[2024] 2 S.C.R. 420 : 2024 INSC 113

Association for Democratic Reforms & Anr.
v.
Union of India & Ors.

(Writ Petition (C) No. 880 of 2017)

15 February 2024

[Dr Dhananjaya Y Chandrachud,* CJI, B R Gavai, J B Pardiwala, Manoj Misra and Sanjiv Khanna,* JJ.]

Issue for Consideration

The matter pertains to the constitutional validity of the Electoral Bond Scheme which introduced anonymous financial contributions to political parties; as also the constitutional validity of the provisions of the Finance Act 2017 which, among other things, amended the provisions of the Reserve Bank of India Act 1934, the Representation of the People Act 1951, the Income Tax Act 1961; as also whether unlimited corporate funding to political parties, as envisaged by the amendment to s. 182(1) of the Companies Act infringes the principle of free and fair elections and violates Art. 14 of the Constitution; and whether the non-disclosure of information on voluntary contributions to political parties under the Electoral Bond Scheme and the amendments to s. 29C of the RPA, s. 182(3) of the CA and s. 13A(b) of the IT Act are violative of the right to information of citizens u/Art. 19(1)(a) of the Constitution.

Headnotes

Elections – Electoral process – Electoral Bond Scheme, 2018 – Electoral Bond Scheme introduced anonymous financial contribution to political parties – Constitutional validity of:

Held: (per Dr Dhananjaya Y Chandrachud, CJI.) (for himself and for B R Gavai, J B Pardiwala and Manoj Misra, JJ) Electoral Bond Scheme is unconstitutional – Directions to the issuing bank to stop the issuance of Electoral Bonds – SBI to submit: details of Electoral Bonds purchased since 12 April 2019 till date to the ECI including the date of purchase of each Electoral Bond, the name of the purchaser of the bond and the denomination of the

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* Authors

Ed. Note : Hon'ble Dr Dhananjaya Y Chandrachud, CJI, pronounced the judgement of the Bench comprising his lordship, Hon'ble Mr. Justice B.R. Gavai, Hon'ble Mr. Justice J.B. Pardiwala, Hon'ble Mr. Justice Manoj Misra, while Hon'ble Mr. Justice Sanjiv Khanna pronounced his separate judgement.

Electoral Bond purchased; details of political parties which have received contributions through Electoral Bonds since 12 April 2019 till date to the ECI, and each Electoral Bond encashed by political parties – SBI to submit the said information to the ECI within the period stipulated – ECI to publish the information shared by the SBI on its official website – Electoral Bonds within the validity period of fifteen days but have not been encashed by the political party yet, to be returned by the political party or the purchaser to the issuing bank – Constitution of India. [Paras 216, 219] – **Held: (per Sanjiv Khanna, J.) (Concurring with Dr Dhananjaya Y Chandrachud, CJI.) (Concurring with conclusions albeit with different reasonings)** Electoral Bond Scheme is unconstitutional and is struck down – Directions to ECI to ascertain the details from the political parties and the State Bank of India, which issued the Bonds, and the bankers of the political parties and thereupon disclose the details and names of the donor/purchaser of the Bonds and the amounts donated to the political party – Henceforth, the issuance of fresh Bonds is prohibited – Electoral Bonds within the validity period of fifteen days but have not been encashed by the political party yet, to be returned by the political party or the purchaser to the issuing bank. [Para 79]

Elections – Electoral process – Electoral Bond Scheme – Amendment to s. 182 of the Companies Act, 2013 Act, deleting the first proviso thereunder (as amended by the s. 154 of the Finance Act, 2017) thereby permitting unlimited corporate funding to political parties – First proviso to s. 182 provided the limit of contribution by the company upto seven and a half per cent of its average net profits during the three immediately preceding financial years – Validity of:

Held: (per Dr Dhananjaya Y Chandrachud, CJI.) (for himself and for B R Gavai, J B Pardiwala and Manoj Misra, JJ): Is arbitrary and violative of Art. 14 – It infringes the principle of free and fair elections – Amendment to s. 182 is manifestly arbitrary for treating political contributions by companies and individuals alike; permitting the unregulated influence of companies in the governance and political process violating the principle of free and fair elections; and treating contributions made by profit-making and loss-making companies to political parties alike [Paras 215, 216] – **Held: (per Sanjiv Khanna, J.)** Amendment to s. 182 of the Companies Act, deleting the first proviso thereunder, is unconstitutional, and is

struck down – Principle of proportionality applied which would subsume the test of manifest arbitrariness – Furthermore, the claim of privacy by a corporate or a company, especially a public limited company would be on very limited grounds, restricted possibly to protect the privacy of the individuals and persons responsible for conducting the business and commerce of the company – It would be rather difficult for a public (or even a private) limited company to claim a violation of privacy as its affairs have to be open to the shareholders and the public who are interacting with the body corporate/company – Constitution of India – Art. 14 – Companies Act, 2013 – s. 182. [Para 73]

Elections – Electoral process – Electoral Bond Scheme – Non-disclosure of information on voluntary contributions to political parties under the Electoral Bond Scheme and the amendments to s. 29C of the Representation of the People Act 1951, s. 182(3) of the Companies Act and s. 13A(b) of the IT Act by the Finance Act, 2017 – If violative of Art. 19(1)(a):

