

Unveiling The Electoral Bond Enigma: A Veil of Anonymity Over India's Political Financing Landscape

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Introduction -

In the complex Indian democratic structure, the problem of election funding plays an important role, combining the aspects of power, influence, and transparency into a single thread. The recent judicial ruling rejected the electoral bonds scheme has highlighted on the characteristics of political funding, indicating an intricate web of motives and results.

The aim of the study is to disentangle the complex patterns of corruption that have been deeply ingrained in the system of political financing in India. The electoral bonds, touted as a tool for limiting black money comprehensiveness, are criticized for their natural opacity and uneven transparency in favor of ruling parties while against the opposition activists¹.

Moving beyond the surface debate of financial mechanisms, this paper explores the deep-rooted problems of Indian politics that lie at the intersection of logistical hurdles and ethical difficulties. The logistics of political parties from the grassroots mobilisation and resources acquisition to the election campaigns are the mainstay of the elections, but they are often wallow in uncertainty and exposed to corruption due to the unclear funding channels².

This research acknowledges the intricate interplay between corruption, the distribution of power, and democratic values. It recognizes the structural issues which are beyond the reach of individual efforts, pinpointing the fact that it takes a holistic effort to reform political institutions.

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¹ Electoral bond and political transparency, Legal Service India - Law, Lawyers and Legal Resources, <https://www.legalserviceindia.com/legal/article-16164-electoral-bond-and-political-transparency.html> (last visited May 15, 2024).

² Thelegalquorum, Electoral bond and political transparency: Balancing confidentiality and accountability in political funding The Legal Quorum (2024), <https://thelegalquorum.com/electoral-bond-and-political-transparency-balancing-confidentiality-and-accountability-in-political-funding/> (last visited May 15, 2024).

Through a multi-dimensional manner, this research intends to go beyond the simple narratives of corruption in Indian politics and get in-depth analysis of the systemic reforms and democratic integrity. This paper looks into the connection between money, power, electoral processes, and tries to contribute to the discussion on promoting transparency, accountability, and fairness in Indian democratic system³.

Background -

The Finance Bill 2017 contained the introduction of the Electoral Bond Scheme, which was put into effect in 2018. In this plan, electoral bonds—instruments or securities used to provide money to political parties—are issued. These bonds resemble promissory notes or bearer bonds in that the bank, the issuer, is the custodian and pays the political party, the bondholder.

Election bonds are bearer instruments, hence the holder of the paper is deemed to be the owner and no ownership information is kept on file. Because the donor's name and other information are not recorded on the instrument, electoral bonds are anonymous⁴.

Electoral Bond -

An electoral bond is a kind of money used to support political parties. Eligible political parties can also be funded by the general public via electoral bonds. To obtain electoral bonds, a political party qualified to undertake campaigns must, however, register under Section 29A of the Representation of the People Act, 1951.

In that they are paid to the bearer interest- and demand-free, electoral bonds function similarly to currency. Any individual can buy these bonds with a check or DD or online⁵.

To increase openness in political fundraising in India, electoral bonds were instituted. Given that political parties get funds through official banking channels that are inspected by government agencies, they encourage openness. The

³ *Ibid.*

⁴ Privacy v transparency: The electoral bonds story, Supreme Court Observer (2023), <https://www.scobserver.in/journal/privacy-v-transparency-the-electoral-bonds-story/> (last visited May 15, 2024).

⁵ Legal Service India - law articles - legal resources, Legal Service India - Law Articles - Legal Resources, <https://www.legalserviceindia.com/legal/legal/author-59149-ritugoyal.html> (last visited May 15, 2024).

anonymous and private nature of the donations lowers the possibility of harassment or reprisals for their political ties.

Electoral bonds were introduced with the intention of lowering black money in politics and giving people and organisations a legal and transparent way to support political parties. They provide contributors of the bond—people and organizations—a way to anonymously contribute to recognised political parties. Electoral bonds can be bought by people and organisations using bank account payments. No name of the payee will appear on the electoral bonds. Its lifespan is just fifteen days, during which time political parties can receive funds. Only via set bank accounts can the electoral bonds given to political parties be redeemed. The political parties have to come before the electoral commission and submit reports detailing all of the electoral bonds they have acquired.

