

Opaque Political Funding: The Indian Experience on the Electoral Bond Scheme

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1. INTRODUCTION

‘Organizing free and fair election is more important than the result itself’- Fatos Nano

Political parties are integral part of the democratic process. They facilitate political participation, aggregation and articulation of interests, formulate policy proposals, express the will of the citizens through the electoral process, partake in free and fair election, organizes legislature and cater a variety of functions. To fulfill these functions and its operation, financial resources are indispensable. However, an unregulated funding of political parties and election can risk the very essence of democracy. Different modes of funding the democratic political process is a contested issue and regulatory provisions are not enough alone. Funds are necessary to reach out to the public and voters and to build a long-term political organization. However, it can also create a nexus between Political Party and the donors rather than the general citizens. Notably, play of ‘you scratch my back, I scratch yours,’ ‘quid pro quo’ and crony capitalism has been a feature in many democracies where the ruling dispensation facilitates the interest of those donors who have provided funds and resources during the election. Unregulated money in politics is often deemed to be disastrous and perilous for the very existence of democracy itself and unjust to the equal rights of ‘level playing field’ for political competition. ‘Freedom House’s Report’, ‘Democracy in Retreat’ (2019) emphasizes, ‘... a growing trend of attacks on key institutions-including electoral mechanism- which are undermining the foundations of democracy’ (Jones, 2019). In fact, abuse of state resources and opaque funding not only is detrimental to fair just democratic practices and values but could give rise to a hybrid aberration - a ‘dominant party system’ per say- those political organizations that have repetitively been successful electorally and their ouster from position seems unlikely (Suttner 2006, p.19).

Civil Society Organizations have significant roles of closely observing the behavior of Political Parties especially the role of money during election. In many democratic countries such CSOs have played a major role to secure the electoral rights of the citizens. In India, NGOs and CSOs like Associations for Democratic Reforms (ADR), Common Cause and others, have actively taken the issue to the Judiciary regarding the funding of Political Parties through ‘Electoral Bonds Scheme’ and challenging the amendments made by the ‘Finance Act 2017’. Underscoring the importance of funding of political parties and the need for having transparent mechanism for the same this paper therefore discusses (i) the major issues and concerns with party funding and EBS as brought before the Supreme Court, (ii) The historic decision of the court and lastly (iii) a brief discussion on the fall out of the scheme.

2. THE ELECTORAL BOND SCHEME (EBS)

Presenting the Union Budget 2017-2018, the then Finance Minister introduced the ‘Electoral Bond Scheme’ with the objective to ‘cleanse the system’ and ‘...the country

Abstract: *This article analyses the issue of Electoral Bond Scheme (EBS) which have been introduced with a series of amendments to the existing related laws and regulations, which was challenged in the Supreme Court. The scheme has been a major area of discussion at various formal and informal forums among politicians, academicians, civil society and legal experts regarding its benefit and defects in the electoral politics. The regulatory character of the state and trade regimes provides ample scope to the politicians and political parties for unethical negotiation; creating a nexus between them and business sectors which is detrimental for electoral democracy. In this backdrop, the paper discusses the different major issues relating ‘Electoral Bond Scheme’ and the Supreme Courts observations and the effects of such a scheme of ‘quid pro quo’ to the democratic electoral system and the need for a proper transparent and accountable system of party funding which protects the electoral right of the citizens and strengthens the electoral democracy in India. Finally, the author tries to estimate the historic verdict delivered in February, 2024.*

Keywords: Party Funding, Electoral Bond Scheme, Election, Political Parties, Supreme Court

has not been able to evolve a transparent method of funding political parties and which is vital to the system of free and fair elections.’ (Arun Jaitley, 2017)

The key features of the ‘Electoral Bond Scheme’:

