

Background guide:

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

These bonds are sold in multiples of Rs 1,000, Rs 10,000, Rs 1 lakh, Rs 10 lakh, and Rs 1 crore. They can be purchased through a KYC-compliant account to make donations to a political party. The political parties have to encash them within a stipulated time. The name and other information of the donor are not entered on the instrument and thus electoral bonds are said to be anonymous. There is no cap on the number of electoral bonds that a person or company can purchase. The government brought in amendments to four Acts to introduce the Electoral Bond Scheme via the Finance Act of 2016 and 2017. These acts are Representation of the People Act, 1951, (RPA), the Companies Act, 2013, the Income Tax Act, 1961, and the Foreign Contributions Regulation Act, 2010 (FCRA), through the Finance Acts of 2016 and 2017. Before the scheme was introduced the political parties had to make public all donations above Rs 20,000. Also, no corporate company was allowed to make donations amounting to more than 7.5% of their total profit or 10% of revenue.

Who can receive funding via electoral bonds?

Political parties that secured at least 1% of the votes polled in the recent Lok Sabha or State Assembly elections and are registered under the RPA can get a verified account from the Election Commission of India (ECI). The bond amounts are deposited in this account within 15 days of their purchase.

The political party has to encash the amount within those 15 days, the amount received as a donation gets deposited into the Prime Minister's Relief Fund. These bonds, however, are not available for purchase all the time. They are available for a period of 10 days in a gap of four months (January, April, July and October). They are also open for 30 days in Lok Sabha election years.

Former Union Finance Minister Arun Jaitley, when presenting the 2017-18 Union Budget, stated that after 70 years of Independence, "the country has not been able to evolve a transparent method of funding political parties which is vital to the system of free and fair elections." He proposed the Electoral Bonds Scheme, which was designed to "cleanse the system" of political funding.

An electoral bond is like a promissory note. It is a bearer instrument payable to the bearer on demand. Unlike a promissory note, which contains the details of the payer and payee, an electoral bond has no information on the parties in the transaction at all, providing complete anonymity and confidentiality to the parties.

The legal framework to introduce the Electoral Bond Scheme

On 14 May 2016, the Finance Act, 2016 came into force. It amended Section 2(1)(j)(vi) of the Foreign Contribution Regulation Act, 2010 (FCRA), which defines "foreign source", to allow foreign companies who have a majority share in Indian companies to donate to political parties. Previously, foreign companies were prohibited from donating to political parties under the FCRA and the Foreign Exchange Management Act, 1999.

On 31 March 2017, the Finance Act, 2017 amended the Representation of the People Act, 1951 (RoPA), the Reserve Bank of India Act, 1934, the Income Tax Act, 1961, and the Companies Act, 2013.

Section 11 of the Finance Act, 2017 amended Section 13A of the Income Tax Act exempting political parties from keeping a detailed record of contributions received through electoral bonds.

Section 135 amended Section 31 of the RBI Act. This permitted the Union government to "authorise any scheduled bank to issue electoral bond[s]."

Section 137 introduced a proviso to Section 29C of RoPA, exempting political parties from publishing contributions received through electoral bonds in “Contribution Reports.” These reports disclose contributions received by parties “in excess of twenty thousand rupees” from companies and individuals.

Section 154 amended Section 182 of the Companies Act, 2013 which removed the upper limit on how much a company could donate to a political party. Previously companies could only donate up to 7.5 percent of three years of the company’s net profits.

Challenges to the Amendments

Shortly after the amendments were introduced, in September 2017 and January 2018, two Non-Governmental Organisations—Association for Democratic Reforms (ADR) and Common Cause—and the Communist Party of India (Marxist) filed petitions in the Supreme Court challenging the amendments. At the outset, the petitions argued that the Finance Acts were wrongfully passed as money bills to prevent higher scrutiny by the Rajya Sabha. This challenge is tagged with the larger challenge to the use of money bills under Article 110.

Petitioners also argued that the scheme allowed “non-transparency in political funding” and legitimised electoral corruption at a “huge scale.”

The Contours of the Electoral Bond Scheme, 2018

On 2 January 2018, the Ministry of Finance issued a notification that introduced the Electoral Bond Scheme, 2018.