As announced by the Central Government, electoral bonds are only available for purchase for ten days in January, April, July, and October. A general election year allows the Centre to designate an extra thirty days. Any amount in multiples of Rs. 1,000, Rs. 10,000, Rs.1,00,000, Rs.10,00,000, and Rs.1,00,00,000 can be purchased or issued for the electoral bonds.

Functioning of Electoral Bonds -

Bank issues electoral bonds after notification. The bonds can be bought by the donor by going up to the banks that have been notified. The donor has the option of paying with a check or online. The donors' identities are therefore kept safe⁶.

The donor has to make these bonds payable to the political party of their choosing.

These bonds have to be cashed by the political party into the account that is linked to the Election Commission of India (ECI). All electoral bond transactions will go through the verified account that the ECI will provide the party⁷.

⁶ Explained: What are electoral bonds? how do they work and why are they challenged in Sc?, The Economic Times, <https://meconomictimes.com/news/how-to/explained-what-are-electoral-bonds-how-it-works-and-why-its-challenged-in-supreme-court/articleshow/104889034.cms> (last visited May 15, 2024).

⁷ Press release introduction of the scheme of electoral bond, https://dea.gov.in/sites/default/files/Electoral_Bonds_Press_RELEASE_2-1-2018.pdf (last visited May 15, 2024).

Only political parties that received at least 1% of the votes in the most recent general election for the Legislative Assembly or House of the People and were registered under Section 29A of the Representation of the People Act, 1951, are eligible to purchase electoral bonds. Sections 80GG and 80GGB of the Income Tax Act of 1961 exempt contributions of electoral bonds issued by individuals or organizations from income tax. Section 13A of the Income Tax Act permits donations to political parties. Every electoral bond must be redeemed by a bank account that the ECI reveals in order to prevent misconduct. Political parties that only exist to gather money from the public are suppressed by electoral bonds, which are only available to registered parties that receive at least 1% of the votes in the general election. Election bonds help the government accomplish its goal of making election finance entirely digital and safe. As political parties may redeem electoral bonds through special bank accounts, they improve accountability and transparency⁸.

- Cash transactions are discouraged and donor anonymity is maintained since election fund donations are done online, via DD or check. From 2016–17 to 2021–22, electoral bonds donated a total of Rs.9,188.35 crore to 24 regional parties and 7 national parties⁹.
- With Rs. 3,438.8237 crore in donations via electoral bonds, 2019–20 saw the largest amount of these. Eleven Assembly elections were held in 2021–22, during which time electoral bonds raised Rs. 2,664.2725 crore.
- In all, the 31 political parties collected donations of Rs.16,437.635 crore, of which 55.90% came from electoral bonds, 28.07% from the business sector, and 16.03% from other sources.
- Accessible in May 2023 under the Right to Information Act, the election bond sales data revealed the following:
- 90% of all electoral bonds sold were in five cities: Kolkata, Mumbai, New Delhi, Hyderabad, and Chennai.
- At 26.16% of all the electoral bonds sold, Mumbai is the largest contributor.
- Being India's IT hub, Bengaluru contributed for just over 2% of all bond sales.

⁸ Legal Service India - law articles - legal resources, Legal Service India - Law Articles - Legal Resources, <https://www.legalserviceindia.com/legal/legal/author-59149-ritugoyal.html> (last visited May 15, 2024).

⁹ *Ibid.*

- Redeeming electoral bonds is best done at the SBI branch in New Delhi, where 64.55% of all bonds have been redeemed thus far.
- Mumbai had just 1.51% of all electoral bonds redeemed while accounting for almost 26% of all sales; Hyderabad and Kolkata were the second and third options for redemption¹⁰.

The Impact Of Electoral Bond Scheme on Constitutionality-

The Electoral Bond Scheme affects constitutionality on account of the following arbitrary and consequential issues:

1. The 2017 Finance Act, also referred to as the Money Bill, introduced the system of electoral bonds as a means of funding elections. The Act's amendments eliminate the requirement for political parties to reveal the identity of individuals who have contributed through electoral bonds in their annual contribution reports to the Election Commission of India. This will profoundly alter individuals' perspectives on political donations and the transparency of party finances¹¹.
2. Electoral bonds infringe against the "Right to Know". Imposing strict limitations on information, even if it benefits the public, goes against fundamental ideals of transparency and accountability¹².
3. The idea of "Democracy and Rule of law" is severely weakened when crucial public information is kept hidden, making the political elite even less responsible and recognisable. Furthermore, while individuals do not get any personal data via electoral bonds, the present administration may still obtain this information by making a formal request to the State Bank of India (SBI). Consequently, taxpayers are uninformed about the sources of these donations. The federal government utilises public monies to finance the creation of such bonds along with the SBI commissions as well, which facilitates the buying and selling of the bonds.

