
RIGHT TO KNOW AND POLITICAL FUNDING

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ABSTRACT

In this paper, I look to analyse the constitutional provision of Right to Information with respect to electoral funding, particularly with respect to the Electoral Bonds Scheme (EBS). The Electoral Bonds Scheme was introduced into the political array by the Government of India in 2017 through the amendments made in the Finance Act, 2017. The stated objective of the act as per the ruling party was to curb the inflow of black money into the funding of political parties¹. I am of the opinion that the electoral bonds scheme is violative of the fundamental Right to Information and Right to Know under article 19(1)(a). The said act was voted as a money bill thereby, bypassing the scrutiny of the Rajya Sabha. The act through its subsequent amendments to Companies Act, 2013 and Representation of People's Act, 1951 (RPA) has managed to make the electoral funding in India opaque and irretraceable for the general public. The disproportionate access to information and helps the incumbent party to retain power by brute muscle and money power even with blatant disregard for governance. Electoral bonds are an evil in the very roots of this country's democracy and is antithesis to the idea of transparency and constitutionally guaranteed right to know.

¹*Arun Jaitley defends Electoral bonds, ask opponents to suggest alternatives* 'THE ECONOMIC TIMES (Apr 04, 2019, 06:38 PM)

<https://economictimes.indiatimes.com/news/elections/lok-sabha/india/arun-jaitley-defends-electoral-bonds-ask-opponents-to-suggest-alternatives/articleshow/68725053.cms?from=mdr>

Introduction

The Right to Information is derived from the fundamental Right to Freedom of Speech and Expression as envisaged in Article 19(1)(a) of the Indian Constitution. The Right to Information was conceptualized under the Right to Freedom of Expression in the landmark judgement of *Bennett Coleman and Co. v. Union of India*.² The basic idea behind the Right to Information being a facet of this provision is that without adequate information about the working and functioning of our public functionaries, we cannot frame our opinions on them or express the same. Further, the Right to Know which is engrained in the Right to Information Act, 2005, is also constitutionally guaranteed under Articles 19 and 21.³

The menace of institutionalised, opaque political funding has crippled the functioning of the Indian democracy. Unaccounted, large amounts of money being pushed into the political framework of the nation has led to reciprocity in the form of “*vote for note*”⁴ and various other undemocratic practises. The Electoral Trust Scheme (ETS), introduced in 2013, was a method of opaque political funding used by domestic corporates and individuals. The trust was registered as a company under the Companies Act, 2013 and helped finance the political parties. The scheme was infected with scepticism as it was not transparent.

In case of electoral trusts, citizens would get to know about the beneficiaries of the trust only after 6 months of disbursement.⁵ Keeping in mind the urgent need for electoral reforms, the 255th Law Commission Report⁶ in 2015 suggested a few amendments to bring about transparency and accountability. The recommendations included a periodic revision of the donation cap with respect to the profits of the corporates, changes to the disclosure provisions to make the candidates disclose the information about private and party funding received, disclosure of funding to be made mandatorily regardless of the amount or source, etc.

Right to know and Article 19(1)(a)

A democracy cannot function without citizens’ access to free and fair information. It is this

² *Bennett Coleman and Co. v. Union of India* AIR 1973 SC 106.

³ *Reliance Petrochemicals Ltd v. Proprietors Of Indian Express* (1989) AIR 190, 1988 SCR.

⁴ ‘Cash for votes in TN: Parties offering Rs 200-Rs 1000 per vote’ THE NEWS MINUTE (April 06, 2021, 07:19AM) <https://www.thenewsminute.com/article/cash-votes-in-parties-offering-rs-200-rs-1000-vote-146588>.

⁵ Bharath Kancharla, ‘*Political donations through Electoral Bonds are 10 times the contributions received by Electoral Trusts*’ FACTLY (February 28, 2020) <https://factly.in/political-donations-through-electoral-bonds-are-10-times-the-contributions-received-by-electoral-trusts/>.

