

Understanding Electoral Bonds in India: Transparency or Ambiguity?

Dr. Ravinder Kumar¹

¹ Assistant Professor of Law, Bharat College of Law, Kurukshetra University, Kurukshetra

Abstract:

Electoral bonds in India have been a subject of considerable debate since their introduction. Most researchers claim that electoral bonds sell transparency in marketing campaign finance through formalizing donations and curbing the influence of black money. However, critics raise concerns about anonymity, potential misuse, and the erosion of democratic principles. This paper examines the electoral bond system, analysing its impact on transparency and accountability in the Indian electoral process. By exploring the underlying principles, legislative framework, and practical implications, it aims to provide a comprehensive understanding of whether electoral bonds serve as a tool for transparency or ambiguity in India's political landscape.

Keywords: Electoral bonds, Transparency, Political funding, Accountability, Black money, Supreme Court verdict, Legislative framework, Indian democracy.

Introduction:

The introduction of electoral bonds in India marked a significant shift in the country's political funding landscape. Aimed at bringing transparency to campaign finance, electoral bonds were introduced as a mechanism to formalize donations to political parties. Unlike traditional methods of funding, such as cash donations, electoral bonds were designed to be traceable and accountable, ostensibly reducing the influence of black money in politics. However, the implementation of electoral bonds has been met with mixed reactions. While proponents argue that they provide a structured and transparent way for corporations and individuals to support political parties, critics raise concerns about the lack of transparency regarding donor identities and the potential for abuse.

The anonymity afforded by electoral bonds has been a particularly contentious issue, with critics arguing that it opens the door for quid pro quo arrangements and undue influence on policy-making. This paper seeks to delve into the nuances of the electoral bond system in India, examining both its intended objectives and unintended consequences. By analyzing the legislative framework, practical

challenges, and broader implications for democracy and governance, it aims to shed light on whether electoral bonds contribute to transparency or ambiguity in India's electoral process.

The Supreme Court, in a landmark unanimous judgment, has struck down the electoral bonds scheme as "unconstitutional and manifestly arbitrary." The scheme, which provided blanket anonymity to political donors and allowed rich corporations to make unlimited political donations, was deemed in violation of voters' right to information about political funding under Article 19(1)(a) of the Constitution. This decision was made by a five-judge Bench headed by Chief Justice of India D.Y. Chandrachud. The court held that the scheme, along with preceding amendments made to the Representation of the People Act, the Companies Act, and the Income Tax Act, was unconstitutional and arbitrary. This judgment represents a significant development in Indian electoral law and is expected to have far-reaching implications for political funding transparency and democracy in the country.

Electoral Bonds Definition

“Electoral Bond” means a bond issued in the nature of promissory note which shall be a bearer banking instrument and shall not carry the name of the buyer or payee¹;

Electoral bonds are essentially a form of financial instrument introduced by the Indian government to enable individuals and corporate entities to donate money to political parties². It's not that they can't get donations from the companies before it.

These bonds are available in specified denominations and can be purchased from select branches of authorized banks. But the unique feature of electoral bonds is that the donor's identity remains anonymous, providing a level of confidentiality for political contributions.

Electoral bonds are interest-free bearer bonds or money instruments that can be purchased by companies and individuals from authorized branches of the State Bank of India (SBI).

These bonds are sold in various denominations and can be purchased through a KYC-compliant account to make donations to political parties.

There is no cap on the number of electoral bonds that a person or company can purchase.

Eligibility to get Donation

Political parties eligible to receive funding via electoral bonds must be registered under the Representation of the People Act, 1951, and have secured at least 1% of the votes polled in the recent Lok Sabha or State Assembly elections.

The Electoral Bond Scheme outlines certain provisions regarding who can purchase the bonds and how they can be used by political parties. Here's a breakdown of the key points mentioned:

Eligibility of Purchasers: The scheme allows any person who is a citizen of India or is incorporated or established in India to purchase electoral bonds. This means that individuals, as well as entities such as companies or organizations, can buy these bonds.

Individual Purchases: An individual buyer has the option to purchase electoral bonds either singly or jointly with other individuals. This provision allows for flexibility in how the bonds are acquired.

