
PRIVACY AND INFORMATION: AN ANALYSIS OF THE ELECTORAL BOND SCHEME THROUGH CONTRASTING RIGHTS

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ABSTRACT

The 2018 Electoral Bond Scheme resulted in a fractious relationship between the right to privacy of political candidates and the right to information of the public. Questions were raised as to which fundamental right ought to prevail over the other. This paper seeks to answer these questions against with the necessary background required to address them. It further delves into the larger debate of whether political parties as associations can claim privacy at all, or if it is time that they be made subject to disclosure.

The paper begins a description of the provisions of the Electoral Bond Scheme, 2018 and the Finance Acts of 2016 and 2017 that enabled its integration into the regime. The writ petitions raised against the Scheme before the Supreme Court are next dissected, and, having established the modern scenario of Indian party funding, the paper delves into the right to privacy and information under the Scheme and how the Scheme purported to protect these. Privacy and accountability in the context of political parties are then deliberated, followed by the reasoning behind the demands for disclosure of contributions received and the identities of donors, and why the right to information ultimately takes precedence over privacy. A jurisprudential view of ‘choice’ in terms of privacy and information is put forth, along with the importance of the right to know for the functioning of an open democracy. The paper concludes with certain considerations that policymakers and other authorities ought to rely upon while formulating a party funding regime, and how these considerations can better shape the regime so created.

INTRODUCTION

India has had a long and turbulent relationship with political financing. The increasing costs of democracy are a cause for concern not merely because of the direct consequences of more and more money being funnelled into elections but because of the broader effects that it could have on political behaviour. The primary sources of political financing can be classified broadly into known (or disclosed) and unknown (or undisclosed) sources.¹

This paper lays out the foundations of the Scheme, its provisions, and the resultant effects – both actual and potential – on the process of elections in India, particularly in the context of the voters' right to information and the right to privacy of donors and recipients under the Scheme. This paper analyses how transparency and accountability can create a conducive environment for free and fair elections. It is posited that the right to information must prevail in order to guard the freedom of voters and the sanctity of elections. This paper concludes with considerations that are material to the creation of a party funding regime that does not serve any one group to the detriment of others.

AN OVERVIEW OF THE SCHEME

The Provisions of the Electoral Bond Scheme, 2018

The Electoral Bond Scheme was presented as an essential component of the Union Budget and thus introduced on the floor of Parliament as a money bill. An electoral bond is a type of bearer instrument in the nature of a promissory note;² it is an instrument that can be purchased by any Indian citizen, organisation or corporation registered in India to make donations to political parties.

The instrument does not carry any identifying information of the donor or the political party to whom the donation is being made; instead, the buyer must have fulfilled extant KYC requirements as instructed by the RBI with the State Bank of India ('the SBI', which is the only authorised issuer) to be eligible to purchase the bonds.³

¹ PTI, *69% of funds for India political parties from unknown sources: Report*, THE NEW INDIAN EXPRESS (Dec. 9, 2023), <https://www.newindianexpress.com/nation/2017/jan/24/69-of-funds-for-india-political-parties-from-unknown-sources-report-1563076.html>.

² Electoral Bond Scheme, 2018, Rule 2(a), Ministry of Finance Notification, 2018 (India).

³ Electoral Bond Scheme, 2018, Rule 4, Ministry of Finance Notification, 2018 (India).

The SBI issued bonds to purchasers in denominations of Rs. 1,000, Rs. 10,000, Rs. 1 lakh, Rs. 10 lakhs, and Rs. 1 crore per Rule 5 of the Scheme Notification.⁴ Payment could be made digitally or through cheque; cash transfers were not permitted.

The bonds were valid for a fifteen-day period from the date of issue, and no payment would be made to any political party if the bond was deposited after the validity period lapsed. Bonds were available for purchase periodically over ten days in the months of January, April, July, and October, or as specified by the Central Government.⁵ The bonds were not necessarily issued in the run-up to polls in any particular State or prior to general elections to the Lok Sabha; the Scheme was merely a means of funding the party itself and not with specific reference to financing election campaigns.

For parties to be eligible to redeem bonds under the Scheme, it was mandated that only those parties registered under Section 29A of the RPA and having secured not less than 1% of the votes polled in the last general election to the Lok Sabha or Rajya Sabha (as the case may be) shall be qualified to receive and encash the bonds.⁶ Bonds could only be encashed by eligible parties through a designated bank account with the SBI. After the fifteen-day validity period, no party was permitted to encash the bonds.⁷ The Scheme dispersed of any uncashed bonds into the Prime Minister's Relief Fund.⁸

Individuals, Hindu Undivided Families, companies, firms, incorporated and unincorporated associations of persons (including foreign corporations holding shares in Indian companies) were deemed competent to purchase bonds under the Scheme.⁹

To create greater incentive to invest, the face value of the bonds was to be counted as 'income' by way of voluntary contributions received by an eligible political party and were exempted under Section 13A of the Income Tax Act, 1961.¹⁰

The Provisions of the Finance Acts of 2016 and 2017

To facilitate the integration of the Electoral Bond Scheme into the existing regime, it was

⁴ Electoral Bond Scheme, 2018, Rule 2(b), Ministry of Finance Notification, 2018 (India).

