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Examining the Voters Right to Information in the Context of the Electoral Bond Scheme: A Constitutional Dilemma

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ABSTRACT

The Electoral Bond Scheme, introduced in India in 2018, has significantly altered the landscape of political funding, raising important questions about the voter's right to information. The scheme permits individuals and entities to donate to political parties anonymously, which has sparked a heated debate regarding its impact on the transparency of the electoral process. The core of this debate revolves around whether the anonymity provided to donors under the scheme infringes upon the voters' right to know who is financing political parties, which is essential for making informed electoral choices. Proponents of the scheme argue that it helps to curb the influence of black money in elections by providing a legal channel for political contributions. However, critics contend that it compromises the transparency of political funding and allows undue influence by wealthy donors, thereby undermining the integrity of the democratic process. This paper explores the legal arguments surrounding the voter's right to information in the context of the Electoral Bond Scheme, analyzing how the scheme intersects with the constitutional mandate of transparency in governance. The paper also delves into the SC of India's responses to various petitions challenging the scheme.

KEYWORDS

Electoral Bond Scheme, SC Judgement on Electoral Bond Scheme

INTRODUCTION

The Electoral Bond Scheme, introduced in the 2017 Union Budget, was initially celebrated as a groundbreaking initiative aimed at enhancing transparency in political funding in India. This reform, proposed by the ruling Bhartiya Janata Party (BJP), sought to replace the previous system where political parties were required to disclose the identities of donors contributing over ₹20,000 (approximately \$240). Under the new scheme,

political parties could receive donations through electoral bonds without revealing the identities of the donors, although they were still required to report the total amounts received. The intention behind this scheme was to tackle issues related to black money and corruption by promoting cleaner electoral practices. However, this change quickly stirred debates about its effectiveness, as critics argued that the anonymity it provided to donors might undermine the scheme's transparency goals. Reports, such as those from the Association for Democratic Reforms (ADR), revealed significant disparities in fundraising, with the BJP and Congress accumulating ₹65.66 crore and ₹1,123.3 crore respectively through electoral bonds. This discrepancy highlighted the scheme's substantial impact on political financing and raised concerns about its role in perpetuating unequal financial influence among major political parties.

The Supreme Court's ruling on the electoral bond scheme delivered a critical blow to its implementation, declaring it unconstitutional and in violation of the right to freedom of speech and expression under Article 19(1)(a) of the Indian Constitution. This landmark decision came amidst growing anticipation and had significant ramifications for political funding in India. The Court not only struck down the electoral bonds scheme but also mandated that the State Bank of India (SBI) cease issuing these bonds and disclose all related donations to the Election Commission of India. The Court's judgment highlighted the scheme's failure to meet its objectives of curbing black money and maintaining donor anonymity. Furthermore, the ruling invalidated several related legal amendments, including those to the Representation of the People Act and the Income Tax laws, as well as changes to the Companies Act that permitted unlimited corporate contributions. This comprehensive judgment emphasized the need for greater transparency and accountability in political financing. As the country approaches its next election, the Court's decision underscores the necessity for reforms to ensure fairness and integrity in the electoral process. Data obtained through the Right to Information Act in May 2023

revealed that electoral bond purchases were highly concentrated in just a few cities, with Mumbai, Kolkata, Hyderabad, New Delhi, and Chennai accounting for nearly 90% of sales. Notably, Mumbai led in sales but was low in redemption rates, and Bengaluru, despite its prominence, had a minimal share of sales. This uneven distribution of bonds and redemptions raises concerns about the transparency and equity of political funding practices under the scheme.

CONCEPTUAL UNDERSTANDING OF THE ELECTRONIC BOND SCHEME

The Electoral Bond Scheme, launched by the Government of India in 2017, represents a significant reform in the realm of political financing. This scheme allows individuals and corporate entities to purchase electoral bonds from designated branches of authorized banks. Once purchased, these bonds are issued in the name of the buyer but are non-transferable, meaning they cannot be sold or given to others. The purchaser can then donate these bonds to a registered political party of their choice.

A key feature of this scheme is the anonymity it provides. Unlike conventional methods of political donation, where the identity of the donor is typically disclosed, electoral bonds do not require the donor's identity to be revealed either to the political party receiving the donation or to the public. This provision aims to protect donors from possible negative consequences or reprisals related to their political contributions.