Eligibility of Political Parties: Only political parties that are registered under section 29A of the Representation of the People Act, 1951, and have secured not less than one percent of the votes polled in the last general election to either the House of the People (Lok Sabha) or the Legislative

¹ MINISTRY OF FINANCE (Department of Economic Affairs) NOTIFICATION New Delhi, the 2nd January, 2018, PG.1 AT <https://www.scobserver.in/wp-content/uploads/2021/10/Electoral-Bonds-Scheme-2018.pdf> VISITED 03/04/2024 AT 12.00

² Julie Ballington, International IDEA, 2003 PG 5

Assembly are eligible to receive electoral bonds. This criterion ensures that only recognized and relatively popular political parties can benefit from the scheme.

Encashment Process: Electoral bonds can only be encashed by eligible political parties through a bank account with an authorized bank. This requirement ensures that the funds received through the bonds are channeled through formal banking channels and are subject to scrutiny and regulation.

Overall, these provisions aim to regulate the purchase and use of electoral bonds, ensuring transparency and accountability in the political funding process³.

Rationale Behind Electoral Bonds:

The rationale behind the introduction of electoral bonds was to bring about transparency in political funding. Proponents argue that by channelling donations through banking channels, electoral bonds would curb the use of black money in elections.

Additionally, the anonymity provided by these bonds was seen as a measure to protect donors from potential retribution or coercion by political parties.

Criticism and Concerns:

Despite the intentions behind their introduction, electoral bonds have faced criticism on several fronts. One of the primary concerns is the lack of transparency regarding the identity of donors. Critics argue that the anonymity provided by electoral bonds undermines the very purpose of transparency in political funding, as it becomes difficult to ascertain the sources of political donations. Furthermore, there are concerns about the potential for misuse of electoral bonds by vested interests. Since the identity of donors remains undisclosed, there is a risk that these bonds could be used as a means for quid pro quo transactions between political parties and donors, leading to undue influence on policymaking. Another point of contention is the role of corporate entities in political funding through electoral bonds. Critics argue that allowing corporate donations through these bonds could give rise to conflicts of interest, with corporations expecting favors from political parties in return for their financial support.

Legal Challenges and Supreme Court's Verdict:

The legality of electoral bonds has also been challenged in the courts. In April 2019, the Supreme Court of India heard a petition challenging the validity of electoral bonds on various grounds, including the lack of transparency and the potential for misuse. However, in a verdict delivered in April 2021, the Supreme Court upheld the validity of electoral bonds, stating that they were aimed at promoting transparency in political funding.

The learned Judge reaffirmed this proposition by tracing the right to information to Article 19(1)(a) of the Constitution:

“74. 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. They are entitled to know the particulars of every public transaction in all its

bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which

³ MINISTRY OF FINANCE (Department of Economic Affairs) NOTIFICATION New Delhi, the 2nd January, 2018, PG.7 AT <https://www.scobserver.in/wp-content/uploads/2021/10/Electoral-Bonds-Scheme-2018.pdf> VISITED 03/04/2024 AT 12.00

can, at any rate, have no repercussion on public security.[...]”⁴

Supreme Court Latest Verdict:

The recent Supreme Court verdict striking down the electoral bond scheme highlighted its violation of Article 19(1)(a) of the Constitution, which guarantees the right to freedom of speech and expression. The court emphasized two key aspects⁵:

Lack of Disclosure: One of the main contentions was the absence of disclosure regarding the voluntary contributions made to political parties through electoral bonds. This lack of transparency was seen as a violation of the right to information. In a democracy, transparency in political funding is crucial for voters to make informed decisions. Without knowing the sources of funding, voters are unable to assess potential biases or influences on political parties. This lack of disclosure undermines the fundamental principle of democracy, where citizens have the right to access information about the functioning of political entities.

Unlimited Corporate Funding: Another concern raised was the unrestricted corporate funding of political parties, which was seen as a threat to the principle of free and fair elections. Unlimited corporate funding creates an imbalance in the political landscape, where parties with access to greater financial resources may have an unfair advantage over others. This not only distorts the electoral process but also undermines the democratic principle of equality among political actors.