⁵ Electoral Bond Scheme, 2018, Rule 8, Ministry of Finance Notification, 2018 (India).

⁶ Electoral Bond Scheme, 2018, Rule 3, Ministry of Finance Notification, 2018 (India).

⁷ Electoral Bond Scheme, 2018, Rule 6, Ministry of Finance Notification, 2018 (India).

⁸ Electoral Bond Scheme, 2018, Rule 12(2), Ministry of Finance Notification, 2018 (India).

⁹ Electoral Bond Scheme, 2018, Rule 2(d), Ministry of Finance Notification, 2018 (India).

¹⁰ Electoral Bond Scheme, 2018, Rule 13, Ministry of Finance Notification, 2018 (India).

necessary to implement several amendments brought about via the enactment of the Finance Act of 2016 and the Finance Act of 2017.

Section 236 of the Finance Act, 2016 amended Section 2(1)(j)(vi) of the Foreign Contribution (Regulation) Act, 2010 ('the FCRA'), permitting foreign companies with a majority share in Indian companies to make political contributions.¹¹ As per the original provisions of the FCRA read with the Foreign Exchange Management Act, 1999 ('FEMA'), foreign companies, regardless of their holding in Indian companies, could not donate to any political parties.¹²

The Finance Act of 2017 inserted amendments into various other statutes. Firstly, Section 11 of the 2017 Act amended Section 13A of the Income Tax Act, 1961. This amendment exempted political parties from any obligations to maintain detailed records of the contributions received through the Scheme.¹³

Secondly, Section 31 of the Reserve Bank of India Act, 1934, was amended by Section 135 of the 2017 Act, empowering the Central Government to authorise the issue of electoral bonds by any scheduled bank. That bank was the State Bank of India.¹⁴

Thirdly, a proviso was introduced to Section 29C of the RPA, exempting political parties from their obligation to disclose any contributions received in excess of Rs. 20,000 from companies and individuals through the publication of 'Contribution Reports'.¹⁵

Lastly, Section 154 of the 2017 Act amended Section 182 in the Companies Act, 2013. This amendment removed the cap placed on corporate donations to political parties.

The above amendments, as well as the Scheme itself, have been met with criticism on several grounds, which can be boiled down to, first, a substantive question raised as to the apparent violation of fundamental rights by the Scheme, and second, a procedural question, which has been raised as to the validity of the introduction of the Finance Bill of 2017 as a money bill on the floor of the Lok Sabha. This paper, as well as the verdict of the Supreme Court regarding the Scheme's constitutionality, focuses on the former.¹⁶

¹¹ Finance Act, 2016, §236, No. 28, Acts of Parliament, 2016 (India).

¹² Gauri Kashyap, *Electoral bonds and democracy: What's at stake?* SUPREME COURT OBSERVER, (Oct. 31, 2023), <https://www.scobserver.in/journal/electoral-bonds-and-democracy-whats-at-stake/>.

¹³ Income Tax Act, 1961, §13A, No. 43, Acts of Parliament, 1961 (India).

¹⁴ Electoral Bond Scheme, 2018, Rule 2(b), Ministry of Finance Notification, 2018 (India).

¹⁵ Representation of the People Act, 1951, §29C, No. 43, Acts of Parliament, 1951 (India).

¹⁶ Association for Democratic Reforms & Anr. v. Union of India & Anr., W.P. (C) No. 880 of 2017 (India).

THE WRIT PETITIONS CHALLENGING THE SCHEME

A batch of petitions challenging the Scheme's constitutional validity on the substantive and procedural grounds mentioned had been raised before the Apex Court between 2017 and 2022. Two key petitioners to the suit included the Association for Democratic Reforms (ADR) and the Communist Party of India-Marxist (CPI-M).¹⁷ The petitioners submitted that the amendments made were unreasonable, irrational, and violative of the Right to Information of the citizens; they bore no connection to the stated intention of the Scheme (i.e., to prevent corruption and expunge black money from the party funding system), and, lastly, that the doctrine of separation of powers was violated by the alleged erroneous passing of the said amendments through a Money Bill when it allegedly did not qualify as such (per the provisions of Article 110 of the Constitution).¹⁸ The petitioners prayed to declare the impugned provisions of the Finance Act, 2017, void, and to deem the corresponding amendments in other Acts unconstitutional and void, along with other distinct prayers by each party joined in the petition.¹⁹