To qualify for receiving electoral bonds, political parties must meet certain criteria established under Section 29A of the Representation of the People Act, 1951. Specifically, the parties must have been officially registered and must have received at least one percent of the votes in the most recent general elections to the Lok Sabha or state legislative assemblies. This requirement is intended to ensure that only well-established political organizations with a notable level of electoral support can benefit from the

scheme. Additionally, eligible political parties are required to deposit and redeem these bonds exclusively through accounts maintained with authorized banks, as specified by the government regulations.

Allowing unlimited contributions from corporations to political parties, as permitted by the Electoral Bond Scheme, carries significant risks and potential issues. When evaluating this provision, the Court applied the concept of manifest arbitrariness to determine its legality. This principle requires that a law be scrutinized to ensure it is not arbitrary, irrational, or lacking a reasonable basis, and that it does not impose excessively disproportionate measures.

The Court identified two main situations where a law could be considered manifestly arbitrary. The first is when a law does not adequately address different levels of harm or risk. The second is when the law's objectives are at odds with fundamental constitutional values. In the case of the Electoral Bond Scheme, Chief Justice Chandrachud noted that the legislation failed to address these issues effectively. Specifically, the law did not make necessary distinctions to prevent potential harm.

For instance, the scheme allowed financially troubled corporations to make political donations without considering the high risk of such donations being linked to reciprocal benefits or quid pro quo arrangements. Additionally, the legislation did not differentiate between donations from individuals and those from corporations. Individual donations might reflect personal political support, whereas corporate donations often resemble business transactions with potential for reciprocal advantages. This oversight in distinguishing between different types of contributions highlighted a major flaw in the scheme, revealing its inadequacy in upholding principles of transparency and fairness in political funding.

Electoral bonds can be bought by any Indian citizen as well as by entities

and corporations that are based in the country. These bonds are available for purchase at designated branches of the State Bank of India (SBI). Individuals can buy electoral bonds either alone or in conjunction with others. It is essential that these purchases are made through accounts that comply with Know Your Customer (KYC) regulations, which are necessary for facilitating donations to political parties. The range of eligible buyers includes various types of entities established in India, such as HUFs, companies, partnerships, AOPs, BOIs, and other artificial juridical persons, regardless of their incorporation status. Furthermore, offices, branches, or agencies controlled by these juridical persons are also permitted to purchase electoral bonds. This broad eligibility criterion ensures that diverse entities operating within India can participate in the electoral bond scheme.

ASSOCIATION FOR DEMOCRATIC REFORMS & ANR. V. UNION OF INDIA & ORS.

Facts of the Case

The Association for Democratic Reforms (ADR) advanced the cause of electoral transparency and fairness in India by filing a petition with the Delhi High Court. The goal of this petition was to enforce certain recommendations proposed by the Law Commission, which were aimed at increasing transparency and accountability in the electoral system. These recommendations suggested that the Election Commission should require all candidates to publicly disclose detailed personal information. This would include criminal records, educational background, financial assets, and other pertinent details essential for voters to evaluate the qualifications and integrity of candidates seeking office.

In a significant judicial development, the Delhi High Court underscored the critical role of transparency in a democratic society and directed the Election Commission to collect and publish this information from

candidates. The court ruled that failing to disclose such background details undermines the democratic process. However, this ruling faced opposition from the Union of India, which appealed to the SC of India. The Union argued that neither the Election Commission nor the High Court had the authority to enforce such disclosure requirements and that voters did not have an inherent right to access this information. This legal conflict illustrates the ongoing struggle between maintaining transparency and protecting privacy in electoral matters, highlighting the need for legal structures that effectively balance these essential democratic values.

Issues

Two issues were identified by the Court for consideration: firstly, whether maintaining secrecy regarding the identities of political contributors and the extent of their contributions would contravene the right to information; secondly, whether unlimited corporate funding would undermine the principle of free and fair elections and consequently violate the right to equality.

Arguments by the Parties

Petitioner

During the SC hearings, Advocate Prashant Bhushan, representing Common Cause and the Association for Democratic Reforms (ADR), highlighted the fundamental right of citizens to access information about political parties and candidates. Bhushan argued that while financial disclosures of companies are accessible via the Ministry of Corporate Affairs, the enormous number of approximately 2.3 million registered companies in India makes it virtually impossible for an average citizen to trace the origins of donations from individual companies. He emphasized the difficulty of sifting through vast amounts of corporate financial data to identify specific contributions, thus underscoring the necessity for a more transparent system that would simplify public access to this information.

