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Funding The Future: Electoral Bonds, Judicial Decisions, And Voter Rights

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ABSTRACT

In the advent of globalization, involvement of biased observers in politics becomes inevitable. It fosters into a national affair. The State must make an electoral reform to fulfil its duty to provide free and fair elections. In order to do so, the State performs its Sovereignty of Policy Framing, keeping the freedoms and limitations of its citizens in mind. The Triad of Rights - Article 14, 19 and 21 are contemplated for a “legitimate state interest”.

The Judiciary have balanced the authority of State for passing a legislation whenever enquired for. The State by The Finance Act, 2017 (NO. 7 OF 2017) introduced the Electoral Bond Scheme to regulate the influx of unaccounted money employed for intruding in Elections. The Scheme has been debated to be violative of Right to Information of citizens in the light of the “anonymity” feature of the Scheme. This paper aims to put-forth justness of Electoral Bond Scheme by deliberating on Rights of Individuals and Limitations thereto vis-à-vis the Power of Enactment rested with the State, drawing upon judicial pronouncements alongside.

Keywords: Electoral Reform, Electoral Bond Scheme, Right to Information, Policy Framing, Anonymity.

INTRODUCTION

Transparency and Accountability are accounted as the pillars of Governance. The Indian Governance is democratic in nature. The State is responsible for strengthening the democracy of its citizens by the virtue of enactments. The Constitution of India concedes ascendancy of the State in sanctioning legislation notwithstanding the enshrined freedoms if within the proscribed limitations of such liberties. With such view, the papers aims at advocate for introduction of Electoral Bond Scheme (hereby referred as the Scheme) with the passing of The Finance Act of

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2017. The Author have relied upon numerous judicial pronouncements aiding the argument whilst evaluating the rationality of it.

MITIGATING THE RISKS OF UNACCOUNTED CASH

The use of unaccounted cash (black money) in the electoral process remains a major worry for the country. The government has periodically taken initiatives to encourage clean money donations to political parties. Elaborating on the legality of the political funding of political parties while assessing the Scheme it should be noted that the authority is competent in accordance with the law.

It can be assessed that Donors chose unexplained money due to fear of victimization or revenge. This ensures that no other parties are aware of the donation. It is common for entities earning clean money to convert it into unaccounted cash and donate it to political parties to avoid detection and retribution from other parties. Converting clean money into dirty money had a significant negative impact on the national economy. The Scheme encourages donors to spend clean money through official banking channels while keeping their identity hidden. If the Scheme's confidentiality, which is essential for using clean money for political donations, is removed, the scheme will be rendered obsolete and the country will return to a cash-based system, defying the very notion of digitalization.

The Hon'ble Court in the matter of Vinay Narayan Sharma v. Union of India & Ors. and held that:

“391. I find considerable force in the contention of the learned Attorney General in as much as the Central Government cannot be said to be without powers in initiating demonetisation of bank notes. This is on the strength of Entry 36 of List I of the Seventh Schedule of the Constitution. The Central Government is not just concerned with the financial health of the country as well as its economy, but it is also concerned with the sovereignty and integrity of India; the security of the State; the defence of the country; its friendly relations with foreign countries; internal and external security and various other aspects of governance. On the other hand, the Bank is only concerned with the regulation of currency notes, monetary policy framework, maintaining price stability and allied matters. Therefore, if the Central Government is of the considered opinion that in order to meet certain objectives such as the ones stated in the impugned notification, namely, to eradicate black money, fake currency, terror funding etc., it is necessary to demonetise the currency notes in circulation, then the Central Government may initiate a proposal for demonetisation.”

Unaccounted-for money, particularly those held by nationals or entities with a legal presence in the country, in foreign banks, tax havens, or jurisdictions with a history of secrecy, undermine the State's ability to manage its affairs under the Constitution. This is true in two aspects.

The amount of money in question, as well as the number of individuals or legal entities holding it, may indicate a significant amount of illegal activity in the country's social and economic spheres, causing significant harm at both individual and collective levels. Large amounts of money stored overseas may signal a deficiency in the state's ability to collect taxes from individuals and legal entities in the country. The State must generate revenues to deliver public goods and services as specified by the constitution and citizens' expectations. A significant level of incapacity indicates the State's failure. This can lead to a vicious cycle of declining moral authority, resulting in an increase in illegal activities and tax evasion. Unaccounted monies kept by nationals and legal entities in overseas banks are crucial for citizens' welfare. The amount of money involved may indicate the state's inability to prevent crime and collect taxes. The amount and frequency of money laundering can indicate the state's softness.