Held: (per Dr Dhananjaya Y Chandrachud, CJI.) (for himself and for B R Gavai, J B Pardiwala and Manoj Misra, JJ) Information about funding to a political party is essential for a voter to exercise their freedom to vote in an effective manner – Electoral Bond Scheme and the impugned provisions-proviso to s. 29C(1) of the RPA, s. 182(3) of the CA, and s. 13A(b) of the ITA to the extent that they infringe upon the right to information of the voter by anonymizing contributions through electoral bonds are violative of Art 19(1)(a) and unconstitutional – Union of India was 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 – Deletion of the mandate of disclosing the particulars of contributions in s. 182(3) violates the right to information of the voter since they would not possess information about the political party to which the contribution was made which, is necessary to identify corruption and quid pro quo transactions in governance – Such information is also necessary for exercising an informed vote – s. 29C exempts political parties from disclosing information of contributions received through Electoral Bonds whereas s. 182(3) applies to all modes of transfer – Both must be read together – Only purpose of amending s. 182(3) was to bring the provision in tune with the amendment under the

RPA exempting disclosure requirements for contributions through electoral bonds – Amendment to s. 182(3) becomes otiose in terms of the holding that the Electoral Bond Scheme and relevant amendments to the RPA and the IT Act mandating non-disclosure of particulars on political contributions through electoral bonds is unconstitutional [Paras 104, 168, 169, 172-174, 216] – **Held: (per Sanjiv Khanna, J.)** On application of the doctrine of proportionality, proviso to s. 29C(1) of the RPA, s. 182(3) of the CA, 2013, and s. 13A(b) of the ITA, as amended by the Finance Act, 2017, unconstitutional, and are struck down – Representation of the People Act, 1951 – s. 29C – Companies Act, 2013 – s. 182(3) – Income Tax Act, 1961 – s. 13A(b) – Constitution of India – Art. 19(1)(a). [Para 74]

Elections – Electoral process – Electoral Bond Scheme – s. 31(3) of the RBI Act added by the Finance Act, 2017 to effectuate the issuance of the Bonds which, as envisaged, are not to mention the name of the political party to whom they are payable, and hence are in the nature of bearer demand bill or note – Challenge to:

Held: Per Sanjiv Khanna, J. Sub-section (3) to s. 31 of the RBI Act, 1934 and the Explanation thereto introduced by the Finance Act, 2017 is unconstitutional, and are struck down as it permits issuance of Bonds payable to a bearer on demand by such person – Finance Act, 2017 – Reserve Bank of India Act, 1934 – s. 31(3). [Para 79]

Elections – Electoral process – Electoral Bonds Scheme, 2018 – Challenge to the Electoral Bond Scheme and the statutory amendments mandating non-disclosure of information on electoral financing; and provisions permitting unlimited corporate funding to political parties – Parameters to test:

Held: (per Dr Dhananjaya Y Chandrachud, CJI, (for himself and for B R Gavai, J B Pardiwala and Manoj Misra, JJ): Courts must adopt a less stringent form of judicial review while adjudicating challenges to legislation and executive action which relate to economic policy as compared to laws relating to civil rights such as the freedom of speech or the freedom of religion – Amendments relate to the electoral process – Correspondence between the Ministry of Finance and RBI that the Bonds were introduced only to curb black money in the electoral process, and

protect informational privacy of financial contributors to political parties – Union of India itself classified the amendments as an "electoral reform" – It cannot be said that the amendments deal with economic policy [Paras 40, 42] – **Held: (per Sanjiv Khanna, J.)** Scheme cannot be tested on the parameters applicable to economic policy – Matters of economic policy normally pertain to trade, business and commerce, whereas contributions to political parties relate to the democratic polity, citizens' right to know and accountability in the democracy – Primary objective of the Scheme, and relevant amendments, is electoral reform and not economic reform – To give the legislation the latitude of economic policy, it would be diluting the principle of free and fair elections. [Para 15]

Elections – Electoral process – Presumption of constitutionality – Application, to electoral laws:

Held: (per Dr Dhananjaya Y Chandrachud, CJI, (for himself and for B R Gavai, J B Pardiwala and Manoj Misra, JJ): Presumption of constitutionality is based on democratic accountability, that is, the legislators are elected representatives who are aware of the needs of the citizens and are best placed to frame policies to resolve them; and that they are privy to information necessary for policy making which the Courts as an adjudicating authority are not – However, the policy underlying the legislation must not violate the freedoms and rights entrenched in Part III of the Constitution and other constitutional provisions – Presumption of constitutionality is rebutted when a prima facie case of violation of a fundamental right is established – Onus then shifts on the State to prove that the violation of the fundamental right is justified – It cannot be said that the presumption of constitutionality does not apply to laws which deal with electoral process [Paras 44, 45] – **Held: (per Sanjiv Khanna, J.):** Doctrine of presumption of constitutionality has its limitations when the test of proportionality is applied – Structured proportionality places an obligation on the State at a higher level, as it is a polycentric examination, both empirical and normative – While the courts do not pass a value judgment on contested questions of policy, and give weight and deference to the government decision by acknowledging the legislature's expertise to determine complex factual issues, the proportionality test is not based on preconceived notion or presumption – Standard of proof is a civil standard or a balance of probabilities; where scientific or social science evidence is

available, it is examined; and where evidence is inconclusive or does not exist and cannot be developed, reason and logic may suffice. [Para 18]