The Union government defended the Scheme's provisions, stating that privacy in the party funding system is a matter of right of the donors under the Scheme and is essential in upholding the sanctity of the election process.²⁰ Furthermore, it had been argued that the Scheme was designed to weed out corruption and undocumented funds that were routed through the primarily cash-based old regime.²¹ The Union stated that the anonymity offered under the Scheme was integral to its existence; without it, the Scheme would become redundant, and the objectives towards which it has been introduced would not be achieved.²²

A five-judge bench of the Supreme Court determined that the Scheme was unconstitutional on the ground of violation of the right to information of voters (among other grounds), and struck it and corresponding amendments down, preventing further tranches of bonds from being issued.²³ It directed the SBI to furnish details of funds collected through the conduit of the

¹⁷ SCO, *Electoral bonds: Writ petitions summary*, SUPREME COURT OBSERVER, (Nov. 9, 2023), <https://www.scobserver.in/reports/association-for-democratic-reforms-electoral-bonds-writ-petitions-summary/>. (last visited Nov 9, 2023).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ The Hindu Bureau, *Supreme Court reserves verdict in the challenge to the electoral bonds scheme*, THE HINDU (Nov. 9, 2023), <https://www.thehindu.com/news/national/electoral-bonds-case-live-updates-from-supreme-court-on-day-3-november-2-2023/article67487720.ece>.

²¹ *Id.*

²² *Id.*

²³ Association for Democratic Reforms & Anr. v. Union of India & Anr., W.P. (C) No. 880 of 2017 (India).

Scheme to the Election Commission, and eventually to make such information available to the public later in the year.²⁴ As far as the wrestle between information and privacy goes, this judgment is a considerable milestone towards ensuring a more transparent election process.

THE RIGHT TO PRIVACY AND THE RIGHT TO KNOW UNDER THE SCHEME

Historically, electoral finance in India has not been known for its transparency or accountability; the system suffered from pitfalls in these areas that the introduction of the new Scheme sought to repair. In the modern era, with the burgeoning reliance on technology in everyday activities, the capacity of both state and non-state actors to potentially invade an individual's privacy has been dramatically enhanced.²⁵ Therefore, the Centre saw fit to develop a regime that could survive in this environment.

The Scheme proposes explicitly to protect the Right to Privacy of participants to transactions under it, that is, the buyers of electoral bonds and political parties receiving donations. It creates and maintains anonymity throughout the process, such that the donor's identity is not revealed to the public or other political parties. At its inception, only the party receiving such donations and the Central Government (and future incumbent governments) were privy to the details of Scheme donors.²⁶ Rule 7(4) of the 2018 Scheme Notification also provided that information furnished by donors shall not be disclosed “to any authority for any purposes, except when demanded by a competent court or upon registration of [a] criminal case by any law enforcement agency.”²⁷ Broadly, it is the public *en masse* and other political parties who did not have access to the particulars of transactions.

The Scheme was designed to protect the confidentiality of donors by allowing them to freely choose the party they wished to donate to and make such donations free from public interference. Parties were additionally not required to disclose donations received below Rs. 20,000.²⁸ Thus, the privacy of candidates and parties was protected in the same breath.

²⁴ Association for Democratic Reforms & Anr. v. Union of India & Anr., W.P. (C) No. 880 of 2017 (India).

²⁵ Raddivari Revathi, *Evolution of Privacy Jurisprudence – A Critique*, 60 2 JILI., 189-199, (2018) (India).

²⁶ IANS, *Explained: What are electoral bonds? how do they work and why are they challenged in SC?*, THE ECONOMIC TIMES (Nov. 9, 2023), <https://economictimes.indiatimes.com/news/how-to/explained-what-are-electoral-bonds-how-it-works-and-why-its-challenged-in-supreme-court/articleshow/104889034.cms>.

²⁷ Electoral Bond Scheme, 2018, Rule 7(4), Ministry of Finance Notification, 2018 (India).

²⁸ Anupa Kujur, *Explained | Cash donations to political parties: What do the current rules say?*, DECCAN HERALD (last visited Dec 4, 2024), <https://www.deccanherald.com/india/explained-cash-donations-to-political-parties-what-do-the-current-rules-say-1146624.html>.

The Scheme claimed to protect the privacy of choice of donors and the privacy of information of political parties – two facets of privacy discussed in the *Puttaswamy* judgment.²⁹ Donors had complete autonomy and freedom to make contributions outside the magnifying glass of public scrutiny. Learned Solicitor-General Tushar Mehta, in his arguments before the Supreme Court defending the constitutionality of the Scheme, submitted:

[The] Purity of elections is supreme over the right to vote. [The] Voter votes, not based on which party is funded by whom; [the] voter votes based on ideology, principle, leadership, and efficiency of the party.³⁰

If this is indeed true, then the details of political contributions (both from the donor and the recipient sides) are not material information for voters and are, therefore, not required to be disclosed.

