Electoral Bonds
The Illusion of Transparency

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The introduction of electoral bonds is a retrograde measure that radically alters the transparency regime of electoral funding. By obscuring the identities of a bond's purchaser and recipient from everyone but the State Bank of India, they give an unfair advantage to the party in power at the centre, undermine the Election Commission's oversight role, and deprive the voters of their right to determine if the ruling party is extending undue favours to its donors.

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The electoral bond is a strange beast. It is a bond that carries no interest, but is comparable to a junk bond. It combines the promise of high returns to the investor in the immediate term with high risk, but the risk inherent in this instrument is borne by the society.

The challenge to the constitutionality of electoral bonds is close to determination. In all fairness, it ought to have been decided well before the start of the current general elections. The challenge is a part of a larger civil society struggle for delineation of the voter's right to be informed in its plenitude.

This struggle has been waged in multiple arenas. The engagements have been numerous, culminating in many notable victories and some heart-breaking defeats. The core issue in the ongoing legal battle is that of transparency of electoral funding.

If the political parties could have their way, the sources and applications of their funds would forever remain hidden from the public gaze. The sums needed to finance their processes and operations have now reached astronomical proportions. The New Delhi-based think tank, Centre for Media Studies, estimates that the expenditure during the current general elections will be an unprecedented ₹50,000 crore, a 40% jump from the 2014 polls (Chaudhary and Rodrigues 2019).

The bulk of the funds raised by the political parties come from donors who have good reasons to avoid any public scrutiny of their munificence. The political establishment, on its part, abhors the prospect of an uncomfortable examination of the linkages between their governments' policies and decisions, and the interests of their major donors.

Historically, civil society and the political establishment have adopted diametrically opposite positions on the issue of transparency in the funding of political parties. While civil society organisations have resorted to public interest litigation (PIL) to bring about some measure of transparency in the obscure domain of political funding, the establishment has done its best to thwart their efforts on one pretext or the other. It has also fashioned ingenious devices to ensure that the identity of corporate donors remains beyond the pale of public scrutiny.

Electoral Transparency

In this context, it will be pertinent to recall some of the significant outcomes in civil society's protracted campaign for greater transparency in various aspects of the electoral process. The campaign is premised on the primacy of the citizen's democratic right to know, which forms an integral part of the fundamental right to freedom of speech and expression under Article 19(1)(a).

In a catena of judgments, the apex court has held that a well-informed citizenry is crucial to the functioning of a democratic polity. In consequence, the political establishment has been forced to comply with the prescribed norms of disclosure on various aspects of the electoral process. The enactment of the Right to Information Act, 2005 (RTI) has further empowered the citizen in their quest for information which is essential to the exercise of their franchise.

In *Common Cause v Union of India and Others* (1996), the Supreme Court denounced the lack of accountability of the political parties and the naked display of money power in the elections in strident terms. The Court held that under Article 324, the Election Commission can issue suitable directions to maintain the purity of the election and, in particular, to bring transparency in the process of the election. To quote,

> Superintendence and control over the conduct of election by the Election Commission include the scrutiny of all expenses incurred by a political party, a candidate or any other association or body of persons or by any individual in the course of the election. The expression "Conduct of election" is wide enough to include in its sweep, the power to issue directions—in the process of the conduct of an election—to the effect that the political parties shall submit to the Election

> Commission, for its scrutiny, the details of the expenditure incurred or authorized by the parties in connection with the election of their respective candidates (*Common Cause v Union of India and Others* 1996).

Pursuant to this decision, the Election Commission prescribed the proformas of statements of income and expenditure and returns of donations exceeding the prescribed limit, to be filed by the political parties. The information thus collected has been displayed on the commission's website.

The campaign for securing the voter's right to know the antecedents of the contesting candidates was quite eventful. The Association for Democratic Reforms (ADR) filed a PIL in the Delhi High Court for determination of the elector's fundamental right to receive information regarding the candidates' criminal activities and to know the facts having a bearing on their suitability for being elected. The court held that it was incumbent on the Election Commission to provide the voters with information pertaining to a candidate's criminal background, assets possessed by his family and his educational qualification (*Association for Democratic Reforms v Union of India and Anr* 2001).

The Supreme Court upheld the decision in appeal, making the directions to the Election Commission more specific (*Union of India v Association for Democratic Reforms and Anr* 2002). Aggrieved by some of the directions, the government brought in an ordinance on electoral reform.[1] It was subsequently replaced by a bill, which inserted Section 33B in the Representation of the People Act (RPA) to overturn the Supreme Court judgment in respect to disclosure of a candidate's educational background and financial status.[2]

This amendment was challenged in a bunch of writ petitions filed by People's Union for Civil Liberties (PUCL) and others. The Court struck down the bill as unconstitutional and restored its earlier order.