Elections – Electoral process – Electoral Bond Scheme, 2018 – Corporate donations to national parties through electoral bonds – Annual audit reports of political parties from 2017-18 to 2022-23 as available on website of ECI – Significance – Doctrine of proportionality, application:

Held: (Per Sanjiv Khanna, J.) Data indicative of the quantum of corporate funding through the anonymous Bonds – It clarifies that majority of contribution through Bonds has gone to political parties which are ruling parties in the Centre and the States – More than 50% of the Electoral Bonds in number, and 94% of the Electoral Bonds in value terms were for Rs.1 crore – This supports the reasoning and conclusion on the application of the doctrine of proportionality – Based on the analysis of the data available, the Scheme fails to meet the balancing prong of the proportionality test, however, the proportionality stricto sensu not applied due to the limited availability of data and evidence. [Paras 69, 74]

Elections – Electoral Process – Electoral Bond Scheme – Infringement of the right to information of the voter, if satisfies the proportionality standard vis-à-vis the purposes of curbing black money; and protecting donor privacy:

Held: (per Dr Dhananjaya Y Chandrachud, CJI.) (for himself and for B R Gavai, J B Pardiwala and Manoj Misra, JJ) Purpose of curbing black money is not traceable to any of the grounds in Art 19(2) – Electoral trusts are an effective alternative through which the objective of curbing black money in electoral financing can be achieved – Electoral Bond Scheme not being the least restrictive means to achieve the purpose of curbing black money in electoral process, there is no necessity of applying the balancing prong of the proportionality standard – 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 – Constitution of India – Art. 19(1) (a) and 19(2). [Paras 116, 121, 124, 129, 130]

Elections – Electoral process – Right to informational privacy, if extends to financial contributions to a political party:

Held : (per Dr Dhananjaya Y Chandrachud, CJI.) (for himself and for B R Gavai, J B Pardiwala and Manoj Misra, JJ) If the right to informational privacy extends to financial contributions to a political party, this Court needs to decide if the Electoral Bond Scheme adequately balances the right to information and right to informational privacy of political affiliation – Informational privacy to political affiliation is necessary to protect the freedom of political affiliation and exercise of electoral franchise – As regards, right to informational privacy if can be extended to the contributions to political parties, Electoral Bond Scheme has two manifestations of privacy, informational privacy by prescribing confidentiality vis-à-vis the political party; and informational privacy by prescribing non-disclosure of the information of political contributions to the public – Financial contributions to political parties are usually made because they may constitute an expression of support to the political party and that the contribution may be based on a quid pro quo – Law permits contributions to political parties by both corporations and individuals – Huge political contributions made by corporations and companies should not be allowed to conceal the reason for financial contributions made by another section of the population: a student, a daily wage worker, an artist, or a teacher – When the law permits political contributions and such contributions could be made as an expression of political support which would indicate the political affiliation of a person, it is the duty of the Constitution to protect them – 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 – Constitution does not turn a blind eye merely because of the possibilities of misuse. [Paras 131, 138, 139, 142]

Doctrines/Principles – Principle of proportionality – Proportionality standard test – Four prongs — Explanation of:

Held: (per Dr Dhananjaya Y Chandrachud, CJI.) (for himself and for B R Gavai, J B Pardiwala and Manoj Misra, JJ) Proportionality standard is laid down to determine if the violation of the fundamental right is justified – Proportionality standard is-the

measure restricting a right must have a legitimate goal (legitimate goal stage); the measure must be a suitable means for furthering the goal (suitability or rational connection stage); the measure must be least restrictive and equally effective (necessity stage); and the measure must not have a disproportionate impact on the right holder (balancing stage) – At the legitimate goal stage, the Court is to analyze if the objective of introducing the law is a legitimate purpose for the infringement of rights – Second prong of the proportionality analysis requires the State to assess whether the means used are rationally connected to the purpose – At this stage, the court is required to assess whether the means, if realised, would increase the likelihood of the purpose – It is not necessary that the means chosen should be the only means capable of realising the purpose – Next stage is the necessity stage, wherein the Court is to determine if the means adopted is the least restrictive means to give effect to the purpose – The Court is to see, whether there are other possible means which could have been adopted by the State; whether the alternative means identified realise the objective in a 'real and substantial manner'; whether the alternative identified and the means used by the State impact fundamental rights differently; and whether on an overall comparison (and balancing) of the measure and the alternative, the alternative is better suited considering the degree of realizing the government objective and the impact on fundamental rights – In the last stage, the Court undertakes a balancing exercise to analyse if the cost of the interference with the right is proportional to the extent of fulfilment of the purpose – It is in this step that the Court undertakes an analysis of the comparative importance of the considerations involved in the case, the justifications for the infringement of the rights, and if the effect of infringement of one right is proportional to achieve the goal [Paras 105, 106, 117, 119, 156] – **Held: (per Sanjiv Khanna, J.)** Four steps of test of proportionality are: first step is to examine whether the act/measure restricting the fundamental right has a legitimate aim, second step is to examine whether the restriction has rational connection with the aim, third step is to examine whether there should have been a less restrictive alternate measure that is equally effective, and last stage is to strike an appropriate balance between the fundamental right and the pursued public purpose. [Para 25]