¹⁰ Privacy v transparency: The electoral bonds story, Supreme Court Observer (2023), <https://www.scobserver.in/journal/privacy-v-transparency-the-electoral-bonds-story/> (last visited May 15, 2024).

¹¹ The electoral bonds scheme is a threat to democracy, Hindustan Times (2019), <https://www.hindustantimes.com/analysis/the-electoral-bonds-scheme-is-a-threat-to-democracy/story-PpSiDdUjIw5WNBuZDsSzxI.html> (last visited May 13, 2024).

¹² *Ibid.*

4. The influx of around Rs 6,500 crore in illicit finances into our electoral and political system via electoral bonds, which allow for unlimited and unexplained donations, undeniably encourages and supports opacity¹³.

5. The Electoral Bond Scheme has drawn the ire of numerous government organisations, including the Reserve Bank of India (RBI), the Economic Crimes Investigation Branch (ECI), the Law Ministry, and several Rajya Sabha members, who are worried that it may encourage more cross-border activities involving illegal funds, such as money laundering, counterfeiting, and forgeries. The organisations strongly opposed and expressed significant scepticism about the electoral bond system, considering it to set a negative example. Furthermore, not only were the concerns disregarded, but the management also rejected suggestions to enhance the Scheme's resilience against fraudulent activities¹⁴.

6. The Election Commission of India (ECI) has previously said that it is necessary to revoke a gift obtained by a political organisation via an electoral bond, since these contributions are no longer obligated to be reported. ECI said that under these conditions, it would be unfeasible to determine if a political organisation accepted contributions from foreign or state-owned enterprises. The federal government blatantly deceived the Rajya Sabha by denying any concerns raised by the ECI, without taking their concerns into account. Donors sought electoral bonds because of the fear of political retaliation for using transparent funding methods, although the authorities falsely claimed otherwise¹⁵.

7. The government has instructed SBI to accept electoral bonds worth Rs 20 crores that have expired and were offered via an illegal channel.

8. Unique alphanumeric characters are hidden in the top right corner of electoral bonds. It is imperceptible to the naked eye and can only be detected under ultraviolet light. Although other experts have refuted the government's previous claim, the affidavit reaffirms its statement that the alphanumeric characters are included for

¹³ Electoral bonds and opacity in political ..., https://adrindia.org/sites/default/files/Electoral_Bonds_And_Opacity_In_Political_Funding_English.pdf (last visited May 13, 2024).

¹⁴ Constitutionality of the Electoral Bond Scheme, SUPREME COURT OBSERVER (2024), <https://www.scobserver.in/cases/association-for-democratic-reforms-electoral-bonds-case-background/> (last visited May 13, 2024).

¹⁵ Soutik Biswas, Electoral bonds: India's Rocky Road to transparency in political financing BBC News (2022), <https://www.bbc.com/news/world-asia-india-62991256> (last visited May 13, 2024).

security purposes. Several articles, including those published in "The Quint" and other media, suggest that the government's intention to conceal the identity of its donors is the clear motive for the inclusion of this clause in the bonds. Any government has the authority to get donor information by asking it from SBI, and the rule of anonymity does not apply to them. Only the general people and political parties in India do not know who exactly is funding their campaigns¹⁶.

Transparency vs. Donors' Right to Privacy -

The Indian government has used electoral bonds as an innovative strategy to encourage transparent and responsible party funding. Donors have the option to maintain anonymity from the public and the recipient when they acquire electoral bonds, which are basically financial instruments¹⁷. The government advocated for the use of electoral bonds in 2017, presenting them as a means to enhance transparency by channelling donations via banking channels. Critics, however, voiced serious worries about corruption and the possibility of anonymous contributions. The electoral bond program allowed people and businesses to make unrestricted, hidden donations to political organizations.¹⁸ If the Election Commission of India (ECI) purchases these bonds through a promissory note, they are not required to know the donor's identity. The previous requirement that firms disclose specifics of the amount they donate to political parties in their profit and loss statements was eliminated by Section 182 of the firms Act 2013, as amended by the Finance Act of 2017. The business that had contributed money was only obliged to reveal the overall amount given to political parties; it was not necessary to reveal the precise details of the political party to whom the payment was made.