A report is titled "Analysis of Sources of Funding of National and Regional Parties of India: FY 2004-05 to 2014-15 (11 years)" offers some information. The report's highlights for the pre-existing scenario are listed below:

- Political parties' total income from known donors (based on contribution reports filed with the Election Commission) is Rs 1,835.63 crore, accounting for 16% of total revenue.
- Political parties earned Rs 7,832.98 crore from undisclosed sources, accounting for 69% of their total income as indicated in IT returns.

The data provided above only represents a part of total political donations in the country, as it only includes those that have been reported. The Electoral Bonds Scheme redirects already converted funds to banking channels, making it the preferred method of donating. The method is intended to lessen the attraction of cash donations.

In the case of *Dr. P. Nalla Thampy Terah v. Union of India & Ors.*, the court referred to the report of the Santhanam Committee on Prevention of Corruption and held (Para 10) that:

“The public belief in the prevalence of corruption at high political levels has been strengthened by the manner in which funds are collected by political parties, especially at the time of elections. Such

suspensions attach not only to the ruling party but to all parties, as often the opposition can also support private vested interests as well as members of the Government party. It is, therefore, essential that the conduct of political parties should be regulated in this matter by strict principles in relation to collection of funds and electioneering. It has to be frankly recognized that political parties cannot be run and elections cannot be fought without large funds. But these funds should come openly from the supporters of sympathizers of the parties concerned.”

The Court has also recognized the necessity for electoral reform, including regulating unregulated donations to political parties to prevent the use of black money and unaccounted funds during elections. In *People's Union for Civil Liberties (PUCL) & Anr. v. Union of India & Anr.*, the Court expressed concern about the high costs associated with the electoral process, stating:

“4.14 High Cost of Elections and Abuse of Money Power.

4.14.1 One of the most critical problems in the matter of electoral reforms is the hard reality that for contesting an election one needs large amounts of money. The limits of expenditure prescribed are meaningless and almost never adhered to. As a result, it becomes difficult for the good and the honest to enter legislatures. It also creates a high degree of compulsion for corruption in the political arena. This has progressively polluted the entire system. Corruption, because it erodes performance, becomes one of the leading reasons for non-performance and compromised governance in the country. The sources of some of the election funds are believed to be unaccounted criminal money in return for protection, unaccounted funds from business groups who expect a high return on this investment, kickbacks or commissions on contracts etc. ”

FEATURE OF THE SCHEME

To fight the unlawful black money parallel economy, Electoral Bonds were created as a more transparent type of giving, replacing unregulated cash payments. Electoral bonds are proposed to ensure that donations/contributions are made in a genuine manner and can be tracked back to a bank account. This resolves the issue of black money. Electoral bonds were introduced to promote transparency in political party donations. They can only be cashed by qualified parties using their authorized bank accounts. To increase security, the bonds carry a unique hidden alphanumeric serial number and do not include the names of the donor or recipient political party.

FUNCTIONALITY OF THE SCHEME

In light of the foregoing Amendment to the Section 29-C of the Representation of Peoples Act, 1951: Previously, political parties had to declare all contribution details to the Election Commission of India (ECI) to claim tax exemption. The 2017 amendment exempted parties from disclosing Electoral Bond contributions to the ECI., it is clear that a political party is not required to prepare a report. The political donation system would become significantly more transparent can be entitled as the aim of introduction of the Scheme. Electoral bonds allow donors to remain anonymous, a feature that was not previously possible. The amendment aims to promote the use of Electoral Bonds for donations, allowing for clean money.

The Amendment to Section 13-A of the Income Tax Act, 1961: Prior to the 2017 amendment, political parties had to maintain detailed records of contributions exceeding Rs 20,000, get the audited, and submit them annually to the Election Commission of India. The amendment exempted parties from maintaining contributor details for donations received through Electoral Bonds and mandated electronic transactions for donations exceeding Rs 2000.

