

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 3 | Issue 4

2020

© 2020 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com>)

This Article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in International Journal of Law Management & Humanities after due review.

In case of **any suggestion or complaint**, please contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication at **International Journal of Law Management & Humanities**, kindly email your Manuscript at editor.ijlmh@gmail.com.

Opacity, Democracy and Political Funding -An Overview of the Indian Electoral Bond System

OM D'COSTA¹

ABSTRACT

One of the most effective ways of maintaining the health of a democracy in the long run is to ensure the participation of its people in the functioning of the political system. At any given time, with the legislative system helmed by an all- powerful political party, and the executive, influenced by the will of such party more often than is ignorable as an aberrance- it is information that enables citizens and civil society organizations to keep a check on the functioning of the powers that be, and information which serves as the plank of their challenges to questionable policy decisions and legislative provisions. Thus, information serves as an equalizer, levelling the playing field between the legislature and the executive on one side, and individuals on the other. Political funding has always been a contentious issue in democratic states, for political parties are highly reluctant in disclosing the amounts and sources of the contributions they receive- presumable because of the Pandora's box of complications that might arise from such disclosures. Prior to certain changes introduced by the Electoral Bond Scheme, there existed adequately comprehensive disclosure norms, which kept a check on almost every stage in the process of making contributions to political parties, and the receipt of these contributions by the latter. The Scheme and related amendments, in contrast, reduce the rigour of the earlier system, and introduce a marked level of opacity in the political funding system. To bring back transparency in the system, essential for the citizens being informed about how political parties are utilizing the thousands of crores they obtain from unknown sources, it is necessary to incorporate changes such as mandatory reporting and audits of political funding and expenditure on a periodical basis, and the disclosure of these reports to the general public.

I. INTRODUCTION

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which we must live.² Free and fair elections are an indispensable part of a democratic system, and a necessary concomitant of this is an informed citizenry, aware

¹ Author is a student of V.M. Salgaocar College of Law, Goa, India.

² *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) [Black J.].

about the workings of political parties.

Given that political parties influence the exercise of political power, transparency in their organization, functions and, more particularly, their means of funding is a democratic imperative, and, therefore, is in public interest.³

Democratic elections and democratic governance involve a mixture of high ideals and, all too often, dubious or even sordid practices. Election campaigns, political party organizations, and pressure groups all cost money. The financing of political life is a necessity—and a problem,⁴ and over the years, money has come to be accepted as an indispensable part of politics.

On one hand, money benefits politics as it supplies assets for advertising and other forms of political solicitation that increases the candidate's exposure to the public, inter alia via hoardings, posters, handbills and brochures, and also provides the means for quick and speedy communications and movements and sophisticated campaign techniques.⁵

The availability of large funds ordinarily tends to increase the number of votes a candidate will receive. If, therefore, one political party or individual has larger resources available to it than another individual or political party, the former would certainly have an advantage over the latter in the electoral process.⁶

On the other, politics is believed to benefit money by providing donors easier access to political parties, and by making parties more amenable to their wishes when framing and making policies.

Even if contributions are not motivated by an expected return in political favours, the legislator cannot overlook the effects of his decisions on the sources of campaign funds.⁷

For these reasons, the intersection between money and politics has been a site of contention and controversy in every democratic state,⁸ and transparency regarding the sources of political funding has increasingly become the rallying cry of the society at large.

The Electoral Bond Scheme of 2018 introduced a new mode for making contributions to

³ Anumeha v. Chief Commissioner of Income Tax XI, New Delhi, CIC/AT/A/2007/01029 (2008) (Central Information Commission, India).

⁴ Michael Pinto Duchinsky, *Financing Politics: A Global View*, 13 JOURNAL OF DEMOCRACY, no. 4, (2002), 69, 69.

⁵ Gupta v. Chawla, (1975) 2 S.C.R. 259, 267 (India).

⁶ *Id.*

⁷ *Statutory Regulation of Political Campaign Funds*, 66 HARV. L. REV., no. 7, (1953), 1259, 1260; cited by Law Commission of India, *Report No 255: Electoral Reforms* (2015) <http://lawcommissionofindia.nic.in/reports/Report255.pdf> [last accessed Apr. 27, 2020] (“255th Report”).