Post the enactment of the RTI,[3] the Central Information Commission's order in *Ms Anumeha, c/o Association for Democratic Reforms v Chief Commissioner of Income Tax-XI, New Delhi* 2008, made the income tax returns filed by political parties accessible to the public.[4] Rejecting the contention that the returns furnished to income tax authorities were inherently barred from disclosure, the commission ruled that Section 138(1)(b) of the Income Tax Act, 1961 empowers the commissioner of income tax to disclose in public interest any information which comes into the hands of the public authority.

As a logical corollary to this decision, the commission held in 2013 that the six national parties, in respect of which information had been sought under the RTI, were within its purview.[5] The commission reaffirmed this ruling in 2015.[6] Although uncontested, this decision has been ignored by the political parties, which have refused to entertain the RTI applications addressed to them (Deshmukh 2015). The United Progressive Alliance (UPA) government considered amending the RTI Act to exclude the political parties from its ambit,[7] but had to drop the move in the face of public opprobrium.

A PIL for declaration of the national political parties as public authorities under the RTI Act has been languishing in the Supreme Court since June 2015 (*Association for Democratic Reforms and Anr v Union of India and Ors* 2015).

The Union of India has strongly opposed the petition. To quote from its counter-affidavit dated 21 August 2015:

> If the political parties are held to be public authorities under the RTI Act, it would hamper their smooth internal working. Further, it is apprehended that political rivals might file RTI applications with malicious intentions to the CPIOs of the political parties, thereby adversely affecting their political functioning (p 7, para 10).

Electoral Trusts

Successive governments have devised innovative measures to shield the corporate donors of political parties from exposure. The UPA government introduced the scheme of electoral trusts to create a smokescreen between corporate donations and their intended beneficiaries.[8] Registered as not-for-profit companies under Section 25 of the Companies Act, these trusts are authorised to receive contributions from companies and route them to the political parties, without having to link specific contributions to the disbursements made to the political parties. This creates the illusion of an arm's length transaction by the donors, who seem to be supporting the institutions of democracy without favouring any particular political party.

> Between 1 April 2013, and 31 March 2016, donations from seven electoral trusts amounted to more than ₹442 crore—about one-third of all the funding disclosed by political parties in that time period. (Stevens and Sethi 2017)

Most of the contributors to electoral trusts operate in highly regulated sectors where the ruling party can recompense the donors by altering the regulatory framework to their advantage. Predictably, the Bharatiya Janata Party (BJP) has captured most of the fund flows. During 2017–18, its share amounted to 86% (Jain 2018). The appeal of electoral trusts has considerably diminished with the introduction of electoral bonds which provide greater anonymity to the donors.

Relabelling of Foreign Money

India has rightly been wary of foreign influence in its democratic processes. Section 29B of the RPA bars political parties from accepting contributions from any foreign source as defined in the Foreign Contribution (Regulation) Act, 2010 (FCRA). Companies incorporated outside India and their Indian subsidiaries came within the mischief of the 1976 act.

Despite this prohibition, both the Indian National Congress (INC) and the BJP received donations from two Indian subsidiaries of the United Kingdom-based Vedanta Resources between 2004 and 2012. The Delhi High Court, adjudicating the matter in a PIL filed by ADR, held that the contributions in question were from foreign sources, irrespective of the fact that an Indian national held a majority of the shares of Vedanta Resources (*Association for Democratic Reforms and Anr v Union of India and Ors* 2014).

The high court ordered a scrutiny of the receipts of all political parties to identify the contributions received in violation of the statutory provisions and demanded prompt consequential action under the law. This decision, coming weeks before the 2014 general elections, rendered the two main political parties liable to disqualification.

The new National Democratic Alliance government opted to nullify the court's

judgment by redefining foreign source through the Finance Act, 2016. A new proviso under Section 2 of FCRA, 2010 stipulated that a company with less than 50% foreign-held equity would cease to be a foreign source (*The Gazette of India Extraordinary* 2017).

This amendment to a law falling in the Home Ministry's domain was made through a money bill ostensibly to enable the Indian subsidiaries of foreign companies to discharge their social responsibility. It was not explained why it was given with retrospective effect from 2010.

The national parties involved, oblivious of the fact that they were still liable in respect of the donations from Indian subsidiaries of foreign companies prior to the promulgation of FCRA, 2010, withdrew their Special Leave Petitions against the high court verdict.[9] Once again, an obliging government came to the rescue of the concerned parties. The Finance Act, 2018 gave retrospective effect to the revised definition of foreign source from the date of promulgation of the repealed FCRA, 1976, by amending the relevant provision of the Finance Act, 2016 (*The Gazette of India Extraordinary* 2018).