Additionally, Bhushan raised concerns that the electoral bond scheme disproportionately benefits the ruling government. He argued that the anonymity guaranteed by the scheme might enable the government to provide various concessions, such as licenses, leases, policy adjustments, or government contracts, without attracting public scrutiny. This lack of transparency could result in the ruling party gaining an unfair advantage from corporate donations made through electoral bonds, thereby distorting the fairness of the political playing field. Bhushan's arguments emphasized the broader implications of the scheme on democratic integrity and called for improved transparency and accountability in political funding.

Senior Advocate Kapil Sibal also presented significant criticisms of the electoral bond scheme during the SC proceedings. He noted that the scheme does not necessitate that donations be linked directly to electoral activities. According to the FAQ section of the State Bank of India (SBI), the bonds can be redeemed at any time and for any purpose, suggesting a potential loophole that might allow funds to be diverted for non-electoral uses. Sibal further contended that the scheme could lead to companies ignoring their obligations to shareholders. By permitting companies to make political donations without requiring shareholder oversight, the scheme could bypass the owners' authority over how their funds are utilized in political contexts. This lack of oversight could undermine principles of corporate governance and accountability, allowing corporate resources to be directed towards political causes without shareholders' consent or awareness.

Defendant

During the SC hearings, Solicitor General Tushar Mehta advocated for the electoral bond scheme, arguing that its fundamental purpose is to maintain donor confidentiality rather than anonymity. He referred to the Supreme Court's 2019 recognition of privacy as a fundamental right,

suggesting that while donors are entitled to privacy, this right can be challenged if the public has a legitimate interest in accessing such information, and legal recourse can be pursued if needed.

Mehta outlined the comprehensive efforts by Parliament, the government, and the Election Commission to address the issue of black money in politics over the years. He noted that the electoral bond scheme was developed following extensive experimentation with various policies and amendments. He maintained that any potential shortcomings in the scheme should not justify its outright invalidation.

In addressing allegations of bias towards the ruling party, Mehta argued that such claims are not directly related to the constitutionality of the scheme. He suggested that if the ruling party appears to have an advantage, it is likely due to its popularity with voters rather than a flaw in the electoral bond system. Mehta's arguments sought to affirm the legitimacy of the electoral bond scheme, emphasizing its role in safeguarding donor confidentiality while facilitating political contributions.

Judgement

In a historic judgment delivered on February 15, the SC rendered a landmark decision, ruling that anonymous electoral bonds are in violation of the right to information enshrined in Article 19(1)(a) of the Constitution. SC struck down the Electoral Bond Scheme on Several grounds. Simultaneously, the Constitution Bench affirmed the voter's entitlement to information regarding the funding of political parties. The Centre contended before the SC that citizens do not possess a general entitlement to knowledge regarding the financial backing of political entities, emphasizing that the right to know is not universally available to citizens. However, the SC firmly rejected this viewpoint in its ruling, drawing upon significant legal precedents such as *PUCL v. Union of India* . In these seminal cases, the Apex Court articulated that voters maintain a right to

essential information necessary for the exercise of their freedom to vote.

the top court has directed the SBI, the issuing bank of electoral bonds, to immediately cease the issuance of these bonds. Furthermore, the court mandated that the SBI must provide comprehensive details regarding donations facilitated through electoral bonds, as well as information concerning the political parties that received these contributions, to the Election Commission by March 6, 2024. Additionally, electoral bonds that remain unencashed by political parties are required to be returned to the purchaser.

The Supreme Court, in a significant move, invalidated amendments made to both the IT Act and the Representation of People Act, which had previously enabled anonymous donations.

Moreover, the SC made a profound observation regarding the electoral bond scheme, asserting that it could potentially benefit the political party in power. The court also dismissed the notion that the scheme could effectively curb the inflow of black money into politics, emphasizing that economic inequality often results in varying levels of political engagement. The court further highlighted that access to information plays a pivotal role in influencing policymaking and may lead to quid pro quo arrangements, which could ultimately advantage the ruling party.