⁸ ANTHONY BUTLER, INTRODUCTION: MONEY AND POLITICS, 1,1 in, *PAYING FOR POLITICS: PARTY FUNDING AND POLITICAL CHANGE IN SOUTH AFRICA AND THE GLOBAL SOUTH* (Anthony Butler ed., Jacana Media and the Konrad Adenauer Foundation, 2010).

political parties- electoral bonds, which are bearer instruments, akin to a promissory note, purchased by one entity in the favour of a specified political party, of a sum of money intended to be donated to the latter as a voluntary contribution.

Disclosure is at the heart of public supervision of political finance,⁹ and this article shall analyse how and why the opacity of the electoral bond system is antithetical to the core tenets of democracy, a part of the basic structure of the Indian Constitution.¹⁰

II. LEGAL PROVISIONS PRIOR TO INTRODUCTION OF ELECTORAL BONDS

The laws relating to companies, elections and political parties, and income tax¹¹ contained interlinked provisions which, when read in conjunction, provided for a transparent and controlled system of contributions to political parties.

In a financial year, all companies could contribute any amount directly or indirectly to political parties,¹² subject to the upper limit of an amount equivalent to seven and a half per cent of its average net profits during the three immediately preceding financial years.¹³ Companies of which more than half of the nominal value of its share capital was held by foreigners were classified as foreign sources, and could not contribute to political parties.¹⁴

Every company had to disclose in its profit and loss account any amount/s contributed by it to any political party during the financial year to which that account related, giving particulars of the total amount contributed and the name of the party to which such amount has been contributed.¹⁵

Political parties receiving such contributions had to prepare in each financial year a report in respect of contributions in excess of twenty thousand rupees received from any person or company,¹⁶ which had to be submitted to the Election Commission before the due date for furnishing income tax returns of that financial year.¹⁷

For income tax purposes, political parties had to keep and maintain a record of contributions in excess of twenty thousand rupees, and the name and address of the person/ company who

⁹ 255th Report, ¶ 2.28.7.

¹⁰ T.N. Seshan v. Union of India, (1995) 4 S.C.C. 611, 618.

¹¹ Respectively, The Companies Act, 2013, Act 18 of 2013, (Aug. 29, 2013) [Gazette of India (Extraordinary), pt. II sec. 1] (“*Companies Act*”); The Representation of the People Act, 1951, Act 43 of 1951, [July 17, 1951] (“*RP Act*”) [India]; The Income-tax Act, 1961, Act 43 of 1961, [Sept. 13, 1961] (“*IT 1961*”) [India].

¹² In existence for at least three financial years, other than government companies-*Companies Act*, sec. 182 sub sec. (1).

¹³ *Id.*, first proviso.

¹⁴ *RP Act*, sec. 29B, read with the Foreign Contributions Regulation Act 2010, sec. 2 sub sec. (1), cl. (j).

¹⁵ *Companies Act*, sec. 182 sub sec. (3).

¹⁶ *RP Act*, sec. 29C sub sec. (1).

¹⁷ *Id.*, sec. 29C sub sec. (3).

made such a contribution.¹⁸

These provisions clearly indicated the legislative scheme to ensure that there was transparency in the process of fund-collecting and incurring expenditure by the political parties.¹⁹

III. CHANGES INTRODUCED TO ACCOMMODATE ELECTORAL BONDS

The Finance Acts of 2016 and 2017, inter alia, effected numerous changes to establish the foundation for the subsequent electoral bond scheme.

There is no longer any prohibition on contribution from foreign sources, which can contribute as long as the foreign investment is in compliance with the provisions of the Foreign Exchange Management Act, 1991.²⁰ The upper ceiling on donations by companies to political parties has been removed, such that there is no limit on voluntary contributions.²¹

The requirement of disclosing each and every contribution to political parties in the profit and loss account of a company, along with the particulars thereof, has also been scrapped, and a mere declaration of the total amount donated as political contributions in a financial year is needed.²²

Political parties receiving donations in excess of twenty thousand rupees from any person or company by way of an electoral bond do not need to include a record of such donations neither in the report of donations received to be submitted to the Election Commission,²³ nor for income tax purposes.²⁴

These changes paved the way for the introduction of the Electoral Bond Scheme in 2018.²⁵ An electoral bond is a bond issued in the nature of promissory note and is a bearer banking instrument. It does not contain the name of the buyer or payee.²⁶

The Government controlled State Bank of India is the sole institution authorized to issue and encash electoral bonds.²⁷ The bond must be encashed by the political party only through a bank

¹⁸ *IT 1961*, sec. 13A, proviso (b).

