

Challenging the Electoral Bond Scheme

Political parties in India have traditionally been averse to any sort of public scrutiny of the sources and applications of their funds. The astronomical sums needed to finance their processes and operations cannot be raised from party cadres and altruistic donors. These can only come from Big Business, and as a quid pro quo.

Civil society has been campaigning for long to empower the voter by improving her access to background information on the candidates in the electoral fray, and to bring about greater transparency in the obscure domain of political funding. In this, the instrument of public interest litigation (PIL) has been deployed to good effect. The campaign is premised on the citizen's democratic right to information, which is integral to the fundamental right to speech and expression under the Constitution.

A veil over the corporate donor

The political establishment, on its part, has sought to undermine these hard-fought victories by legislative legerdemain and ingenious schemes fashioned to obfuscate the identity of corporate donors. The United Progressive Alliance government had devised the Electoral Trusts Scheme (2013) to create a smokescreen between political parties and their corporate donors. The National Democratic Alliance, the succeeding government, came up with a far more ambitious and ingenious Electoral Bond Scheme (EBS).

The guardrails designed to limit the influence of foreign money and big business in India's democratic polity were systematically demolished to prepare the ground for the introduction of the EBS in January 2018, which was touted as a sincere effort to clean up electoral democracy by incentivising political donations through banking channels.

To begin with, the Foreign Contribution (Regulation) Act (FCRA) was retrospectively amended through the Finance Act of 2016 to permit Indian subsidiaries of foreign companies to donate to political parties and save the Bharatiya Janata Party (BJP) and the Indian National Congress (INC) from imminent disqualification for having violated the ban on acceptance of foreign contributions. This was followed by an overhaul of the regulatory framework comprising the Representation of the People Act (RPA), the Companies Act, the Income Tax Act and the Reserve Bank of India (RBI) Act through the Finance Act of 2017, despite strident protests from the RBI, the Election Commission of India (ECI) and Opposition parties. The device of incorporating the amending Bills in the



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With the constitutionality of electoral bonds being contested more strongly, the citizen must push for a more level-playing field in the next round of elections

Finance Bill effectively short-circuited the consideration of the legislative proposals by the Rajya Sabha and ensured their smooth passage.

Months before the EBS was promulgated, the Association for Democratic Reforms (ADR) and Common Cause filed a PIL to challenge the constitutionality of the amendments made in the legal framework of corporate donations by the Finance Act of 2017. The petition contended that these amendments infringed the citizen's fundamental 'Right to know' under Article 19(1)(a), and were not saved by any of the permissible restrictions under Article 19(2). The vires of the amendment to FCRA effected through the Finance Act of 2016 were also impugned.

The gravamen of the petition was that the impugned amendments jeopardised the country's autonomy, militated against transparency, incentivised corrupt practices by lifting the caps on corporate donations and allowing contributions by loss-making and shell companies.

Consequently, the nexus between politics and big business was rendered more opaque. The instrument would enable special interest groups, corporate lobbyists and foreign entities to secure a stranglehold on the electoral process and influence the country's governance to public detriment. By relieving the political parties of the duty to disclose the particulars of their donors, the amendments eroded the ECI's constitutional role and deprived citizens of vital information concerning electoral funding. Further, the recourse to a money bill to amend the relevant laws subverted the legislative scheme envisaged in the Constitution.

Bonds, the favoured mode

Over time, electoral bonds have become the favoured mode of political donation. Bonds worth ₹13,791 crore have been sold in 27 tranches until July 2023. The ADR's research has shown that electoral bonds accounted for 55.9% of the donations totalling ₹9,188 crore received by 31 political parties. Unsurprisingly, the BJP got the lion's share of 74.5% of electoral bonds redeemed until 2020-2021. The INC was a distant second, at 1%, followed by the Biju Janata Dal, the YSR Congress Party and the Trinamool Congress.

It will be naive to believe that political parties depend on these inflows to meet their insatiable requirement of funds. The expenditure on the last general election to the Lok Sabha has been estimated at between ₹55,000 to ₹60,000 crore. Most dealings of political parties continue to be in cash, but the receipts from electoral bonds enable them to meet their transactions with the formal economy, such as the costs of

infrastructure expansion, equipment and publicity in the print, electronic and digital media. This gives them an enormous advantage over their rivals in influencing voter behaviour and electoral outcomes.

After an agonising six-year wait, the challenge to the constitutionality of electoral bonds is now approaching denouement. Meanwhile, a general election to the Lok Sabha and 30 elections to State Assemblies have been held. In most of these contests, the political formations in power have enjoyed the advantage of augmented inflow of corporate contributions, thanks to the EBS that inherently favours the incumbent.

The Supreme Court of India did not take kindly to the petitioners' repeated pleas to stay the impugned scheme, pending determination of the weighty issues raised in their petition. Rejecting the plea for interim stay, the top court in its order of June 23, 2021 posited that it was possible for a voter to pierce the scheme's veil of secrecy by tallying the expenditure on electoral bonds disclosed in corporate filings with the corresponding receipts in the audited accounts of political parties. One wonders how. Even if a determined voter had the capacity to scrutinise the returns of the suspect corporates and political parties, it would be pointless since the scheme does not require the donors and recipients to furnish disaggregated information regarding their electoral bond transactions.

