

ELECTORAL BONDS AND FUNDING TO POLITICAL PARTIES IN INDIA: A CRITIQUE

*Suryasnata Mohapatra**

Abstract

Indian democracy is characterized by a Parliament with multifarious party politics. The political parties are the major players in the Indian polity. These political parties require money for their sustenance, rallies and participation in the elections. They derive these monies primarily from the donations from individuals, sympathizers, industrialists and even outlaws. The sources are anonymous or pseudonymous. These donations run into hundreds of crore and lack transparent funding mechanism. As a result, the donors have a wide influence over the policy making of the winning parties and the governments become puppet at the hands of a few. So, as an initiative to get certain degree of check and transparency in the political financing, the Union Government in its Budget speech of 2017-18 had declared to bring electoral bonds as a monetary instrument in electoral donations by amending the RBI Act 1934 and the Finance Act 2017. This is made with an

*Suryasnata Mohapatra is a fourth-year student at KIIT School of Law, Bhubaneswar, Odisha. The author may be reached at suriya.mohapatra@gmail.com.

intent to have cashless donations and systematized cash tracing. Such a policy change came as an addendum to the controversial “demonetization” implementation. This policy seems to be a great initiative to reform the electoral finances and funding and came as an adherence to the recommendations of Law Commission, Election Commission and the Hon’ble Supreme Court. But the said policy contains few discrepancies which are presumed to cater to the needs of certain targeted persons. Thus, in this paper, the researcher shall be discussing the salient features of the recent electoral bonds policy along with a multidimensional criticism. It would further try to ameliorate the said gaps by suggesting measures which can aid in bringing transparency and contribute in reducing the menace of black money in the electoral system. Further, the researcher shall be citing certain electoral finance reforms and laws in other countries which can be beneficial in our country’s electoral financing and diminish corrupt practices in the political parties.

Key Words - Black Money, Dinesh Goswami Committee Report on Electoral Reforms 1990, Election Commission, Electoral Bonds, Reserve Bank of India (RBI), Supreme Court (SC), The Representation of People’s Act (RPA) 1961, 255th Law Commission Report.

“I mean to diminish no individual, institution or phase in our history when I say that India is valued the world over for a great many

things, but for three over all others: The Taj Mahal; Mahatma Gandhi; and India's electoral democracy."

– **Gopalkrishna Gandhi**

Corruption has spread to all spheres of our lives. The problem of the corruption is that it pollutes the ethos of a body and inducts malevolent vibes in its integral parts. In our case, the body is our electoral system and political parties as one of its integral part. Corruption has vandalized the well-being of the elections. The *prima causa* of corruption in the elections is money. Money is the attribute which decides the fate of a political party and not the electorates. Concerns have often been expressed in various quarters that money power is disturbing the level playing field and vitiating the purity of elections.¹ The electoral compulsions for funds become the foundation of the whole superstructure of corruption.² The consequences of not having reforms in electoral finances may be summed up as follows:

Firstly, it is an undeniable fact that financial superiority translates into electoral advantage, and so richer candidates and parties have a greater chance of winning elections. Money is bound to play an important part in the successful prosecution of an election campaign of richer candidates and supplies assets for advertising and other forms of political solicitation that increases the candidate's exposure to the public.³

¹Election Commission of India, *Guidelines on Transparency and Accountability in Party Funds and Election Expenditure* (New Delhi: 2014), <https://eci.gov.in/files/file/867-guidelines-on-transparency-and-accountability-in-party-funds-and-election-expenditure-matter-regardingdated-29082014/>.

²Ministry of Law and Justice, *National Commission Report on Implementation of the working of the Constitution* (New Delhi: 2001), <https://archive.pib.gov.in/archive/releases98/1yr2002/rsep2002/12092002/r120920024.html> [hereafter NC Report].

³Kanwar Lal Gupta v. Amar Nath Chawla, 1975 AIR 308, ¶7.