However, as pointed out by the Supreme Court, the right of the voters to know details about candidates and parties contesting elections originates from the broader Right to Information, which in turn is derived from the Right to Freedom of Expression.³¹ In 2003, when the People's Union for Civil Liberties challenged the constitutionality of Section 33-B of the RPA, PV Reddi J. opined that, within a democratic republic, the will of the people is the source from which any government elected by them derives its power.³² The Court, in the case of *Lily Thomas v. Speaker, Lok Sabha*, stated: "Voting is a formal expression of will or opinion by the person entitled to exercise the right on the subject or issue."³³

Thus, for a true expression of the will of the voter and for their opinion to be formulated intelligently, rationally and to the best of their judgment, they must have access to relevant information about the candidates and parties standing for elections.

PV Reddi, J. also wrote of an alternative interpretation – that a voter "speaks out or expresses by casting [their] vote",³⁴ and the ballot is their instrument to do so. The Court, in the case of *Union of India v. Association for Democratic Reforms*, has previously held a similar

²⁹ Justice K.S. Puttaswamy (Retd.) v. Union of India (2017) 10 SCC 1, [510] (India).

³⁰ THE HINDU BUREAU, *supra* note 20.

³¹ Association for Democratic Reforms & Anr. v. Union of India & Anr., W.P. (C) No. 880 of 2017 (India).

³² People's Union for Civil Liberties v. Union of India (2003) 2 SCR 1136 (India).

³³ (1993) 4 SCC 234 (India).

³⁴ People's Union for Civil Liberties v. Union of India (2003) 2 SCR 1136 (India).

perspective on the necessity of dissemination of candidate information to the public and that it is a form of expression that should be construed as such under Article 19(1)(a).³⁵ The right to know is an indelible component of the voters' ability to express their opinions freely, and a candidate's privacy cannot be more important than the right to information of the voting class.

The disclosure requirement stands compulsory for candidates in an individual capacity. Whether political parties as entities can claim the right to privacy is a different question altogether.

Political Candidates, Parties, and Privacy

In the *PUCCL* judgement, PV Reddi, J. observed that when conflict arose between an individual's right to privacy and the citizens' right to information, information would unseat privacy because it served a greater public interest.³⁶ This was laid down specifically regarding the disclosure of the assets and liabilities of individual candidates standing for elections and not for political parties as a whole.

Political parties, broadly unacknowledged in the constitutions of democracies worldwide, are nonetheless an integral part of the democratic process. Political parties in India, furthermore, are excluded from the scope of 'public authorities' as per Section 2(h) of the RTI Act, whereby their once-private affairs could be flung open to public scrutiny.

An argument can be made that political parties are ultimately private associations of citizens³⁷ and are, therefore, entitled to the privacy of affairs enjoyed by all other such private associations. A cursory analysis of the term 'public authorities' under the RTI Act reveals that, *prima facie*, political parties do not qualify as such.³⁸

But it is the very nature of political parties and the significance of their role within a democracy that sets them distinctly apart from that of ordinary private associations. Political parties serve a public function by participating in the election process and, moreover, employing public contributions to conduct their activities. In *S.P. Gupta v. Union of India*, Bhagwati, J. wrote, "The concept of an open government is the direct emanation from the right to know, which

³⁵ (2002) 5 SCC 294 (India).

³⁶ *People's Union for Civil Liberties v. Union of India* (2003) 2 SCR 1136 (India).

³⁷ DEVESH KAPUR AND MILAN VAISHNAV, *COSTS OF DEMOCRACY: POLITICAL FINANCE IN INDIA*, (Oxford University Press 2018).

³⁸ The Right to Information Act, 2005, §2(h), No. 22, Acts of Parliament, 2005 (India).

seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(a).”³⁹ Mathew, J., in *State of Uttar Pradesh v. Raj Narain*, observed:

In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries.⁴⁰

The Supreme Court has conclusively determined that political candidates participating in governance are, ultimately, servants of the public, and as such, for them to enjoy the same degree of privacy that a private individual does is a *non sequitur*. Justice Bhagwati in *S.P. Gupta v. Union of India* remarked that the Constitution guarantees the right to know which is necessary to secure “true facts” about the administration of the country – and it is apparent that this is a vital component of democratic governance. Why then should political parties be immune from the discerning public eye?

Political Parties and Accountability

'Accountability' is broadly considered a form of mutual exchange of responsibilities; however, the more distinctive branch of 'political accountability' is complex and primarily involves asymmetrical, recursive interaction between the citizens and rulers of a polity. As a democratic tool, accountability must not be left to citizens' preferences; it requires the consistency and standardisation of well-entrenched institutions. For political accountability to be effective in any capacity, it must be embedded within the institutional framework through a stable set of rules because it is not the same as other forms of accountability; its ramifications are felt at a much larger scale.⁴¹ Accountability to the citizenry forms the core of good governance itself.⁴²

Viewed through the lens of a stakeholder, the asymmetric power between organisations and stakeholders demands accountability from the agent, in the form of providing essential

³⁹ 1981 Supp. (1) SCC 87 (India).