The amendments to FCRA, 2010 and the repealed act of 1976 have been challenged in the Supreme Court (*Association for Democratic Reforms and Anr v Union of India* 2018). The petition underlines the danger of exposing the nation's polity to a deluge of foreign funds and influence. After issuing notice to the respondents, the Supreme Court has tagged the petition with other PILs in which related issues have been agitated.

Overhaul of Transparency Regime

The Finance Act, 2017 has radically altered the transparency regime applicable to the political parties to pave the way for the introduction of electoral bonds (*The Gazette of India Extraordinary* 2017). The following statutory provisions have been amended through the device of a money bill to circumvent the requirement of Rajya Sabha's approval.

Section 31 of the Reserve Bank of India Act has been amended to empower the central government to authorise any scheduled bank to issue electoral bonds (Chapter VI, Part III, Section 134).

Section 29C of the RPA has been amended to exclude the contributions received through electoral bonds from the report of contributions exceeding ₹20,000 made to the Election Commission (Chapter VI, Part IV, Section 136).

In order to discourage cash transactions and to bring transparency in the source of funding to political parties, Section 13A, Income Tax Act has been amended to provide that donations to political parties exceeding ₹2,000 must be made through cheque, demand draft, electronic transfer, or electoral bond (Chapter III, Section 11). The earlier limit for cash donations was ₹20,000. Donations by way of electoral bonds have been exempted from disclosure in the annual returns, which must be filed by the political party to obtain the benefit of tax exemption. This exemption aims to address the concern of anonymity of the donors.

Section 182 of the Companies Act has been amended to remove the cap on political contributions of 7.5% of three years' average net profits. Only the aggregate of the contributions to different political parties needs to be disclosed in the company's profit and loss account (Chapter VI, Part XII, Section 154).

Electoral Bonds

Justifying the introduction of electoral bonds, the finance minister candidly stated:

> [The] electoral bond scheme, which I placed before the Parliament a few days ago, envisages total clean money and substantial transparency coming into the system of political funding. A donor can purchase electoral bonds from a specified bank only by a banking instrument. He would have to disclose in his accounts the amount of political bonds that he has purchased. The life of the bond would be only 15 days. A bond can only be encashed in a pre-declared account of a political party. Every political party in its returns will have to disclose the amount of donations it has received through electoral bonds to the Election Commission. The entire transactions would be through banking instruments. As against a total non-transparency in the present system of cash donations where the donor, the donee, the quantum of donations and the nature of expenditure are all undisclosed, some element of transparency would be introduced in as much as all donors declare in their accounts the amount of bonds that they have purchased and all parties declare the quantum of bonds that they have received. (Press Information Bureau 2018)

This admission falls short of the objective of transparency set forth in the Finance Act. While the electoral bond route enables a corporate entity to make a legitimate political contribution without attracting public attention, it causes a great detriment by denying the public at large an opportunity of assessing whether a political party in power has shown undue favours to its donors.

Moreover, creative accountants can neutralise the impact of a lowered ceiling for cash contributions by multiplying the number of unattributed cash donations by a factor of 10. The new instrument does not inhibit the generation of illicit funds, or their employment in election campaigns.

The amendment to the Companies Act has enabled the companies regardless of their financial health, to buy favours by making unlimited political donations. The creation of shell companies to channel corporate contributions to political parties has been facilitated. The shareholders are kept in dark about the details of donations made by the company management.

The amendment to the RPA has impeded the discharge of the Election Commission's constitutional mandate to conduct free and fair elections. Nasim Zaidi, the then chief election commissioner, advised the government against the move, asserting that it would vitiate transparency (Mohanty 2017). It is reported that the central government had omitted to consult the commission before altering the reporting requirement laid down in the RPA (Raman and Pandey 2017).

The introduction of electoral bonds has attracted strong criticism from experts in the domain. Some of Zaidi's predecessors and successors in office have described it as a retrograde measure that has legalised crony capitalism (Rashid 2019; Vishnoi 2018).

As apprehended, the introduction of electoral bonds has led to a spurt in corporate funding of political parties. The sales in the first tranche of March 2018 totalled ₹222 crore, of which the BJP got ₹210 crore and the INC ₹5 crore. During 2018–19, electoral bonds worth ₹834.7 crore were sold in five tranches until November 2018 (Chopra 2019). The next two tranches of January and March 2019 registered sales of ₹1,716 crore (*Business Standard* 2019).