⁶ The Law Commission of India, ‘255th report, Electoral Reforms’ (2014).

very information that empowers the masses to decide on who should be representing and ruling them. The very idea of democracy is that the government shall operate on the consent of the governed. Free consent of the voters can only be obtained through a solid framework of information and transparency. Therefore, it is imperative that the citizens have access to information, coupled with the Right to Know about the functioning and funding of the political parties that will govern them.

The information about political funding is crucial to determine the swing in ideals and possible powerhouses the parties might support in the future. Such information is crucial to the decision-making process of the citizens. However, the government represented by the Advocate General has claimed that the public has no right to know regarding the political funds as long as it is legitimate.⁷ This line of argument is in direct contravention to the law laid down by the Supreme court in *C. Narayanaswamy v. CK. Jaffar Sharief And Ors*,⁸ where it was unequivocally held that political funding and expenditure cannot be hid from the general public.

An informed citizenry is crucial to the free and fair functioning of a democracy.⁹ In *Sakal Papers (P) Ltd. & Ors. v. Union of India*,¹⁰ the Hon'ble Supreme Court of India has held that freedom of speech and expression of opinion must be preserved in a democratic institution which is subject to changes in the composition of the governments. The possible anti-incumbency sentiments may, without the freedom of speech and expression, be muted, leading to a deceptive faith in government.

Even though the Right to Information is a fundamental right, it is subject to reasonable restrictions such as the security of state, friendly relations with foreign states, etc.¹¹ In the *State of Uttar Pradesh v. Raj Narain and Others*,¹² the court held that:

“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

⁷ ‘It Is Not a Voter's Concern Where Political Parties' Money Comes From, AG Tells SC’ THE WIRE (April 11th, 2019) <https://thewire.in/government/electoral-bonds-supreme-court>.

⁸ *C. Narayanaswamy vs Ck. Jaffar Sharief & Ors.* 1994 SUPPL. (2) SCR 463.

⁹ *Romesh Thappar v. State of Madras*, [1950] S.C.R. 594.

¹⁰ *Sakal Papers (P) Ltd. & Ors. v. Union of India*, [1962] 3 S.C.R. 842 at 866.

¹¹ Shukla, V N, and Mahendra P. Singh. *V.n. Shukla's Constitution of India* (Eastern Book Company, 1990).

¹² *State of Uttar Pradesh v. Raj Narain and Others* [(1975) 4 SCC 428].

functionaries.”

The court's reference to a “*few secrets*” indicates its understanding of the limitations of the government in disclosing some facts. However, the discretion in non-disclosure enjoyed by the government should be restricted to the bare minimum by reasonable laws. Further, the court in *S.P. Gupta v. Union of India*¹³ held that the decision on immunity from disclosure of information does not rest with the heads of government but the courts.

Also, what maybe crucial for the citizens in making an informed opinion may change. The court in *People's Union of Civil Liberties (PUCL) v. Union of India*¹⁴ observed that fundamental rights are subject to changes with the demands and needs of the future. It was observed that:

“Fundamental right themselves have no fixed content, most of them are empty vessel into which each generation must pour its content in the light of its experience. The attempt of the court should be to expand the reach and ambit of the fundamental right by the process of judicial interpretation.”

Therefore, given the widespread corruption and dishonesty in electoral practises, it is imperative that courts imbibe electoral funding as crucial information with respect to elections, to which all citizens must be privy to. This will expand the reach of citizens to relevant information. Untapped funding and money laundering leads to elections being tilted in the favour of money and muscle power over good governance. Therefore, there is an inherent Right to Know, as also envisaged in the provision of Right to Freedom of Speech and Expression when it comes to the actions of public functionaries. Withholding crucial information regarding funding is thus, outside the purview of Article 19(2).

Electoral bonds

A new scheme of political funding called the Electoral Bonds Scheme (EBS) was introduced to curb monetary donations to political parties. Electoral bonds are an instrument in the nature of promissory notes or bearer bonds, which can be purchased from The State Bank of India (SBI) by individuals or corporates for amounts specified by the notification for the specific

¹³ SP Gupta v. Union Of India AIR 1982 SC 149.

