



The Indian Journal for Research in Law and Management

Open Access Law Journal – Copyright © 2024

Editor-in-Chief – Dr. Muktai Deb Chavan; Publisher – Alden Vas; ISSN: 2583-9896

This is an Open Access article distributed under the terms of the Creative Commons Attribution-Non-Commercial-Share Alike 4.0 International (CC-BY-NC-SA 4.0) License, which permits unrestricted non-commercial use, distribution, and reproduction in any medium provided the original work is properly cited.

"BALANCING JUSTICE AND TRANSPARENCY: A CRITICAL EXAMINATION OF ADR VS. UOI (2024) AND THE VOTER'S RIGHT TO INFORMATION"

INTRODUCTION

The Electoral Bond Scheme, introduced in 2018, allows individuals and corporations to purchase electoral bonds from authorized banks and donate them to political parties. This scheme allowed certain State Bank of India (SBI) branches to offer electoral bonds for ten days in January, April, July, and October of each year in the following denominations: ₹1,000, ₹10,000, ₹1,00,000, ₹10,00,000, and ₹ 1,00,00,000. Most significantly, the bonds protected the buyer's identity from prying eyes—all parties except the SBI must keep a record of the buyer's Know Your Customer (KYC) information. However, the scheme has been criticized for its anonymity, which critics argue undermines transparency and accountability in political funding.

The lack of transparency makes it difficult for citizens to know who is funding political parties, raising questions about potential influence over government policies. Critics also argue that electoral bonds give an unfair advantage to wealthy donors and large corporations, as they can make significant contributions without public scrutiny, affecting the democratic process. The Supreme Court of India has heard petitions challenging the constitutionality of electoral bonds, arguing that they undermine free and fair elections by facilitating unregulated and undisclosed funding of political parties. Despite the intention to promote transparency and curb black money in political funding, the implementation of electoral bonds has been controversial, with critics arguing they create loopholes for opaque financing of political parties.

RIGHT OF VOTER'S

Association of Democratic Reforms v. Union of India (2002)¹

The Delhi High Court received a Public Interest Litigation (PIL) brought in 1999 by the Association for Democratic Reforms, which urged candidates to declare any existing criminal proceedings against them at the time of filing their nomination papers. After ruling in favor of the lawsuit, the Delhi High Court mandated that MPs and MLAs disclose these cases in an affidavit.

In an attempt to overturn the ruling, the Union administration petitioned the Supreme Court for Special Leave. Voters now have the right to view affidavits filed by candidates exposing their criminal history, as the Supreme Court upheld the High Court's decision in May 2002.

The ruling further stated that under Article 19(1)(a)² of the Constitution, the right to information—including a candidate's assets and criminal history was essential to democracy's continued existence. It was instructed that the Election Commission obtain information on affidavits from candidates running for State Legislature or Parliament, including information on prior convictions, ongoing legal matters, and judicial recognition.

The candidate's nomination papers would be rejected if an affidavit was not filed, as it would be considered incomplete. But thereafter, the Parliament inserted Sections 33A³ and 33B⁴ into the Representation of People's Act (RP Act), thus overturning the Supreme Court's decision by stating that a candidate was not required to reveal any information about their criminal history.

People's Union for Civil Liberties v. Union of India (2003)⁵

The RP (Third Amendment) Act's Section 33B⁶ amendment was challenged by the Supreme Court in 2003 because it was thought to be unconstitutional. The amendment sought to restrict candidates' ability to disseminate information, going against the "right of electors to know" and impeding free and fair elections. Because it violated the fundamental right to free speech and

¹ AIR 2001 DELHI 126

² Protection of certain rights regarding freedom of speech, etc. (1) All citizens shall have the right- (a) to freedom of speech and expression

³ A candidate shall, apart from any information which he is required to furnish, under this Act or the rules made thereunder, in his nomination paper delivered under sub-section (1) of section 33, also furnish the information as to whether

⁴ Candidate to furnish information only under the Act and the rules. —

Notwithstanding anything contained in any judgment, decree or order of any court or any direction, order or any other instruction issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information, in respect of his election, which is not required to be disclosed or furnished under this Act or the rules made thereunder.* This section has been struck down by the Supreme Court in People's Union for Civil Liberties v. Union of India, AIR 2003 SC 2363

⁵ AIR 2003 SUPREME COURT 2363

⁶ Supra note at 4

expression, the court declared it invalid. Consequently, contesting candidates had to furnish details regarding all cases that were still outstanding, their assets and liabilities, and their educational background. The *ADR v. UOI*⁷ ruling was overturned by this ruling.