Doctrines/Principles – Principle of proportionality – Test of proportionality – Proportionality standard to balance two conflicting fundamental rights – Foreign vis-à-vis Indian jurisprudence:

Held: (per Dr Dhananjaya Y Chandrachud, CJI, (for himself and for B R Gavai, J B Pardiwala and Manoj Misra, JJ): Foreign case *Campbell v MGM Limited judgment adopts a double proportionality standard – It employed a three step approach to balance fundamental rights, first step to analyse the comparative importance of the actual rights claimed, second step to lay down the justifications for the infringement of the rights, and third to apply the proportionality standard to both the rights – Said approach must be slightly tempered to suit Indian jurisprudence on proportionality – Indian Courts adopt a four prong structured proportionality standard to test the infringement of the fundamental rights – In the last stage, the Court undertakes a balancing exercise, wherein the Court undertakes an analysis of the comparative importance of the considerations involved in the case, the justifications for the infringement of the rights, and if the effect of infringement of one right is proportional to achieve the goal – Thus, the first two steps laid down in Campbell case are subsumed within the balancing prong of the proportionality analysis. [Paras 154, 156] – **Held: (per Sanjiv Khanna, J.)** Test of proportionality employed by courts in various jurisdictions like Germany, Canada, South Africa, Australia and the United Kingdom, however, no uniformity on application of test of proportionality or the method of using the last two prongs – In the third prong, courts examine whether the restriction is necessary to achieve the desired end, wherein they consider whether a less intrusive alternative is available to achieve the same ends, aiming for minimal impairment – As regards, the fourth prong, the balancing stage, some jurists believe that balancing is ambiguous and value-based, which stems from the premise of rule-based legal adjudication, where courts determine entitlements rather than balancing interests – However, proportionality is a standard-based review rather than a rule-based one – Balancing stage enables judges to consider various factors by analysing them against the standards proposed by the four prongs of proportionality – This ensures that all aspects of a case are carefully weighed in decision-making – While balancing is integral to the standard of proportionality, such an exercise should be rooted in empirical

data and evidence as adopted by most of the countries – In the absence of data and figures, there is a lack of standards by which proportionality stricto sensu can be determined – However many of the constitutional courts have employed the balancing stage 'normatively' by examining the weight of the seriousness of the right infringement against the urgency of the factors that justify it – Findings of empirical legal studies provide a more solid foundation for normative reasoning and enhance understanding of the relationship between means and ends – Proportionality analyses would be more accurate and would lead to better and more democratic governance. [Paras 29, 31-33, 35]

Doctrines/Principles – Doctrine of proportionality – Proportionality standard test to balance fundamental rights-right to information and the right to informational privacy:

Held: (per Dr Dhananjaya Y Chandrachud, CJI.) (for himself and for B R Gavai, J B Pardiwala and Manoj Misra, JJ) Proportionality standard is an effective standard to test whether the infringement of the fundamental right is justified – It would prove to be ineffective when the State's interest in question is also a reflection of a fundamental right – Proportionality standard is by nature curated to give prominence to the fundamental right and minimize the restriction on it – If the single proportionality standard were employed to the considerations in the instant case, at the suitability prong, the Court would determine if non-disclosure is a suitable means for furthering the right to privacy – At the necessity stage, the Court would determine if non-disclosure is the least restrictive means to give effect to the right to privacy – At the balancing stage, the Court would determine if non-disclosure has a disproportionate effect on the right holder – In this analysis, the necessity and the suitability prongs would inevitably be satisfied because the purpose is substantial: it is a fundamental right – Balancing stage will only account for the disproportionate impact of the measure on the right to information (the right) and not the right to privacy (the purpose) since the Court is required to balance the impact on the right with the fulfillment of the purpose through the selected means – Thus, the Court while applying the proportionality standard to resolve the conflict between two fundamental rights preferentially frames the standard to give prominence to the fundamental right which is alleged to be violated by the petitioners (in this case, the right to information). [Paras 152-153]

Doctrines/Principles – Double proportionality standard – Application of, to both the rights-right to informational privacy of the contributor and the right to information of the voter:

Held: (per Dr Dhananjaya Y Chandrachud, CJI.) (for himself and for B R Gavai, J B Pardiwala and Manoj Misra, JJ) Double proportionality standard is the proportionality standard to both the rights (as purpose) to determine if the means used are suitable, necessary and proportionate to the fundamental rights – First prong of the analysis is whether the means has a rational connection with both the purposes, that is, informational privacy of the political contributions and disclosure of information to the voter – Further, while applying the suitability prong to the purpose of privacy of political contribution, the court must consider whether the non-disclosure of information to the voter and its disclosure only when demanded by a competent court and upon the registration of criminal case has a rational nexus with the purpose of achieving privacy of political contribution – Undoubtedly, the measure by prescribing non-disclosure of information about political funding shares a nexus with the purpose – Non-disclosure of information grants anonymity to the contributor, thereby protecting information privacy – It is certainly one of the ways capable of realizing the purpose of informational privacy of political affiliation – Suitability prong must next be applied to the purpose of disclosure of information about political contributions to voters – There is no nexus between the balancing measure adopted with the purpose of disclosure of information to the voter – According to Clause 7(4) of the Electoral Bond Scheme and the amendments, the information about contributions made through the Electoral Bond Scheme is exempted from disclosure requirements – This information is never disclosed to the voter – Purpose of securing information about political funding can never be fulfilled by absolute non-disclosure – Measure adopted does not satisfy the suitability prong vis-à-vis the purpose of information of political funding – The next stage is the necessity prong, wherein the Court determines if the measure identified is the least restrictive and equally effective measure – Court must determine if there are other possible means which could have been adopted to fulfill the purpose, and whether such alternative means realize the purpose in a real and substantial manner; impact fundamental rights differently; and are better suited on an overall comparison of the degree of realizing the purpose