Under the 2018 Scheme, certain branches of the State Bank of India (SBI) were authorised to sell electoral bonds. Bonds can be purchased in denominations of ₹ 1,000, ₹10,000, ₹1,00,000, ₹10,00,000, and ₹ 1,00,00,000 from the SBI.

They are to be sold for 10 days in January, April, July, and October each year. The identity of the purchaser remains anonymous to everyone, except the SBI, who must record the buyer’s Know Your Customer (KYC) details.

Political parties which secured more than one percent votes “in the last general election to the House of the People or a Legislative Assembly” are eligible to accept donations through electoral bonds. The political parties must encash the bond within 15 days of receiving it. After this period ends, the funds are deposited to the Prime Minister’s Relief Fund.

Election Commission of India on the Electoral Bonds Scheme

On 25 March 2019, the Election Commission of India (ECI), one of the respondents, filed an affidavit opposing the Electoral Bond Scheme. The affidavit claimed that the scheme is contrary to the goal of transparency in political finance. It also claimed that the ECI had shared a letter to the Union Government on 26 May 2017, warning against the “repercussions/impact on the transparency aspect of political finance/funding.” Further, they submitted that exempting political parties from sharing details regarding contributions would keep information on foreign funding in the dark. The affidavit stated, “unchecked foreign funding of political parties in India, which could lead to Indian policies being influenced by foreign companies.”

On 1 April 2019, the Union government submitted a rejoinder claiming that the EBS was “a pioneer step in bringing electoral reforms, to ensure that the spirit of transparency and accountability in political funding is maintained.” The Union claimed that political parties largely received funds through cash donations, leading to an “unregulated flow of black money.” The Union assured that these issues would no longer hamper political funding because there is only one authorised bank—the

State Bank of India—that can issue such bonds. Further, providing KYC details ensure accountability.

The challenge in the Supreme Court

On 12 April 2019, a bench led by Chief Justice Ranjan Gogoi, with Justices Deepak Gupta, and Sanjiv Khanna directed all political parties to submit details of donations, donors, and bank account numbers in a sealed cover to the ECI. The Bench refrained from imposing a stay on the implementation of the scheme stating that “such weighty issues would require an in-depth hearing.”

Following this Order, the petitioners approached the Court on multiple occasions. An application for an urgent hearing was filed in November 2019, then again in October 2020 before the Bihar elections.

In early 2021, ADR approached the Court seeking a stay on the scheme, before the commencement of a fresh round of bond sales. This application was substantially considered by a Bench led by Chief Justice S.A. Bobde, with Justices A.S. Bopanna, and V. Ramasubramanian. On 26 March 2021, the Bench denied any stay on the application of the scheme. They held that the “apprehension that foreign corporate houses may buy the bonds and attempt to influence the electoral process in the country, is...misconceived.” The Bench also sternly discouraged the petitioners from approaching the Court, stating that “there cannot be repeated applications seeking the same relief.”

On 16 October 2023, the petitioners approached the Court during mentioning, to hear the case prior to the 2024 General Elections. A Bench led by Chief Justice D.Y. Chandrachud, with Justices J.B. Pardiwala, and Manoj Misra referred, noting the “importance of the issue” referred the case to a five-judge Constitution Bench.

On 31 October 2023, a five-judge Constitution Bench led by CJI Chandrachud, with Justices Sanjiv Khanna, B.R. Gavai, J.B. Pardiwala, and Manoj Misra heard arguments over three days. Petitioners argued that the electoral bonds scheme increased corporate funding, black money circulation, and corruption. They argued that voters have a right to information about political parties’ source of funding, as it informs the policies and views of that party. The Union contended that the scheme was designed to guarantee confidentiality and the right to privacy of the donors, who were otherwise exposed to retribution from political parties that they didn’t fund.

Challenges to the scheme in the Supreme Court:

Since the five-judge constitutional bench commenced hearings on October 31, several arguments have been made against the constitutionality and legality of the Electoral Bond Scheme and the threat it poses to Indian democracy by petitioners lawyers including senior advocates Prashant Bhushan, Nizam Pasha, Kapil Sibal, Vijay Hansaria, Sanjay Hegde and Advocate Shadan Farasat.