A further acceleration in sales is expected during the ongoing elections despite a five-day reduction in the window for May ordered by the Supreme Court.[10] The corporate sector should again account for most of the sales with the lion's share going to the parties expected to provide attractive returns on investment.

The ruling party at the centre has the added advantage of access to particulars of the purchasers of electoral bonds which are sold through the State Bank of India (SBI) exclusively. Investigation by the *Quint* has revealed that the bonds carry a unique alphanumeric code that becomes visible in ultraviolet light (Agarwal 2019). The implications of this secret feature are obvious.

Legality of Electoral Bonds

The Supreme Court has belatedly taken up for consideration a PIL filed by ADR and Common Cause [WP(C) 880/2017] to challenge the constitutionality of the amendments made in the legal framework by the Finance Act of 2017.

The petition posits that these amendments infringe the citizen's fundamental "Right to Know" under Article 19(1)(a), and are not saved by any of the reasonable restrictions under Article 19(2). The vires of the amendment to FCRA 2010 effected through the Finance Act, 2016 have also been challenged.

The gravamen of the petition is that the impugned amendments jeopardise the country's autonomy, militate against transparency, incentivise corrupt practices, and render the nexus between politics and big business more opaque. The instrument of electoral bonds enables special interest groups, corporate lobbyists and foreign entities to secure a stranglehold on the electoral process and influence the country's governance to the detriment of the masses. By relieving the political parties of the duty to disclose the details of their donors, the amendments have eroded the Election Commission's constitutional role and deprived the citizens of the country of vital information concerning electoral funding. Further, the recourse to a money bill for amending the laws relating to electoral funding has subverted the legislative scheme envisaged in the Constitution.

In its affidavit in response, the Election Commission has referred to its advice for reconsideration of the amendments vide its letter dated 26 May 2017 to Ministry of Law and Justice. The commission had stated that the amendments would seriously impact the transparency of political finance. Further, the omission of contributions received through electoral bonds from the contribution reports of the political parties would make it impossible to verify the compliance of the prohibition against acceptance of contributions from government companies and foreign sources.

The commission had warned that the amendments proposed to the Companies Act would "open up the possibility of shell companies being set up for the sole purpose of making donations to political parties, with no other business of consequence having disbursable profits."

Referring to the changes made in FCRA of 2010 through the Finance Act, 2016, the commission had pointed out that acceptance of donations from Indian subsidiaries of foreign companies would result in unchecked foreign funding to political parties in India and could lead to Indian policies being influenced by foreign companies.[11]

The contention of the Union of India is that the amendments in question, including the Electoral Bond Scheme, have been introduced to deal with the menace of unaccounted money in political funding. During the hearing which concluded on 12 April 2019, the attorney general contended that the implementation of the measures would be tested by the results obtained in the course of the ongoing general elections and that the government must be allowed a free hand to implement measures in execution of policies framed.[12]

The highlight of the attorney general's argument was his claim that the voter did not have a fundamental right to know the source of political funding (Tripathi 2019). This was reminiscent of Ashok Jaitley's defence of Section 33B, RPA in PUCL. He had contended that there was no specific fundamental right of the voter to know the antecedents of a candidate, and that declaration by the Court of such a fundamental right was derivative and liable to be nullified by appropriate legislation. The Supreme Court rightly rejected this ingenious argument (*People's Union for Civil Liberties and Anr v Union of India* 2003).

The interim order passed by the Supreme Court notes that the rival contentions give rise to weighty issues that have a tremendous bearing on the sanctity of the electoral process.[13] These issues require an in-depth hearing and cannot be answered within the limited time available before the process of funding through the electoral bonds comes to a closure. Hence, it has to be ensured that any interim arrangement that is made does not tilt the balance in favour of either of the parties, while their competing claims are adjudicated.

The fact is that a petition raising such weighty issues could only be heard 18 months after it was filed. Moreover, the Court could have stayed the operation of the impugned scheme to determine the issue of its constitutionality. The process of funding through this scheme, which is in its eighth schedule, is not coming to a close anytime soon.

The Court also directed all the recipients of donations through electoral bonds to submit to the Election Commission, in sealed cover, the details of the donor of each bond, its amount and full particular of the credit received against it. The sealed covers received until 30 May 2019 will remain in custody of the commission until further orders.

It will be difficult for the political parties to furnish this information, because in terms of the Electoral Bonds Scheme, 2018, the particulars of the donor are not to be disclosed. The electoral bond is a bearer instrument, and the donor can have it delivered to the beneficiary party through courier or a messenger. Even if a political party possesses information of the donor's identity, it may well withhold it. In fact, donor anonymity is the unique selling proposition of electoral bonds.