¹⁹ *Common Cause v. Union of India*, [1996] 3 S.C.R. 1208, 1214 (“*Common Cause - IT*”).

²⁰ The Finance Act, 2016, Act 28 of 2016, [May 14, 2016] (India), sec. 236- inserts proviso to sec. 2 sub sec. (1), cl. (j), The Foreign Contributions Regulation Act, Act 42 of 2010, [Sept. 26, 2010] (India).

²¹ The Finance Act, 2017, Act 7 of 2017, [Mar. 31, 2017] (India), sec. 154 cl. (i)- omits first proviso of sec. 182 sub sec. (1), *Companies Act*.

²² The Finance Act, 2017, Act 7 of 2017, [Mar. 31, 2017] (India), sec. 154 cl. (ii)- replaces sec. 182 sub sec. (3), *Companies Act*.

²³ *Id.*, sec. 137- adds proviso to sec. 29C sub sec. (1), *RP Act*.

²⁴ *Id.*, sec. 11 sub sec. (I), cl. (i)- amends sec. 13A, proviso (b), *IT 1961*.

²⁵ The Electoral Bond Scheme, 2018, Gazette of India (Extraordinary), pt. II sec. 3 subsec. (ii) (Jan. 2, 2018) [Notification No. S.O. 29(E)] [Notification under sec. 31 sub sec. (3) of the Reserve Bank of India Act, 1934, Act 2 of 1934, (Mar. 6, 1934)] (“*EB Scheme*”).

²⁶ *EB Scheme*, sec. 2 cl. (a).

²⁷ *Id.*, sec. 2 cl. (b).

account with the State Bank.²⁸

The bond is valid for a period of fifteen days from the date of issue, and no payment can be made to any payee political party if the bond is deposited after the expiry of the validity period.²⁹

IV. AN ANTI-TRANSPARENCY MEASURE

The Electoral Bond Scheme was devised by the Central Government with the avowed object of ‘cleansing up the political funding system’ and bringing about ‘substantial transparency’ into it.³⁰ However, the changes brought about actually dilute the existing provisions regarding the transparency of contributions to political parties.

Furthermore, details about the entity buying the bond as well as the beneficiary political party are not available to the public, except when the bank has to disclose such information when demanded by a competent court or upon registration of criminal case by any law enforcement agency.³¹

It is for all these reasons that the Electoral Bond Scheme has been strongly criticized by important institutions in the political funding system it is a part of, such as the Election Commission and the Reserve Bank of India.

The Election Commission is of the opinion that these amendments will have serious repercussions on the transparency aspect of the funding of political parties.³²

The removal of the statutory cap on contributions by companies opens up the possibility of shell companies being set up for the sole purpose of making donations to political parties, with no other business of consequence having disburseable profits, and the removal of the requirement to disclose contributions in the profit and loss statements of companies compromises transparency.³³

Due to the non-requirement of accounting for donations via electoral bonds in the Contribution Reports submitted by political parties to the Election Commission, it cannot be determined whether the political party has taken any donation in violation of provisions under Section 29B of the RP Act, which prohibits political parties from taking donations from Government

²⁸ *Id.*, sec. 3 cl. (4).

²⁹ *EB Scheme*, sec. 6 cl. (1).

³⁰ Arun Jaitley, *Why Electoral Bonds are Necessary*, PRESS INFORMATION BUREAU (2018) <https://pib.gov.in/newsite/PrintRelease.aspx?relid=175452> (last accessed Apr. 27, 2020).

³¹ *EB Scheme*, sec. 7 cl. (4).

³² *Association for Democratic Reforms v. Union of India*, Writ Petition (Civil) No 333 of 2015, ¶ 5 (“*ADR Case*”).

³³ *Id.*, ¶ 7.

Companies and Foreign sources.