and the impact on fundamental rights - On an overall comparison of the measure and the alternative, the alternative is better suited because it realizes the purposes to a considerable extent and imposes a lesser restriction on the fundamental rights – Having concluded that Clause 7(4) of the Scheme is not the least restrictive means to balance the fundamental rights, there is no necessity of applying the balancing prong of the proportionality standard. [Paras 160-164, 168]

Doctrine/Principles – Doctrine of proportionality, when applied:

Held: (**Per Sanjiv Khanna, J.**) Proportionality principle is applied by courts when they exercise their power of judicial review in cases involving a restriction on fundamental rights – It is applied to strike an appropriate balance between the fundamental right and the pursued purpose and objective of the restriction. [Para 24]

Doctrine/Principles – Doctrine of proportionality – Application of proportionality test to Electoral Bond Scheme, 2018 – Legitimate purpose prong – Retribution, victimisation or retaliation, if can be treated as a legitimate aim:

Held: (Per Sanjiv Khanna, J.) Retribution, victimisation or retaliation cannot by any stretch be treated as a legitimate aim – This would not satisfy the legitimate purpose prong of the proportionality test – Neither the Scheme nor the amendments to the Finance Act, 2017, rationally connected to the fulfilment of the purpose to counter retribution, victimisation or retaliation in political donations – It will also not satisfy the necessity stage of the proportionality even if the balancing stage is ignored – Retribution, victimisation or retaliation against any donor exercising their choice to donate to a political party is an abuse of law and power – This has to be checked and corrected – As it is a wrong, the wrong itself cannot be a justification or a purpose – Cloak of secrecy, leads to severe restriction and curtailment of the collective's right to information and the right to know – Transparency and not secrecy is the cure and antidote. [Para 39]

Doctrine/Principles – Doctrine of proportionality – Application of proportionality test to Electoral Bond Scheme, 2018 – Rational nexus prong:

Held: (Per Sanjiv Khanna, J.) Donor may like to keep his identity anonymous is a mere ipse dixit assumption – Plea of infringement

of the right to privacy has no application at all if the donor makes the contribution, that too through a banking channel, to a political party – Identity of the purchaser of the Bond can always be revealed upon registration of a criminal case or by an order/direction of the court – Thus, the fear of reprisal and vindictiveness does not end – So-called protection exists only on paper but in practical terms is not a good safeguard even if it is accepted that the purpose is legitimate – Under the Scheme, political parties in power may have asymmetric access to information with the authorised bank – They also retain the ability to use their power and authority of investigation to compel the revelation of Bond related information – Thus, the entire objective of the Scheme is contradictory and inconsistent – Rational connection test fails since the purpose of curtailing black or unaccounted-for money in the electoral process has no connection or relationship with the concealment of the identity of the donor – Payment through banking channels is easy and an existing antidote – On the other hand, obfuscation of the details may lead to unaccounted and laundered money getting legitimised. [Paras 41, 42, 44]

Doctrine/Principles – Doctrine of proportionality – Application of proportionality test to Electoral Bond Scheme, 2018 – Necessity prong:

Held: (Per Sanjiv Khanna, J.) As per the Electoral Trust Scheme, contributions could be made by a person or body corporate to the trust which would transfer the amount to the political party – Trust is thus, treated as the contributor to the political party and guidelines were issued by the ECI to ensure transparency and openness in the electoral process – When the necessity test is applied, the Trust Scheme achieves the objective of the Union of India in a real and substantial manner and is also a less restrictive alternate measure in view of the disclosure requirements, viz. the right to know of voters – Trust Scheme is in force and is a result of the legislative process – In a comparison of limited alternatives, it is a measure that best realises the objective of the Union of India in a real and substantial manner without significantly impacting the fundamental right of the voter to know. [Paras 50-51]

Doctrine/Principles – Doctrine of proportionality – Application of proportionality test to Electoral Bond Scheme, 2018 – Fourth prong-the balancing prong of proportionality:

Held: (Per Sanjiv Khanna, J.) On application of the balancing prong of proportionality, the Electoral Bond Scheme falls foul and negates and overwhelmingly disavows and annuls the voters right in an electoral process as neither the right of privacy nor the purpose of incentivising donations to political parties through banking channels, justify the infringement of the right to voters – Voters right to know and access to information is far too important in a democratic set-up so as to curtail and deny 'essential' information on the pretext of privacy and the desire to check the flow of unaccounted money to the political parties – While secret ballots are integral to fostering free and fair elections, transparency-not secrecy-in funding of political parties is a prerequisite for free and fair elections – Confidentiality of the voting booth does not extend to the anonymity in contributions to political parties. [Para 57]

