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ELECTORAL BONDS IN INDIA: A LEGAL EXAMINATION OF CONSTITUTIONALITY

AND

ELECTION FUNDING PRACTICES

Abstract

This paper examines the concept of electoral bonds within the Indian legal framework, evaluating its constitutionality and juxtaposing it against global best practices in election funding. By dissecting the pros and cons of electoral bonds, this study seeks to uncover the implications for democracy, transparency, and political financing in India, offering recommendations for reform.

Introduction

Electoral bonds are a form of financial instrument introduced by the Government of India in 2018, designed as an anonymous way to donate money to political parties. These bonds are part of a broader effort to ensure transparency in political funding, while also protecting donor anonymity. Here's an outline of their key features and functioning:

Issuance and Purchase: Electoral bonds are issued by the State Bank of India (SBI) and can be purchased by any citizen of India or a body incorporated in India. They are available for purchase at designated times throughout the year, typically in January, April, July, and October, and additionally during periods specified by the Central Government, usually around the time of major elections.

Denominations: The bonds are available in multiple denominations, ranging from INR 1,000, 10,000, 1 lakh, 10 lakhs, to 1 crore, to accommodate various levels of contributions.

Donation Process: After purchasing these bonds, a donor can donate them to a political party of their choice. The party can then encash the bonds through a verified account in a designated bank. This process ensures that all funds are accounted for and pass through banking channels.

Anonymity: A key feature of electoral bonds is the anonymity they provide; the identity of the donor is not disclosed to the recipient political party. This aspect has been both praised and criticized, with proponents arguing it protects donors from political victimisation, while critics argue it could lead to a lack of transparency in political donations.

Eligibility of Political Parties: Only political parties registered under Section 29A of the Representation of the People Act, 1951, and which secured not less than 1% of the votes polled in the last general election or Legislative Assembly election, are eligible to receive donations through electoral bonds.

Purpose and Criticism: The introduction of electoral bonds aimed at cleaning up the system of political donations, reducing cash donations and ensuring that funding comes through banking channels. However, the scheme has faced criticism for potentially leading to unchecked, anonymous donations, thereby not fully addressing the issue of transparency in political funding.

The electoral bond scheme represents a significant shift in how political donations can be made in India, intended to bring more accountability and cleanliness to political finance, although its effectiveness and impact on transparency remain subjects of ongoing debate.

The controversy surrounding the constitutionality of electoral bonds in India centers on concerns about transparency and potential misuse for unaccounted money in political funding. Critics argue that the scheme compromises transparency in political donations, making it difficult to trace the source of political funding and potentially leading to an increase in the use of black money for political donations.

Are electoral bonds unconstitutional, and how do they compare to global best practices in election funding?

Historical Context of Political Funding in India

Prior to the introduction of electoral bonds, political funding in India was largely opaque and unregulated, with a significant portion of donations made in cash. This system raised concerns about black money (unaccounted funds) flowing into the political arena, potentially influencing

policy decisions and election outcomes. Political parties were required to report any contribution over ₹20,000 to the Election Commission, but the enforcement and verification of these contributions were challenging. The lack of transparency and accountability in political donations was a major concern for electoral reform advocates, who argued that it led to corruption and undermined the democratic process.

Legal Framework Governing Electoral Bonds

The legal framework for electoral bonds was established through the Finance Act, 2017. Key provisions related to electoral bonds include:

- **Amendments to the Reserve Bank of India Act, 1934:** This amendment allowed the RBI to authorize any bank to issue electoral bonds.
- **Amendments to the Representation of the People Act, 1951:** It exempted political parties from disclosing the identity of the donors contributing through electoral bonds, altering the previous requirement to report donations above a certain threshold.
- **Amendments to the Income Tax Act, 1961:** These amendments ensured that donations made through electoral bonds would be tax-exempt, and donors would not have to disclose the donation as income or expenditure, aiming to encourage donations through formal banking channels.

The Finance Act of 2017, therefore, laid down the statutory basis for the issuance and regulation of electoral bonds, embedding them within India's broader legal and financial system.