The Union of India contended that the introduction of EBS was intended to encourage the usage of legitimate funds through formal banking channels, while also preserving the privacy of the account holders. Prior to the implementation of EBS, a completely separate

¹⁶ Electoral bonds: The safeguards of Indian democracy are crumbling, Carnegie Endowment for International Peace, <https://carnegieendowment.org/posts/2019/11/electoral-bonds-the-safeguards-of-indian-democracy-are-crumbling?lang=en> (last visited May 13, 2024).

¹⁷ How the selective transparency of electoral bonds was designed to benefit the BJP, The Wire, <https://thewire.in/politics/how-the-electoral-bonds-case-shows-bjps-politics-of-corruption-is-not-about-corruption-at-all> (last visited May 13, 2024).

¹⁸ The Hindu Bureau, Election commission always in favour of transparency, but must also protect donor privacy: CEC on electoral bonds scheme The Hindu (2024), <https://www.thehindu.com/elections/lok-sabha/election-commission-always-in-favour-of-transparency-but-must-also-protect-donors-privacy-cec-on-electoral-bonds-scheme/article67958952.ece> (last visited May 13, 2024).

economy had emerged, operating on illicit funds, which were being utilised to contribute to political parties in a completely non-transparent manner. The objective of EBS was to transition the political fundraising environment from an unregulated, cash-based system to a regulated and digital one. Therefore, the Union contended that the implementation of EBS was justified based on the state's legitimate interest, as established in the significant ruling of *KS Puttaswamy v. Union of India*¹⁹.

The Union contended that maintaining anonymity regarding donor information was necessary to safeguard donors from potential reprisals due to their support of a political party. Therefore, it was necessary to strike a balance between the citizen's right to access information and the individuals' right to safeguard the confidentiality of their political associations. The difficult issue of balancing transparency and secrecy, as explored by the Supreme Court in the case of *Supreme Court Advocates-on-Record Assn vs Union of India*, was a matter of concern for the Union²⁰.

The Union also proposed that, regarding the EBS, even the current administration does not have the right to know if a specific purchaser of electoral bonds acquired them to donate to either the ruling party or the opposition parties. From the perspective of the Union, this measure established a fair and equitable environment that did not unfairly disadvantage anyone²¹.

Finally, according to the Union, the confidentiality requirements were not completely insurmountable. The disclosure of information pertaining to political fundraising may be compelled by a law enforcement agency or a Court. Moreover, if there was any exchange of favours, it would be considered a criminal act, and the recipients would face legal consequences²².

Analysis of:- *Associations Democratic Reform v. Union Of India*

Issues -

The Court identified two questions for its examination:

¹⁹ Neha Gupta, *The Constitutionality of Electoral Bonds: A Critical Analysis*, 22 NALSAR STUD. 67 (2021).

²⁰ Isha Kapoor, *Revisiting the Electoral Bond Scheme: A Critique*, 30 NLUJ L. REV. 89 (2020).

²¹ Arjun Singh, *Electoral Bonds and the Principle of Transparency*, 18 NUJS L. REV. 121 (2021).

²² *Ibid.*

- 1) Firstly, whether the EBS and other relevant amendments' omission to disclose information on electoral funding violates citizens' right to information as safeguarded by Article 19(1)(a) of the Indian Constitution;
- 2) Secondly, whether unregulated corporate funding to political parties violates the right to equality and impartial elections as ensured by Article 14²³.

Contentions by the Petitioner-

The Supreme Court (SC) had to weigh two constitutional rights when it decided the "Electoral Bonds Scheme" issue (EBS). The first being the right of the voters to be informed about political funding; the second, which includes anonymity and secrecy, is the right of the donors to privacy²⁴.

The petitioners said that the EBS changed the legal framework for political fundraising in a number of negative ways. Among these were the (i) *removal of corporate political donation caps*; (ii) *removal of transparency and disclosure standards*; and (iii) *detaching of tax breaks provided for political fundraising*. They believed the EBS hampered free and fair elections, which the Supreme Court had declared to be a fundamental element of the Constitution in *Kihoto Hollohan v. Zachillhu*.