Constitution of India – Balancing of conflicting fundamental rights-right to information and the right to informational privacy – Standard to be followed:

Held: (per Dr Dhananjaya Y Chandrachud, CJI.) (for himself and for B R Gavai, J B Pardiwala and Manoj Misra, JJ) First exercise that the Court must undertake while balancing two fundamental rights is to determine if the Constitution creates a hierarchy between the two rights in conflict, if yes, then the right which has been granted a higher status would prevail over the other right involved – And if not, the following standard must be employed from the perspective of both the rights where rights A and B are in conflict, whether the measure is a suitable means for furthering right A and right B, whether the measure is least restrictive and equally effective to realise right A and right B, and whether the measure has a disproportionate impact on right A and right B – Courts have used the collective interest or the public interest standard, the single proportionality standard, and the double proportionality standard to balance the competing interests of fundamental rights – There is no constitutional hierarchy between the right to information and the right to informational privacy of political affiliation. [Paras 145-146, 157, 159]

Constitution of India – Fundamental right – Breach of – Burden of proof:

Held: (per Dr Dhananjaya Y Chandrachud, CJI, (for himself and for B R Gavai, J B Pardiwala and Manoj Misra, JJ): Courts

cannot carve out an exception to the evidentiary principle which is available to the legislature based on the democratic legitimacy which it enjoys – In the challenge to electoral law, like all legislation, the petitioners would have to prima facie prove that the law infringes fundamental rights or constitutional provisions, upon which the onus would shift to the State to justify the infringement [Para 45] – **Held: (per Sanjiv Khanna, J.)** Once the petitioners are able to prima facie establish a breach of a fundamental right, then the onus is on the State to show that the right limiting measure pursues a proper purpose, has rational nexus with that purpose, the means adopted were necessary for achieving that purpose, and lastly proper balance has been incorporated. [Para 17]

Constitution of India – Art. 14 – Doctrine of manifest arbitrariness – Application of:

Held: (per Dr Dhananjaya Y Chandrachud, CJI.) (for himself and for B R Gavai, J B Pardiwala and Manoj Misra, JJ) Doctrine of manifest arbitrariness can be used to strike down a provision where the legislature fails to make a classification by recognizing the degrees of harm; and the purpose is not in consonance with constitutional values – Legislative action can also be tested for being manifestly arbitrary – There is, and ought to be, a distinction between plenary legislation and subordinate legislation when they are challenged for being manifestly arbitrary – Manifest arbitrariness of a subordinate legislation has to be primarily tested vis-a-vis its conformity with the parent statute – Doctrines/Principles. [Paras 198, 209]

Constitution of India – Art 19(1)(a) – Right to information, scope of – Evolution of jurisprudence on right to information:

Held: (per Dr Dhananjaya Y Chandrachud, CJI.) (for himself and for B R Gavai, J B Pardiwala and Manoj Misra, JJ) Right to information can be divided into two phases – In the first phase, the right to information is traced to the values of good governance, transparency and accountability – In the second phase, the importance of information to form views on social, cultural and political issues, and participate in and contribute to discussions is recognised – Crucial aspect of the expansion of the right to information in the second phase is that right to information is not restricted to information about state affairs, that is, public information – It includes information which would be necessary to further

participatory democracy in other forms – Right to information has an instrumental exegesis, which recognizes the value of the right in facilitating the realization of democratic goals – Beyond that, it has an intrinsic constitutional value; one that recognizes that it is not just a means to an end but an end in itself. [Paras 60, 64, 65]

Constitution of India – Art. 19(1)(a) – Right to vote – Right to know – Significance:

Held: (Per Sanjiv Khanna, J.) Right to vote is a constitutional and statutory right, grounded in Art 19(1)(a), as the casting of a vote amounts to expression of an opinion by the voter – Citizens' right to know stems from this very right, as meaningfully exercising choice by voting requires information – Representatives elected as a result of the votes cast in their favour, enact new, and amend existing laws, and when in power, take policy decisions – Access to information which can materially shape the citizens' choice is necessary for them to have a say – Thus, the right to know is paramount for free and fair elections and democracy – Denying voters the right to know the details of funding of political parties would lead to a dichotomous situation – Funding of political parties cannot be treated differently from that of the candidates who contest elections – Democratic legitimacy is drawn not only from representative democracy but also through the maintenance of an efficient participatory democracy – In the absence of fair and effective participation of all stakeholders, the notion of representation in a democracy would be rendered hollow. [Paras 19, 21, 22]

Constitution of India – Fundamental rights – Conflict of – Voter's right to know vis-à-vis right to privacy:

Held: (Per Sanjiv Khanna, J.) Fundamental rights are not absolute, legislations/policies restricting the rights may be enacted in accordance with the scheme of the Constitution – Thread of reasonableness applies to all such restrictions – Furthermore, Art. 14 includes the facet of formal equality and substantive equality – Thus, the principle 'equal protection of law' requires the legislature and the executive to achieve factual equality – This principle can be extended to any restriction on fundamental rights which must be reasonable to the identified degree of harm – If the restriction is unreasonable, unjust or arbitrary, then the law should be struck down – Further, it is for the legislature to identify the degree of

harm – Voters right to know and access to information is far too important in a democratic set-up so as to curtail and deny 'essential' information on the pretext of privacy and the desire to check the flow of unaccounted money to the political parties. [Paras 56, 57]

