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Electoral Bonds: Layers of Campaign Finance

In a Democracy

India's general elections are the largest democratic exercise in the world. This mammoth exercise is a right and opportunity, and to make this right accessible and exercisable we need procedural machinery which endorses an informed discourse that encourages informed decisions. The supreme court in *People's Union of Civil Liberties vs Union of India*¹ noted that, "The moment they (contesting candidates) put in papers for contesting the election, they are subjected to public gaze and public scrutiny. Nothing is therefore more important for the sustenance of democratic polity than the voter making an intelligent and rational choice of his or her representative." Public gaze and scrutiny are the best agents for inspection of the governing system and a means of securing competent legislatures. Transparency of campaign financing therefore becomes axiomatic to informed public discourse and decision. Electoral bonds come to attention as a means of increasing campaign contributions while decreasing the information voters have on these contributions. It also removes the cap of 7.5 per cent imposed by the Companies Act² on the donation by companies and foreign sources to political groups. On April 12th 2019, almost two years after the initial filing of the first writ, the apex court's interim order refused to stay the scheme, and directed that detailed particulars of the donors as against each bond received until the end of the general elections (May 30th) be submitted to the electoral commission.

What is an electoral bond?

Electoral bond is a bearer instrument like a Promissory Note. It can be bought by any Indian citizen or incorporated company to be donated to any eligible political party of his/her choice. The Electoral bond Scheme was announced in the union budget of 2017-18. Although presented as a legislative

¹Writ Petition (civil) 515 of 2002

²Section 182 of the Companies Act 2013

machinery to curb corruption and build transparency, the scheme itself flatters to deceive as it enables companies, including trusts with foreign donations to contribute with the protection of anonymity and without restriction, to political parties.

Lack of disclosure in a democracy and its implications

The scheme itself elucidates upon the anonymity of the donors: "The information furnished by the buyer shall be treated confidential by the authorised bank and shall not be disclosed to any authority for any purpose," including an exemption from Section 29C(1) of the RPA, 1951 which talks about mandatory reports on contributions exceeding 20 thousand rupees. This scheme creates an environment where our elections can be held hostage, even by foreign entities.

This opacity in the funding system creates two major issues

1. Infringement of the citizen's right to information in a democracy and,

2. Quid pro quo corruption

1. Transparency and right to know

The indispensable right of the country's little man to know his potential representative is what should propel the electoral process. Judicial precedent has also been unequivocal on this. In *UOI vs Association of Democratic Reforms*³, the supreme court noted that, "There is no reason to hold that freedom of speech and expression would not cover right to get material information with regard to a candidate who is contesting election for a post which is of utmost importance in the democracy" and went as far as calling a democracy which creates uninformed citizens via one-sided information, disinformation, misinformation and non-information a farce. The hearings on electoral bonds centred on the constitutional right of the peoples' right to information. Article 19(1) of the constitution of India imparts an indisputable right to speech and expression of opinions and ideas. This article also provides a right to receive and enjoy uninterrupted information. This is inherently a positive right, meaning a right to receive information only from whoever is willing to relay it and does not grant the citizen a right against an unwilling speaker. This established Right to Information, which also manifested in the form of the Right to Information Act, 2005, is exercisable against electoral candidates as a democratic practice. This right is what makes the opacity of electoral bonds questionable. The freedom to ideate is insufficient in the absence of information that influences the people to form intelligent decisions. The identity of contributors holds important data about the position, inclinations, and alliances of a party. In a diverse democratic setting, the political affiliations of a candidate are crucial to the decision of the citizen and campaign donors can act as a rather

³ 2002 (3) SCR 294

observable beacon of said affiliations⁴. For example, if a tobacco company is donating to a political party the voters can assume the inclination of the party vis-à-vis the tobacco policy of our country. Knowing the very personal and costly investment these donors have in the election or non-election of a particular candidate can provide insight to the agenda of the candidate itself and then further translate into voting cues for the people. All of this perhaps was best expressed by Lord Simon of Glaisdale and reiterated in *UOI vs ADR*, “*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.*” Pertinent to note is that these bonds will be issues only by public sector banks. This compounds the concerns regarding the scheme as the ‘paper trail’ attached to the bonds that has been touted by the government as a means of combating black money will only be accessible by the central government.

2. Quid pro quo corruption

Latin for ‘something for something’ in terms of electoral corruption translates to the purchase (via donations) of political compliance of a party for a potential acquisition of power after elections. The bothersome veil on public knowledge does little to help the influence of the wealthy on policy and politics in a country plagued by wealth disparity. Contributing to your preferred political party is not a bad practice on its own, but uncapped and unaccounted for, it will dilute the essence of the democracy. The supreme court of USA in *Nixon v. Shrink Missouri Government*⁵ stated, articulating the need for regulated campaign finance in democracies, “*We recognise a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors*”. This raises a question as to how ‘complacent’ an elected representative willing to be with the wishes of his contributors. The veil on the identity of the contributors that is provided by the electoral bonds scheme disallows the voters to uncover the ‘adherence’ of certain representatives towards certain causes. This view on poll funding has been reiterated by the Supreme Court of India in *Ashok Shankarrao Chavan v Election Commission of India* (2014)⁶. Here the court noted that it is imperative that, ‘the election not be the bounty of rich people only’. Hence, with the ethos of established free and fair election regimes kept in mind the electoral bond scheme simply does not hold water.

Right to Privacy Vs Right to Information

⁴ Campaign contribution disclosures as an instrument to voter competence has been studied and noted by Garrett, Elizabeth, *The Future of Campaign Finance Reform Laws in the Courts and in Congress* (December 2001). *Oklahoma City University Law Review*, Vol. 27, No. 2, Summer 2002. Available at SSRN: <https://ssrn.com/abstract=293253>

⁵ 528 U.S. 377

⁶ W.P.(C) No. 4590/2014 & CM 9137/2014

The governments's arguments regarding donor privacy trumping right to information falls flat on two points: i) Donor identity is paramount in attempts to eliminate black money ii) Right to information in this scenario directly translates to right to receive material information regarding persons contesting for posts of utmost importance.

While refusing the stay on the electoral bonds scheme the then CJI, Ranjan Gogoi too raised concerns on the legitimacy of this method of poll finance stating that black money only *becomes* white through this practice of veiled uncapped donations. Citizens and companies have faced repeated fiscal probing in the form of KYC linking and relinking methods, demonisation, and GST to combat money laundering. This scheme however exempts our parliamentarians of the same inquest and scrutiny on tainted money in politics. While the lack of information on the donors is a n covert threat to the legitimacy of the Indian elections ,by removing the requirement that the political contributions must come from *profits*, it creates an overt risk of money laundering which may manifest in the form shell companies that do not actually conduct any legitimate business but exist solely to funnel money to political parties.

Conclusion

The fallacy of the electoral bond scheme creates a democracy not for the people but, for the highest donor. The test of pith and substance of this scheme lies in the condition that breathes life into any democracy: an informed citizenry. Electoral bonds hence do covertly meddle with the integrity of the election process itself. Against this background the delayed but effective order delivers towards a scheme that would've been nothing but a gateway for our democracy to be left clamouring for credibility.



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