Permitting contributions from foreign sources will allow unchecked foreign funding of political parties in India, which could lead to Indian policies being influenced by foreign companies.³⁴

The Reserve Bank of India opposed the introduction of electoral bonds stating that it would set a bad precedent by encouraging money laundering and undermining faith in Indian banknotes, and would erode core principles of central banking legislation. It warned that there was an ‘inherent scope of misuse of such bonds for undesirable activities’ and that globally there were ‘hardly any precedents in recent times for issuance of bearer bonds.’³⁵

Prior to the changes of the Finance Acts of 2016 and 2017 dealing with electoral bonds, there existed a near comprehensive system of disclosing contributions to political parties, with attempts made to document details at every stage of the contribution- at the stage of donation, of money received by political parties, and at the stage of filing income tax returns.

The problem, thus, is not one limited to the device of electoral bonds as a mode of political funding, but the numerous amendments in related laws that cover electoral bond donations with a veil of secrecy, hidden from the public.

V. MISUSE OF ELECTORAL BOND SCHEME

From the time the system has been introduced, the provisions of the Scheme have been violated twice by the Central Government and its functionaries. The transgressions pertain to the duration of sale of electoral bonds, and the occasions when the sale of such bonds is permitted.

Electoral bonds are permitted to be issued and purchased in a period of 10 days each in the months of January, April, July and October, and in the year when elections to the Lok Sabha are held, an additional 30-day period may be notified.³⁶

Firstly, the government authorized the sale of bonds for a period of 45 days in the months of March, April and May, in light of the General Elections. However, the permissible period was 40 days- 10 days in April, and the special period of 30 days. The excess period of 5 days was dropped after the Supreme Court directed the Government to comply with the limits set by the EB Scheme.³⁷

³⁴ ADR Case, Writ Petition (Civil) No 333 of 2015, ¶ 8.

³⁵ Letter by Dept. of Currency Management, Reserve Bank of India to Ministry of Finance, dated Jan. 30 2017; Letter by Reserve Bank of India to Ministry of Finance, Aug. 2017, cited by Nitin Sethi, *Electoral Bonds: Seeking Secretive Funds, Modi Govt Overruled RBI*, HUFFPOST INDIA (last updated Nov. 27, 2019) https://www.huffingtonpost.in/entry/rbi-warned-electoral-bonds-arun-jaitley-black-money-modi-government_in_5dcbde68e4b0d43931ccd200.

³⁶ EB Scheme, sec. 8 cl. (1), cl. (2).

³⁷ ADR Case, Writ Petition (Civil) No 333 of 2015, ¶ 15.

Secondly, electoral bonds cannot be issued and purchased at any time other than the aforementioned situations. The Central Government sought for the issuance of electoral bonds in May 2018, a month in which such issuance is impermissible under the EB Scheme. However, the Finance ministry permitted, as an ‘exception’, the issuance of bonds in the month of May, contrary to the provisions of the EB Scheme.³⁸

What was initially a one-off illegal breach of regulations in May 2018 came to be institutionalised by the government as practice by the end of the year, as yet again, the Finance Ministry permitted the issuance and sale of bonds in the Month of November, contrary to the EB Scheme.³⁹

VI. TRANSPARENCY IN POLITICAL FUNDING IS IMPERATIVE

Democracy does not consist merely in people exercising their franchise once in five years to choose their rulers and, once the vote is cast, then retiring in passivity and not taking any interest in the government. It has a more positive content and its orchestration has to be continuous and pervasive.⁴⁰

This means, inter alia, that people should not only cast intelligent and rational votes but should also exercise sound judgment on the conduct of the government and the merits of public policies; so that democracy does not remain merely a sporadic exercise in voting but becomes a continuous process of government-an attitude and habit of mind.⁴¹

The availability of proper and relevant information about political parties and their candidates fosters and promotes the freedom of speech and expression both from the point of view of imparting and receiving the information, which in turn leads to the preservation of the integrity of the electoral process, essential for the growth of democracy.⁴²

Over the years, the Supreme Court of India has advocated and established numerous cornerstones of a transparent political funding system, such as recognizing the fundamental right of citizens to know the criminal antecedents, assets and liabilities, and educational qualifications of candidates contesting elections;⁴³ and that the requirement of maintaining

³⁸ Letter by Dept. of Economic Affairs, Ministry of Finance, to the Finance Minister, dated Apr. 11, 2018, cited by Nitin Sethi, *Modi PMO Ordered Illegal Electoral Bond Sale Before Vital State Polls*, HUFFPOST INDIA (last updated Nov. 20, 2019) https://www.huffingtonpost.in/entry/electoral-bonds-modi-illegal-sale-state-elections_in_5dce6b7ee4b01f982effa205 [“Sethi”].