Secondly, in furtherance of the first point is the issue of equality and equal footing between richer and poorer candidates.⁴ Without equality between the candidates healthy competition is unable to sustain within the elections. A simple perusal of the Lok Sabha 2014 candidates reveals that 27% (or 2208 candidates) of all the candidates were “crorepati candidates,” and the average asset of each of the 8163 candidates was Rs. 3.16 crores. The percentage of crorepati candidates increased from 16% in 2009 Lok Sabha elections.⁵

Furthermore, most of the funding received is from anonymous sources. A report from Association for Democratic Reforms shows data on funding of political parties, which stated that various political parties received Rs. 7,833 crore of funding from unknown sources between 2004-05 and 2014-15, which constitutes 69 percent of their total income during the period. Thus 69 per cent of the income of various political parties is anonymous and untraceable.⁶

Finally, the argument for election finance reform is premised on a more philosophical argument that large campaign donations, even when legal, amounts to what Lessig terms “institutional corruption”, which compromise the political morality norms of a republican democracy. Here, instead of direct exchange of money or favour, candidates alter their views and convictions in a way that attracts the most funding. This change of perception leads to an erosion of public trust, which in turn affects the quality of democratic engagement.⁷

This shows opacity and flaw in the legal framework to check the corrupt practices. As an innovation to electoral financing policy, the Central Government has introduced Electoral Bonds as a monetary instrument for the sake of transparent donation to political parties. It

⁴NC Report, *supra* note 2.

⁵Law Commission of India, *255th Law Commission on Electoral Reforms* (New Delhi: 2015), 13 [hereafter ER Report].

⁶*Id.*

⁷ER Report, *supra* note 5, at 315.

is a welcoming step towards making the electoral processes corruption- free.

I. ABOUT THE ELECTORAL BONDS AND THEIR SIGNIFICANCE

The Central Government has devised a new monetary scheme known as “Electoral Scheme” by virtue of the power conferred under sub-section (3) of Section 31 of the Reserve Bank of India Act, 1934.⁸ Electoral bond as defined in the scheme⁹ means “a bond issued in the nature of promissory note which shall be a bearer banking instrument and shall not carry the name of the buyer or payee.” It is designed to be a bearer instrument like a Promissory Note — in effect, it will be similar to a bank note that is payable to the bearer on demand and free of interest. It can be purchased by any citizen of India or a body incorporated in India.¹⁰ The bonds shall be issued in the denomination of Rs. 1000, Rs. 10,000, Rs.1,00,000, Rs. 10,00,000 and Rs.1,00,00,000.¹¹They can be purchased by giving a Know Your Customer Form (“KYC”)¹² from notified branches of the State Bank of India (SBI) for 10 days each in month of January, April, July and October.¹³ Such an innovative scheme is first of its kind implemented in any country and carries certain significance. The characteristics of this scheme are as follows

⁸The provision has authorized the Central Government to make or issue any promissory note expressed to be payable to the bearer of the instrument other than the Reserve Bank of India.

⁹Electoral Bond Scheme, 2018, § 2(a), No. 2 of 2018.

¹⁰Electoral Bond Scheme, 2018, § 3, No. 2 of 2018.

¹¹Electoral Bond Scheme, 2018, § 5, No. 2 of 2018.

¹²Electoral Bond Scheme, 2018, § 4, No. 2 of 2018.

¹³Electoral Bond Scheme, 2018, § 8, No. 2 of 2018.

I) The significant aspect of this scheme is that the bond will remain valid for 15 days and shall not carry the donor's name, although the payee will have to fulfil KYC protocols at the bank. It will ensure safety and security of the donor from the threat of any political parties.

II) To benefit from the electoral bonds scheme, the political parties must have been registered with the Election Commission and should have secured not less than 1 per cent of the votes polled in the most recent General Election to the Lok Sabha or a State legislative assembly. This can be seen as a measure for pushing out the non-serious candidates.¹⁴

III) Also, the bonds can be en-cashed by an eligible political party only through a designated bank account with an authorized bank. Every political party has to submit details of one designated account to the Election Commission and the bonds can be en-cashed only in that account.

IV) In order to achieve the success of the electoral bonds, the government has reduced the direct cash donations to a limit of Rs. 2000 and thus the donor will be compelled to donate through electoral bonds. It will ensure transparency in the funding to the political parties and the concerned state authorities (RBI and the Election Commission) will have information about the donors.