⁴⁰ (1975) 4 SCC 428 (India).

⁴¹ Phillippe C. Schmitter, *Political Accountability in 'Real-Existing' Democracies: Meaning and Mechanisms*, EUI (2007).

⁴² *Id.*

information to the involved parties in order to bridge the gap between them.⁴³ Transparency, accountability, and disclosure are the core components of corporate governance, and the basic principle underlying this is that the stakeholders, who have an interest in the workings of the organisation because it affects them (either directly or indirectly), have a right to know of its affairs. In turn, the organisation is answerable for its actions to stakeholders, which ensures that it takes no arbitrary or excessive action.

Accountability exists to be implemented to different extents. Should political parties be held to the same standards of accountability as, for instance, the ruling government? Or should they be afforded a certain degree of privacy in their affairs and workings?

The basis of accountability in these two cases differs greatly; the incumbent government must be held accountable to the public by virtue of the terms of the social contract between the ruler and the ruled. Contrastingly, political parties that conduct themselves in the public arena and on funds received from the self-same public need not necessarily be held to such strict a standard. Parties ought to be held accountable to the extent that they enable enhanced precision of voter knowledge by supplying relevant information to the public.

And this accountability is not limited to times of election; Bhagwati, J., remarked that democratic governance is not restricted to voting once in every five years, but is a continuous process by which citizens choose representatives and hold the government accountable for action and inaction, and in order to do so, they require information.⁴⁴

Disclosure under the Bond Scheme (and by extension, better accountability) may be satisfied in two measures: firstly, the quantum of donations received, and secondly, the identities of donors.

Disclosure of Contributions Received: Why is it Necessary?

Irrelevant or trivial information does not necessarily need to be disclosed. The Supreme Court has laid down that indiscriminate and impractical demands or directions under the RTI Act for

⁴³ R. H. Gray et al., *Struggling with the praxis of social accounting: Stakeholders, accountability, audits and procedures*, 10 3 ACCOUNT., AUDIT. ACCOUNT. J., 325-364 (1997); Masiyah Kholmi et al., *Phenomenology Study: Accountability of a Political Party in the Context of Local Election*, 2 11 PROCEDIA SOC. BEHAV. SCI., 731-737 (2015).

⁴⁴ S.P. Gupta v. Union of India, 1981 Supp SCC 87 (India).

disclosure of all and sundry information unrelated to transparency and accountability in the functioning of public authorities would be counterproductive, ultimately inefficient and needlessly burdensome for the Executive.⁴⁵

The underlying purpose of disclosure in the interest of the right to know is not to satiate the mere curiosity of the public. It will allow the voters to form a well-reasoned opinion to exercise at the time of polls and act as a deterrent to parties themselves against any future instances of receipt of funds from illicit sources. If made available, the information would allow voters to engage in comparative analysis of a candidate's assets and liabilities throughout and "assess whether the high public office had possibly been used for self-aggrandisement."⁴⁶

Transparency and accountability are the twin pillars that uphold the right to information and are of particular importance for open governance. In the case of party funding, financial information of political entities and the sources of such finances, ought to be considered vital information that cannot be kept confidential from voters. The Supreme Court has also stated that: "[T]he most important value of the functioning of a healthy and well-informed democracy is transparency."⁴⁷

Disclosure of Donor Identities and the Role of Money in Elections

In a perfect world, money would play a negligible part in the electoral process. As it stands, however, the role of money in elections is unfortunately undeniable, and its influence is felt in electoral outcomes.⁴⁸ In a 1932 study, James Kerr Pollock lamented that "The relation between money and politics has come to be one of the great problems of democratic government."⁴⁹ Large quantities of money in politics serve to "undermine the level playing field, as all candidates and parties do not have equal access to funds."⁵⁰ Learned counsel Mr Prashant Bhushan, representing the petitioners, stated before the Court, "Today, unequal use of money power is universally recognised by various bodies and the judgement of this court as something

⁴⁵ CBSE v. Aditya Bandopadhyay, 2011 (8) SCC 497 (India); ICAI v. Shaunak H. Satya, Civil Appl. No. 7571 of 2011 (India).

⁴⁶ People's Union for Civil Liberties v. Union of India (2003) 2 SCR 1136 (India).

⁴⁷ ICAI v. Shaunak H. Satya and Ors. (2011) Civil Appeal No. 7571 of 2011 (India).

⁴⁸ Association for Democratic Reforms & Anr. v. Union of India & Anr., W.P. (C) No. 880 of 2017 (India).

⁴⁹ JAMES KERR POLLOCK, MONEY AND POLITICS ABROAD (A. A. Knopf, 1932); DEVESH, *supra* note 37.