SC declared the amendment to the Companies Act, which permitted unrestricted corporate political funding, as "unconstitutional." CJI remarked that this amendment infringed upon citizens' right to information regarding potential quid pro quo arrangements. Prior to the 2017 amendment to the Companies Act, Indian companies operating at a loss were prohibited from making contributions to political causes, signifying a departure from the previous regulatory framework.

Furthermore, the SC mandated political parties to reimburse unencashed electoral bonds to donor individuals and corporations within the bonds'

15-day validity period. By requiring political parties to refund unutilized electoral bonds, the SC aims to prevent the misuse of funds and uphold the integrity of the electoral process. This decision represents a significant stride towards promoting fairness and equity in political funding, reaffirming the judiciary's role in safeguarding democratic principles and protecting the rights of citizens.

In its ruling, the SC clarified that while donors have a right to privacy, this right does not extend to contributions made with the expectation of receiving favors or benefits in return. The Court emphasized that political donations made as part of a quid pro quo arrangement, where donors seek influence or favors from political parties or candidates, cannot be shielded under the guise of donor privacy

VOTER'S RIGHT TO INFORMATION

The voter's right to know is a fundamental aspect of democracy, ensuring transparency and accountability in the political process. This right encompasses various dimensions, including access to information about political candidates, their backgrounds, policy platforms, and sources of funding. Informed voters are better equipped to make decisions that align with their values and interests, contributing to the overall integrity and legitimacy of elections. Additionally, the voter's right to know extends to understanding the mechanisms by which political campaigns are funded, including contributions from individuals, corporations, and special interest groups. The right to information for voters in India is not explicitly enshrined under a specific article of the Indian Constitution. The right to information for voters is essential as it ensures that citizens are well-informed about political parties, candidates, and election processes, allowing them to make informed decisions during elections. This right empowers voters to assess candidates based on their policies, track records, and promises, rather than being swayed by misleading propaganda. Informed voters play a crucial role in holding politicians and

political parties accountable for their actions. When voters have access to information about political donations, campaign finances, and candidate backgrounds, it fosters greater transparency and accountability in the political system. This, in turn, leads to more responsible governance and helps prevent corruption and malpractice in elections. Additionally, the right to information enhances democratic participation by encouraging citizens to actively engage in political processes, such as voting, political discussions, and civic activities. Overall, the right to information for voters is fundamental to a healthy democracy, promoting transparency, accountability, and citizen participation in governance.

The electoral bond scheme, with its veil of anonymity shrouding the flow of political funding, undermines the voters' ability to make informed decisions. It erects barriers to access critical information about the sources of political funding, thereby compromising the integrity of the electoral process. In essence, the judgment reaffirms that the right to information is not just a statutory provision but a fundamental pillar of democracy. It underscores the principle that voters must have unfettered access to relevant information to exercise their democratic rights effectively.

The recent SC judgment striking down the electoral bond scheme is a landmark decision rooted in the voter's right to information. The court found that the scheme violated this fundamental right, along with principles of equality and freedom of speech and expression. By allowing anonymous donations to political parties, the scheme hindered voters' ability to make informed decisions about the parties and candidates they support. The court's ruling highlights the importance of transparency and accountability in the electoral process, emphasizing that citizens have a right to know about the financial dealings of political parties. This decision is significant not only for its immediate impact on political funding but also for reaffirming the principles of democracy and the rule of law.

Right to Informational Privacy of a Contributor v. Right to

Information of a Voter

When courts are faced with a conflict between two fundamental rights, the Chief Justice of India outlined a structured approach for adjudicating such disputes. This approach involves several key steps to determine how to balance the competing rights effectively:

First, the court must establish whether the Constitution assigns a hierarchy between the conflicting rights. If such a hierarchy exists, the right given higher priority will take precedence. If no explicit hierarchy is specified, the court must apply the following evaluative criteria to both rights in contention:

- a. The court needs to assess whether the proposed measure is a suitable method for advancing both rights. It is not required that the measure be the only possible means of achieving the rights; it is sufficient if it partially contributes to the realization of the rights.
- b. The measure must be the least restrictive option that is still effective in realizing both rights. The court must evaluate if there are other potential measures that could achieve the rights in a substantial and meaningful way. These alternatives should be compared based on how well they fulfil the rights, their differential impacts, and their overall suitability.
- c. The court should examine whether the measure imposes a disproportionate burden on either of the rights. This involves analysing if the cost of restricting one right is justified by the benefit gained for the other. The assessment includes comparing the significance of the considerations at play, justifications for the rights' infringement, and whether the negative impact on one right (for instance, the right to information) is proportional to the benefits gained in fulfilling the other right (such as the right to privacy).