³⁹ Letter by Department of Economic Affairs, Ministry of Finance, to the Finance Minister, dated Oct. 22, 2018, cited by Sethi, *supra* note 37.

⁴⁰ S.P. Gupta v. Union of India, (1982) 2 S.C.R. 365, ¶ 65 (“*SP Gupta*”).

⁴¹ *Id.*

⁴² People’s Union for Civil Liberties v. Union of India, (2003) 2 S.C.R. 1136, ¶ 94 (P.V. Reddi J.) [“*PUCL*”].

⁴³ Union of India v. Association for Democratic Reforms, (2002) 3 S.C.R. 294, 314-315.

audited accounts by political parties is mandatory to claim exemptions from income tax.⁴⁴

On this basis, it can be said that there is a legal framework and basis for extending the requirement of disclosure of information to political parties, specifically regarding the sources and extent of their income, and the expenses undertaken therewith.

This extension is well recognized in the context of the fundamental right to information about the State and its policies, integral to the freedom of speech and expression guaranteed by the Constitution.⁴⁵

The people have a right to know every public act, namely everything that is done in a public way by their public functionaries, and to cover with the veil of secrecy common routine business is not in the interest of the public.⁴⁶ The public interest in freedom of discussion stems from the requirement that members of a democratic society should be sufficiently informed that they may influence intelligently the decisions which may affect themselves.⁴⁷

The judgement of the apex court in the *First Judges Case*⁴⁸ contains a remarkable exposition of these principles:

Where a society has chosen to accept democracy as its credal faith, it is elementary that the citizens ought to know what their government is doing. The citizens have a right to decide by whom and by what rules they shall be governed and they are entitled to call on those who govern on their behalf to account for their conduct. No democratic government can survive without accountability, and the basic postulate of accountability is that the people should have information about the functioning of the government. It is only if people know how the government is functioning that they can fulfil the role which democracy assigns to them, and make democracy a really effective participatory democracy.

The Central Information Commission of India has recognized that political parties of India registered under the RP Act are public authorities falling within the purview of the Right to Information Act, 2005,⁴⁹ inter alia, as they are substantially financed by the Government, which allots to them land at highly concessional rates and provides them income tax

⁴⁴ Common Cause v. Union of India, [1996] 3 S.C.R. 1208, 1214.

⁴⁵ India Const., art. 19 cl. (1) sub cl. (a).

⁴⁶ State of Uttar Pradesh v. Narain, (1975) 3 S.C.R. 333, 360.

⁴⁷ A-G v. Times Newspapers Ltd, [1974] A.C. 273, [1973] 3 All E.R. 54, 81 (Lord Simon).

⁴⁸ S.P. Gupta v. Union of India, (1982) 2 S.C.R. 365, ¶ 64.

⁴⁹ Agarwal v. Indian National Congress, CIC/SM/C/2011/001386 (2013) ¶¶ 76, 84, 86, (Central Information Commission, India).

exemptions,⁵⁰ and are continuously engaged in performing public duties.⁵¹

In summation, there is well established in India a need to make available to the public information about the particulars of the candidates of political parties; and about all the public transactions and activities of the Government and its functionaries.

The common thread between these two is political parties- it is a political party that decides which candidates get tickets, and the members of these parties end up constituting the Government, whether as a part of the ruling party or the opposition.

Further, there are a number of situations where the actions of elected representatives are indistinguishable from their actions as members of the political parties they belong to, and this nexus between a political party and the Government is reflected in legal provisions as well.

One instance of this is found in the 10th Schedule to the Indian Constitution, which provides for the disqualification of a lawmaker on the ground of voting contrary to any direction issued by the political party to which he belongs, without prior permission to do so.⁵²

In such a case, the lawmaker, in his capacity as the member of the Government, may have an opinion on the subject matter of the vote, but cannot vote to give effect to this opinion if it runs contrary to the opinion of the political party he belongs to. When he eventually votes in line with the party whip, he votes as both a government functionary and a party member.