- i.) Nature of the Bonds: Electoral Bonds are ‘bearer instruments’ akin to ‘promissory notes’ and are interest-free.
- ii.) Purchase Value: The bonds can be issued in denominations of 1,000, 10,000, 100,000, 1,00,000, and 1,00,00,000 and can only be bought from designated branches of the State Bank of India.
- iii.) KYC Compliance: Purchasers must fulfill all ‘Know Your Customer’ norms and make payments from a bank account. The bonds do not carry the name of the purchaser. They are valid for 15 days and can only be donated to political parties registered under “Section 29A of the Representation of the People Act, 1951”, which received at least one percent of the votes in the last general election to the House of People or Legislative Assembly.
- iv.) Purchase Period: The bonds are available for purchase in the ‘month of January, April, July, and October’ for ten days with an additional thirty days period in the year of general elections.
- v.) Encashment: Encashed only through designated bank accounts at authorized banks.

2.1. Rationale of the Government for Introducing the Electoral Bond Scheme

The Press Information Bureau (PIB) published an article written by the then Union Minister for Finance regarding the urgency for such a scheme. The stand of the government was to bring transparent funding mechanism.

In the article it stated:-

‘The conventional system of political funding is to rely on donations. These donations ... from political workers, sympathizers ... and even large industrialist. The traditional practice of funding political system was to take donations in cash and undertake these expenditures in cash. Sources are anonymous or pseudonymous... the present system ensures unclean money coming from unidentifiable source. It is a non-transparent system... The effort therefore, is to run down alternative system which is devised to cleanse the political funding mechanism.’

The article further stated ‘...It was hoped that the donors would increasingly start donating money by cheque. Some started to follow the practice but most of them were reluctant to disclose the details of the quantum of donation given to a political party. This was because they feared the consequences visiting them from political opponents... these reforms taken together resulted in only a small fraction of the donations coming in form of cheques.’

Further it stated :-

‘In order to make a serious effort to carry forward this reform... a scheme of electoral bonds was introduced to enable clean money and substantial transparency being brought into the system of political funding... the electoral bond scheme is substantial improvement in transparency over the present system of no-transparency.’ (PIB, GOI, 2018)

2.2. Finance Act (FA), 2017

The petitioner, ‘Association for Democratic Reforms vs. Union of India’ through the civil writ Petition No. 880 of 2017, ‘has set in motion proceedings under Article 32 of the Indian Constitution, challenging the

constitutional validity of EBS which was introduced as a money bill.’ The petitioner has also challenged certain provisions of the ‘Finance Act (FA), 2017’ and series of amendments related to it. The ‘Finance Act, 2017 section 137’ inserted a proviso to ‘section 29 C of RPA, 1951,’ making Political Parties immune from declaring their donations through electoral Bonds in ‘Contribution Reports.’ Prior, it was mandatory to disclose contribution ‘in excess of twenty thousand rupees’. Moreover, the ‘Finance Act, 2017’ section 11 amended section 13 A of ‘TT Act,’ made political parties immune from maintaining detailed record of funds through. Further, The ‘Finance Act, 2017,’ ‘section 135 amended section 31’ of the ‘RBI Act’ which allowed the central government to ‘authorize any scheduled bank to issue electoral bond(s)’. Lastly, ‘Finance Act, 2017,’ ‘section 154’ amended ‘section 182’ of the ‘Companies Act, 2013’ removed the previous donation capping of 7.5 percent (of three previous year’s net profit)

2.3. Objection by the ECI and RBI regarding EBS

‘When this bond Scheme was introduced, the Election Commission, as well as the Reserve Bank strongly objected to it’ (SC proceeding 31.10.2023). The Election Commission (ECI) alerted the government about amendments in the ‘Finance Act’ that could undermine transparency in political financing. The ECI specifically raised concerns over changes to ‘Section 182 of the Companies Act’, which could facilitate black money through shell companies by removing limits on corporate contributions. The ‘Reserve Bank of India’ (RBI) expressed concerns about a proposal to amend ‘Section 31’ of the ‘RBI Act’, which would allow authorized banks to issue bearer bonds for political donations which would diminish its authority, as bearer bonds are easily transferable and could obscure the actual donor’s identity, countering efforts for transparency and potentially violating the ‘Prevention of Money Laundering Act.’