⁵⁰ DR S.Y. QURAISHI, FINANCING DEMOCRACY: FUNDING OF POLITICAL PARTIES AND ELECTION CAMPAIGNS AND THE RISK OF POLICY CAPTURE, (OECD Publishing (Paris), 2016).

that erodes the concept of democracy.”⁵¹

Particularly in Indian elections, money has been a significant driving force, and as of 2019, India's elections have become the most expensive in the world.⁵² It is reasonable to say that the Electoral Bond Scheme had significantly contributed to this. According to the latest available data regarding funds collected through the Scheme, the Bharatiya Janata Party has received over Rs. 5,271 crores in donations (Rs. 5271,97,58,000), while the Indian National Congress has received over Rs. 952 crores (Rs. 952,29,56,000).⁵³ Among the regional parties, Biju Janata Dal, serving primarily in Odisha, received over Rs. 622 crores. In contrast, the Yuva Jana Sramika Rythu (YSR) Congress, serving primarily in Andhra Pradesh and Telangana, received around Rs. 330 crores. The total quantum of electoral bonds redeemed under the Scheme since its introduction was just over Rs. 9187 crores (Rs. 9187,55,40,000).⁵⁴

The 2018 Scheme allowed various entities to make virtually unrestricted donations to political parties, and these entities could donate in such large sums as everyman citizens were incapable of doing. Foreign investors, foreign companies, and corporate entities unhindered by contribution caps were all capable of purchasing bonds of much higher value than ordinary individuals could, thereby injecting ostentatious quantities of money into Indian elections, and potentially influencing the outcomes thereof.

This phenomenon was already in effect: in 2020, the SBI, in response to an RTI application filed by Commodore Lokesh Batra (retd.), disclosed the total quantity and denomination of electoral bonds printed and sold.⁵⁵ The reply revealed that a large quantity of the bonds printed by the Indian Security Press were of Rs. 1,000 denomination (2,56,000 in number), while the higher denominations of Rs. 10 lakh and Rs. 1 crore ran up to 26,000 and 14,650 bonds in print respectively.⁵⁶ Interestingly enough, the information provided by the SBI also revealed that the bonds sold were primarily of the higher denominations; to quantify: 5,702 bonds of Rs. 1 crore

⁵¹ THE HINDU BUREAU, *supra* note 20.

⁵² Bibhudatta Pradhan & Shivani Kumaresan, *India's Bitterly Fought Election Becomes the World's Most Expensive*, BLOOMBERG (June 3, 2019), https://www.bloomberg.com/news/articles/2019-06-03/india-s-bitterly-fought-poll-becomes-the-world-s-most-expensive?utm_source=website&utm_medium=share&utm_campaign=copy.

⁵³ The Hindu Bureau, *Electoral bonds chief source of donations for political parties: Report*, THE HINDU, (Jan. 4, 2024), <https://www.thehindu.com/news/national/electoral-bonds-chief-source-of-donations-for-political-parties-report/article67068053.ece>.

⁵⁴ *Id.*

⁵⁵ State Bank of India, Reply to RTI Application filed by Commodore Lokesh K. Batra (Retd.), TBU/RTI/2020-21/01 (Apr. 8, 2020), https://www.scribd.com/document/460631770/Electoral-Bond-Sale-and-Printing#fullscreen&from_embed.

⁵⁶ *Id.*

denomination (or about 94.41%) and 4,911 bonds of Rs. 10 lakh denomination were purchased, whereas merely 0.01% of bonds of Rs. 1,000 were purchased in that same duration.⁵⁷ The purchase of such high denominations of bonds in such high quantity (especially compared to the nearly negligible quantity of bonds purchased in lower denominations) is likely far beyond the purchasing capacity of any ordinary individual or family unit. This, in turn, could imply that it is primarily corporate entities and foreign companies who are among the prominent investors in the Scheme.⁵⁸

The Court in *Kanwar Lal Gupta* succinctly recognises the Courts' position on "big money" in elections:

It is likely that some elected representatives would tend to share the views of the wealthy supporters of their political party [...]. In such event, the result would be that, though ostensibly the political parties which receive such contributions may profess an ideology acceptable to the common man, they would in effect and substance be representative of a certain economic class and their policies and decisions would be shaped by the interests of that economic class.⁵⁹

The concern of petitioners such as ADR and CPI-M, along with other critics of the Scheme, was that there may now be an increase in behind-the-curtain political lobbying by companies and foreign entities, having been strengthened with greater financial bargaining capacity via unrestricted political donations. The fact that such contributions were income tax-exempt is merely an added incentive.