On the basis of the abovementioned points, a strong argument may successfully be made towards extending the general requirements of full disclosure and transparency to political parties as well, particularly with regards to the sources of their funding. It is of paramount importance to know the various entities and areas that have contributed to a political party, and this will add another necessary layer of scrutiny in the analysis of policy and legislative decisions of the Government, and the actions of elected representatives.

VII. NEED OF THE HOUR- REFORMS IN POLITICAL FUNDING

Between the financial years 2004-05 and 2018-19, the National political parties have collected around Rs 11,234 crores from unknown sources, that is from contributions below Rs 20,000, and through electoral bonds.⁵³

After the introduction of the EB Scheme, electoral bonds have become the preferred vehicle

⁵⁰ *Id.*, ¶¶ 65, 70.

⁵¹ *Id.*, ¶ 77.

⁵² India Const., sch. 10, ¶ 2 cl. (1), sub cl. (b).

⁵³ Association for Democratic Reforms, *Analysis of Sources of Funding of National Parties of India, FY 2018-19* (2019) <https://adrindia.org/content/analysis-sources-funding-national-parties-india-fy-2017-18-0> [last accessed Apr. 27, 2020] (“2018-19 Report”).

for anonymous contributions to political parties, and this is reflected in the tremendous share it holds in the total income obtained by political parties from unknown sources.

In 2017-18, 53% of the total income, nearly Rs 689 crores, came from unknown sources, of which Rs 215 crores was obtained via electoral bonds.⁵⁴

In 2018-19, 67% of the total income of parties, approximately Rs 2512 Crores, came from unknown sources, of which a whopping 78%, or Rs 1960 Crores, was donated through electoral bonds.⁵⁵

If the call for ‘purity of elections’ is not to be reduced to a lip service or a slogan,⁵⁶ full and complete information regarding the contributions received by political parties, through electoral bonds or otherwise, must be placed in the public domain. To improve the transparency of the political funding system, important institutional bodies like the Election Commission and Law Commission of India, as well as non-governmental organizations, have suggested a number of measures and recommendations.

A. SHAREHOLDER APPROVAL, CAPPED CORPORATE CONTRIBUTIONS

Under the current scheme, the authorisation of corporate contribution is through a resolution passed at the meeting of the Board of Directors.⁵⁷ This allows a small group of people to decide how to use the funds of a company for political purposes, instead of involving the vast numbers of shareholders, who are the actual owners.⁵⁸

It should be amended to empower a larger group of people, including the shareholders, in deciding how to use the funds of a company for political purposes.⁵⁹ One way to implement this would be to require the resolution to be passed at the Annual General Meeting of the company, rather than merely by the Board of Directors.⁶⁰

Further, the cap on corporate and foreign contributions removed by the Finance Acts of 2016 and 2017 should be reintroduced, so as to diminish the possibility of unchecked donations from corporations and foreign entities influencing key policy decisions.

⁵⁴ Association for Democratic Reforms, *Analysis of Sources of Funding of National Parties of India, FY 2017-18* (2019) <https://adrindia.org/content/analysis-sources-funding-national-parties-india-fy-2017-18-0> [last accessed Apr. 27, 2020] (“2017-18 Report”).

⁵⁵ 2018-19 Report, *supra* note 52.

⁵⁶ C. Narayanaswamy v. C.K. Jaffar Sharief, (1994) Supp 2 S.C.R. 463, 473 (India).

⁵⁷ *Companies Act*, sec. 182 sub sec. (1).

⁵⁸ 255th Report, ¶ 2.27.13.

⁵⁹ *Id.*, ¶ 2.28.6.

⁶⁰ Samya Chatterjee and Niranjana Sahoo, *Corporate Funding of Elections: Strengths and Flaws*, OBSERVER RESEARCH FOUNDATION (2014) <https://www.orfonline.org/research/corporate-funding-of-elections-the-strengths-and-flaws/> (last accessed Apr. 27, 2020).