Intended Purpose and Government's Rationale

The government introduced electoral bonds as part of a broader agenda to clean the financial system, particularly to address concerns related to anonymous cash donations. The primary purposes and rationales behind the implementation of electoral bonds were:

Enhancing Transparency: By routing political donations through the banking system, electoral bonds aimed to ensure that all political contributions were accounted for and traceable within the formal financial system, thus reducing the flow of unaccounted money in politics.

Protecting Donor Anonymity: The scheme was designed to protect donors from potential harassment or backlash by ensuring their anonymity, encouraging more individuals and corporations to donate without fear of reprisal or political victimization.

Encouraging Legal Donations: By providing tax exemptions and removing caps on corporate donations, the scheme aimed to encourage donations to be made legally and transparently, reducing reliance on cash donations.

Leveling the Playing Field: The government argued that by making funding more transparent and routed through official channels, the electoral bonds would help to level the playing field among political parties, although this aspect has been debated.

The constitutionality of electoral bonds has been challenged on several grounds, primarily focusing on the right to know under Article 19(1)(a) of the Indian Constitution, which guarantees the freedom of speech and expression. Critics argue that the scheme's provision for anonymity directly impacts the transparency in political funding, which is crucial for a functioning democracy. This examination delves into these challenges, the judiciary's response, and a comparative analysis with constitutional provisions on transparency, accountability, and corruption.

Right to Know under Article 19(1)(a)

- **Argument Against Electoral Bonds:** The argument centers on the premise that the right to freedom of speech and expression encompasses the right to information, including the right to know who funds political parties. The anonymity clause in the electoral bond scheme, therefore, is seen as infringing on this right, as it prevents citizens from accessing information about the financial contributions received by political parties, potentially affecting voters' decisions.
- **Implications for Transparency:** Transparency in political funding is deemed essential for holding political entities accountable and for preventing corruption and undue influence in governance. The lack of disclosure requirements for electoral bond donations raises concerns about hidden influences on policy-making and governance, undermining democratic principles and voter trust.

Supreme Court Judgments and High Court Challenges

In early 2021, ADR approached the Court seeking a stay on the scheme, before the commencement of a fresh round of bond sales. This application was substantially considered by a Bench led by Chief Justice S.A. Bobde, with Justices A.S. Bopanna, and V. Ramasubramanian. On 26 March 2021, the Bench denied any stay on the application of the scheme. They held that the “apprehension that foreign corporate houses may buy the bonds and attempt to influence the electoral process in the country, is...misconceived.” The Bench also sternly discouraged the petitioners from approaching the Court, stating that “there cannot be repeated applications seeking the same relief.”

On 31 October 2023, a five-judge Constitution Bench led by CJI Chandrachud, with Justices Sanjiv Khanna, B.R. Gavai, J.B. Pardiwala, and Manoj Misra heard arguments over three days. Petitioners argued that the electoral bonds scheme increased corporate funding, black money circulation, and corruption. They argued that voters have a right to information about political parties' source of funding, as it informs the policies and views of that party. The Union contended that the scheme was designed to guarantee confidentiality and the right to privacy of the donors, who were otherwise exposed to retribution from political parties that they didn't fund.

On 2 November 2023, the Constitution Bench reserved judgement.

On 15 February 2024, the Court unanimously struck down the Union's 2018 Electoral Bonds (EB) Scheme. The Bench held that the Scheme violated the voters' right to information enshrined in Article 19(1)(a) of the Constitution. The Court also directed that the sale of electoral bonds be stopped with immediate effect. SBI was directed to submit details of the Electoral Bonds purchased from 12 April 2019 till date, to the ECI. This will include details of the purchaser as well as the political parties that the bonds were given to. Further, the Court ordered the ECI to publish the information shared by SBI on its official website within one week from the receipt of the information (by 13 March 2024).

Various High Courts have also received petitions challenging the electoral bonds, with petitioners seeking transparency in political donations.

In a much debated move, just when the General Elections 2024 is around the corner, State Bank of India has moved the Supreme Court seeking time till June 30 to comply with a direction to make public details of electoral bonds purchased since April 2019.