1) Violates Right to Information:

It has been so far argued in the court that the Electoral Bond scheme violates the citizen's fundamental right to information under Article 19 (1) a, about political parties. Citing previous judgements of the top court, Bhushan asserted that if the citizens have the right to know about candidates then they certainly have the right to know about who is funding the political party as well.

2) Enables backdoor lobbying and quid pro quo:

Bhushan told the court that there is circumstantial evidence to prove that there were kickbacks being paid by corporations via electoral bonds to political parties in power to get favours for the corporations.

He highlighted that almost all bonds have been received by the party in power.

He said that donations to Electoral Bonds from Vedanta Limited, a company that has been declared as the preferred bidder for various mining licences, went up despite reports of a financial crunch. Citing individual cases like Vedanta, the petitioners have made a case that the scheme provides curtain veil for cases of backdoor lobbying by corporations.

3) Opens doors to shell companies:

It has been argued that since the government removed the limit of 7.5 per cent of the annual profit for companies to make donations to political parties and allowed Indian subsidiaries of foreign companies to make donations, shell companies can now also be used to make donations.

Bhushan told the court that the amendments to FCRA mean that even a loss-making company or a company that does no business (a pure shell company) can also donate.

4) Opaque instrument that is not entirely anonymous:

It has been argued that Electoral Bonds are opaque instruments that are not entirely anonymous. As nobody can come to know other than the government who contributed to whom. Since the SBI comes under the government, donations to the opposition can come under scrutiny by an investigative agency, which leads to selective anonymity.

Bhushan also argued that this anonymity of electoral bonds had raised suspicions of corruption and that donors may use these bonds to provide kickbacks to political parties in exchange for policy favours as the secrecy of these donations makes it difficult to trace any quid pro quo agreements.

The CJI while listening to Bhushan's argument pointed out that a point he may explore is that this scheme anonymised donations in relation to the rest of the society and not the donee.

"Another point you may want to also explore is that this is not an anonymised donation in relation to a donee. It's anonymised in relation to the rest of society. The donee may or may not but could know of the sources."

5) Can be used for any other purpose than Elections:

Sibal in his argument has submitted before the court that the name "Electoral Bond" is a misnomer as the money can be used for any purpose after it is withdrawn since no one is asking how the parties spent the money.

"There is nothing in the scheme which connects the donations made to the participation in the electoral process. It's a means for political parties to be enriched," he explained. To this, the CJI asked if there was no spending requirement.

Sibal replied, "None! You can spend this money, however. You can build your office. You can set up a whole internet network throughout the country."

6) Promotes corruption:

Sibal told the court that if required the account can be closed anytime by the political party. He also submitted before the court that this is a scheme to protect criminals from being prosecuted under the Prevention of Corruption Act (PCA) and Prevention of Money Laundering Act (PMLA). "Please read Section 7 of the Prevention of Corruption Act... This is also true under the PMLA. Because a predicate offence has been committed but no proceeds of crime - you'll never know... You never know who bribed whom, how much was the bribe, what quid pro quo was there you never get to know."

It has also been argued that reducing the disclosure threshold from Rs 20,000 to Rs 2,000 might not reduce the use of cash in politics and promote intended transparency. As earlier political parties declared

that they received a certain amount in small donations below Rs 20,000. Now the same can be done for Rs 2000.

Bhushan also presented before the court that in the last five years since the electoral bonds scheme was introduced, the contribution to political parties by way of electoral bonds has far exceeded any other method.

"The limit fixed per candidate is less than Rs 1 cr (Rs 95-75 lakh depending on the state). The total spent can be less than 500 crore in Lok Sabha. One party is getting more than 10 times the amount. Please see this is affecting our democracy," he said.

7) Eliminates level playing field for political parties in Opposition:

"More than 50 per cent have been received only by the ruling party at the

Centre and the rest have only been received by the ruling party in States...Not even 1 per cent has been received by opposition parties that aren't ruling in opposition states," Bhushan said in court.

Bhushan told the court that virtually all bonds have been purchased by corporates saying that nearly 95 per cent are in the denomination of 1 crore and above.

He highlighted that the Centre through this scheme has also removed the cap on corporate donations and amended FCRA. "It destroys and disturbs democracy in the country. Because it does not allow a level playing field between political parties which are ruling versus opposition parties; or between political parties and independent candidates."