The court's decision underscored the importance of transparency and accountability in political funding to uphold the integrity of democratic institutions. By striking down the electoral bond scheme, the Supreme Court reaffirmed the need for measures that ensure transparency, fairness, and equality in the electoral process.

Challenges to the Scheme in the Supreme Court⁶:

Several arguments have been presented against the electoral bonds scheme in the Supreme Court, including:

Violation of Right to Information:

Critics argue that the scheme violates citizens' fundamental right to information about political parties' funding, as it lacks transparency⁷. Article 19(1)(a) has been held to guarantee the right to information to citizens⁸. The challenge against the amendments introduced by the Finance Act 2017 and the Electoral Bond Scheme primarily revolves around the argument that the non-disclosure of information about electoral contributions infringes upon the right to information of the voter, which is protected under Article 19(1)(a) of the Constitution of India⁹. In a landmark unanimous decision, the Supreme Court of India on Thursday delivered a resounding verdict, striking down the electoral bonds scheme. The court declared that anonymous corporate donations to political parties facilitated by the scheme infringed upon the fundamental right to information enshrined under Article 19(1)(a) of the Constitution.

Led by Chief Justice D Y Chandrachud, a distinguished five-judge Constitution bench rendered the judgement, invalidating the amendments made to the IT Act and the Representation of the People

⁴ State of Uttar Pradesh v. Raj Narain (1975) 4 SCC 428.

⁵ <https://www.news18.com/explainers/how-electoral-bond-scheme-is-violative-of-article-191a-of-constitution-what-does-sc-verdict-mean-8779845.html> 02/04/2024 at 10:52 pm.

⁶ <https://www.thehindu.com/news/national/67849714-Electoral-Bond-Judgment-1.pdf> .

⁷ <https://www.thehindu.com/news/national/why-did-the-supreme-court-strike-down-the-electoral-bonds-scheme-explained/article67848657.ece> 02/04/2024 at 11:00 pm

⁸ Indian Constitution A. 19(1) (a) J.N panday pg.

⁹ Association for Democratic Reforms & Anr. ... Versus Union of India & Ors. Writ Petition (C) No. 880 of 2017 para 58.

Act. These amendments, which had been introduced to facilitate contributions through electoral bonds, were unequivocally deemed unconstitutional by the apex court.

Potential for Backdoor Lobbying and Quid Pro Quo: Concerns have been raised about the possibility of corporations using electoral bonds to engage in backdoor lobbying and influence political decisions. During the proceedings, Prashant Bhushan presented arguments in the Supreme Court concerning the potential for backdoor lobbying and quid pro quo associated with electoral bonds. He presented circumstantial evidence suggesting that corporations were providing kickbacks to political parties in power through electoral bonds in exchange for favorable treatment.

learned counsel pointed out that an overwhelming majority of electoral bonds were received by the ruling party, indicating a possible bias in favor of corporations aligned with the government. He cited specific instances, such as donations from Vedanta Limited, a company seeking mining licenses, which increased despite reports of financial difficulties. This suggested a correlation between electoral bond donations and corporate interests seeking government favors.

By highlighting individual cases like Vedanta, learned counsel and the petitioners argued that the anonymity afforded by the electoral bond scheme created a veil of secrecy, enabling corporations to engage in backdoor lobbying without public scrutiny. The concern raised was that such practices undermine transparency and accountability in governance by allowing corporations to influence policy decisions through undisclosed donations to political parties.

Overall, the argument presented to the Supreme Court emphasized the need to address potential loopholes in the electoral bond scheme to prevent misuse and uphold the principles of democracy and fair governance.

Opening Doors to Shell Companies: Amendments allowing donations from loss-making companies and Indian subsidiaries of foreign companies raise concerns about the potential misuse of shell companies. In the Supreme Court, it was argued that the amendments made to the Foreign Contributions Regulation Act (FCRA), which removed the limit on annual profit for corporate donations to political parties and allowed Indian subsidiaries of foreign companies to make donations, created opportunities for shell companies to make contributions.

Counsel highlighted that these amendments potentially enabled even loss-making companies or those with no business operations (pure shell companies) to donate to political parties. This raised concerns about the misuse of shell companies for making undisclosed donations, as they could potentially serve as conduits for funneling illegal funds into the political system.

