

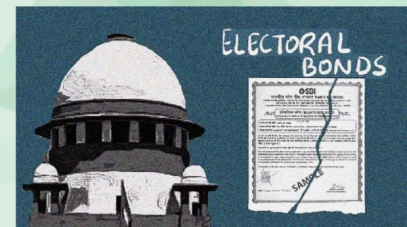
Case Analysis Association for Democratic Reforms v. UOI, 2024 INSC 113

The Finance Act 2017 modified the RBI Act to allow scheduled banks to issue electoral bonds, previously a prerogative of the RBI or government-authorized entities. The Electoral Bond Scheme Judgment delves into the constitutional challenge against the Scheme and the Finance Act 2017 amendments, questioning their impact on the democratic principle of transparent political funding.

Issues – The issues that arose before the Hon'ble Court through these petitions were, firstly, whether unlimited corporate funding to political parties, infringes the principle of free and fair elections and violates Article 14 of the Constitution and Whether the non-disclosure of information on voluntary contributions to political parties under the Electoral Bond Scheme, is violative of the right to information of citizens under Art. 19(1)(a) of the Constitution.

Submissions – Petitioner

The petitioner primarily contests the rationale behind electoral bonds, noting the continued allowance of cash donations despite claims of enhancing transparency. They condemned the noncompliance with regulatory agencies' objections and declared non-disclosure terms unconstitutional, citing interference with democratic principles, voter rights breaches,



and the encouragement of corruption. The amendments and Electoral Bond Scheme undermine fair elections by allowing unlimited corporate contributions without disclosure. Freedom to vote includes access to relevant financial information. The Union's argument for judicial restraint is flawed as electoral process rules are at stake, not economic policy. Corporate funding violates citizen rights. Bonds permit unrestricted fund use, distorting democracy by favouring contributors over voters. Information asymmetry benefits the ruling party. Amendments allowing non-disclosure violate the right to information. The intrusion on information privacy lacks proportionality, as political funding inherently involves public acts subject to scrutiny. Excessive delegation in the RBI Act the right to political funding information, which critics argue doesn't align with permissible

grounds for restriction under Article 19(2) of the Constitution. Additionally, objections are raised against statutory amendments enabling non-disclosure of political funding information by companies, questioning transparency and accountability. Opposition also emerges regarding the discriminatory and non-transparent nature of the Electoral Bond Scheme, conflicting with existing laws requiring transparency in fund sourcing. Further arguments contest the removal of transparency requirements for company contributions to political parties, amendment renders it unconstitutional due to lack of clarity. Firstly, concerns arise regarding the Electoral Bond Scheme's efficacy in curbing black money due to loopholes allowing de facto trading despite prohibitions. Secondly, there's contention over the restriction of



essential for informed shareholder decision-making. International perspectives on political funding transparency underscore the global consensus on its importance. Moreover, concerns are voiced about the potential impact of the Scheme and amendments on regional and marginalized political parties, with assertions of disproportionate favouritism towards major entities. Lastly, challenges are made to the presumption of constitutionality of electoral laws, considering the vested interests of incumbent legislators in shaping these laws.

Submissions of Union of India –

The Attorney General for India argues that political parties are vital to democracy and should receive financial backing. They support the Electoral Bond Scheme for promoting transparent donations through banking channels, ensuring clean contributions. They contend that citizens don't have an absolute right to know political funding details, emphasizing the importance of informed voter choice. Additionally, they suggest that legislative, not judicial, action should address corporate influence on parties. Furthermore, The Solicitor General of India argues that the Electoral Bond Scheme improves upon the prior cash-based political donation system, curbing black money infusion and safeguarding donor privacy. The scheme mandates disclosure of donations by political parties and

public companies, promoting transparency while protecting privacy rights. It aims to shift to a regulated digital donation framework, with provisions to prevent misuse and ensure banking channel transactions. The scheme's conditions aim to prevent ghost political parties from receiving funds and limit cash circulation. Maintaining donor anonymity balances the right to privacy with the public's right to know. The amendments aim to curb cash donations, remove contribution limits to deter shell companies, and ensure KYC compliance and confidentiality of bond buyers' information. The Court recognizes legislative discretion in economic matters and acknowledges that disproportionate support for one party does not invalidate the scheme.

Scope of judicial review:- The Union of India asserts judicial restraint is warranted in challenges to the Electoral Bond Scheme and related amendments, citing precedents favouring deference in economic matters. The petitioners argue against the presumption of constitutionality, asserting the unneeded rigorous review given the electoral context. The Court reasoned that while the Union claimed these amendments were economic policy, they primarily pertained to electoral processes. The Court highlighted that the amendments sought to regulate electoral financing and permit corporate funding to political parties, aspects not purely

economic.

Moreover, correspondence between the Ministry of Finance and RBI suggested that the amendments were aimed at curbing black money in elections rather than purely economic objectives. Additionally, the Union itself classified the amendments as "electoral reform." Consequently, the Court rejected the Union's argument that the amendments were solely economic, indicating a need for thorough judicial scrutiny.