8) Differentiates between corporations and citizens: Sibal while making his argument in the court highlighted that the scheme gives anonymity to corporate donors but citizens who are donating Rs 2000 in cash will disclose their names. This may also lead to the overshadowing of citizens' voices by corporates in a democracy11) Does not reduce black money:

On 15 February 2024, the Court unanimously struck down the Union's 2018 Electoral Bonds (EB) Scheme. The Bench held that the Scheme violated the voters' right to information enshrined in Article 19(1)(a) of the Constitution. The Court also directed that the sale of electoral bonds be stopped with immediate effect. SBI was directed to submit details of the Electoral Bonds purchased from 12 April 2019 till date, to the ECI. This will include details of the purchaser as well as the political parties that the bonds were given to. Further, the Court ordered the ECI to publish the information shared by SBI on its official website within one week from the receipt of the information (by 13 March 2024).

Further research:

<https://www.scobserver.in/cases/association-for-democratic-reforms-electoral-bonds-case-background/#:~:text=The%20Supreme%20Court%20held%20that,right%20to%20information%20of%20voters.>

Bharatiya Nyaya Sanhita

The Indian Penal Code (IPC), 1860, the Code of Criminal Procedure (CrPC), 1973, and the Indian Evidence Act (IEA), 1872, govern the overall criminal justice system in India. While the IPC and IEA are both laws from the British era, the Code of Criminal Procedure is more than 50 years old. Thus, there has been a need to revamp these outdated laws in order to enable the criminal justice system to evolve, deliver justice in an efficient, speedy and timely manner, and enforce more stringent punishments for crimes such as threats to national security threats. Against the above backdrop, three bills were introduced in the Lok Sabha to replace the existing criminal laws in India. Subsequently, the three bills were introduced in the Rajya Sabha on 21 December 2023. Thereafter, on the same day, the Indian Parliament (both houses) passed the Bharatiya Nyaya Sanhita, 2023 (BNS), the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) and the Bharatiya Sakshya Bill, 2023 (BSB), replacing the IPC, 1860, the CrPC, 1973, and the IEA, 1872, respectively. By introducing these bills, Indian Government seeks to bring about several changes in the existing criminal justice system, including additions to/modification of definitions and revisions in the punishment for certain crimes. Further, the bills were introduced with a clear vision to address the issues and challenges in the existing criminal justice system of India, including the large number of outstanding cases in different courts, lack of human resources and infrastructure, lack of thorough investigations and prosecution, and outdated laws and processes to execute a case. Through these bills, the Indian Government also aims to keep pace with the major technology changes that have taken place in recent years by digitising every step of a criminal investigation – right from registration of a first information report (FIR) through to drawing of charge sheets and delivery of judgements. For instance, under the BNSS, summons can be issued electronically to parties and testimonies from experts, witnesses, accused and other parties may also be presented through the digitised mode.

The key features of these three bills are summarised below:

a. BNS, 2023:1 The BNS replaces the IPC. While the new law retains relevant provisions of the IPC, a few additions have been made to the list of offences. It also removes offences which have been struck down by the apex court and increases punishment for several heinous offences. Further, lawmakers have added community service as a form of punishment and introduced a new offence for acts that threaten the sovereignty, unity and integrity of India. The BNS also classifies criminal breach of trust, forgery, financial scams, Ponzi schemes, mass marketing frauds and cybercrimes, inter alia, as ‘organised crime’. This is a noteworthy change which will lead to severe penalisation of such organised crimes in India.

b. BNSS, 2023:2 This law replaces the CrPC. Under the new law, lawmakers promote the use of technology for trials, appeals, recording of submissions and use of video conferencing for every step of legal proceedings. Further, it empowers magistrates to take cognisance of offences based on electronic records such as email, SMS and instant messages, which can facilitate evidence collection and verification process. It is important to note that under the BNSS, lawmakers have introduced a new provision which states that ‘a forensic examination will be mandatory in cases with offences that are punishable with imprisonment of seven years or more which are categorized under heinous offences’. Further, it is also mandatory under the new law to video record the entire proceeding. By introducing this provision, lawmakers aim to enhance investigative processes and criminal investigations by ensuring that a team of experts conduct an on-site examination and gather evidence in the best possible manner.