The legislature's goal in altering Section 13-A of the Income Tax Act, 1961, was to encourage donations through Electoral Bonds and reduce cash donations. Clause (d) of the First Proviso mandates the use of account payee cheques, bank drafts, electronic clearing systems, or electoral bonds for donations exceeding ₹2,000/-. This was done to make the law regarding cash donations to political parties more severe, with the purpose of limiting black money. Further, the other requirements of other statutory provisions is untouched and mandatory to comply with. To fully comprehend the meaning of the modifications, it's important to study the Representation of People Act, 1951 in conjunction with the Income Tax Act, 1961.

In the case of K.S. Puttaswamy (retd.) & Anr. (Aadhar) v. Union of India & Anr., the Court considered the legality of Section 33 of the Aadhaar Act, 2016, which allows for the disclosure of information, including identity and authentication records, under certain conditions. The Court upheld Section 33 but introduced a precaution that requires an order from a High Court Judge before sharing such information. Sub-section (2) of Section 33 authorizes the disclosure of information in the interest of national security, as directed by an officer not below the level of Secretary to the Government of India. The Electoral Bond Scheme requires that information collected by donors be kept confidential and only shared with a "competent" court or registered criminal prosecution.

According to Para 4 of the Scheme, only individuals who have completed their KYC in compliance with RBI directions are eligible to apply. KYC was implemented in accordance with the Financial Action Task Force principles aimed at combating money laundering globally. The Scheme has been framed in highly comprehensive manner whose ultimate aim is to eradicate the evils behind electoral deceitfulness. According to Clause 2:

“2. Definition.— In this Scheme, unless the context otherwise requires, —

(d) “person” includes- (i) an individual; (ii) a Hindu undivided family; (iii) a company; (iv) a firm; (v) an association of persons or a body of individuals,

whether incorporated or not; (vi) every artificial juridical person, not falling within any of the preceding sub-clauses; and (vii) any agency, office or branch owned or controlled by such person.”

It can be opined that the interpretation of the word “person” is defined to lay down the beneficiaries of the scheme, who are eligible under the same to seek issuance of bonds. Any person other than the one’s referred to under this scheme are therefore explicitly excluded from the purport of the scheme.

As per Clause 3 which reads as:

“3. Eligibility for purchase and encashment of electoral bond -

(1) The Bond under this Scheme may be purchased by a person, who is a citizen of India or incorporated or established in India.

(2) A person being an individual can buy bonds, either singly or jointly with other individuals.

(3) Only the political parties registered under section 29-A of the Representation of People Act, 1951 (43 of 1951) and secured not less than one per cent of the votes polled in the last general election to the House of the People or the Legislative Assembly, as the case may be, shall be eligible to receive the bond.

(4) The bond shall be encashed by an eligible political party only through a bank account with the authorised bank.”

Clause 3(1) restricts the policy to Indian citizens and companies, thereby prohibiting foreign funding. Clause 3(2) allows eligible individuals or groups to purchase electoral bonds in the stated

denominations. This allows individuals who cannot afford the minimum denomination of an electoral bond to acquire it jointly with others, as long as they meet KYC standards. The Electoral Bond covers all major political parties that receive considerable unaccounted donations, assuring their compliance. Clause 3(4) ensures that the withdrawal of funds received via electoral bonds by a political party can be solely exercised through banking channels.

According to Clause 4 of the scheme which reads as:

“4. Applicability of Know Your Customer Norms.-

- (1) The extant instructions issued by the Reserve Bank of India regarding Know Your Customer norms of a bank's customer shall apply for buyers of the bonds.
- (2) The authorised bank may call for any additional Know Your Customer documents, if it deems necessary.

Clause 4 states that only individuals who have completed their KYC in compliance with RBI guidelines as outlined in Para 4 of the Scheme are eligible to apply. KYC was implemented to align with Financial Action Task Force recommendations aimed at combating money laundering globally. The Scheme prohibits individuals who do not meet KYC requirements from purchasing an Electoral Bond and will reject their application. The bank may request extra KYC documentation if deemed essential. KYC eliminates the possibility of using phony bank accounts.

Anonymity and Information privacy are critical for marketing the scheme and transforming the cash economy into a regulated legal one. The amendments limit access to information regarding political party donations, although they are appropriate and tailored to specific needs. The amended limits and incentives are consistent with the desired outcome. Without them, political donations could continue to occur outside of statutory constraints.