The Supreme Court likely observed that the amendments to FCRA indeed widened the scope for corporate donations to political parties, but without adequate safeguards, they could facilitate the use of shell companies to circumvent transparency and accountability measures. This observation may have contributed to the Court's deliberation on the constitutionality and legality of the electoral bond scheme.

Opaque and Anonymous Nature: Electoral bonds are criticized for their opaque nature, as the names of donors are not disclosed. This lack of transparency raises suspicions of corruption and potential quid pro quo arrangements. In the Supreme Court, it was argued that electoral bonds, despite being marketed as anonymous instruments, are not entirely anonymous due to the involvement of the State Bank of India (SBI), which is a government-owned entity. Critics pointed out that while the donor's identity remains undisclosed to the public, the government has access to this information through the SBI, thereby compromising the anonymity of the donations.

Counsel highlighted concerns about the potential for corruption and quid pro quo arrangements facilitated by the secrecy surrounding electoral bond donations. He argued that without transparency, donors could use electoral bonds to provide kickbacks to political parties in exchange for policy favors, as it would be difficult to trace any quid pro quo agreements.

During the proceedings, the Chief Justice of India (CJI) acknowledged this argument and suggested exploring the distinction between anonymity in relation to the donee (political party) and anonymity in relation to the rest of society. The CJI indicated that while electoral bonds may anonymize donations from the perspective of the general public, they may not necessarily provide complete anonymity to the recipients (political parties), as they could potentially have access to information about the sources of the donations.

The Supreme Court likely considered these arguments in its deliberations on the electoral bond scheme, recognizing the need to balance transparency and accountability in political funding with the protection of donor privacy and freedom of expression.

Misleading the bond: In the Supreme Court, it was argued that the term "Electoral Bond" is misleading, as the funds obtained through these bonds can be used for purposes other than electoral activities. Kapil Sibal, representing the petitioners, emphasized that there are no provisions in the scheme that restrict the usage of the donated funds to electoral expenses or related activities. Therefore, once the money is withdrawn, political parties have the discretion to utilize it for any purpose they deem fit.

Sibal highlighted that the absence of accountability regarding the expenditure of electoral bond funds undermines the intended purpose of transparent political funding. He asserted that the scheme essentially serves as a means for political parties to accumulate wealth without any obligation to demonstrate how the funds are utilized in furtherance of the electoral process¹⁰.

During the court proceedings, counsel provided examples to illustrate the wide-ranging potential uses of the funds obtained through electoral bonds. He pointed out that political parties could utilize the money to establish offices, set up communication networks, or undertake various other activities unrelated to elections. This argument underscored the concern that electoral bonds lack specific guidelines or mechanisms to ensure that the donated funds are utilized exclusively for electoral purposes. The Supreme Court likely considered these arguments while deliberating on the constitutional validity of the electoral bond scheme, recognizing the importance of ensuring transparency and accountability in political funding to uphold the integrity of the electoral process.

Promotion of Corruption: Critics argue that the scheme may facilitate corruption by providing a channel for undisclosed donations and protecting donors from scrutiny under anti-corruption laws.

In the Supreme Court, Kapil Sibal presented arguments suggesting that the electoral bond scheme promotes corruption and undermines transparency in political funding. He pointed out that political parties have the ability to close the account associated with the electoral bonds at any time, thereby potentially concealing the source and usage of the funds. Sibal further contended that this aspect of the scheme could be exploited by individuals involved in criminal activities to evade prosecution under laws such as the Prevention of Corruption Act (PCA) and the Prevention of Money Laundering Act (PMLA).

Sibal referenced and highlighting the challenge in tracing proceeds of crime and establishing quid pro quo arrangements due to the lack of transparency surrounding electoral bond donations. By allowing political parties to close accounts associated with electoral bonds, the scheme creates a loophole that could be exploited to conceal illicit financial transactions¹¹.

Moreover, Sibal argued that reducing the disclosure threshold from Rs 20,000 to Rs 2,000 may not effectively curb the use of cash in politics or enhance transparency as intended. He pointed out that political parties previously disclosed donations below Rs 20,000, and the lower threshold would simply allow the same practice for smaller amounts.