Manoj Narula v Union of India (2014)

A Public Interest Litigation (PIL) was brought before the Supreme Court in 2005, questioning the appointment of some Ministers to the Union of India's Council of Ministers despite their charges for grave or horrific offenses. The court held that the judiciary lacked the authority to read disqualifications not covered by the statute into Article 75(1)⁸ and acknowledged the judiciary's limited authority in matters about Minister appointments. The Prime Minister may select a person with a criminal history against whom charges have been brought for egregious or serious crimes or corruption, according to the majority ruling.

Public Interest Foundation v. Union of India (2018)

The Public Interest Foundation petitioned the Supreme Court in 2011 to broaden the list of reasons that would render someone ineligible to serve in the Union and State legislatures. The petition sought the Court to disqualify legislators and candidates under the RP Act if they file fraudulent affidavits or if a court has framed severe criminal charges against them. The Supreme Court was urged to establish suitable criteria and a six-month trial period for these individuals.

In its 2014 report on disqualification, the Law Commission brought attention to the detrimental practice of affidavits and nomination papers filling in erroneous information or leaving blank spots. The report suggested that the minimum sentence for filing false affidavits be increased to two years in prison and that this offense be grounds for disqualification. Additionally, it recommended that daily trials be held in all of these cases to guarantee the required conviction before exclusion.

The Supreme Court's Constitutional bench rendered a unanimous decision, holding that the Court cannot enact additional regulations under the RP Act that would bar candidates who are

⁷ Supra note at 1

⁸ The Prime Minister shall be appointed by the President and the other Ministers shall be appointed by the President on the advice of the Prime Minister.

the subject of criminal proceedings from running for office. The bench delegated the task of enacting legislation that bars candidates facing serious charges from running for office to the parliament.

Regarding criminal histories, the Court ordered that candidates disclose their criminal histories in detail in their nomination forms and provide ample publicity for them by promoting them three times in widely read print and digital media following the submission of their papers. The court further ordered prompt and efficient trials for the MPs and MLAs who are the targets of charges.

***Rambabu Singh Thakur v. Sunil Arora (2020)*⁹**

In a February 2020 ruling on a contempt petition filed by Ashwini Kumar Upadhyay and Rambabu Singh Thakur, the Supreme Court's division bench—which included former Justices Nariman and Bhat—cited the Election Commission of India's noncompliance with the 2018 Constitution Bench's directives regarding the decriminalization of politics. Within 48 hours of selection or two weeks of nomination, the bench ordered political parties to make public the criminal histories of candidates running in the Lok Sabha and Assembly elections. Political parties were threatened with contempt proceedings by the court if they did not comply.

***Brajesh Singh vs. Sunil Arora (2021)*¹⁰**

In August 2021, the Supreme Court declared that eight political parties had disregarded its orders during the elections for the Bihar Legislative Assembly. Each of the parties, which included the Nationalist Congress Party and the Communist Party of India (Marxist), was fined five lakhs. Additionally, the court ordered the payment of one lakh to each of the following political parties: the Communist Party of India, the Indian National Congress, the Bharatiya Janata Party (BJP), Janta Dal, and Rashtriya Janata Dal (United). A special bench recalled the fine in February 2023, finding no evidence of deliberate noncompliance.

***Bhim Rao Baswanth Rao Patil v. K. Madan Mohan Rao & Ors. (2023)*¹¹**

⁹ (2020) 3 SCC 733

¹⁰ (2021) 10 SCC 241

¹¹ 2023 SCC OnLine SC 871

Voters have a full right to know about the background of an electoral candidate, according to a ruling by the Supreme Court, which is made up of former Justice S. Ravindra Bhat and Justice Aravind Kumar. The court maintained that one of democracy's fundamental characteristics is the ability to make an educated decision, and it highlighted this point. The court further found it incongruous that, although democracy is one of the fundamental characteristics of the Constitution, the right to vote has not been recognized as a fundamental right. In a challenge to the Telangana High Court's ruling to dismiss an election petition against appellant Bhim Rao Baswanth Rao Patil, who failed to justify, the issue was taken up.