B. MANDATORY DISCLOSURE OF CONTRIBUTIONS RECEIVED

Entities donating to political parties have circumvented the requirement of disclosing donations above Rs 20,000 by donating multiple amounts marginally lesser than this limit, such as Rs 19,999. Setting any limit to exempt disclosure would be arbitrary, as it allows political parties/donors to game the system, and results in reporting amounts just below the threshold.⁶¹

All contribution amounts received by political parties must be disclosed, along with details about the donors, whatever mode they are obtained from- electoral bonds or otherwise. This provision should also apply to contributions given cumulatively by a person or company throughout the year.⁶²

C. AUDIT OF ACCOUNTS OF POLITICAL PARTIES

For every financial year, political parties must maintain accounts clearly and fully disclosing the sources of all amounts received by it, and the expenditure incurred by it. Within six months after the end of a financial year, each recognised political party should submit its accounts, duly audited by an accountant to the Election Commission,⁶³ which should publish the said accounts on its website.⁶⁴

The accounts should also be open for inspection by the members of the public in the offices of the Election Commission, and they should also be entitled to obtain copies of such accounts or any part thereof in accordance with such rules as the Election Commission may issue in this behalf.⁶⁵

D. STRONGER DETERRENT FOR NON-COMPLIANCE WITH DISCLOSURE AND AUDIT REQUIREMENTS

At present, political parties are under a statutory requirement to disclose contributions received by it for income tax purposes,⁶⁶ and under the RP Act.⁶⁷ Under the former, the only consequence of non-disclosure is the inability to claim exceptions on the amounts received in

⁶¹ Shelly Mahajan and Major General Anil Verma (Retired), *Transparency and Accountability in Political Funding*, ASSOCIATION FOR DEMOCRATIC REFORMS, 10
<https://adrindia.org/sites/default/files/Transparency_and_Accountability_in_Political_Funding_ResearchPaper_ADR.pdf (last accessed Apr. 27, 2020).

⁶² 255th Report, ¶ 2.28.11; Election Commission of India, *Proposed Electoral Reforms*, ch. VII, cl. 3 (2016) <https://eci.gov.in/files/file/9236-proposed-election-reforms/> [last accessed Apr. 27, 2020] (“*ECI Reforms*”).

⁶³ 255th Report, ¶ 2.28.14, 15; *ECI Reforms*, *supra* note 61.

⁶⁴ 255th Report, ¶ 2.28.23, cl. 7; *ECI Reforms*, *id.*

⁶⁵ 255th Report, ¶ 2.28.23, cl. 7; *ECI Reforms*, ch. VII cl. 3.

⁶⁶ *IT 1961*, sec. 13A.

⁶⁷ *RP Act*, sec. 29C.

the process of assessing the income tax to be paid by the party, while the latter provides no penalties for non-compliance by political parties.

When compared with the party's desire to maintain anonymity of its donors, these provisions do not function as strong enough deterrents to impress upon parties that such disclosure is necessary in larger public interest. For example, political parties in the 1980's did not disclose their accounts for the better part of 2 decades until they were hauled up by the Supreme Court for not complying with the mandatory requirement of disclosure to obtain income tax exemptions.⁶⁸

The Election Commission is the primary authority vested with the responsibility of ensuring free and fair elections in India, and this entails ensuring compliance by political parties with the provisions of the RP Act. However, it does not have any powers to take penal action in cases of non-compliance with the Act. To ensure compliance with disclosure and audit requirements, the Election Commission needs to be given powers to impose a daily fine for each day of non-compliance, with the possibility of de-recognition in extreme cases.⁶⁹ These recommendations are in line with the best practices of developed democracies around the world, such as the United Kingdom, the United States of America, and Canada.⁷⁰

VIII. CONCLUSION

The changes introduced by the Electoral Bond system vis-à-vis disclosure requirements and transparency in political contributions are regressive, in as much as they have diluted then existing legal provisions which provided a definite measure of accountability.

The data indicates the existence of a ruling party bias- electoral bonds heavily favour the party in power at the time they are issued. For instance, in 2017-18, the ruling Bharatiya Janata Party received 210 Crores, or 97%, of the total money received by political parties via electoral

⁶⁸ Common Cause v. Union of India, [1996] 3 S.C.R. 1208, 1214.

⁶⁹ 255th Report, ¶ 2.28.23, cl. 10; *ECI Reforms*, ch. VII cl. 1.