¹⁰ <https://www.thehindu.com/news/national/67849714-Electoral-Bond-Judgment-1.pdf>.

¹¹ Section 7 of the Prevention of Corruption Act, 1988.

Additionally, Prashant Bhushan highlighted in court that since the introduction of the electoral bond scheme, contributions to political parties through electoral bonds have far exceeded any other method. This observation underscores the potential impact of the scheme on distorting the democratic process by concentrating political funding in the hands of a few dominant parties, thus affecting the fairness and integrity of elections.

These arguments likely contributed to the Supreme Court's consideration of the constitutional validity of the electoral bond scheme, highlighting concerns about its potential to facilitate corruption and undermine democratic principles.

Elimination of Level Playing Field: The disproportionate distribution of electoral bonds among political parties, with the majority going to the ruling party, undermines the level playing field in elections. In the Supreme Court, Prashant Bhushan presented arguments highlighting how the electoral bond scheme creates an unequal playing field for political parties, particularly those in opposition. He pointed out that a significant majority of electoral bonds, approximately 50%, have been received by the ruling party at the central level, with the remaining share going to ruling parties in various states. Conversely, opposition parties, especially those not in power at the state or central level, have received negligible contributions through electoral bonds¹².

Bhushan further emphasized that the overwhelming majority of electoral bonds are purchased by corporations, with nearly 95% of them being in denominations of Rs 1 crore and above¹³. This concentration of contributions from corporate entities, coupled with the removal of caps on corporate donations and amendments to the Foreign Contribution Regulation Act (FCRA), significantly disadvantages opposition parties and independent candidates¹⁴.

By allowing corporations to make unlimited contributions to political parties through electoral bonds, Bhushan argued that the scheme undermines democracy by skewing political funding in favor of ruling parties. This lack of financial parity between ruling and opposition parties creates an uneven playing field, making it challenging for opposition parties and independent candidates to compete effectively in elections.

These arguments presented in court underscore the concerns raised about the electoral bond scheme's potential to distort the democratic process and reinforce the dominance of incumbent parties. The Supreme Court's consideration of these arguments would have played a crucial role in its assessment of the scheme's constitutional validity and its impact on the democratic principles enshrined in the Indian Constitution.

Differentiation between Corporations and Citizens: The scheme provides anonymity to corporate donors while requiring citizens making smaller donations to disclose their identities, potentially overshadowing citizens' voices in democracy. In the Supreme Court, Kapil Sibal argued that the electoral bond scheme unfairly differentiates between corporations and individual citizens in terms of transparency requirements. He pointed out that while corporate donors can remain anonymous when making contributions through electoral bonds, individual citizens making smaller donations are required to disclose their identities. This differentiation, according to Sibal, creates an imbalance where the voices of corporations may overshadow those of individual citizens in a democracy.

Sibal highlighted the potential consequences of this differentiation, suggesting that it could lead to the amplification of corporate interests at the expense of citizen voices. In a democracy where every citizen's voice is supposed to carry equal weight, granting anonymity to corporations while

¹² <https://www.thehindu.com/news/national/67849714-Electoral-Bond-Judgment-1.pdf>.

¹³ <https://www.hindustantimes.com/india-news/introduced-in-2018-electoral-bond-scheme-allowed-anonymous-political-funding-101707978089532.html> 03/04/2024.

¹⁴ foreign contribution (regulation) act 2022

imposing transparency requirements on individual citizens may tilt the balance of influence in favor of corporate entities.

By allowing corporations to contribute anonymously, Sibal argued that the electoral bond scheme undermines the principle of equality among citizens in the political process. It creates a scenario where the financial influence of corporations, whose identities remain hidden, could disproportionately impact policy decisions and electoral outcomes, potentially marginalizing the voices of ordinary citizens.

Sibal's argument underscores the broader concern about the role of money in politics and its potential to distort democratic principles. The Supreme Court's consideration of these arguments would have been crucial in assessing the constitutionality of the electoral bond scheme and its compatibility with the principles of equality and fairness in a democratic society¹⁵.