Association for Democratic Reforms v Union of India (2024)

FACTS

The Finance Act amended the RBI Act, which governs the issuance of promissory notes and bills of exchange, to provide the Central Government the authority to permit scheduled banks to issue electoral bonds. In addition, Section 182¹² of the Companies Act underwent three modifications as a result of the Finance Act 2017: a cap on corporate funding was eliminated, companies were required to disclose the total amount they contributed to political parties during a fiscal year, and Sub-section 3A was added, restricting corporate contributions to bank drafts, electronic clearing systems, and checks.

Additionally, the proviso permits corporations to make contributions to political parties using any mechanism authorized by current legislation. The Finance Act's amendments established a new system for monetary donations to political parties in the form of electoral bonds, permitting political parties to reveal the contributions they have received through these bonds, exempting corporations from the need to reveal the specifics of their contributions, and permitting unlimited corporate funding.

ISSUES

- Whether the electoral bond scheme violated the right to information of the voters.

¹² Prohibitions and restrictions regarding political contributions

- Whether the lack of disclosure concerning voluntary contributions to political parties under the Electoral Bond Scheme and the amendments to the RPA, Companies Act and IT Act infringes upon citizens' right to information.¹³

JUDGMENT

On February 15, 2024, a five-judge Constitution Bench headed by Chief Justice D.Y. Chandrachud unanimously invalidated the Union's 2018 Election Bonds (EB) Scheme. According to Article 19(1)(a)¹⁴ of the Constitution, the Bench found that the Scheme violated voters' right to information access. "A voter cannot effectively exercise their right to vote without knowing how much money a political party receives," they said.

Companies were able to donate to political parties in secret thanks to the Scheme. The plan was challenged by the Communist Party of India (Marxist), Common Cause, the Association for Democratic Reforms (ADR), and the petitioners, who said that it allowed for "huge scale" election corruption and "non-transparency in political funding."

IS THIS A CASE THE COURT CAN HEAR?¹⁵

The Respondent (Union of India) argues that because the Scheme and the Finance Act Amendments raise issues with economic policy, the Supreme Court should exercise judicial restraint in determining whether to sustain them. However, after considering the case, the Supreme Court concluded that the Scheme and the Finance Act Amendments were more related to electoral politics than they were to economic matters.

The Supreme Court reached this conclusion because the true intent behind the Finance Act Amendments did not appear to have anything to do with economic policy, particularly in the case of laws on the electoral process as opposed to economic policy, such as:-

- (i) those that require the secrecy of information regarding electoral finance and
- (ii) those that permit political parties to accept unlimited corporate funding.

¹³<https://www.legalbites.in/landmark-judgements/case-analysis-association-for-democratic-reforms-anr-v-union-of-india-ors-2024-electoral-bonds-case-1013837>

¹⁴ Supra note at 2

¹⁵ https://main.sci.gov.in/supremecourt/2017/27935/27935_2017_1_1501_50573_Judgement_15-Feb-2024.pdf

INFRINGEMENT OF THE RIGHT TO INFORMATION OF THE VOTER¹⁶

The early Indian laws about the right to information focused on the close relationship between the right and open governance. In the second phase of the legal precedent-building process concerning the right to information, this Court recognized the role that information plays in helping people form perspectives on social, cultural, and political issues as well as in starting and participating in conversations.

Courts recognized the role that information had in protecting the goal of self-development by keeping the government accountable and assisting citizens in discovering the truth in a marketplace of ideas. This Court additionally recognized that one aspect of the freedom of speech and expression is the right to get information that would support moral, political, and social discourse.

Courts recognized the role that information had in protecting the goal of self-development by keeping the government accountable and assisting citizens in discovering the truth in a marketplace of ideas.⁸³ This Court additionally recognized that one aspect of the freedom of speech and expression is the right to get information that would support moral, political, and social discourse.