Elections – Electoral Bond Scheme, 2018 – Clause 7(4), 2(a) – Features of the Scheme:

Held: (per Dr Dhananjaya Y Chandrachud, CJI.) (for himself and for B R Gavai, J B Pardiwala and Manoj Misra, JJ) Scheme defines electoral bond "as 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 payee" – The Scheme also stipulates that the information furnished by the buyer shall be treated as confidential which shall not be disclosed by any authority except when demanded by a competent court or by a law enforcement agency upon the registration of criminal case – While it is true that the law prescribes anonymity as a central characteristic of electoral bonds, the *de jure* anonymity of the contributors does not translate to *de facto* anonymity – The Scheme is not fool-proof – There are sufficient gaps in the Scheme which enable political parties to know the particulars of the contributions made to them – Electoral bonds provide economically resourced contributors who already have a seat at the table selective anonymity vis-à-vis the public and not the political party. [Paras 102, 103]

Elections – Electoral process – Focal point of the electoral process-candidate or political party:

Held: (per Dr Dhananjaya Y Chandrachud, CJI.) (for himself and for B R Gavai, J B Pardiwala and Manoj Misra, JJ) Statutory provisions relating to elections accord considerable importance to political parties, signifying that political parties have been the focal point of elections – 'Political party' is a relevant political unit in the democratic electoral process in India – Voters associate voting with political parties because of the centrality of symbols and its election manifesto in the electoral process – Form of government where the executive is chosen from the legislature based on the political party or coalition of political parties which has secured the majority – Prominence accorded to political parties by the Tenth Schedule of the Constitution – Law recognises the inextricable link between a political party and the candidate though vote is cast for a candidate – Voters casts their votes based on two considerations:

the capability of the candidate as a representative and the ideology of the political party. [Paras 80, 86, 89, 94]

Elections – Electoral democracy in India – Basis of:

Held: (per Dr Dhananjaya Y Chandrachud, CJI.) (for himself and for B R Gavai, J B Pardiwala and Manoj Misra, JJ) Electoral democracy in India is premised on the principle of political equality, guaranteed by the Constitution in two ways – Firstly, by guaranteeing the principle of "one person one vote" which assures equal representation in voting, and secondly, the Constitution ensures that socio-economic inequality does not perpetuate political inequality by mandating reservation of seats for Scheduled Castes and Scheduled Tribes in Parliament and State Assemblies – Constitution guarantees political equality by focusing on the 'elector' and the 'elected' – However, political inequality continues to persist in spite of the constitutional guarantees – Difference in the ability of persons to influence political decisions because of economic inequality is one of the factors – Economic inequality leads to differing levels of political engagement because of the deep association between money and politics – It is in light of the nexus between economic inequality and political inequality, and the legal regime in India regulating party financing that the essentiality of the information on political financing for an informed voter must be analyzed. [Paras 96-100]

Elections – Electoral process in India – Nexus between money and electoral democracy:

Held: (per Dr Dhananjaya Y Chandrachud, CJI.) (for himself and for B R Gavai, J B Pardiwala and Manoj Misra, JJ) Law does not bar electoral financing by the public – Both corporates and individuals are permitted to contribute to political parties which is crucial for the sustenance and progression of electoral politics – Primary way through which money directly influences politics is through its impact on electoral outcomes – One way in which money influences electoral outcomes is through vote buying – Another way in which money influences electoral outcomes is through incurring electoral expenditure for political campaigns – Enhanced campaign expenditure proportionately increases campaign outreach which influences the voting behavior of voters – Money also creates entry-barriers to politics by limiting the kind of candidates and political parties which enter the electoral fray – Challenge to the

statutory amendments-provisions dealing with electoral finance and the Electoral Bond Scheme cannot be adjudicated in isolation without a reference to the actual impact of money on electoral politics. [Paras 46-51, 55]

Election Symbols (Reservation and Allotment) Order, 1968 – Allotment of symbols to political parties – Significance:

Held: (per Dr Dhananjaya Y Chandrachud, CJI.) (for himself and for B R Gavai, J B Pardiwala and Manoj Misra, JJ) In terms of the provisions of the Symbols Order, the ECI shall allot a symbol to every candidate contesting the election – Symbols Order classifies political parties into recognised political parties and unrecognised political parties – Difference in the procedure under the Symbols Order for allotting symbols to recognised political parties, registered but unrecognised political parties and independent candidates indicates both the relevance and significance of political parties in elections in India – Purpose of allotting symbols to political parties is to aid voters in identifying and remembering the political party – Law recognises the inextricable link between a political party and the candidate though the vote is cast for a candidate – Most of the voters identified a political party only with its symbol and this still continues to the day – Symbols also gain significance when the names of political parties sound similar. [Paras 81, 84, 86, 87]

Words and Phrases – Privacy – Definition:

Held : (per Dr Dhananjaya Y Chandrachud, CJI.) (for himself and for B R Gavai, J B Pardiwala and Manoj Misra, JJ) Privacy is not limited to private actions and decisions – Privacy is defined as essential protection for the exercise and development of other freedoms protected by the Constitution, and from direct or indirect influence by both State and non-State actors – Viewed in this manner, privacy takes within its fold, decisions which also have a 'public component'. [Para 133]