The close association of politics and money

The absence of regulations on contributions to candidates while outlining expenditure caps for candidates in elections under Section 77 of the RPA and Rule 90 of the Conduct of Election Rules 1961 is fairly elucidated in the judgement. It underscores the dichotomy in the legal framework, regulating contributions to political parties but not to candidates directly. Money's substantial impact on electoral politics, influencing voter behaviour through campaign expenditure and candidate selection, is highlighted. The judgement while referring to judicial precedents like *Kanwar Lal Gupta v. Amar Nath Chawla* and *Vatal Nagaraj v. R Dayanand Sagar*, critiques the role of money in elections, noting its potential to skew fairness. Additionally, it touches upon *Common Cause (A Registered Society) v. Union of India*, which emphasizes the potential dishonest use of money in elections and the lack of



transparency in political funding. The argument asserts that electoral finance regulations must consider the influence of money on electoral democracy, necessitating scrutiny of the impact of money on politics while adjudicating on statutory amendments and the Electoral Bond Scheme. The bottom line here is that when it comes to election finance laws, it's not just about what they say on paper—it's about how they affect the democratic process.

The challenge to non-disclosure of information on electoral financing –

1. Infringement of the right to information of the voter

The Hon'ble Court explores how changes in electoral financing laws and the introduction of the Electoral Bond Scheme impact voters' right to information. It mentions specific legal sections like Section 29C of the Representation of the People Act (RPA), Section 13A of the Income Tax Act, and Section 182 of the Companies Act. The Apex Court reasonably looks at the evolution of the right to information, linking it to Article 19(1)(a) of the Constitution, with references to important cases like Association for Democratic Reforms (ADR) and People's Union for Civil Liberties (PUCL).

The Hon'ble Court emphasizes the importance of voters having enough information about candidates, rejecting the idea that candidate details aren't "public information." The court asserts

that voters should have access to information about candidates, like their criminal records and assets, to make informed decisions. This shows the court's commitment to transparency and accountability in elections, ensuring voters can actively participate in democracy. The Hon'ble Court further observed that the Election Commission of India's authority to request disclosure of political parties' expenditures to uphold the integrity of elections. While this observation was made, it wasn't reflected in the court's decision. Following the ADR case, Parliament amended the Representation of the People Act (RPA) to include certain directions issued by the court. However, in the PUCL v. Union of India case, it was found that Section 33-B of the RPA, which sought to render the court's judgment inoperative, was unconstitutional. Justice M B Shah and Justice Venkatarama Reddi opined that voters have a fundamental right to essential information about candidates, particularly regarding their criminal records, assets, and liabilities.

Justice Reddi emphasized that certain aspects of disclosure, like criminal records and financial information, are crucial for voters' right to information, while others, like educational qualifications, are less relevant. The court underscored that the right to privacy of candidates must be balanced with the public interest in transparency.

Ultimately, the petitioners argued that the non-disclosure of information about political party funding violates voters' right to information under Article 19(1)(a). The court is tasked with determining whether disclosure requirements for candidates should extend to political parties and whether information about party funding is essential for informed voting. The legal arguments revolve around the right to voter information, particularly about candidates and political parties. Court decisions like ADR and PUCL emphasize voters' right to essential information for informed voting. The debate questions whether political parties' funding details are crucial for voters. Despite the Constitution not initially mentioning political parties, they play a significant role in elections, as seen through the Election Symbols Order, which aids voters in identifying parties. Political parties' symbols and manifestos influence voter decisions, showcasing their importance in the electoral process. Additionally, India's government system and anti-defection laws highlight the central role of political parties. In summary, political parties are integral to India's democratic electoral process due to their association with voting, their role in government formation, and legal frameworks like the Tenth Schedule



The challenge to non-disclosure of information on electoral financing

Deciding on the question of Whether the infringement of the right to information of the voter is justified the court delves into the proportionality standard. After laying out four requirements of proportionality standard, the court lays down that, the state needs to discharge two burdens. Firstly, State must demonstrate that the objective is legitimate. Secondly, that the law is indeed in furtherance of the legitimate aim that is contended to be served. The state had argued that the main purpose of the Scheme is to curb black money in electoral financing and this purpose could be achieved only if information about political donations is kept confidential, that essentially meant that donor privacy is a *means* to incentivise contributions through banking channel.

The state thus argues for restriction of the right to information regarding electoral bonds (which is a part of Right to Freedom of Speech and Expression under article 19(1)) on the grounds that such anonymity furthers the aim of curtailment of black money. The court while relying mainly on the precedent of *Cricket Association of Bengal* held that it is necessary that the restriction on article 19(1) must fall “squarely within” the grounds mentioned in article 19 (2). The purpose of curbing black money does not squarely fall within the grounds of restrictions

mentioned in the article 19(2), thus it cannot be said that it can act as a legitimate restraint on the exercise of right to information regarding electoral bonds.