Therefore, the Court went beyond recognizing the purpose of freedom of speech and expression as a method of holding the government accountable in the second phase and emphasized the essential relevance of citizens' meaningful involvement in democracy.

A crucial element of the right to information's second phase of development is the fact that it is not restricted to material that is public or state-related. It includes information needed to advance participatory democracy in different situations as well as details about the workings of public workers.

Because of this, the Court moved past the notion that the purpose of freedom of speech and expression is to hold the government accountable in the second stage and recognized the inherent value of citizens' active participation in democracy.

¹⁶ Ibid

This Court recognized that meaningful participation in democratic governance is not just a means to an end, but an end in and of itself.

Right to information of a voter: exploring the judgments in ADR and PUCL

As previously indicated, the jurisprudence of the first and second stages of the doctrine's evolution serves as the foundation for voters' right to knowledge, as stated in Article 19(1)(a). The common theme connecting the first and second phases is the belief that citizens should be provided with information that promotes democratic involvement. Voters have a right to information that will enable them to make informed decisions, as voting is one of the most fundamental forms of democratic involvement.

The Court stated in the 1999 ADR case that disclosing certain information is required to further the public interest, even though it would violate the private rights of candidates and their families. Voters are entitled to information that is deemed "essential" in determining which candidate receives their ballot.

JUSTIFICATION FOR INFRINGING VOTERS' RIGHT TO KNOW

Goal 1: Curbing Black Money

Electoral bonds, together with electoral trust and other electronic transfer mechanisms, are the most effective ways to decrease the influence of dark money in politics. This is presuming that donations made through financial systems are encouraged by anonymity. This result is predicated on the idea that the Electoral Bond lowers the amount of black money. However, the Scheme is not perfect. The Electoral Bond Scheme does not have any regulatory checks to limit bond trading, even though Clause 14 stipulates that the bonds must not be tradeable.

The least restrictive way for contributions under twenty thousand rupees is to use different electronic transfer methods, keeping in mind the overall impact of the alternative measures on the right to information and its ability to achieve the purpose. This is because these techniques may affect the right to information while simultaneously fulfilling the purpose of the gift. The Electoral Trust is the least restrictive way to make contributions over twenty thousand rupees.

It has been established that the Electoral Bond Scheme is not the least restrictive means of achieving the objective of lowering the use of black money in the electoral process, hence

applying the balancing prong of the proportionality test is not required. Based on the aforementioned justification, we conclude that the Electoral Bond Scheme fails the least restrictive means test.

Goal 2: Donors' Right To Privacy

The first issue this Court must resolve is whether information about a citizen's political affiliation is protected by the fundamental right to informational privacy, which this Court recognized in Justice *KS Puttaswamy v. Union of India*¹⁷. If the answer to (a) above is yes, the second is whether financial contributions to a political party are considered a part of political affiliation. This Court will decide whether voter access to information can be restricted based on donor privacy.

If the right to informational privacy includes making financial contributions to political parties, then this Court must decide whether the Electoral Bond Scheme effectively balances the right to information and informational privacy of political affiliation.

Constitutionality of Unlimited Corporate Funding

The Court began by asking whether "if companies that bring enormous financial resources and engage in quid pro quo arrangements with parties are permitted to contribute unlimited amounts, would the elected truly be responsive to the electorate?"¹⁸

According to the Union, companies were found creating shell companies to circumvent the donation limitations that were in place before the 2018 Scheme. He suggested eliminating the restriction of 7.5 percent of the average net income from the three previous fiscal years to discourage sham companies.

The Court drew attention to the restrictions that had previously been in place to ensure that companies suffering financial losses did not donate to political parties. "There is no justification for removing the Union's goal if it was to discourage the creation of shell companies."