The government issued electoral bonds despite objections from the Reserve Bank of India (RBI). The government had initially proposed that all scheduled commercial banks issue electoral bonds. The RBI said that this would question the credibility of the financial system and only the RBI Mumbai office should issue the bonds. The government ignored the RBI's concern and made the minor modification that the SBI would be the sole bank to issue electoral bonds. The SBI notified 29 branches across India to issue the bonds.

Requesting an extension, the SBI has said that since 22,217 electoral bonds were issued between April 12, 2019 and February 15, 2024, and since the information was in two silos, the bank had to decode 44,434 information sets. This is a juvenile half-hearted attempt at an excuse, and is a rebuke of the court's order. In this age of technology, this information should already be available with the SBI. Even if it is not, given the importance of the data, in an ideal scenario, the

bank should work doubly hard and provide the information before the Lok Sabha polls. The information must be out before the polls because as observed by the court, the people have the right to know what are the sources of income for the political parties.

Comparative Analysis with Constitutional Provisions

- **Transparency and Accountability:** The Indian Constitution, though not explicitly mentioning political funding, underpins the principles of transparency and accountability through various provisions and the overarching framework of democracy. Article 19(1)(a) and the broader interpretations of the right to information are pivotal in ensuring that citizens have access to information that affects governance and their democratic choices.
- **Against Corruption:** The fight against corruption is integral to the Indian Constitution's ethos, reflected in various laws and the establishment of institutions like the Central Vigilance Commission (CVC) and the Lokpal. The lack of transparency in electoral bonds is argued to be at odds with these anti-corruption efforts, as anonymous donations could potentially lead to quid pro quo arrangements and policy manipulations.

Global Best Practices in Election Funding

Election funding models vary widely across democracies, each with its own set of mechanisms to balance the need for political parties to secure funding with the principles of transparency, fairness, and minimizing undue influence. Here's an overview of some common models, along with their advantages and disadvantages:

Public Funding

Overview: Public funding involves government allocation of funds to political parties and candidates, often based on their performance in elections or other criteria. This model is used in various forms in countries like Germany, Sweden, and Canada.

Pros:

- **Level Playing Field:** Ensures all parties have access to a basic level of funding, promoting electoral fairness.
- **Reduces Influence of Wealth:** Limits the need for parties to seek private donations, thereby reducing potential undue influence by wealthy donors.

Cons:

- **Taxpayer Burden:** Public funding means using taxpayer money to finance political activities, which can be controversial.
- **Potential for Entrenching Established Parties:** Allocation based on past electoral performance might disadvantage new or smaller parties.

Capped Private Donations

Overview: Many democracies impose caps on private donations to political parties and candidates. The United States and Canada have variations of this system, setting limits on how much individuals, corporations, and unions can donate.

Pros:

- **Limits Influence:** Caps aim to prevent wealthy donors from having disproportionate influence over political parties.
- **Encourages Small Donations:** Can encourage parties to seek broader support from a larger number of donors.

Cons:

- **Circumvention through Super PACs:** In some systems, like in the U.S., while direct donations are capped, Super PACs can raise and spend unlimited amounts, potentially undermining the caps.
- **Administrative Complexity:** Monitoring and enforcing donation caps can be challenging.

Full Disclosure Requirements

Overview: Requiring parties and candidates to fully disclose their sources of funding is a common mechanism, used in conjunction with other funding models. Countries like Australia and the UK require detailed reporting of donations.

Pros:

- **Enhances Transparency:** Voters can see who is funding political parties, increasing accountability.
- **Deters Corruption:** The public scrutiny of donations can deter potential corrupt practices.

Cons:

- **Privacy Concerns:** Donors might be deterred from contributing due to concerns about privacy and potential backlash.
- **Complexity and Loopholes:** The need for detailed reporting can be burdensome, and parties may find ways to obscure funding sources.

Lessons for India from Global Best Practices

India can draw several lessons from these international models to refine its election funding framework:

Combining Models: Adopting a hybrid model that incorporates elements of public funding, capped private donations, and full transparency could address multiple concerns simultaneously, ensuring fairness while minimizing undue influence.

Enhanced Transparency with Safeguards: Full disclosure, combined with strong privacy protections, could encourage transparency while protecting donor interests.

Public Funding with Checks: Public funding could be considered to ensure a level playing field, with mechanisms to prevent entrenchment of existing parties and ensure equitable access for newer entrants.