Unfair to Shareholders: Shareholders' interests may be compromised as companies donate to electoral bonds without informing shareholders how their money will be spent. Sibal argued in court that the electoral bond scheme is unfair to shareholders who invest in companies. He highlighted that shareholders donate their funds to ensure that the corporation operates within the framework of its Memorandum of Understanding (MoU) or similar agreements. However, when companies donate to electoral bonds, they do not inform their shareholders about how their money will be spent. This lack of transparency deprives shareholders of crucial information about the use of their funds, undermining their ability to hold the company accountable for its actions. Sibal's argument suggests that the electoral bond scheme fails to uphold the principle of transparency and accountability to shareholders, potentially disadvantaging them in the decision-making process of the companies they invest in.

Inability to Stop Trading of Electoral Bonds: Despite prohibitions, the trading of electoral bonds remains difficult to regulate, potentially enabling their misuse. Despite attempts to prohibit the trading of electoral bonds, regulating their exchange has proven to be challenging. Electoral bonds are intended to be non-transferable instruments, meaning they should not be bought or sold in secondary markets. However, enforcing this restriction has been difficult in practice.

One reason for this challenge is the lack of stringent mechanisms in place to monitor and track the movement of electoral bonds once they are issued. Unlike traditional financial instruments, electoral bonds do not have robust tracking systems or mechanisms for verifying their ownership. As a result, individuals or entities may engage in trading electoral bonds discreetly, making it difficult for authorities to detect and prevent such activities. Furthermore, the anonymity associated with electoral bonds adds another layer of complexity to regulating their trading. Since the identity of donors and recipients is not disclosed publicly, it becomes challenging to trace the origins and destinations of electoral bonds that are being traded.

The inability to effectively stop the trading of electoral bonds poses significant risks of misuse. For example, political parties or individuals could potentially use electoral bonds to funnel undisclosed funds or engage in illicit financial transactions without adequate oversight. This undermines the transparency and accountability objectives that the electoral bond scheme aims to achieve.

Failure to Reduce Black Money: Critics argue that the scheme does not effectively reduce black money in politics but rather reroutes non-anonymous funding through alternative channels.

Advocate Farasat, representing the CPI (M), argued before the court that the electoral bonds scheme does not effectively reduce the circulation of black money in political funding. Contrary to its purported objective of combating black money, Farasat contended that the scheme primarily serves

¹⁵ <https://www.thehindu.com/news/national/67849714-Electoral-Bond-Judgment-1.pdf>.

to redirect non-anonymous funding from conventional banking channels to anonymous electoral bonds.

Farasat characterized the electoral bond scheme as an "alternative white money channel" devised by the government. Instead of promoting transparency and accountability, as conventional banking methods such as RTGS, bank drafts, and cheques do through disclosure requirements, electoral bonds offer added anonymity. This anonymity, Farasat argued, facilitates the channeling of funds without proper scrutiny or transparency, potentially perpetuating the use of unaccounted or illicit funds in political financing.

By allowing donors to contribute anonymously through electoral bonds, the scheme creates a parallel financial system that operates outside the bounds of traditional transparency measures. Rather than curbing the influx of black money into politics, Farasat suggested that the electoral bond scheme inadvertently fosters a mechanism for concealing the sources of political funding, thus undermining efforts to combat corruption and ensure the integrity of the electoral process. These challenges underscore the complexity and controversy surrounding the electoral bonds scheme and its implications for political transparency and accountability in India¹⁶.

Conclusion:

The debate over electoral bonds in India highlights complex issues of transparency, accountability, and democratic integrity. While proponents argue that electoral bonds enhance accountability and reduce black money, critics express concerns about the lack of transparency, potential for misuse, and unequal treatment between corporations and individual citizens. The recent Supreme Court verdict striking down the scheme underscores these concerns, emphasizing the importance of transparency in political funding. Furthermore, the scheme's alleged role in enabling backdoor lobbying and the disproportionate influence of corporations on policy-making raise serious questions about democratic principles. Additionally, the failure to address black money and the scheme's potential to bypass existing disclosure mechanisms further compound these challenges. In conclusion, the electoral bond scheme presents a false dichotomy between transparency and ambiguity, necessitating comprehensive reforms to uphold democratic ideals while ensuring fairness and accountability in the political process. Finally, the apex court decided it unconstitutional.

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