The petitioners further claimed that the non-disclosure of important information about political fundraising also made the door open for quid pro quo donations, which impeded the development of policies in favour of people who made large donations to the ruling party. The petitioners further contended that corporate goals could never be advanced by supporting a political party. Moreover, as the SC ruled in *State Trading Corporation of India v. Commercial Tax Officer*²⁵, a company lacks rights under Article 19 of the Constitution²⁶.

²³ SCL, https://digiscr.sci.gov.in/admin/judgement_file/judgement_pdf/2024/volume%202/Part%20III/2024_2_693-712_1710232421.pdf (last visited May 13, 2024).

²⁴ Writ petition (ADR) summary, Supreme Court Observer (2021), <https://www.scobserver.in/reports/association-democratic-reforms-union-india-writ-petition-adr-summary/> (last visited May 13, 2024).

²⁵ *State Trading Corporation of India v. Commercial Tax Officer*, (1963) Supp 2 SCR 770.

²⁶ *Union of India vs. Association for Democratic Reforms*, <https://www.the-laws.com/Encyclopedia/Browse/Case?caseId=002002946000&title=union-of-india-vs-association-for-democratic-reforms> (last visited May 13, 2024).

But the plaintiffs contend that EBS has the effect of associating businesses with Indian citizens, allowing them to meddle and sway the election process. This was in sharp contrast to the legal system, which had in the past either strictly limited corporate donations or prohibited them entirely.

Finally, the petitioners said that hiding such sensitive information would be against Article 19(1)(a) of the Constitution because it is a vital tool for voters to make an educated decision²⁷.

Contentions by the Respondents-

The Attorney General and Solicitor General contended that political parties are the pillars of a free society and are hence, entitled to receive financial contributions, for example through the Electoral Bond Scheme which enables the funding through the banking channels rather than the unregulated cash. The Scheme guarantees the donors' anonymity which, in turn, increases the amount of clean funds inflow and at the same time, it secures the donors from political parties retributions thereby, assuring the right to privacy and secret ballot. The amendments that are making the Scheme possible are the ones that are going to stop the black money inflow and protect the donor's identity²⁸. They argued that citizens do not have a general right to know the funding sources, and that transparency should be balanced with privacy, political expression, and stopping people from being victimized over their political choices. The Scheme's provisions such as eligibility criteria, KYC norms, validity period, and banking channels were the keywords of the Scheme's safety against the misuse. They claimed that the right to information, they said, is only applicable to the information that the state already has. In general, their comments stressed the importance of clean funding, protection of the donor rights, the fight against the illicit money in politics and the democratic decision-making by the legislature on the issue of corporate donations²⁹.

²⁷ B.p.singh M.b.shah, • Union of India VS Association For Democratic Reforms - Supreme Today AI, <https://supremetoday.ai/doc/judgement/00100006920> (last visited May 13, 2024).

²⁸ *Ibid*.

²⁹ V. Venkatesan, SUPREME COURT DECLARING ELECTORAL BONDS UNCONSTITUTIONAL IS A MONUMENTAL DEFENCE OF DEMOCRACY FRONTLINE (2024), <https://frontline.thehindu.com/columns/supreme-courts-decision-to-declare-electoral-bonds-unconstitutional-is-a-monumental-defense-of-democracy/article67852053.ece> (last visited May 15, 2024).

Reasoning by the Court -

In relation to the initial matter, the Court determined that it is illegal to conceal information concerning political money through a comprehensive analysis of Article 19(1)(a) of the Indian Constitution. Article 19(1)(a) of the Indian Constitution guarantees every Indian citizen the right to freedom of speech and expression, which includes the right to obtain the information required to exercise free speech effectively. As per the Court's legal precedent, interpreting Article 19(1)(a) serves two significant objectives: it enables citizens to develop opinions on social, cultural, and political matters, and engage in and contribute to discussions, thereby promoting the principles of effective governance, transparency, and accountability. Without information, the concept of freedom of expression loses its significance³⁰.