Robust Enforcement Mechanisms: Any model adopted must be supported by strong, independent enforcement mechanisms to oversee adherence to funding rules and to investigate and penalize violations.

The key is finding a balance that suits India's unique political and social landscape, drawing on global best practices to create a system that promotes transparency, fairness, and the health of its democracy.

To address the concerns surrounding the electoral bond scheme and to improve the overall transparency and accountability of political financing in India, a multi-faceted approach is necessary. This involves not only revising the current electoral bond system but also considering broader legal and electoral reforms. Herein are several recommendations followed by concluding remarks on finding the balance between transparency, electoral integrity, and donor privacy.

Recommendations for Improving the Electoral Bond Scheme

Introduction of Partial Disclosure Norms: Implementing a system where donations above a certain threshold are disclosed can strike a balance between protecting donor privacy and ensuring transparency. This would allow the public and watchdog organizations to scrutinize large contributions that might influence political decision-making, while still protecting smaller donors.

Caps on Donations: Instituting caps on the amount that can be donated through electoral bonds by an individual or entity in a financial year could prevent undue influence by a single donor or entity. Similar to practices in other democracies, this would limit the potential for large donors to exert disproportionate influence over political parties.

Strengthening the Role of the Election Commission: Empowering the Election Commission with greater oversight and enforcement capabilities regarding electoral bonds can ensure adherence to legal frameworks and address potential misuse.

Alternative Funding Mechanisms: Exploring alternative funding mechanisms, such as a matched funding system where small donations are matched with public funds, could encourage political parties to engage more broadly with the electorate rather than relying on a few large donors.

Public Funding Component: Introducing a component of public funding based on criteria such as vote share could help ensure a level playing field, reducing parties' dependence on large private donations and enhancing electoral fairness.

Need for Comprehensive Legal and Electoral Reform

To address the root issues of political financing in India, broader legal and electoral reforms are crucial. These include:

- **Revising Legal Frameworks:** Updating the Representation of the People Act and other relevant legislations to incorporate modern funding mechanisms, transparency norms, and accountability measures.
- **Enhancing Transparency and Reporting Standards:** Mandating detailed reporting of all forms of political funding, including in-kind contributions, with periodic disclosures to the public.
- **Independent Oversight:** Strengthening independent oversight bodies, such as the Election Commission of India, enabling them to monitor, investigate, and enforce campaign finance laws effectively.
- **Engaging Stakeholders:** Involving civil society, legal experts, political parties, and the public in the reform process to ensure that new regulations are comprehensive, fair, and reflective of the democratic ethos.

Way Forward

The debate around electoral bonds in India underscores the complex interplay between the need for transparency in political funding, the integrity of electoral processes, and the protection of

donor privacy. A vibrant democracy like India requires robust mechanisms to ensure that political financing is both transparent and accountable to maintain public trust in the electoral system. Yet, it is equally important to safeguard the privacy and security of donors to encourage broad-based participation in the democratic process.

Balancing these competing interests requires nuanced solutions that draw from global best practices while being tailored to India's unique political landscape. Comprehensive legal and electoral reforms, coupled with a willingness to adapt and refine funding mechanisms, are essential to achieve this balance. By fostering a transparent, accountable, and inclusive environment for political funding, India can strengthen its democratic foundations and ensure that its electoral processes reflect the will and interests of its citizens.

Ultimately, the goal should be to create a political financing system that supports a healthy democracy, where the influence of money is minimized, and the voice of every voter is heard and valued. Through thoughtful reforms and ongoing dialogue among all stakeholders, India can pave the way for a more transparent, equitable, and vibrant democratic process.

References:

The Finance Act, 2017

India, The Finance Act, 2017, Act No. 7 of 2017, Gazette of India, Part II, sec. 1 (2017).

The Constitution of India.

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

Association for Democratic Reforms v. Union of India (2024) 10 SCC 421.

Association for Democratic Reforms, "The State of Electoral Finance in India," (New Delhi: ADR, 2023).

Law Commission of India, "Reforming Electoral Finance: A Report," Report No. 255 (New Delhi: Government of India, 2022).