V) It is a good step so as to moving away from dubious cash given to political parties to moving to electoral bonds. The returns will have to be filed by the political parties through these bonds and therefore it is

¹⁴Navmi Krishna, *The Hindu Explains: What is an electoral bond and how do we get one?*, THE HINDU (Jan. 4, 2018, 4: 35 PM), <https://www.thehindu.com/news/national/the-hindu-explains-what-is-an-electoral-bond-and-how-do-we-get-one/article22367124.ece>, Last visited on 17th January 2019.

meant to be transparent, accountable and a small step towards electoral reforms.¹⁵

II. CRITICISM OF THE ELECTORAL BONDS

“Criticism may not be agreeable, but it is necessary. It fulfills the same function as pain in the human body. It calls attention to an unhealthy state of things.”

– **Winston Churchill**

The lawmaker has been given discretionary power for the benefit of the public but it takes no time for discretion to become the handmaid of corruption where *the little man is pitted against the might of the state*.

Firstly, the procedural flaws in the formulation. This scheme was introduced in the Lower House as a money bill. But the said law doesn't fulfill any such criteria required to be regarded as a money bill as mentioned in the Constitution.¹⁶ The requisite criteria for a bill to be regarded a money bill cover areas dealing with the imposition, abolition, remission, alteration or regulation of taxes, appropriation of moneys out of the Consolidated Fund of India.¹⁷ The ulterior motive behind such action is that the Lower House has an edge over the Upper House in matters relating to the money bills¹⁸ and the President shall sign on the proposed bill without exercising his veto powers.¹⁹

¹⁵AIR spotlight summary on “Electoral Bond”, INSIGHT IAS (Jan. 5, 2018), <https://www.insightsonindia.com/2018/01/05/air-spotlight-summary-electoral-bond/>.

¹⁶INDIA CONST. art 110.

¹⁷V.N SHUKLA, CONSTITUTION OF INDIA (12 ed. 2019, Eastern Book Company).

¹⁸INDIA CONST. art.109(2).

¹⁹INDIAN CONST. art 111.

But the last discretion on the typology of a bill lies only with Speaker and such discretion is not available for judicial scrutiny.²⁰

Secondly, the legislative intent associated with the electoral bonds is to evade black money from the funding of the political parties and to have a transparent- cashless funding to the political parties. Per contra, the collateral action of the government accompanying the electoral bonds present a different scenario.

I) Section 29(c) of the Representation of People's Act, 1951 is added to exempt the political parties from disclosing the donations received through the electoral bonds.

II) Section 182 (3A) of the Companies Act, 2013 to relax the companies from contributing to the political parties. This move is being criticized as this fallacy has strong sense of corporate bidding.

III) Section 13(A)(b) of the Income Tax Act 1961 providing scope to the Political Parties to incur huge monetary benefits through the donations through these bonds without getting liable to pay tax.

Thirdly, a plethora of fundamental rights are violated through this action. The fundamental rights pledge to attain the lofty goals of justice, liberty, equality, fraternity and the "dignity of the individual" set out in the Preamble.²¹ So, shutting the eyes to this segment of rights is not acceptable.

I) The method adopted to pass the Finance Act, 2017 is symbolic of its arbitrary and unconstitutional provision. Certain specified provisions like maintaining secrecy of the donations and the procedures followed on in many ways is in accordance with the principles of arbitrariness and unreasonableness. Also, there is a lack of quantum of punishment for breach of confidentiality²² which is

²⁰Mohd. Sayed Siddiqui v. State of Uttar Pradesh, 1954 CriLJ 1607.

²¹Re: Ramlila Maidan Incident, (2012) 5 SCC 1.