On the question whether the measure was least restrictive measure, the court poses before the state further questions: (a) Whether there are other possible means which could have been adopted by the State; (b) whether the alternative means identified realise the objective in a ‘real and substantial manner’. Answering this question the court explained that, even if the argument of the Union of India that the other alternative means such as the other modes of electronic transfer do not realise the objective of curbing black money substantially because contributors would resort to cash donations due to the fear of consequences is accepted, Electoral Trusts are an effective alternative. There will be a lesser degree of “political consequences” for contributions made to the Electoral Trust because the information about which of the contributors contributed to which of the parties will not be disclosed. It is only where the Electoral Trust contributes to one political party, would there be a possibility of political consequences and witch-hunting (assuming that there is a link between anonymity and contributions).

The court on the issue of least restrictive measure held that the Electoral Bond Scheme does not fulfill the least restrictive means

test. The Electoral Bond Scheme is not the only means for curbing black money in Electoral Finance. There are other alternatives which substantially fulfill the purpose and impact the right to information minimally when compared to the impact of electoral bonds on the right to information.

Thirdly, the court analyses the argument of the state regarding donor privacy. The state had argued on two prongs: (a) the State interest in introducing the Electoral Bond Scheme which guarantees confidentiality (or anonymity) to financial contributions is that it furthers donor privacy, (b) this State interest facilitates a guaranteed fundamental right. The state basically argues that the right to information can be restricted even if donor privacy is not traceable to the grounds in Article 19(2) because privacy is a fundamental right in itself. The question before the court is, if the right to informational privacy extends to financial contributions to a political party, and further if the Electoral Bond Scheme

The bond funds

Total value of electoral bonds sold from 2017-18 to 2021-22.
Rs 9,208.23 crore
5,271.97



* Electoral bonds / electoral bond contribution
Source: ECI, from NAB records and analysis of parties' annual account statements submitted in EC

adequately balances the right to information and right to informational privacy of political affiliation. The court while placing reliance on *Justice KS Puttaswamy* declares that the freedom of political expression cannot be exercised freely in the absence of privacy of political affiliation. Informational privacy to political affiliation is necessary to protect the freedom of political franchise. It follows from this observation that the Constitution guarantees the right to informational privacy of political affiliation.

The court clarifies contradictory positions and tries to balance two differing interests. It opines that while it is true that contributions made as quid pro quo transactions are not an expression of political support. However, to not grant the umbrella of informational privacy to political contributions only because a portion of the contributions is made for other reasons would be impermissible. The Constitution does not turn a blind eye merely because of the possibilities of misuse.

The next challenge before the court was to balance the right to information and the right to informational privacy, and in that light evaluate electoral bonds and the extent to which it balances these contradictory positions. The judicial approach was of *double proportionality standard*. The court while placing reliance on

precedents including on *Mazdoor Kisan Shakti Sangathan v. Union of India*, *Justice KS Puttaswamy (5J) v. Union of India*, *Campbell v. MGM Limited*, *Central Public Information Officer, Supreme Court of India v. Subash Chandra Agarwal*, and *Justice KS Puttaswamy (9J) v. Union of India* held that the Union of India has been unable to establish that the measure employed in Clause 7(4) of the Electoral Bond Scheme is the least restrictive means to balance the rights of informational privacy to political contributions and the right to information of political contributions. Thus, the amendment to Section 13A(b) of the IT Act introduced by the Finance Act 2017, and the amendment to Section 29C(1) of the RPA are unconstitutional.

The next question was whether Court should only strike down the non-disclosure provision in the Electoral Bond Scheme, that is Clause 7(4). To this, the court declared that, the Electoral Bond is not distinguishable from other modes of contributions through the banking channels such as cheque transfer, transfer through the Electronic Clearing System or direct debit if the anonymity component of the Scheme is struck down. Thus, the Electoral Bond Scheme 2018 will also consequently have to be struck down as unconstitutional.

Challenge to unlimited corporate funding

The court had also to examine the validity of section 154 of the Finance Act amending Section 182(3) to the Companies Act. The court while judging the merits of the arguments held that in terms of Section 136 of the Companies Act, every shareholder in a company has a right to a copy of the financial statement which also contains the profit and loss account. The petitioners submitted that the non-disclosure of the details of the political contributions made by companies in the financial statement would infringe upon the right of the shareholders to decide to sell the shares of a company if a shareholder does not support the political ideology of the party to which contributions were made. This it was contended, violates Articles 19(1)(a), 19(1)(g), 21 and 25. The court did not see the necessity of viewing the non-disclosure requirement in Section 182(3) of the Companies Act from the lens of a shareholder in this case when we have identified the impact of non-disclosure of information on political funding from the larger compass of a citizen and a voter. In view of the above discussion, Section 182(3) as amended by the Finance Act 2017 was declared unconstitutional. To reach this decision, the court also delved into the manifested arbitrariness as a facet of article 14 that emerged from *Shayara Bano v Union of India*.