namit Sharma, *supra* note 5, at ¶ 100.

⁹¹ Under the status quo, information authorities at the levels of PIO and first appeal may be required to take action against their peers. Such a situation highlights the both the possibility of bias that would contravene the right of the applicant, and the clear need for impartiality and a judicial bent of mind in order to ensure a fair process.

Having stated the dangers qua constitutionality of the present regime, we would reiterate that the Supreme Court directives are completely justified and fall within the ambit of its powers. To ask the questions posed by Upendra Baxi:⁹²

*“Should Courts and Justices remain mute spectators when the executive does not implement its statutory and constitutional obligations, in response to an adequate showing to this effect by the social action litigation petitioners? Should they not feel constitutionally constrained to intervene in the face of stark governance failures? Are Justices and Courts usurping in any sense of that word the powers of other institutions of governance in issuing orders and directions to cease and abate from unlawful and unconstitutional administration on part of the executive?”*⁹³

IV. CONCLUSION

The above analysis shows that while the state of the RTI appears to be satisfactory in isolation, its interaction with constitutional law doctrines showcases principled tensions. One might argue that these doctrinal predicaments are nothing but examples of ‘an old wine in a new bottle’ and that they have persisted since time immemorial. However, given the unique nature of the RTI, the central place it has come to occupy and its expanding coverage, it would only be sensible to conclude that the RTI regime must find unique solutions to these age old quandaries. One solution might be to give large amounts of discretion to the Public Information Officers appointed under the Act. However, as our critique has shown, that too can be problematic.

It is hoped that every reader who comes across Naib’s work is compelled to think as deeply as these two readers were. All in all, this present work stands head and shoulders above the many commentaries and short introductions on the RTI that have flooded the market in the recent past. If the decisions given in the past few months are anything to go by, the RTI will garner even more attention in newspapers and across media in general. It is thus that if a citizen is to be made familiar with the fundamentals of the subject, he would do good to refer to this book.

⁹² Upendra Baxi, *The Myth and Reality of Indian Administrative Law*, in I. P. Massey, ADMINISTRATIVE LAW, XLVIII (2008).

⁹³ *Id.*, at XLIX.