c. BSB, 2023:3 The BSB replaces the IEA. The new law promotes and acknowledges the need for technological modernisation in India's current legal system. The bill expands the definition of 'documents' to include electronic or digital records, including online communication on various personal devices. The definition is wide and covers any electronic communication such as emails, messages, server logs, user files such as photographs and call recordings, as well as communication devices such as mobile phones, laptops, websites and cameras and any other electronic device which 'may be specified by the Government at a later stage'. Further, it is also pertinent to note that as electronic records are classified as 'documents', there is a paradigm shift in their perception from secondary to primary evidence. By introducing advanced forensic techniques such as DNA profiling, digital evidence collection, gathering, examination and acceptance of expert opinions may play an important role and strengthen the new law's commitment to an effective and updated legal framework and criminal justice system in India.

India's criminal justice system has largely remain unchanged, with several laws that date back to the colonial era or are based on local legal traditions. However, the legal system is now seeing significant reforms with the Indian Government recently introducing the Digital Personal Data Protection Act 2023, the Mediation Bill, the Taxation Laws (Amendment) Bill, 2021, as well as the three new criminal law bills. Through these three new bills, lawmakers have imposed fixed timelines for enforcement agencies to take cognisance of complaints and mercy petitions, as well as for filing of chargesheets and e-FIR for women, along with timelines for hearings to address contemporary challenges. The laws also allow admissibility of digital evidence, use of digital forensics, and collaboration between legal counsels, forensic accountants and law enforcement agencies, thus marking a further step in upholding the principles of fairness, equity and justice.

Section 69 of the BNS: *Whoever, by deceitful means or by making promise to marry to a woman without any intention of fulfilling the same, has sexual intercourse with her, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.*

Explanation.—“deceitful means” shall include inducement for, or false promise of employment or promotion, or marrying by suppressing identity.

Criticism by experts: This section manifests with all chauvinism the ideals of protectionism on which misogyny feeds. On the one hand, chastity of women is endorsed as a virtue legally. Therefore, it is "in her (chastity's) interest" that the otherwise consensual sexual intercourse transforms to the offence of rape when there is no resultant marriage, and the promise to marry is proved to have been made without any intention of fulfilling the same. Several patriarchal norms are woven into the provision. Her consent for sexual intercourse when dependent on his promise to marry her, is subtly justified, and her chastity safeguarded. Therefore, when the promise was fake and sexual intercourse happens, it becomes an offence. The deep understanding that lawmakers still adhere to is that promise to marry is an enticement to women to consent to sexual intercourse, as otherwise it is disgraceful or even blasphemous.

Leaving the promises, fake, broken and failed aside, my uncompromising fury is on the explanation added at the tag end of the section. It defines "deceitful means" as including giving of false promise of employment or promotion as an inducement to have sexual intercourse with a woman, thereby making it an offence under the provision. As one glances through the BNS, one of the most jarring is Chapter V, titled as 'Of Offences Against Woman and Child.' The feminist foremothers of the past fought hard to establish an identity for women, independent of the children they bear or care for. The association of women with children denies both their independent identity; this is more so with

women, whose social worth is defined exclusively by motherhood. Scholars such as Sarah Lamb have highlighted stories of gender, exclusion, possibility and challenges for single women in India. It is ironical that while the Indian Constitution, through Article 14 (fundamental right to equality), Article 15 (fundamental right against non-discrimination on grounds including gender), Article 16 (equality of opportunity in public employment) and Article 21 recognise women to be independent entities possessing fundamental rights, the BNS, through the title of Chapter V, relegates women to their status in ancient India – glorified apparatuses for reproduction. The chapter title also indicates that women and children are both vulnerable, weak and in need of state protection and benevolence, and have no capacity for exercising agency or autonomy.

QARMA:

- 1) Should the government regulate donations to parties?
- 2) What steps must the government take to reduce black money?
- 3) What is the future of party donations in India?
- 4) Is there a need for section 69 of the Bharatiya Nyaya Sanhita?
- 5) Should there be any changes to section 69 of the Bharatiya Nyaya Sanhita?