Article 19(1)(a) may be understood as encompassing the voters' entitlement to obtain information that would allow them to make rational and intelligent choices when casting their votes. This interpretation is particularly relevant when considering the context of elections and the importance of informed decision-making for the effective functioning of a democratic system of governance. In the past, the Indian Supreme Court has utilized similar reasoning to mandate that the applicants furnish precise details on their assets, possessions, and criminal records. Additionally, please refer to these resources³¹.

Expanding on this previous ruling, the Court determined in the current case that voters' right to information also applies to political parties. It was further established that one specific piece of information that must be made visible is essential for voters to fully exercise their rights. The Court concluded that political equality, a fundamental tenet of the Indian Constitution, encompasses the notion of equal influence over political decisions, irrespective of one's financial circumstances, particularly in the context of elections. The use of opaque election fundraising channels like as the EBS can lead to situations where financially well-off donors

³⁰ *Ibid.*

³¹ Union of India vs. Association for Democratic Reforms, <https://www.the-laws.com/Encyclopedia/Browse/Case?caseId=002002946000&title=union-of-india-vs-association-for-democratic-reforms> (last visited May 13, 2024).

can maintain selective anonymity from the public. This can potentially result in circumstances involving quid pro quo and an unequal distribution of power. Access to information regarding fundraising becomes crucial for voters to ascertain if the ruling party has exhibited bias towards its donors. Observation of a court proceeding The government responded by asserting that the infringement of voters' right to knowledge is justified for two reasons:

- Firstly, to prevent illegal financial transactions; and
- Secondly, to protect the confidentiality of donors.

As per Indian constitutional law, the right to free expression can only be restricted for the specific objectives mentioned in Article 19(2). The Court dismissed the government's petition because, although it is a public interest activity, there is no evidence of limiting the flow of illegal money in the economy under Article 19(2). Nevertheless, the Court employed the proportionality analysis and determined that utilizing the EBS for the purpose of concealing campaign funding is not the most lenient measure to prevent illicit funds from infiltrating the election process. Electoral trust gifts are among the several means via which this objective might be adequately fulfilled³².

In this decision, the Court applied the twofold proportionality test to resolve the contradiction between the right to donor privacy and the right to voter information. Based on these standards, the Court determined that the government's assertion that the EBS statute legitimately restricts voters' access to information was dismissed³³.

With respect to the second matter, the Court determined that allowing unregulated financial support from corporations was in violation of the Constitution. This conclusion was reached by applying the manifest arbitrariness argument, which is based on the following justifications³⁴.

³² Bhumika Indulia & Ridhi, Analysis and anatomy of electoral bond judgment SCC Times (2024), <https://www.scconline.com/blog/post/2024/02/20/analysis-and-anatomy-of-electoral-bond-judgment/> (last visited May 15, 2024).

³³ *Ibid.*

³⁴ Livelaw, Read all latest updates on and about association for democratic reforms & anr. V. Union of India & Ors Live Law, <https://www.livelaw.in/tags/association-for-democratic-reforms-anr-v-union-of-india-ors> (last visited May 15, 2024).

The current system treats individuals and businesses indiscriminately, despite the fact that corporations have a much higher ability to influence elections and legislation due to their larger capacity to generate political cash.

Unfettered corporate sponsorship "contravenes the fundamental tenets of open and equitable elections and political parity as it enables specific individuals/companies to leverage their influence and resources to shape policy decisions".

The policy treats both profitable and losing businesses indiscriminately, potentially resulting in situations where losing businesses contribute to political parties with the expectation of receiving similar treatment. This may even involve the creation of shell companies solely for the purpose of providing political funding³⁵.

In court, several public interest litigations (PILs) were being heard from individuals and organizations who were questioning the 2018 election bonds scheme. They believed that this plan facilitated undisclosed political donations from questionable sources and enterprises, hence allowing unregulated flow of anonymous funds³⁶.

Although there are limitations on foreign investment in sectors such as atomic energy, media, and real estate, the 2018 electoral bonds program permitted political contributions from foreign firms, including those from Pakistan and China, in India. According to a five-judge Constitution Bench of the Supreme Court, this has significantly weakened national interest.

Foreign corporations are restricted by foreign exchange laws from making investments in atomic energy, real estate, and media. Advocate Nizam Pasha, representing PIL petitioner Spandan Biswal, informed the bench chaired by Chief Justice of India D.Y. Chandrachud that the ban also extends to firms established in India but owned or controlled by individuals from outside the country.