3. MAJOR CONCERNS OF EBS

Some of the concerns regarding the EBS can be summarized as follows:

- (a) Lack of Disclosure: The EBS permits non-disclosure of electoral funding information, which is seen as unconstitutional and contrary to laws requiring transparency in political contributions, potentially leading to corruption and undermining voters’ rights to information.
- (b) Shareholder Rights: Corporate shareholders are unaware of the political contributions made by their companies, infringing on their rights.
- (c) Unequal Playing Field: The scheme creates disparities between well-funded political parties and those with fewer resources, compromising electoral democracy.
- (d) Impact on Free Elections: The absence of accountability in political funding threatens the integrity of free and fair elections.
- (e) Informed Voting: Voters need comprehensive information about political parties and candidates; non-disclosure undermines informed decision-making.
- (f) Discretionary Fund Use: Political parties can use contributed funds beyond election campaigns, raising concerns about misuse.
- (g) Quid Pro Quo Risks: Unlimited opaque funding can lead to quid pro quo arrangements, compromising public interest.

(h) Privacy vs. Transparency: The argument for donor privacy contradicts the principle of political equality and public interest in fair elections.

(i) Deterrent Deficiency: The scheme lacks sufficient safeguards to prevent abuse, failing to meet legal standards for electoral integrity.

(j) Shareholder Conscience: Non-disclosure violates shareholders' rights and freedoms, as they may oppose the ideologies of the parties funded by their companies.

(k) Marginalized Representation: The scheme adversely affects political parties representing weaker sections of society, violating equality principles.

(l) Entry Barriers for New Parties: Unlimited funding makes it difficult for new political parties to compete, stifling democratic competition.

Overall, the EBS raises significant concerns about transparency, accountability, and the integrity of India's electoral democracy.

The arguments in favor of the Electoral Bond Scheme (EBS) put forward by the Union of India through the Attorney General can be summarized as follows:

(a) Role of Political Parties: Political parties are crucial in community administration and have the right to receive financial support.

(b) Legitimate Contributions: The EBS allows individuals to contribute to political parties through legitimate banking channels, promoting transparency.

(c) Donor Privacy: The scheme ensures donor privacy, helping to facilitate contributions of clean money.

(d) Improvement over Previous Framework: The EBS is seen as an improvement over a cash-driven system that risked unaccounted money entering politics.

(e) Incentives for Clean Donations: By maintaining donor privacy, the EBS encourages individuals to donate clean money, reducing the likelihood of unreported cash donations.

(f) Regulated Framework: The EBS aims to transition from unregulated cash contributions to a legal and digital framework that curbs black money and corruption.

(g) Confidentiality Assured: Authorized banks are required to keep buyer information confidential, disclosing it only under legal directives.

(h) Shell Company Regulation: Amendments to the Companies Act aimed to curb the rise of shell companies by removing the previous cap on corporate contributions.

3.1. The Scope of Judicial Review

The 'Union of India' argued for 'judicial restraint' in matters of 'economic policy', referencing previous judgments that suggest courts should adopt a more lenient approach when reviewing economic legislation compared to cases involving fundamental rights. The court acknowledged this principle but emphasized that it must first analyze the true nature of the legislation before classifying it as an economic policy. In this context, while the amendment to 'Section 31 of the RBI Act' could be categorized as a financial matter due to the introduction of a new banking instrument, it also directly impacts the electoral process by allowing unlimited corporate funding and failing to ensure transparency in political financing. The court rejected the government's characterization of the EBS as merely an

economic policy, noting that the government itself initially framed it as an electoral reform.

3.2. The Issue of Presumption of Constitutionality

The court also addressed the notion of 'presumption of constitutionality,' stating that this principle does not apply when the electoral process is at stake. The petitioner cited the 'representation-reinforcement model of judicial review' by John H Ely (2002). The 'presumption of constitutionality' is grounded upon the principle that elected body must be trusted to make necessary decisions and that this very principle should not be applied when the rules amending the electoral process are themselves being challenged. Further if a prima facie case of infringement is established, the State bears substantial responsibility of rationalizing the legislation. The court also referred to the previous judgment of 'Dharam Dutt v. Union of India' where the court have refused the presumption of constitutionality when a prima facie case of infringement of fundamental right is confirmed the onus lies with the state to justify the violation. It recognized that, while the legislature has democratic legitimacy to enact laws, challenges to electoral legislation require the petitioner to establish a prima facie violation of constitutional rights, shifting the burden of proof to the state to defend the legislation's validity.