²²Finance Act, 2016, §31(2), No. 28 of 2016.

also a reason for vagueness and arbitrariness. The concept of reasonableness and non- arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution.²³ Upon violation of this cardinal principle, the court may by applying a rational mind invalidate the impugned legislative as well as the executive action.²⁴

II) The secrecy of the money donated and received herein through the electoral bonds is in direct violation of the right of a citizen to get information which in turn contravenes the freedom of speech and expression of a citizen.²⁵ By including the statutory right of Right to Information under the ambit of freedom under Article 19 (1) (a) and making it a fundamental right, the Hon'ble Supreme Court has paved way for citizens to avail information about public offices.²⁶

Lastly, Clause 7(4) of the scheme²⁷ has mentioned that the requisite information of the bonds may be supplied on demand from a competent court. But the law has failed to specify the “competent court” to which such information can be submitted in case of registration of criminal case by any law enforcement agency. Furthermore, the scheme has not specifically mentioned at which stage of the proceeding i.e at investigation, trial or appeal, the banks are compelled to provide detailed information to the “competent court.”

²³Ajay Hasia v. Khalib Mujib Sehravardi, (1981) 1 SCC 722.

²⁴Maneka Gandhi v. Union of India, (1978) SCC 248.

²⁵Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal, (1995) 2 SCC 161.

²⁶State of Uttar Pradesh v. Raj Narain, (1975) 4 SCC 428.

²⁷The information furnished by the buyer shall be treated confidential by the authorized bank and shall not be disclosed to any authority for any purposes, except when demanded by a competent court or upon registration of criminal case by any law enforcement agency.

III. SUGGESTED MEASURES

The intent associated with the scheme of electoral bond is to have cashless donations to political parties in a transparent and accountable structure. But the concerned scheme might not be able to cater to the primary concern of having corruption free electoral processes because of certain discrepancies. The following suggestive measures to the scheme might be able to address the problems in its proper implementation.

The relaxation granted to the political parties from non-disclosures of donations through the electoral bonds in their annual financial asset report needs to be omitted.

The independent candidates should also be allowed to get donations through these bonds by amending clause 3 of the scheme.²⁸

Procedure for disclosure of the information of donor needs to be specified comprehensively by changing clause 7 (4) of the scheme.²⁹

All political parties registered under Section 29 A of the Representation of people's Act, 1961³⁰ need to be considered as public authorities to enable citizens to get information³¹ under the Right to Information Act, 2005. The Apex Court had declared that Right to Freedom of Speech and Expression guaranteed by Article 19(1)(a) included the right to know every public act, everything that is done in a public way and by their public functionaries.³² Since political parties also form an integral instrumentality with regard to

²⁸Eligibility for purchase and encashment of the Bond.

²⁹Confidentiality of the donor and condition for making the information disclosed before a competent court.

³⁰Registration with the Election Commission of Association and Bodies as Political Parties.

³¹Any material including records and electronic messages which can be accessed by a public authority under any other law. *See* Right to Information Act, 2005, § 2(f), No. 22 of 2005.

³²*State of Uttar Pradesh v. Raj Narain*, 1975 AIR 865.

public functionaries, bringing them under the ambit of the Right to Information Act, 2005 is justified.

Most importantly, structural reforms relating to electoral financing is necessary to get rid of corruption in the existing electoral set up. Some suggestive measures are as follows:

A. *State Funded Elections*

The role of big money in elections (and the associated chances of bribing, capture and lobbying) has sought to be reduced through public funding of elections. The idea of state funding has been proposed to reduce the unending increase in the cost of elections (and create a level playing field) and to curb corruption and the influence of black money. The state funding may be in terms of giving subsidies or any sort of material help. As per Dinesh Goswami Committee Report,³³ there should be partial state funding in the form of limited in-kind support for vehicle fuel (which is a primary campaign expense), rental charge for microphones, and issuance of voter identity slips and additional copies of electoral rolls. Furthermore, the state funding will also call for auditing and accounting by the Comptroller and Auditor General (C & AG) because of appropriation of public money.³⁴ But, the prevailing economic conditions of the country make it impossible for complete state funding.³⁵ So, partial state funding will be a judicious decision. Some European countries also follow the practice of partial public funding of political parties which are given in the tabular form:³⁶

³³Dinesh Goswami, *Report of the committee on Electoral Reforms* (New Delhi: 1990), Ministry of Law & Justice (India).

³⁴INDIA CONST. art.148.

³⁵Indrajit Gupta, *Report of the committee on State Funding of Elections* (New Delhi: 1998), Ministry of Law & Justice (India).