¹⁴ (2003) 4 SCC 399.

purpose of funding a political party.

The EBS however, was as opaque as the ETS if not more. Earlier, by virtue of Section 29 Representation of People Act 1951,¹⁵ political parties had to mandatorily record and report the information of the donors making any contributions to a party in excess of 20,000 rupees. The objective of this Section was to make the process of electoral funding more transparent to the general public.

However, the exception granted to electoral bonds under the new amendment to the RPA defeats the whole objective of transparency, as a major source of funding is now immune from the same. A combined reading of amendments¹⁶ made to Representation of People Act, 1951, and the Income Tax Act, 1961, makes it obvious that such an onus on the political parties has been lifted and the donors and the receivers of the funds through electoral bonds can now maintain a blanket of secrecy from the public.

The few existing laws which add a modicum of transparency in electoral funding have been deleted or amended to the detriment of the public, directly in contravention to the 255th Law Commission Report.¹⁷ In blatant disregard for this Report, the government has discarded the provisions which had previously capped the funding and anonymity, aspects that were supposed to be enhanced to maintain the sanctity of democracy. The removal of a cap on corporate donations, the deletion of Section 182 (1) of the Companies Act, 2013,¹⁸ the relaxations made to the disclosure of donor information provisions, etc., are some of the examples.

This risk that emanates from such secrecy in political funding is that it increases the risk of corporates and foreign firms influencing the general outcome of the elections and impairs the citizens' Right to Know.

The influence of corporates and disadvantages to the minor parties

Section 182(1) of the Companies Act, 2013 had imposed a restriction on the amount of corporate funding received by political parties via the imposition of a limit of 7.5% of the

¹⁵ The Representation of People's Act, 1951, s. 29.

¹⁶ The Representation of People's Act, 1951, Clause (1) s. 29C ; The Income Tax Act, 1961, s.13A.

¹⁷ The Law Commission of India, supra 5.

¹⁸ The aforementioned section had prevented companies in existence for less than 3 years to fund the parties, in order to prevent formation of shell companies formed exclusively for political funding.

profits generated by the company. Further, the Section also mandated that only companies with over three years of legitimate business would be allowed to fund parties. However, deletion of these clauses from the Section has led to multiple problems. Without a cap on the funding that can be provided by the political parties, there is a bidding war among the corporates to win over the government.

This could result in a quid-pro-quo arrangement where the political party who forms the government may favour, in the form of tenders and other contracts to the corporations who have supported the party. Such brazen acts of institutionalised corruption would now be safeguarded legally under the scheme of electoral bonds.¹⁹ Further, companies or individuals may create sub-companies just for the purpose of channelling money to political parties, leading to further corruption.

This leads to disproportionate funding for the party that is likely to form the government by the corporations. During the 2016 Lok Sabha elections, the BJP (who subsequently formed the government) raised a staggering Rs 1450 crores through electoral bonds, while the largest opposition party received only Rs 383 crores through the same.²⁰ Therefore, the scheme creates an undue disadvantage for smaller parties, as they are less likely to receive any funding from the corporates due to their brim chances at forming government.

Another defect with the electoral bonds scheme is that all the bonds have to be purchased via the State Bank of India. The ruling party, through the Know Your Customer (KYC), which is mandatorily required to be submitted while purchasing the bonds, is privy to the information about the donors and the receivers via the State Bank of India. This may cause significant apprehensions for the donors to fund the opposition or minor parties²¹ as the ruling party might exhibit a negative bias towards the company or firm that funded the opposition during the campaign.

This may hamper the prospects of opposition parties and information dissemination as they simply do not have the funds or means their bigger counterparts do. The Supreme court in

¹⁹ Suhrith Parthasarathy, 'Why Electoral Bonds Are Unconstitutional' BLOOMBERG QUNIT (April 13 2019, 1:41 PM) <https://www.bloombergquint.com/opinion/why-electoral-bonds-are-unconstitutional>.