This fear can be allayed through disclosure. With donor-identifying information made available, voters are empowered to conduct an informed comparative analysis between the sources of donations, mainly corporate and foreign, and between policy decisions and government tenders or contracts granted during tenure. Additionally, the disclosure requirement will act as a check on parties from potentially showing favouritism or engaging in

⁵⁷ Dheeraj Mishra, *Taxpayers, not donors or parties, are bearing the cost of printing electoral bonds: RTI*, THE WIRE, (Dec. 10, 2023), <https://thewire.in/rights/electoral-bonds-tax-payers-cost-printing-bank-commission>.

⁵⁸ Shabbir Ahmed, *Lokesh Batra: The War Veteran on a Mission to Tackle the Electoral Bonds Scheme*, THE WIRE, (Jan. 4, 2024), <https://thewire.in/rights/lokesh-batra-electoral-bonds-scheme-rti>.

⁵⁹ *Kanwar Lal Gupta v. Amar Nath Chawla* 1975 3 SCC 646, (India).

quid pro quo arrangements while simultaneously curbing potential corporate and foreign interference with domestic politics.

Choice as a Facet of Privacy and a Product of Information

Fundamental rights are born out of notions of civilised society, such as liberty and dignity. They are inherent to individuals but can only be exercised to their fullest extent by individuals who are at liberty to do so. Voting is interpreted to be a component of 'expression' under Article 19(1)(a), thereby affording the freedom to voters to express themselves through ballot the same protection as any other facet of the Right to Freedom of Speech and Expression. It is by extension subject to the same reasonable restrictions under Article 19(2),⁶⁰ and aside from these specific circumstances, the State cannot arbitrarily interfere in its exercise.

Choice goes far beyond its mere conceptualisation as a part of the freedom of expression; it cuts to the very nature of an individual's identity, liberty and dignity. According to Fried, "[...] A violation of liberty tears something: a man recognises me, recognises me as being a person like him, but then contradicts that recognition by using against me and for himself the very things that make him and me persons."⁶¹ Violating the voters' right to know strikes at the very heart of their liberty and dignity as citizens. By recognising the voting class as individuals possessed of a distinct consciousness and judgement only to arbitrarily interfere with the responsibility placed upon them by claiming that they do not have the right to have access to information about parties standing for elections is nothing more than a plain infringement of their freedom of choice, their liberty and dignity.

Without access to relevant information, the voters are being made to exercise their will without full knowledge of material facts that could alter their final decision. The election process itself is not invalidated entirely by this, rather, the "free and fair" dimension is significantly impacted.

Sir Churchill's oft-cited 'little man' philosophy explains the importance of unimpeded democratic elections: "At the bottom of all tributes paid to democracy is the little man, walking into a little booth, with a little pencil, making a little cross on a little bit of paper—no amount of rhetoric or voluminous discussion can possibly diminish the overwhelming importance of

⁶⁰ INDIA CONST. art. 19 cl. 2.

⁶¹ CHARLES FRIED, MODERN LIBERTY: AND THE LIMITS OF GOVERNMENT 22 (W. W. Norton and Co., 2007).

that point."⁶² Essentially, the path of the so-called 'little man' cannot be swayed off the course of free and fair elections by any means or persons, and certainly not by the State.

A fair and just democracy ultimately boils down to the capacity of one citizen being able to make a choice with their own free will. If they are unable to do so, it cannot be concluded that the principles of democracy are thriving in that polity. When a voter is deprived of necessary information in the interest of privacy, it is *prima facie* evidence of the 'little man' being inhibited from carrying out his duty.

Bearing in mind the 'little man', democratic policymakers ideally ought to champion certain fundamentals while formulating a political funding regime. The following section discusses these briefly.

CONSIDERATIONS

1. Encouraging greater citizen participation and decentralisation

The Scheme at its inception was largely understood to be a means of efficiently and effectively enabling the general public to participate in political financing, but it is quite unlikely that the public was truly participating. Party funding regimes that are deployed with the specific intent to encourage donations from the public at large ought to consider implementing stricter limits on corporate and foreign donors or banning them entirely. Such regimes may also make provision for concessions to encourage purchases of bonds in lower denominations, such as tax exemptions or credits, or more stringent caps on the amount that can be donated at a time. This would enable more individuals and small units to invest in electoral bonds rather than large sums from corporate and foreign entities.

In the context of a bond scheme, breaking down the bond denominations into smaller increments would also allow everyday citizens to partake in the party funding process with greater ease. This would also serve as a check on illicit donations should those donations be made through the system; since the denominations are so low, those intending to convey illicit donations through bonds will be required to purchase a greater number of the bonds. This can quickly alert authorities and open such entities to investigation. Policymakers may also consider a more decentralised approach when determining how the funds received from

⁶² Shakhawat Liton, *The power of the 'little man' in democracy*, THE DAILY STAR, (Nov. 9, 2023) <https://www.thedailystar.net/opinion/perspective/news/the-power-the-little-man-democracy-1649548>.

electoral bonds will be dispersed, allowing donations to be made and deployed at local levels rather than to the party at a national level alone.