The Court drew attention to the restrictions that had previously been in place to ensure that companies suffering financial losses did not donate to political parties. If the Union's real goal was to dissuade the creation of shell firms, then it said, "There is no justification for removing

¹⁷ AIR 2018 SC (SUPP) 1841

¹⁸ <https://www.scobserver.in/reports/electoral-bonds-constitution-bench-judgement-summary/>

the cap on contributions which was included for the very same purpose: to deter shell companies from making political contributions."¹⁹

The Chief continued by stating that "unlimited corporate contributions to political parties are inimical to free and fair elections because they permit certain individuals or companies to use their resources and influence to influence policymaking." Giving companies this kind of "unrestrained influence" is in opposition to the idea of "one person, one vote."

In the end, the Court determined that the corporate funding cap is arbitrary for the following three reasons. It began by accounting for donations from both individuals and corporations. Secondly, it allowed unbridled corporate interference in fair and unbiased elections. Thirdly, equal weight was given to gifts made by both commercial and non-profitable companies.²⁰

Justice Khanna's Concurring Opinion

Writing a concurring opinion, Justice Khanna explained at the outset that he "arrived at the same conclusion" by employing an alternative line of reasoning. Most significantly, he contended that the Companies Act amendments that allowed for unlimited donations were illegal primarily because of the proportionality test rather than the clear arbitrariness requirement.

He declared that the third and fourth prongs of the proportionality test, the minimal limitation and balancing tests, must be interpreted rigorously. Citing *Anuradha Bhasin v. Union of India* (2020), he stated that the least limitation or necessity test can be evaluated using a reasonable interpretation. To "undertake an overall comparison between the measure and its feasible alternatives," the Court would need to act.

The balance test, he insisted, must "be rooted in empirical data and evidence." "This is crucial because the proportionality inquiry demands an unbiased assessment of competing values instead of depending on opinions and prejudices." Justice Khanna stated that statistics will offer a "more solid foundation" for normative reasoning and understanding of the procedures followed to get the intended outcomes.

He assessed data regarding the quantity of bonds sold, the distribution of funds among stakeholders, and the portion of the total raised from corporate contributions. Even though he

¹⁹ <https://cjp.org.in/sbi-fails-to-comply-in-the-electoral-bond-scheme-case-despite-sc-ruling>

²⁰ Supra

did not exactly adhere to the proportionality rule, he wrote that the Scheme fails the balancing test due to insufficient facts.

He concluded by stating that "retaliation, victimization, or retribution cannot be treated as a legitimate aim by any stretch of the imagination." He said it failed the appropriateness, need, and balance standards as well. Retaliation and victimization are illegal and legal abuses, but they are also unjustifiable. He said, "Transparency, not secrecy, is the cure and antidote."

Justice Khanna then listed all the ways because the goals of the plan were not achieved. He made the point that political parties "retain the ability to use their power and authority of investigation to compel the revelation of Bond-related information." The overarching objective of the Scheme is therefore inconsistent and nonsensical. Moreover, the concealment of donor identity and the suppression of unlawful money.

A public limited business's operations and dealings are transparent to its shareholders, therefore in terms of privacy, he said, "the claim of privacy by a corporate or a company, especially a public limited company, would be on very limited grounds." Only employees of the corporation were able to assert their right to privacy; the company itself was unable to do so.

Passionately, the author stated that the right of voters to know and access information is too important in a democratic system to be curtailed or denied on the pretext of privacy concerns or the necessity to halt unreported cash from coming to political parties.

THE COURT'S DIRECTIVES

- The State Bank of India's (SBI) bond sales related to the election will conclude.
- SBI will provide the Election Commission of India (ECI) with information regarding the Election Bonds purchased between April 12, 2019, and the present. The information needs to include the name of the buyer, the acquisition date of each bond, and the bond denomination.
- Starting on April 12, 2019, the Election Commission of India (ECI) will get a list of political parties to whom SBI has contributed using Electoral Bonds. This ought to include details about every Election Bond that political parties have cashed, as well as the denomination and the paid date of the bond.
- SBI will give the ECI the previously indicated data within three weeks of this date.
- SBI must deliver the aforementioned data to the ECI by March 6, 2024, or within three weeks of the date of this ruling.

- The information provided by SBI will be posted on the official website of the ECI within a week of receiving it (by March 13, 2024).
- Election bonds have a 15-day validity period. Political parties that haven't cashed them yet will return the bonds and credit the buyer's account.