²⁰ Anubhuti Vishnoi, 'At Rs 1,450 cr, BJP got 61% funding via Electoral Bonds before LS polls' THE ECONOMIC TIMES (Jan 10, 2020, 08:45 AM) <https://economictimes.indiatimes.com/news/politics-and-nation/at-rs-1450-cr-bjp-got-61-funding-via-electoral-bonds-before-ls-polls/articleshow/73181670.cms?from=mdr>.

²¹ Gautam Bhatia, 'Here is why the electoral bonds scheme must go' THE HINDU (March 26, 2021 12:29 AM) <https://www.thehindu.com/opinion/lead/here-is-why-the-electoral-bonds-scheme-must-go/article34163851.ece>.

*Kanwar Lal Gupta v. Amar Nath Chawla & Ors*²² recognised the evil of electoral funding and observed that if there were no caps on funding, political parties would be forced to pay heed to the affluent members of the society, which would further lead to the “*worst form of corruption.*”

The huge amount of money received by political parties gives them the financial leeway to influence votes through bogus means. Funding indirectly impairs the partiality of the information disseminated to the citizens through mass media, thereby impairing their right to know. Media houses, celebrities, etc., are paid to praise and defend the policies undertaken by the parties, regardless of their morality, legality, or constitutionality.

Secrecy with respect to foreign donations

Another crucial change made to electoral funding is that foreign companies or entities can now enter into the Indian political funding picture. The amendments made to the Foreign Contribution Regulation Act (FRCA), 2010, and the RPA have opened the floodgates for foreign companies registered in India to fund the political parties. The possible ramifications to this amendment are that foreign countries, whether friends or foes with India, can now influence the political landscape of our country and tilt the same in its favour. Former French President Nicolas Sarkozy is alleged to have favoured the Libyan dictator Muhammed Ghaddafi, in exchange for his contributions to the donations made by the former in the latter’s election campaign.²³

With the amendments made to the FRCA, certain foreign policy decisions might surprise Indians in the future. The foreign policy of a nation has great ramifications on the lives of its citizens. Possible funding by foreign entities and possible return of favours by the party which might eventually form the government in India is information crucial for the citizens to make an informed decision regarding their vote.

Judicial intervention and implementation of right to know as a part of electoral reforms

The lawmakers are antagonistic to the idea of electoral reforms as it changes the *status quo* of the functioning of political parties they are part of. Therefore, the lacunae in political funding

²² *Kanwar Lal Gupta v. Amar Nath Chawla & Ors*. AIR 1975 SC 308.

²³ Angelique Chrisafis ‘*French inquiry opens into allegations Gaddafi funded Sarkozy 2007 campaign*’ THE GUARDIAN (Apr 19 2013 17.39 PM) <https://www.theguardian.com/world/2013/apr/19/french-inquiry-gaddafi-sarkozy-2007-campaign>.

needs to be filled by judicial intervention, namely implementing right to know.

The Supreme court in the *Union of India v. Association for Democratic Reforms*²⁴ had boldly directed political parties to disclose information such as the criminal antecedents, education, property of the candidates to the public and election commission. This judgement was delivered despite the vehement opposition to it by the political parties. This principle was further extended by the Supreme court in *Lok Prahari v. Union of India And Others*²⁵ by including the information about a candidate's associates within the ambit of Right to Know. Therefore, by extending the provision to include information about the people linked to the candidates, the court has effectively broadened the scope of information available to the citizens in order to make informed choices.

Even though all the electoral reforms so far have been enforced by judicial activism, that pragmatic approach in addressing the need for electoral reforms was limited to these interventions.

Despite there being no information as significant as electoral funding being hidden from the eyes of the public, neither the legislature nor the courts seem to be interested in tackling this r. A writ petition challenging the constitutional validity of the electoral bonds is still pending before the Supreme court,²⁶ which has further refused to grant a stay on issuing electoral bonds.²⁷ Therefore, the legislature and the judiciary are complacent in the dismal and opaque state of the electoral funding in India despite the existence of a fundamental Right to Information enshrined in Article 19(1)(a).