⁷⁰ Shareholder approval- [United Kingdom – The Companies Act 2006, ch. 46, <https://www.legislation.gov.uk/ukpga/2006/46/contents>, § 366]; No donations by foreign entities- [United Kingdom – The Political Parties, Elections and Referendums Act 2000, ch. 41, <https://www.legislation.gov.uk/ukpga/2000/41/contents> [“PPERA”], § 54(2)]; Disclosure of income and expenses, audited accounts- [United Kingdom - PPERA, §§ 62-63, §§ 42-43], [United States of America – Voting and Elections, 52 U.S.C. § 30104(a), § 30102 sub. §§ (c)-(d), § 30111(b)], [Canada - Canada Elections Act, S.C. 2000, c.9, <https://laws.justice.gc.ca/eng/acts/E-2.01/index.html> [“CEA”], § 432]; Information available to public- [United Kingdom- OECD; *Financing Democracy: Funding of Political Parties and Election Campaigns and the Risk of Policy Capture* 70 (OECD Public Governance Reviews, OECD Publishing 2016)], [United States of America – Voting and Elections, 52 U.S.C. § 30104(a), cl. 11(B)], [Canada - CEA, § 362]; Penal Provisions – [United Kingdom- PPERA, § 20], [United States of America – Voting and Elections, 52 U.S.C. § 30109], [Canada-CEA, § 497].

bonds,⁷¹ and in 2018-19, this increased almost sevenfold to 1450 Crores, or 75%, of the total funds through the bonds.⁷²

This is one of the main reasons for opposition parties and the Fourth Estate believing that the Central Government's non-adherence to its own scheme was purportedly obscured by the ease and magnitude of funds generated by electoral bonds.

A more pressing consideration is the fact that since the inception of the scheme, more than 6128 crores of money has been donated to political parties,⁷³ who do not have to account for how much it has received and how it has spent the money. In a system priding itself on being a healthy democracy and having free and fair elections, it is alarming that political parties do not need to keep a record of the funds received by them via the mechanism of electoral bonds.

Anonymity, believed to encourage political contributions without the fear of backlash from dependent entities,⁷⁴ cannot trump the need in the larger public interest for political accountability.

Ex abundanti cautela,⁷⁵ it needs to be made clear that the issue of transparency in electoral funding is not a phenomenon identifiable with only the electoral bonds introduced by the current regime. The same problem of transparency reared its head during the UPA regime as well, albeit in a different name- 'electoral trusts'- by which trusts collected funds donated as political contributions and disbursed them to political parties without any information available as to the donors and the principles determining how and to whom allocations were made.⁷⁶

The bottom line is that regardless of which political party is governing the Country, and what modes are used for raising political funds, complete transparency with regards to details about the donor, the donee political party, and the amount donated is necessary to accurately gauge the impact of such contributions to governmental policy outcomes, and to stimulate public discourse about the degree of impact one has on the other.

Such a system should incorporate the best practices regarding political funding as suggested by the Law Commission of India and the Election Commission, such as the mandatory

⁷¹ 2017-18 Report, *supra* note 53.

⁷² 2018-19 Report, *supra* note 52.

⁷³ Association for Democratic Reforms, *Analysis of Electoral Bonds sold and redeemed during the twelve phases* (2020) <https://adrindia.org/content/analysis-electoral-bonds-sold-and-redeemed-during-twelve-phases-march-2018-%E2%80%93-october-2019> (last accessed Apr. 27, 2020).

⁷⁴ For example, shareholders in the case of a company's political contribution.

⁷⁵ Meaning 'out of abundant caution' - HC BLACK, BLACK'S LAW DICTIONARY 1, 641 (B.A. Garner ed., Thomson Reuters 9th edn. 2009).

⁷⁶ The Electoral Trusts Scheme, 2013, Gazette of India (Extraordinary), pt. II sec. 3 subsec. (ii) (Jan. 31, 2013) [Notification No. S.O. 309€]

reporting and audits of political funding and expenditure on a periodical basis, and the disclosure of these reports to the general public.

Having these safeguards would not only strengthen and keep from rusting the anchors of democracy holding the political funding system intact, but also keep from sinking public confidence in the government of, by and for the people