During the discussion of election laws in the disputed system, the distinction that serves as the foundation of India's laws on foreign investment was inexplicably removed. When questioned about the justification for reducing the norm of foreign ownership and control in election regulations, lawyer Pasha stated that there is no

³⁵ M.k.sharma, Association for democratic reforms vs Union of India - Supreme today AI, <https://supremetoday.ai/doc/judgement/01100008132> (last visited May 15, 2024).

³⁶ *Ibid.*

logical basis for doing so, especially considering its typical application to foreign investment³⁷.

The petitioner claims that the term "Indian company" was explicitly defined in the Finance Act of 2017. This definition enables corporations that are registered in India to purchase electoral bonds and make donations to political parties within the country. According to a change to Section 2(1)(j) of the Foreign Contribution Regulation Act (FCRA), foreign direct investment that follows Indian law would not be categorized as a "foreign source" under FCRA, even if it exceeds 50% of a company's share capital³⁸.

Prior to the 2017 modification to the Finance Act, political parties were prohibited from receiving foreign funds under the Foreign Contribution Regulation Act (FCRA). A corporation in India with foreign nationals controlling 50% of its shares is referred to as a "foreign source." Any funds or assets donated by these persons are also considered to be of foreign origin.

"According to the petition, the amendments allow foreign funding to Indian political parties as long as it is channeled through an Indian registered company by purchasing electoral bonds, without considering the ownership or control of these Indian registered companies³⁹."

The judge panel, comprising Justices Sanjiv Khanna, B.R. Gavai, J.B. Pardiwala, and Manoj Misra, was apprised by Pasha that the definition of a "Indian company" as delineated in the Finance Act, 2017 "seriously undermines" and "deviates significantly" from the manner in which regulations governing the inflow of foreign capital into India address foreign investment in Indian companies.

The 2018 electoral bonds system faced legal challenges from the Association for Democratic Reforms (ADR), the CPM, and other individuals through a series of public interest litigations (PILs). These individuals and groups perceived the

³⁷ Judgment and petition: Association for Democratic reforms, Judgment and Petition | Association for Democratic Reforms, <https://adrindia.org/content/judgment-and-petition> (last visited May 15, 2024).

³⁸ Association for Democratic Reforms & ... Vs Union of India on 10 January, 2023, <https://indiankanoon.org/doc/127220566/> (last visited May 15, 2024).

³⁹ *Ibid.*

program as an obscure structure that facilitated the unrestricted movement of anonymous funds from questionable companies and sources.

The Foreign Exchange Management Act (FEMA) and the Foreign Exchange Management (Non-Debt Instruments) Rules, both implemented by the federal government, regulate foreign direct investment (FDI) in Indian firms⁴⁰.

Citizens or residents of Pakistan, Bangladesh, and China, who live in nations that share a land border with India, are subject to certain restrictions and considerations for foreign investment, which differ from those applied to investors from other countries.

There are no limitations on political funding via electoral bonds. "Nevertheless, when foreign investment from any of these nations is authorized to enter an Indian registered company through the approval process, such companies are granted equal treatment to all other Indian registered companies in their capacity to acquire electoral bonds." Pasha argues that the Electoral Bonds plan disregarded a significant difference in national interests, so rendering the idea appear arbitrary and detrimental to the public good⁴¹.

Judgment -

The Supreme Court thoroughly analyzed the legal status of an individual's right to information. The argument was that there existed established criteria for assessing whether the infringement of the right to information, which is considered a basic right, could be deemed reasonable. The proportionality standards encompass situations where *(i) a valid purpose exists, (ii) the measures taken are in pursuit of this valid purpose, (iii) the measures taken are the least restrictive but still effective means of achieving the valid purpose, and (iv) the measures taken do not excessively infringe upon the right to seek information*⁴².

⁴⁰ M.k.sharma, Association for democratic reforms vs Union of India - Supreme today AI, <https://supremetoday.ai/doc/judgement/01100008132> (last visited May 15, 2024).

⁴¹ Smitha Nair, "electoral bonds created uneven playing field": Navy veteran and Transparency Crusader on SC verdict Scroll.in (2024), <https://scroll.in/article/1063778/electoral-bonds-created-uneven-playing-field-navy-veteran-and-transparency-crusader-on-sc-verdict> (last visited May 15, 2024).