Significantly, the government has also stressed the imperative of protecting donor anonymity, ostensibly to shield them from retribution by political rivals. The Solicitor General has argued that anonymity is central to their right to privacy, even though this fundamental right is not available to artificial legal persons. Over 94% of the electoral bond sales are in the denomination of one crore rupees – a sum beyond the capacity of individual donors. Moreover, particulars of individuals contributing ₹20,000 and above are duly disclosed in party accounts. Why must corporate donors receive greater protection?

The hope

The pendency of the PIL has been marked by rare interludes of activity and long stretches of somnolence. It is gratifying that the Constitution Bench, to which the crux of the PIL was referred, has expeditiously concluded the hearing. Having regard to the strength of the case against the Scheme and the Supreme Court's stellar record in expanding the scope of the right to freedom of speech and expression and empowering the voter to make an informed choice, one may hope that the next round of elections will be contested on a reasonably level-playing field.

EVASIT

Branded, generic and the missing ingredient of quality -

Many patients seek or solicit a second opinion in a medical shop – that of the seller. Any school finalist or school drop-out who can read a doctor's prescription in English or mysterious scribbling will do. It need not be a qualified pharmacist. Queries range from, "Is this medicine too strong?" "What is this medicine for?" to "Does it have any serious side-effects?" The replies are supposed to be *pro bono* or free under the guarantee that the prescribed medicines will be bought from the same medical shop. The prescription may have been written out by the most famous cardiologist, neurologist or gastroenterologist, but it is the verdict in the medical shop that is accepted without any doubt. The same person will not ask any questions at a bar counter or liquor shop on whether alcohol is injurious to health, or what the chances are of developing fatty liver, cirrhosis and liver failure. Nor will he ask the person at a shop selling cigarettes whether cigarettes will affect his lungs or cause cancer. In a supermarket, customers ignore the insecticide coating on vegetables and fruits and will never ask a question about safer alternatives.

Generic over brand

This is the reality of over-the-counter sales in India, where a salesperson can decide which brand of generic medicine (pharmacological compound) can be given to a patient. The prescribing doctor has no freedom to mention his favourite brand in which he has invested his faith in terms of quality. On August 3, 2023, the National Medical Council (NMC) directed all doctors to prescribe only generic names and not brand names which led to protests.

Brand names are shunned because many brands are costly. Generic names are much cheaper. In 1975, the Hathi Committee demanded that all brand names should be weeded out gradually. That only certain renowned and branded companies have quality is a myth propagated by the big pharma companies, with their expensive propaganda and unethical marketing techniques at work.

There is an alleged nexus between



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pharmaceutical companies and doctors who can be influenced to give in to unethical marketing and promotional offers or kick-backs. But the Indian Medical Association and allied professional organisations of specialists believe that improving access to affordable medicines is part of their ethical commitment to patients. A doctor's reputation on successful treatment depends on the reliability of the quantity and quality of the active pharmaceutical ingredient in a tablet, syrup or injection available in a pharmacy. But who will guarantee compliance with those quality parameters? Individual manufacturers? The networks of pharmaceutical industries, Indian standards and quality control? Price control authorities?

No compromise on quality

The prevalence rate of spurious and "not standard quality" medicines (NSQs), stands at 4.5% and 3.4%, respectively, as shown by two national drug surveys in the last 10 years using thousands of samples from retail chemists across India. In safeguarding a patient and enabling complete healing, drugs must be 100% quality test-passed. Having even 5% of medicines failing to pass quality tests is simply unacceptable.

The government must ensure the quality of medicines produced, procured, and supplied through its Universal Health Coverage system as well as the private health-care network. For this, there has to be periodic lifting of samples for testing. Batches of medicines that fail the quality test must be banned, with punitive action taken against manufacturers. This will eliminate repeat defaulters from the supply chain. The mechanism and systems are in place but are not implemented in earnest.

The Tamil Nadu Medical Services Corporation Limited's practice, where all supplied medicines are kept under quarantine stock till double blinded samples are cleared in quality testing by government and private sector laboratories, is worth replicating. It is only on receipt of a pass quality test report that stock entry is done.

Till such time as the government is able to make the assurance (with concrete evidence) that

all medicines in the market are of standard quality, doctors should be allowed to use in their generic prescription, the name of the company (in brackets), in which the prescribing doctor has confidence in in terms of the quality of the medicine.

Without such a reliable assurance from the government, it does not have the moral right to enforce prescription only by generic name. Moreover, control over choosing the brand will pass on to the chemist, or, even worse, the half-knowledgeable sales boy who, it is feared, will decide the brand primarily on the basis of profits to be gained.

Other issues

The availability rate of all essential medicines must be above 90%. In a study of the availability of 50 essential paediatric medicines in Chhattisgarh, in 2010 – the first of its kind in India – my team calculated it to be only 17%. Non-essential vitamin tonics and cough syrups line the shelves in a pharmacy but there is no trace of the low profit-margin essential medicines. There must also be a ban on unscientific combinations of medicines – currently around 40% of the retail market in India.

To ensure affordable medicines for all under Universal Health Care, free medicines and free diagnostics are acceptable policy, but implementation needs to be monitored. The network of *Janaushadhi kendras* needs to be expanded. Approved norms of the profit margin for wholesale agents must be limited to 15%. For retailers it must be 35% over the ex-factory or manufacturer's selling prices (MSP) excluding transportation cost and VAT. Without these comprehensive measures, accessibility to cheaper medicines in India will be a mirage.

Following the Indian Medical Association's protest, the NMC has withdrawn the order on 'generic prescribing' since August 23, 2023. But this is only a case of one step forward but two steps back in moving to the goal of universal access to affordable generic medicines for all without brand names.

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