The sole repository of the particulars of the purchasers of electoral bonds is the SBI, but in principle, it is unable to link a particular bond credited to the account of a political party to its purchaser. The bank claims not to maintain any record of the secret alphanumeric numbers of the bonds that it sells (Agarwal 2019).

In a hypothetical case where a donor opts to reveal his identity to a political party and the party provides his particulars to

the Election Commission, there is no reason why this information should remain hidden from the commission, which has routinely been publishing the details of political contributions exceeding ₹20,000 on its website. The Court's newly acquired preference for guarding all manner of information in sealed covers militates against the concept of adjudication in open court.

The Struggle Ahead

The history of the tumultuous campaign for transparency in the processes impinging on the exercise of the citizen's right to vote tells us that the political establishment, which comprises political parties of all hues and their governments, has an innate preference for opacity. It can be trusted to come up with ingenious arrangements that obfuscate the workings of the political machine in the name of enhancing transparency.

The prescriptions for bringing about an acceptable degree of clarity in the obscure domain of political funding are well known. The political establishment will have to be compelled to institute the requisite changes in the relevant laws and refrain from tinkering with the transparency framework in future.

As in the past, civil society will have to bear the brunt of the struggle to bring about the desired changes in the transparency regime. Experience has shown that the victories won after years of legal battles can be hollowed out of substance through legislative and administrative legerdemain. One has to be on the lookout for such machinations. Acting in concert, civil society organisations can harness the potential synergy of networks and alliances to further their common objective. To this end, they will need to sensitise the public opinion, multiply the pressure points, intensify their engagement with the institutions of governance, and create an enduring constituency for reforms. The struggle should continue until the political leadership realises that it stands to gain electorally by appropriating the cause of reforming the transparency regime of political funding.

In this struggle, civil society has a natural ally in the judiciary, which has played a decisive role in the progress made in the direction of transparency so far. Unfortunately, the institution, riven by inner contradictions, is facing an unprecedented crisis of credibility. A resurgent executive has managed to increase its leverage with the judiciary in the last five years. Yet, one may take heart from the apex court's emphasis on the significance of the issues agitated in the ADR–Common Cause PIL and hope that it will maintain the institution's tradition of keeping in step with the needs of the time and pouring new content in the vessel of fundamental rights, placing a comprehensive transparency framework on a firm footing.

NOTES

1 The Representation of the People (Amendment) Ordinance, 2002 (No 4 OF 2002).
2 The Representation of the People (Third Amendment) Act, 2002 (Act No 72 of 2002).
3 The Right to Information Act (No 22 of 2005).
4 Central Information Commission Order dated 29 April 2008 in Appeal Nos CIC/AT/A/2007/01029 CIC/AT/A/2007/01263 CIC/AT/A/2007/01264, CIC/AT/A/2007/01265 CIC/AT/A/2007/01266 CIC/AT/A/2007/01267, CIC/AT/A/2007/01268 CIC/AT/A/2007/01269 CIC/AT/A/2007/01270.
5 Central Information Commission Order dated 3 June 2013 in File No CIC/SM/C/2011/001386 and File No. CIC/SM/C/2011/000838.
6 Central Information Commission Order dated 16 March 2015 in File No CIC/CC/C/2015/000182.
7 RTI Amendment Bill No 112 of 2013.
8 Electoral Trusts Scheme, 2013 vide Notification No S.O.309(E) dated 31 January 2013.
9 Supreme Court of India Order dated 29 November 2016 in Special Leave to Appeal (C) No(s). 18190/2014 & 32626/2014 (Arising out of impugned order dated 28/03/2014 in WP(Civil) No 131/2013 of the High Court Of Delhi).
10 Supreme Court's Interim Order dated 12 April 2019, p 15, para 15, https://www.sci.gov.in/supremecourt/2015/16902/16902_2015_Order_12-Apr-2019.pdf.
11 Supreme Court's Interim Order dated 12 April 2019, pp 9–12, paras 5–8, https://www.sci.gov.in/supremecourt/2015/16902/16902_2015_-Order_12-Apr-2019.pdf.
12 Supreme Court's Interim Order dated 12 April 2019, pp 12–13, para 10, https://www.sci.gov.in/supremecourt/2015/16902/16902_2015_Order_12-Apr-2019.pdf.
13 Supreme Court's Interim Order dated 12 April 2019, pp 13–14, paras 11–12, https://www.sci.gov.in/supremecourt/2015/16902/16902_2015_Order_12-Apr-2019.pdf.

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