CONSTITUTIONAL EQUILIBRIUM

The reduction of black money influx into elections is a reasonable state interest. The Scheme's anonymity requirement serves as an incentive to use banking channels and reduce black money. Concerns about "funnelling" black money are addressed by investigation agencies. Obtaining financial details in case of a criminal investigation into electoral bond monies is a strategy against any violation. Previously, cash donations were untraceable and inaccessible. The campaign finance

system needs to be overhauled. The scheme must strike a balance between donor privacy and disclosure.

The concept of a "legitimate state interest" has been emphasized in the context of Articles 14, 19, and 21's triad of rights. Implementing a program to transition from cash-based political donations to regulated, digital, and legal donations serves a legitimate state interest. Our constitutional jurisprudence has long held that legislative enactments are presumed to be constitutional. In matters of constitutional legitimacy, it is widely believed that the Legislature has a better understanding of people's interests and the means to address administrative issues than the judicial branch.

The right of buyers to purchase bonds without disclosing their political party preference is a fundamental right recognized in *K.S. Puttaswamy v. Union of India*, as:

“109.5. Informational privacy is a facet of right to privacy: The old adage that “knowledge is power” has stark implications for the position of individual where data is ubiquitous, an all-encompassing presence. Every transaction of an individual user leaves electronic tracks without her knowledge. Individually these information silos may seem inconsequential. In aggregation, information provides a picture of the beings. The challenges which big data poses to privacy emanate from both State and non-State entities.”

“328. Informational privacy is a facet of the right to privacy. The dangers to privacy in an age of information can originate not only from the State but from non-State actors as well. We commend to the Union Government the need to examine and put into place a robust regime for data protection. The creation of such a regime requires a careful and sensitive balance between individual interests and legitimate concerns of the State. The legitimate aims of the State would include for instance protecting national security, preventing and investigating crime, encouraging innovation and the spread of knowledge, and preventing the dissipation of social welfare benefits. These are matters of policy to be considered by the Union Government while designing a carefully structured regime for the protection of the data”

In the matter of *State of U.P v. Raj Narain*, the court held that “in a government ...where all the agents of public must be responsible for their conduct, there can be but few secrets”. Section 8 (1)(j) of the RTI Act itself provides a discretion stating the disclosure (personal) which has no relation to any public activity or interest or which would cause unwarranted invasion of privacy of the individual shall not be disclosed unless Central Public Information Officer or State requests.

The Honb'le Court in the case of *Canara Bank v. The Central Information Commission*, declared that the information mentioned under Section 8 (1)(j) is Personal information which are so intimately private in nature that the disclosure of the same would not benefit anyone, but would result in the invasion of privacy of the person. In *Vijay Goswami v. PIO Delhi University*, the court held that banks are under obligation of secrecy of bank accounts of public interest in disclosure of such information.

The State in order to balance the interest of the individual vis-à-vis the State, has notified that the information furnished by the buyer shall be treated as 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. It is further stated that keeping the identity of the buyer of the bonds anonymous can also be seen an extension to his right to vote via secret ballot. Political parties benefit from the Scheme's deductions and exemptions, which promote transparency, privacy, and tax efficiency. This will encourage donations through legitimate banking channels and tax-benefit disclosures, lowering cash donations and increasing electoral transparency.

A Constitution Bench of this Honourable Court in *Charanjit Lal Chowdhury v. Union of India*, speaking through Fazl Ali, J. stated as follows:

“58. Prima facie, the argument appears to be a plausible one, but it requires a careful examination, and, while examining it, two principles have to be borne in mind: (1) that a law may be constitutional even though it relates to a single individual, in those cases where on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself; (2) that it is the accepted doctrine of the American Courts, which I consider to be well-founded on principle, that the presumption is always in favour of the constitutionality of an enactment, and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. A clear enunciation of this latter doctrine is to be found in *Middleton v. Texas Power and Light Company* in which the relevant passage runs as follows:

“It must be presumed that a legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds.”

The Legislature's considerable power in accordance with the Constitution of India, the risk of a statute being abused or misused is not an important factor for establishing the legitimacy of an economic policy initiative. Furthermore, the likelihood of misuse must be considered in light of the pre-existing condition.

In *Collector of Customs v. Nathella Sampathu Chetty*, this Court observed that “The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity.” To the same effect are the observations by Khanna, J. in *Kesavananda Bharati v. State of Kerala*, noted as under:

“In exercising the power of judicial review, the Courts cannot be oblivious of the practical needs of the government. The door has to be left open for trial and error. Constitutional law like other mortal contrivances has to take some chances. Opportunity must be allowed for vindicating reasonable belief by experience.”