Recommendations and solutions

A possible solution to resolve the mess of political funding would be either full transparency of funding to the citizens, so that they can make an informed choice or the state funding of elections. State funding of elections is endorsed by the Indrajith Gupta Commission Report of 1998 and is further affirmed by the 170th Law Commission Report.²⁸ State funding would help

²⁴ AIR 2002 SC 2112.

²⁵ Lok Prahari Through Its General Secretary S N Shukla v. Union Of India & Ors. [(2018) 4 SCC 699].

²⁶ Krishnadas Rajagopal, 'Supreme Court to hear on March 24 plea against sale of electoral bonds' THE HINDU (March 19, 2021 01:18 AM) <https://www.thehindu.com/news/national/supreme-court-to-hear-on-march-24-plea-against-sale-of-electoral-bonds/article34097973.ece>.

²⁷ 'SC refuses to stay issue of fresh electoral bonds, says no evidence of adverse impact on elections' THE TIMES OF INDIA (Mar 26, 2021, 22:53) <https://timesofindia.indiatimes.com/india/sc-refuses-to-stay-issue-of-electoral-bonds-says-no-evidence-of-adverse-impact-on-elections/articleshow/81701846.cms>.

²⁸ The Law Commission of India, 170th report, 'Reform of Electoral Laws' (1999).

curb the influence of foreign and corporate actors and the citizens would be privy to the source of political funds. The two restrictions suggested are 1) only the national and state parties with symbols would be allocated the funds, leaving out independent candidates 2) short term state funding must only be given in kind in the form of facilities for the parties.

If the state plans to continue with corporate and external funding, the same should be done so according to the recommendations of the 255th Law Commission Report²⁹ enhancing the existing transparency laws. The reports suggest that new laws be made to mandate the political parties to maintain an audited report of funding which needs to be submitted to the district election officer. The election officer should make this information available to the public. Further the government could incorporate disclosure clauses to EBS to make the system more transparent.

Conclusion

The Right to Know has been incorporated into the Right to Freedom of Speech and expression as they are interdependent. The right to be informed about who funds the parties that might later form the government and represent the citizens is vital to the pulse of democracy. Therefore, the citizens need to be aware of the corporates and foreign players influencing and funding the political parties in order to voice their opinions on relevant issues and to check corruption. Although, Right to Know provisions are extended to antecedents of criminal past, education of candidates, associates of candidates, etc., the vital information of electoral funding is still hidden from the eyes of the public. Therefore, the provision is half filled and half empty.³⁰

Political funding like the rest of electoral politics is infested with opacity and corruption which needs to be tackled by active legislative and judicial intervention. The current BJP government had promised to remove corruption and improve transparency.³¹ However, through electoral bonds, they have institutionalised a form of corruption and retrograded the process of transparency in electoral funding. Disclosure of information is subject to certain restrictions,

²⁹ The Law Commission of India, *supra* 5.

³⁰ Professor Satish Saberwal, "India's Living Constitution: Ideas, Practices, Controversies", ed Zoya Hasan, E. Sridharan, R. Sudarshan, 2005.

³¹ 'What promises did the BJP make in its 2014 manifesto', BUSINESS TODAY (April 7, 2019, 09:44 AM) <https://www.businesstoday.in/current/economy-politics/what-promises-did-the-bjp-make-in-its-2014-manifesto/story/334812.html>.

disclosure of which is under the prerogative of courts.³² Since the issue of electoral bonds does not come within the eight reasonable restrictions, the right to know is cannot be reasonably restricted. Judicial intervention is responsible for most of the electoral reforms so far. Therefore, one can hope that in its wisdom and wide interpretation of the Right to Know, courts brings the issue of electoral funding under the ambit of Right to Know and declare the EBS as unconstitutional, to ensure that the Indian democracy functions freely and fairly.

³² SP Gupta, Supra note 12.