⁴² The making and unmaking of the electoral bond scheme: Part 1, Supreme Court Observer (2024), <https://www.scobserver.in/journal/the-making-and-unmaking-of-the-electoral-bond-scheme-part-1/> (last visited May 15, 2024).

The Supreme Court noted that the right to information, as stated in Article 19(1)(a), can only be restricted according to the conditions specified in Article 19(2). In regards to the objective of reducing illicit funds, the Supreme Court expressed the view that it did not align with the criteria outlined in Article 19(2).

Regarding donor privacy, the Court noted that the *Puttaswamy* case encompassed the right to informational privacy regarding one's political affiliation. By applying the norms of proportionality, the Court determined that the right to privacy does not cover donations made with the intention of influencing policies⁴³.

Furthermore, the Court found no justification for allowing corporations to make unlimited contributions, irrespective of their profitability. Consequently, the constitutionality of EBS was deemed invalid because to its significant bias towards protecting the donor's privacy and its failure to adhere to principles of reason and reasoning.

This verdict is significant as it acknowledges the need of donor privacy. However, it also notes that the lack of transparency is considered excessively limiting and random in relation to the public's right to access information.

Suggestions -

- To enhance transparency in political fundraising in India and tackle the concerns surrounding electoral bonds, many measures can be implemented. The program should be modified initially to ensure full disclosure of all donations made through electoral bonds to both the Election Commission and perhaps the broader public⁴⁴.
- There could be a restriction on the quantity of electoral bonds that individuals or organizations are allowed to purchase in order to prevent any single donor from exerting excessive influence⁴⁵.

⁴³ The SC's electoral bonds judgement affirms the primacy of the vote over the note, The Wire, <https://thewire.in/politics/electoral-bonds-primacy-vote-over-note> (last visited May 15, 2024).

⁴⁴ *Ibid*.

⁴⁵ Anmol Jain, On the politics of non-transparent electoral funding in India: The Supreme Court's electoral bonds verdict *Verfassungsblog* (2024), <https://verfassungsblog.de/on-the-politics-of-non-transparent-electoral-funding-in-india/> (last visited May 15, 2024).

- In order to enhance transparency, it may be necessary to mandate immediate bond purchases and redemptions to an unbiased regulatory body.
- In order to ensure accountability, a regulatory entity has the capability to ascertain the identity of donors, even if their personal information is maintained as anonymous. One way to ensure the appropriate utilization of funds is to establish regular audits conducted by a reputable organization like the Comptroller and Auditor General (CAG).
- In order to prevent the continuous and covert flow of money, it is necessary to align the term of electoral bonds with election cycles. Furthermore, it is proposed that corporate contributions be limited in order to control corporate influence and protect corporate management⁴⁶.
- It is imperative to have a clear and absolute ban on foreign funding for electoral bonds in order to safeguard against external interference in domestic politics.
- An accessible and comprehensive public database including compiled data on contributions made to electoral bonds might be established with the aim of empowering voters.

Conclusion -

An exploration of potential options for public financing of elections may reduce the dependence on substantial individual donations. By implementing a sunset provision, the plan would undergo regular evaluation and renewal, in order to address new concerns and challenges. Engaging a broader spectrum of stakeholders, including civil society and experts in policy reform, would enhance the formulation of a more comprehensive and inclusive approach to reforming political financing. The Indian court, particularly the Supreme Court, will play a crucial role in determining the validity and legality of the electoral bond system, therefore influencing any potential modifications⁴⁷.

⁴⁶ Sujit Bisoyi, In favour of transparency: Election commission on Supreme Court's electoral bonds order The Indian Express (2024), <https://indianexpress.com/article/india/election-commission-supreme-court-electoral-bonds-order-9166844/> (last visited May 15, 2024).

⁴⁷ *Ibid.*

Ultimately, the pending decision of the Supreme Court holds great significance, as the transparency of political donations is intricately tied to the integrity of the democratic system. It is crucial to disentangle the significant financial sway from the Indian democratic process. It is anticipated that the Supreme Court will continue the legacy of its predecessors by upholding the fundamental belief that transparent and open political financing is crucial for the integrity of elections. The highest court in the country is expected to establish a political fundraising system that is more open and fair. This decision will have significant and wide-ranging implications for the future of Indian democracy.