3.3. Disparity Between Expenditure Limit and Unlimited Funding

The discussion around election and political party financing highlights significant inconsistencies and challenges in the current legal framework. The Electoral Bond Scheme allows for unlimited political funding, yet existing laws, such as 'Section 77 of the Representation of the People Act' (RPA) and Rule 90 of the 'Conduct of Election Rules', set expenditure limits for individual candidates, ranging from rupees 28 to 40 lakhs for assembly candidates and Rupees 75 to 90 lakhs for parliamentary candidates, without similar restrictions on political parties.

While there are expenditure limits for candidates, the lack of regulation on political party spending can lead to disproportionate advantages for wealthier parties. Huge spending on political campaigns, advertisement, personal canvassing, utilization of television and social media platforms surely has substantial influence over the voters' behavior. These methods of campaign may not be much effective for an 'informed voter' as it decides his choice through his rational analysis. But an 'uninformed voter' does not have any knowledge about the policy stand of the candidate. Hence, the campaign plays a much persuasive and convincing role in conditioning his electoral behavior (Baron 1994). Apart from the traditional method of campaigning, political parties to have a 'lasting impression on the minds' of the 'uninformed voters' sponsors tournaments, festivals, celebrations, fairs, organizes competitions and give away cash prizes etc. Moreover, the financial dynamics of political campaigning often favor candidates who can self-finance, disadvantaging those from weaker socio-economic backgrounds and reducing opportunities for new or marginalized parties. Such financial barriers can compromise the inclusivity of the electoral process, forcing lesser-funded parties to form coalitions with wealthier allies, potentially diluting their core ideologies for political survival.

3.4. Scope of 'Article 19(1) (a)' and the Right to Information

'Article 19(1)(a) of' the 'Indian Constitution'

guarantees the right to information, which the Court has interpreted in two significant phases. Initially, the focus was on its role in promoting good governance, transparency, and accountability, as seen in cases like 'State of Uttar Pradesh V. Raj Narain' and 'SP Gupta v. Union of India.' In the second phase, the Court expanded this interpretation to emphasize the right to information as essential for public discourse and democratic engagement, enabling citizens to participate meaningfully in societal issues. This dual significance highlights the right to information as both a mechanism for accountability and a tool for empowering citizens in a vibrant democracy, ultimately fostering informed participation in governance.

3.5. Voters Right to Information

Referring the judgments in 'ADR' and 'PUCL' the courts established the following principles:

1. Right to Information: Voters' right to information, rooted in 'Article 19(1)(a),' must facilitate informed electoral participation.
2. Public Interest vs. Privacy: While disclosures may infringe on candidates' privacy, the public interest in informed voting takes precedence.
3. Essential Information: Voters are entitled to essential information for making informed choices, although there may be differences regarding what is deemed essential.

4. SUPREME COURTS FINAL VERDICT

The apex court after having heard the arguments put forward by the petitioners and the respondent and thoroughly examining the issues with past judgments and employing the proportionally standard the court declared:

- a. 'The Electoral Bond Scheme, the proviso to Section 29C(1) of the Representation of the People Act 1951 (as amended by Section 137 of Finance Act 2017), Section 182(3) of the Companies Act (as amended by Section 154 of the Finance Act 2017), and Section 13A(b) (as amended by Section 11 of Finance Act 2017) are violative of Article 19(1)(a) and unconstitutional; and'
- b. 'The deletion of the proviso to Section 182(1) of the Companies Act permitting unlimited corporate contributions to political parties is arbitrary and violative of Article 14.'