In resolving conflicts between fundamental rights, the court applies a unified proportionality test to both rights, considering them as objectives to be balanced against each other. This comprehensive approach ensures that the protection of each right is carefully weighed and harmonized in accordance with constitutional principles.

In applying the test for balancing fundamental rights to the Electoral Bond Scheme (EB scheme), the Chief Justice of India assessed whether Clause 7(4) of the scheme adequately balanced the right to informational privacy of donors against the right to information of voters. Clause 7(4) of the EB scheme mandates that any information provided by the purchaser of an electoral bond is to be kept confidential by the authorized bank. This information can only be disclosed if a competent court requests it or if a criminal case is registered by law enforcement authorities.

The Chief Justice's analysis led to several key conclusions:

First, the Constitution does not explicitly prioritize either right in this context. Both the right of voters to access information about political funding and the right of contributors to maintain the confidentiality of their donations are linked to Article 19(1)(a). The latter right is tied to the broader enjoyment of political speech and participation.

Second, Clause 7(4) fails to meet the suitability requirement regarding the voter's right to know about political funding. While it effectively protects the anonymity of donors, it does not rationally address the need for voters to be informed about political contributions. The court highlighted that absolute non-disclosure cannot fulfil the objective of transparency in political funding, as voters are denied access to any information about contributions made through electoral bonds.

Third, the court identified alternative measures that could better balance the two rights. For instance, Section 29C of the Representation of the People Act requires political parties to disclose contributions exceeding

₹20,000. This provision strikes a balance by protecting the privacy of smaller donations while ensuring transparency for larger ones that could potentially influence political decisions. This approach aligns more closely with the need for transparency without unduly infringing on donors' privacy.

Lastly, the court deemed it unnecessary to apply the balancing prong, as Clause 7(4) was already found to be overly restrictive. The court concluded that the clause disproportionately favored informational privacy over transparency, ultimately declaring the entire EB scheme unconstitutional. The court reasoned that the anonymity feature was integral to the scheme and could not be separated from other forms of financial contributions, such as cheque transfers or electronic payments. Consequently, the entire scheme was invalidated due to its inherent reliance on donor anonymity.

CONCLUSION

The decision to scrap the Electoral Bond scheme represents a significant milestone in promoting an informed electorate and reducing the prevalence of quid pro quo arrangements in political funding. However, it is important to recognize that this action alone is just one step in the right direction. Political parties have historically demonstrated a knack for finding alternative avenues to secure corporate donations and influence. Therefore, simply doing away with one flawed law may not be sufficient to address the broader challenges associated with political financing. Moving forward, there is a pressing need to explore and implement more effective alternatives that prioritize transparency, accountability, and fairness in the political process. This could involve the development of comprehensive regulations and mechanisms to monitor and regulate political donations, as well as greater public awareness and engagement on issues related to campaign finance reform. By addressing these underlying issues and fostering a more open and accountable political environment, we can work towards strengthening democratic principles and ensuring that the voices

of citizens are heard and respected in the political arena.

REFERENCES

- A Flip to Democracy: Supreme Court’s Electoral Bond Case Verdict, available at: livelaw.in/articles/a-fillip-to-democracy-supreme-courts-electoral-bonds-case-verdict (last visited on May 19, 2024)
- Anjali Bhardwaj, “Electoral Bonds , The state Bank and the Art of Evasion” The Hindu, March 11, 2024, available at: <https://www.thehindu.com/opinion/lead/electoral-bonds-the-state-bank-and-the-art-of-evasion/> (last visited on July 18, 2024)
- Muthuswamy, Right to Information 112 (Eastern Book Company, Delhi, 10th edn., 2024)
- The Saga of Voter’s Right to Information, available at: <https://articles.manupatra.com/article-details/The-Saga-of-Voters-Right-to-Information> (last visited on Aug 7, 2024)
- Electoral Bonds: How Supreme Court Used Proportionality Test to Give Primacy to Voters Right to Information, available at: <https://www.livelaw.in/top-stories/supreme-court-electoral-bonds-case-balance-conflicting-rights> (last visited on Aug 6, 2024)