In the *Supreme Court of India v. Subhash Chandra Agarwal* case, a constitution bench ruled on the Right to Information Act as:

“47. If one's right to know is absolute, then the same may invade another's right to privacy and breach confidentiality, and, therefore, the former right has to be harmonised with the need for personal privacy, confidentiality of information and effective governance.....A claim to protect privacy is, in a sense, a claim for the preservation of confidentiality of personal information. With progression of the right to privacy, the underlying values of the law that protects personal information came to be seen differently as the courts recognised that unlike law of confidentiality that is based upon duty of good faith, right to privacy focuses on the protection of human autonomy and dignity by granting the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people.”

“84. Most jurists would accept that absolute transparency in all facets of Government is neither feasible nor desirable, for there are several limitations on complete disclosure of governmental information, especially in matters relating to national security, diplomatic relations, internal security or sensitive diplomatic correspondence. There is also a need to accept and trust the Government's decision-makers, which they have to also earn, when they plead that confidentiality in their meetings and exchange of views is needed to have a free flow of views on sensitive, vexatious and pestilent issues in which there can be divergent views. This is, however, not to state that there are no dangers in maintaining secrecy even on aspects that relate to national security, diplomatic relations, internal security or sensitive diplomatic correspondence. Confidentiality may have some

bearing and importance in ensuring honest and fair appraisals, though it could work the other way around also and, therefore, what should be disclosed would depend on authentic enquiry relating to the public interest, that is, whether the right to access and the right to know outweighs the possible public interest in protecting privacy or outweighs the harm and injury to third parties when the information relates to such third parties or the information is confidential in nature.”

Parliament enacted the RTI Act in pursuance of the State's positive obligation to provide citizens with information about the functioning of Government. It is a statute to operationalise the right of citizens to access information, otherwise only held by the Government, under the “right to know” or “right to information” as protected by Article 19(1)(a). In requesting for information under the provisions of the RTI Act, a citizen engages certain statutory rights and duties under its provisions, but simultaneously also engages the “right to know” under Article 19(1)(a) of the Constitution. The “right to know” is not absolute. The RTI Act envisages certain restrictions on the “right to know” in the form of exemptions enumerated in clause (1) to Section 8. Crucially, restrictions on the disclosure of information under the RTI Act also constitute restrictions on the information applicant's “right to know” which is protected under Article 19(1)(a) of the Constitution. The constitutional permissibility of the statutory restrictions on disclosure contained within the RTI Act is not in challenge before this Court. But it is trite to state that any restrictions on the disclosure of information would necessarily need to comport with the existing law on the protection of the “right to know” as a facet of the freedom of expression.”

Further, it was observed that in *Ram Jethmalani vs Union of India*, it has been held:

“88. The revelation of details of bank accounts of individuals, without establishment of *prima facie* grounds to accuse them of wrongdoing, would be a violation of their rights to privacy. Details of bank accounts can be used by those who want to harass, or otherwise cause damage, to individuals. We cannot remain blind to such possibilities, and indeed experience reveals that public dissemination of banking details, or availability to unauthorised persons, has led to abuse. The mere fact that a citizen has a bank account in a bank located in a particular jurisdiction cannot be a ground for revelation of details of his or her account that the State has acquired. Innocent citizens, including those actively working towards the betterment of the society and the nation, could fall prey to the machinations of those who might wish to damage the prospects of smooth functioning of society. Whether the State itself can access details of citizens' bank accounts is a separate matter. However, the State cannot compel citizens to reveal, or itself reveal details of their bank accounts to the public at large, either to receive benefits from the State or to facilitate investigations, and

prosecutions of such individuals, unless the State itself has, through properly conducted investigations, within the four corners of constitutional permissibility, been able to establish prima facie grounds to accuse the individuals of wrongdoing.”

CONCLUSION

The Constitution of India empowers the State with its Sovereignty of Policy Framing. The Judicial Pronouncements have widen the authority granted, to meet the needs of public interest. Nevertheless, the Judiciary in the recent Judgement²³ held the Scheme to be Violative of Right to Information as enshrined under Article 19 (a) of the Constitution of India. However, the purpose of Anonymity posits to be in the areas consideration of limitation of Right to Information. One must not forget that a “legitimate state interest” always presides over individual’s rights’ and interests.

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