2. Auditability

Transparency and disclosure must be at the core of any deliberations over electoral funding reform. These components can only be achieved through mandatory auditing of the financial statements and books of accounts of political parties. Effective disclosure mechanisms depend on a strong and independent form of oversight, as well as the timeliness of such information being made available, to ensure that citizens may actually utilise it.⁶³

Though audited income tax returns are to be mandatorily filed annually by political parties, there is no requirement for a third-party audit of these books. Provisions can be made for a select few Chartered Accountants authorised and approved by the ICAI as well as the Comptroller and Auditor General to act as unbiased third-party scrutinisers for parties at different levels.

3. Independent oversight

The importance of oversight cannot be overstated; that of independent oversight even more so. In order to stringently regulate the functioning of political parties and ensure that there is no misuse or abuse of the system, a strong oversight mechanism or body must be put into place. In short, an independent regulator is vital to ensure that there is no policing of the political process by those in public office.

The power to deregister political parties or to bar them from contesting elections (either temporarily or permanently) for violating rules and regulations of conduct or orders handed down by the courts are some of the methods through which oversight authorities can keep a tight leash on elections. In addition to this, noncompliance with transparency rules and other violations of the provisions of the Scheme ought to be considered valid grounds for deregistration or disqualification (whether this be temporary or permanent depending on the severity of the offence, or other criteria set in this regard) by the supervising body.

⁶³ Committee of Ministers, *Recommendation of the Committee of Ministers to Member-states on Common Rules Against Corruption in the Funding of Political Parties and Electoral Campaigns*, COUNCIL OF EUROPE RECOMMENDATIONS (2003), <https://wcd.coe.int/ViewDoc.jsp?id=2183>.

4. Partial state funding

State funding or Union funding is a form of party financing whereby the Government bankrolls political parties. It is believed that, under a state financing system, there would be a greater degree of control over political party spending, and a greater incidence of equality (at least in a financial sense) would exist between political parties.

Partial state funding has been successfully incorporated into various democracies, such as in the United Kingdom, wherein the State administers public assistance to political parties in the form of policy development grants and funding in kind.⁶⁴ In France, political parties may raise funds privately from their own members as party dues as well as receiving direct public financing from the State.⁶⁵ In the Indian context as well, state funding as a regime has been deliberated. It was first recommended by a Task Force set up by the CII, stating that funds could be raised either by a cess on excise duty or via contributions to an election fund pool managed and controlled by the state.⁶⁶ The Indrajit Committee Report also recommended the creation of a separate election fund towards which the Central and State Governments could contribute and thereby enable a form of partial state funding.⁶⁷ While total state funding may not be a viable solution in a practical sense, policymakers should not rule out the benefits that partial state funding schemes could bring.

CONCLUSION

Over the course of the present discussion, the history of party funding in India has been delved into, and the provisions of the newly implemented Electoral Bond Scheme as well as the Finance Acts of 2016 and 2017 have been dissected at length. The Scheme has been further analysed through the lenses of the Right to Privacy and the Right to Information, whether one right must take precedence over the other, and if so, to what extent.

Any party funding regime must first champion the cause of voters rather than merely acting as a means by which political parties may obtain finances; its implications are far wider than what

⁶⁴ House of Commons (2016), *Political party funding: sources and regulations*, (HC 2016-17 7137) (United Kingdom).

⁶⁵ ABEL FRANCOIS & ERIC PHELIPPEAU, FINANCING OF THE FRENCH POLITICAL PARTIES, HANDBOOK OF POLITICAL PARTY FUNDING (Edwar Elgar, 2018).

⁶⁶ M. V. Rajeev Gowda and E. Sridharan, *Reforming India's Party Financing and Election Expenditure Laws*, 11 2 ELECT. LAW J., (2012)

<https://casi.sas.upenn.edu/sites/default/files/upiasi/Reforming%20India%27s%20Party%20Financing%20and%20Election%20Expenditure%20Laws.pdf>.

⁶⁷ *Id.*

is printed on the tin. Transparency, accountability, and disclosure of affairs will create a conducive environment in which the voters may exercise their choice during elections, and it will also act as a deterrence mechanism to prevent underhanded transactions among donors and political parties, ultimately lowering the risk of donations translating into favours upon election. It is imperative in any regime formulated that the ability of the voters to cast their vote freely and fairly is not compromised in favour of privacy of political parties. Policymakers must acknowledge that political parties are utilising public funds to conduct activities in a public arena, and therefore provisions must be made to hold them accountable to that same public.

As for the case of India, the wisdom of the judiciary has determined that the Electoral Bond Scheme is unconstitutional on the grounds raised, and the Court has struck it down. While the judgment is certainly important, it does not preclude the duty of voters to be informed and discerning of all information available for their perusal. After all, democratic institutions are only as powerful as their citizens' awareness of them.