5. DISCUSSION ON THE FALL OUT OF THE ELECTORAL BOND SCHEME

Many firms facing investigation or scrutiny by regulatory agencies has purchased electoral bonds worth millions of rupees. Most of the funds went to the ruling parties especially BJP or the parties in power in the states. This leads to introspect and raises critical concerns regarding the potential for the Electoral Bond Scheme to facilitate quid pro quo arrangements. Preliminary analyses of publicly accessible data have highlighted several emerging patterns that warrant closer examination. These patterns raise legitimate questions about the interrelationships between bond purchases, political donations, and the actions of enforcement agencies, such as the Enforcement Directorate (ED). Data made available on the Election Commission of India website regarding the purchase of electoral bonds by corporations and their subsequent encashment by political parties provides substantial grounds for suspicion. Notably, there appears to be a correlation between the timing of these bond purchases and significant actions taken by the ED, as well as the awarding of government contracts. This situation raises

critical inquiries about whether donations made through electoral bonds may represent a form of quid pro quo from firms facing legal scrutiny.

5.1. Correlation between Donor and Receiver

The potential for quid pro quo arrangements in political funding cannot be dismissed; as such exchanges are a pervasive aspect of the political landscape. Corporations generally do not contribute to political campaigns out of altruistic intentions, such as fostering democracy or ideological congruency with the political party. Instead, the relationship between businesses and political entities is often characterized by a pragmatic pursuit of mutual interests. This dynamic has been a cornerstone of liberal thought, which acknowledges the symbiotic relationship between economic and political actors. Consequently, while these financial contributions are frequently portrayed as supportive of democratic engagement, they often function within a framework of reciprocal benefits, thereby raising critical concerns regarding accountability, transparency, and ethical governance in the political funding process.

The business firms that previously abstained from making donations due to regulatory requirements for disclosure are now actively participating in the EBS, which facilitates opaque and anonymous funding. This change in behavior may be attributed to their perception that the anonymity afforded by the EBS ensures that neither recipients nor the public will have knowledge of the donors' identities. As a result, these firms are able to utilize legal funds for political contributions without the transparency that might have influenced their decision-making under prior regulations. This dynamic raises important questions about the implications of anonymity in political funding and its potential to obscure accountability.

5.2. Anonymity as a Pivotal Justification

During the deliberations regarding the introduction of the EBS, anonymity was highlighted as a pivotal justification, enabling donors to contribute without the necessity of converting legal 'white money' into untraceable 'black money.' This perceived need for a mechanism that supports opaque and anonymous funding was considered essential for facilitating safe and efficient transactions within a legal framework. As a result, the EBS may have inadvertently institutionalized a form of quid pro quo, allowing for a more overt exchange between donors and political parties. Under the EBS, political parties are mandated to disclose only the aggregate amounts received, which can then be utilized through formal banking channels, ostensibly promoting a facade of transparency. The specific details of transactions conducted under the EBS were not designed to be disclosed publicly; rather, the scheme was intended to ensure complete anonymity for both donors and recipients. It was only through the Supreme Court's judgment, which declared the EBS unconstitutional, that these transactional details became accessible to the public. Absent this retrospective declaration, citizens would likely have remained uninformed about the operations within the scheme. Furthermore, the State Bank of India designated as the authorized public sector bank for issuing and encashing these bonds, played a pivotal role in this unexpected transparency by recording the alphanumeric codes associated with both purchasers and recipients. This record-keeping was not an inherent aspect of the scheme's design but emerged as an unintended consequence that facilitated some degree of oversight. Consequently, the

revelation of these details can be understood as an accidental occurrence rather than a deliberate feature of the EBS. This underscores the pressing need for enhancements in the regulatory framework governing political financing, aiming to foster greater accountability and transparency in such mechanisms.