³⁶ELIN FALGUERA ET AL., *FUNDING OF POLITICAL PARTIES AND ELECTION CAMPAIGNS 6* (International Institute for Democracy and Electoral Assistance, 2014).

United Kingdom	<ul style="list-style-type: none"> • Modest public funding of political parties. • Political parties receive direct public funding over each financial year for policy development purposes up to 2 million pounds on the basis of current legislative representation.
Sweden	<ul style="list-style-type: none"> • High Level of Public Subsidies exist for parties at various levels, with each party being given a base amount at the sub-national level along with additional state aid to party. Sub-organization and to party media based on past performance and current representation. • Indirect Subsidies include media access and the party affiliated press receives press support.
Italy	<ul style="list-style-type: none"> • Public funds are distributed according to the votes pulled and is given to candidates. • Indirect, in-kind subsidy in the

	<p>form of free media access and state aid for radio and newspapers and reduce rates for sending electoral propaganda material by post to voters.</p>
--	---

B. National Electoral Fund

A fund where all donors can openly contribute without expressing any preference for any political party. The funds could then be allocated to all registered political parties in proportion to the votes obtained. There can be tax benefit for those who donate to the fund. This will also address donor's concern for secrecy. It is seen in the electoral donations that donors are coerced to donate a particular party and violence have taken place because of such unruly behaviour and the use of criminal ailments for extortion by the concerned parties.³⁷

C. A single electoral law with a Strong Enforcement Mechanism

The laws associated with the elections are very dis sorted and create ambiguity in the minds of the concerned persons. A single integrated law relating to elections along with proper mechanism is call for the time. For instance- The Representation of People's Act, 1961 is mainly associated with the conduct of elections and governs the moral conduct of individual person contesting the election. It lacks any sort of provision regulating the moral conduct of political parties.³⁸ Again, the said act lacks any penal measure relating to misconduct especially

³⁷N.N. Vohra, *Committee Report on Criminalisation of Politics* (New Delhi: 1993), Ministry of Home Affairs (India).

³⁸The Representation of People's Act, 1961 §29(c), No. 43 of 1951.

the corrupt electoral finances. A single integrated election laws containing:

- Disqualification criteria of Political Parties and its members.
- Penal provisions for any misconduct especially relating to corrupt practices
- Provisions governing the donors³⁹ to the Political parties.
- Compelling the Political Parties to make their spending and internal administration public.
- Setting up an investigation agency similar to Enforcement Directorate or CBI to look into matters associated to economic offenses done by the Political Parties and their respective members.
- Instituting special courts to try cases related to the election disputes, both Civil and Criminal matters.⁴⁰

IV. CONCLUSION

Elections are the mean through which the citizens show their legitimacy and will towards the sovereign. These rustic ballot papers are not only a mean to elect an individual but an agreement of the population to elect a body of able persons who are speaking the legitimate interest of the whole population. So, the elections need to be conducted fairly to ensure that the ethos of the parliament is maintained. The government has taken up several steps to tackle the menace of corruption and the discussed Electoral Bond Scheme is a nascent initiative. It is a welcome step to clean up the elections and

³⁹Kanwar Lal Gupta v. Amar Nath Chawla, 1975 AIR 308.

⁴⁰Ashwini Kumar Upadhyay v. Union of India, Writ Petition (Civil) No. 699 of 2016.

the political parties. But the said scheme also contains criticisms which need to be addressed by the government, Election Commission and the Hon'ble Supreme Court. Awareness is the greatest agent for change.⁴¹Therefore, every initiative of the Government is only possible when there is popular and conscious awareness about the prevailing problems. Majority of the issue will get resolved when the general masses are aware of their rights, liability and the duties and act accordingly keeping in mind the welfare of the nation, the population and the self.

⁴¹David Gerken, *Eckhart Tolle's Most Important Saying: "Awareness is the greatest agent for change*, MEDIUM (Aug. 4, 2020), <https://medium.com/change-your-mind/eckhart-tolles-most-important-saying-awareness-is-the-greatest-agent-for-change-21e713d64a90>.