5.3. The Dynamics of Business Sector and Government

In India, the dynamics of business operations **5.3. The Dynamics of Business Sector and Government**

In India, the dynamics of business operations are significantly shaped by government involvement. The business sector contends with high levels of taxation and a complex array of laws and regulations. Moreover, the government serves as a critical facilitator in key sectors such as electricity, infrastructure, and land etc. Many businesses rely on government schemes and subsidies for sustainability, which can create a situation where aligning corporate interests with governmental expectations becomes necessary. The EBS can be viewed as symptomatic of the challenges inherent in the Indian business environment. It is important to recognize that the responsibility for these dynamics cannot rest solely with corporations, as they operate within a framework heavily influenced by government actions as both facilitator and regulator. For substantial reform to take place there must be a concerted effort to diminish government intervention and reduce unnecessary regulatory burdens, thereby enabling businesses to function with greater autonomy and efficiency.

5.4. Mushrooming of Shell and Loss Making Companies

Research indicates that many firms making political donations in India were established after the introduction of the EBS and contributed significantly during the pandemic, despite reporting financial losses. The removal of prior restrictions on corporate donations, which included profitability criteria and caps, has altered the political funding landscape, enabling loss-making companies to donate without sufficient verification of their legitimacy. This raises concerns about the integrity and transparency of political financing, as profit-making companies may create loss-making subsidiaries to obscure their contributions. The emergence of donations from loss-making firms invites scrutiny over potential quid pro quo arrangements, as these contributions may reflect ulterior motives rather than genuine intent. An analysis of the Bharatiya Janata Party's financial statements reveals that 54% of its income from electoral bonds, surpassing that of other political parties. Following a Supreme Court directive for transparency, expectations arose that major corporate donors like the Ambanis, Adanis, Tatas, and Birlas, would be identified; however, their absence raises presumptive questions about potential use of shell companies or continued cash donations despite the Electoral Bond Scheme. The EBS aimed to reduce cash transactions and black money in political financing, but its transparency goals appear unfulfilled. There is also uncertainty about whether cash transactions have truly declined, as many remain unreported, particularly donations below 2,000. The anonymity inherent in the EBS complicates matters, highlighting the need for ongoing scrutiny of its effects on corporate political contributions and the electoral system. Rather than fostering genuine transparency; the EBS may inadvertently sustain a system that disproportionately benefits certain parties while marginalizing others, thereby compromising the fundamental tenets of democratic govern-

nance. Continuous scrutiny of both the implications of the EBS and the operational practices of investigative agencies is vital to ensure that the electoral process remains fair, equitable, and reflective of the democratic ideals it seeks to uphold.

6. CONCLUSION

Increasing role of money in politics and people's lack of trust and confidence in political parties have made imperative to make several reforms in many countries. Proper regulations on political party funding is decisive for strengthening and success of democracy, deterring possibilities of financial misuse and corruption but accentuating transparency and accountability (Martini 2012, 48). The Electoral Bond Scheme can be viewed as a commendable attempt of 'trial and error' to establish a structured system for political party funding, despite significant concerns regarding its design and implementation. The case not only provided an opportunity to discuss the issues and concerns of political funding but also provided an occasion for civil society and the judiciary to reaffirm the importance of citizens' fundamental rights, emphasizing the resilience of electoral democracy in India. Moreover, it allowed the judiciary to assert its constitutional authority, thereby enhancing public confidence in the legal system. Democracy does not operate in vacuum; it is conditioned by Social, Political, Historical and Economic and such other context. Hence, there is no mono solution that suits all. Any regulation regarding party funding to be successful must have highest degree of transparency and accountability with easy public access to information; inclusion of all stakeholders; robust disclosure mechanism; transparent and autonomous monitoring institutions; civil society institutions actively exercising their right to know and Media performing its role as one of the pillars of democracy. The EBS case has raised concerns regarding the credibility of legislators, investigative agencies and financial institutions. However, such constructive criticism presents an opportunity to address the shortcomings of these entities. India has made substantial progress, positioning itself as one of the world's most vibrant democracies. Elections in India are often celebrated as festivals; to fulfill this ideal, the electoral process should foster justice, fairness, level playing field and engagement among all citizens. Despite the apex court declaring the EBS unconstitutional and nullifying it, a lingering presumption persists: is the status of the funds accumulated through the now-defunct EBS scheme still legally valid? If so, are we ready to open a Pandora's Box?

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