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List of Keywords

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Electoral bond scheme, 2018; Electoral bond; Corporate contributions; Curbing black money; Transparency; Judicial review; Close association of politics and money; Non-disclosure of information on electoral financing; Right to information; Electoral process; Donor privacy; Informational privacy of financial contributions to political parties; Privacy vis-a-vis political party; Right to informational privacy; Judicial approach; Balancing fundamental rights; Double proportionality standard; Arbitrariness; Manifest arbitrariness; Indian jurisprudence; Anonymous financial contributions to political parties; Financial contributions to political parties; Financial

contributions; Election Commission of India; Transparency of political finance; *Quid pro quo* arrangements; Free and fair elections; Presumption of constitutionality; Corporate funding; Electoral campaigns; Excessive delegation; Principle of 'one person-one vote'; Non-disclosure of funding by companies; Public domain; Corporate donations; Anonymity of donations to political parties; Judicial restraint; Symbols Order; Electoral democracy; Proportionality standard; Electoral Trusts; Political contribution; Electronic transfer other than electoral bonds; Right to informational privacy of political affiliation; Privacy; Political beliefs; Political affiliation; Privacy of political affiliation; Electoral franchise; Corrupt practices; Single proportionality standard; Plenary legislation; Subordinate legislation; Removal of contribution restrictions; Loss-making companies; Profit-making companies.

In the Judgment of Sanjiv Khanna, J

Electoral Bonds Scheme, 2018; Electoral bonds; Electoral process; Doctrine of proportionality; Corporate funding; Ban on contributions to political parties; Contributions by companies; Electronic Clearing System; Economic policy; Judicial review; Electoral democracy; Burden of proof; Doctrine of presumption of constitutionality; Test of proportionality; Structured proportionality; Right to vote; Right to know; Symbol allotted to political parties; Funding of political parties; Democratic legitimacy; Substantive balance; Diversity; Conscientiousness; Equal consideration; Donors of a political party; Informational privacy of donors; Black money in electoral finance; Retribution; Victimisation; Retaliation; *Quid pro quo*; Multiple donors; Double proportionality; Single proportionality standard; Principle of reasonableness; Right of privacy; Balancing prong of proportionality; Principle of *lis pendens*; Necessity test; Rational connection test; Standard based review; Rule based legal adjudication; Empirical deference; Transparency; Secrecy; Identities of donor; Money laundering; Alternative measures; Electoral Trust

Scheme; Fundamental rights; Complementary rights; Law Commission of India; Party wise donation; Test of manifest arbitrariness.

Case Arising From

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No.880 of 2017

(Under Article 32 of the Constitution of India)

With

Writ Petition (Civil) Nos.59 of 2018, 975 And 1132 of 2022

Appearances for Parties

Kapil Sibal, Sr. Adv., Prashant Bhushan, Ms. Neha Rathi, Pranav Sachdeva, Ms. Alice Raj, Ms. Shivani Kapoor, Kamal Kishore, Ms. Kajal Giri, Varinder Kumar Sharma, Varun Thakur, Gautam Bhatia, Pradanns. S, Ms. Rupali Samuel, Ms. Aprajits Jamuel, Rishabh Parikh, Shsntanu Sharma, Ms. Deeksha Gaur, Y K Prasad, Shadan Farasat, Ms. Hrishika Jain, Aman Naqvi, Ms. Natasha Maheshwari, Rizwan, Ms. Sachi Chopra, Nizam Pasha, Javedur Rahman, Mudassir, Arif Ali, Ms. Aayushi Mishra, Advs. for the Petitioners.

R Venkataramani, AG, Tushar Mehta, SG, R Balasubramanian, Sr. Adv., Raj Bahadur Yadav, Ms. Seema Bengani, Shyam Gopal, Ms. Chinmayee Chandra, Kanu Agrawal, Rajat Nair, Raman Yadav, Chitvan Singhal, Mrs. Shraddha Deshmukh, Ms. Sonali Jain, Abhishek Kumar Pandey, Kartikay Aggarwal, Rajan Kumar Chourasia, Ms. Shraddha Deshmukh, Ankur Talwar, Arvind Kumar Sharma, Amit Sharma, Dipesh Sinha, Ms. Pallavi Barua, Ms. Aparna Singh, Advs. for the Respondents.

Vijay Hansaria, Sanjay R Hegde, Sr. Advs. Ms. Sneha Kalita, Ms. Kavya Jhawar, K.S.bhati, Ms. Jessy Kurian, Ms. Sr. Leona, Pawanshree Agarwala, Suren Uppal, Aviral Kashyap, Shahrukh Ali, Sanjeev Menon, Ms. Stuti Srivastava, Ms. Vimal Sinha, Rajesh Kumar, P.B. Suresh, Prasanna S., Ms. Disha Wadekar, Ms. Deeksha Dwivedi, Ms. Swati Arya, Yuvraj Singh Rathore, Varun K Chopra, Mehul Sharma, Abhishek Kandwal, M/S. Vkc Law Offices, Kaleeswaram Raj, Ms. Thulasi K Raj, Ms. Aparna Menon, Mohammed Sadique T.A., Advs. for the Intervenors.

Judgment / Order of the Supreme Court

Judgment

Dr Dhananjaya Y Chandrachud, CJI*

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1. The petitioners have instituted proceedings under Article 32 of the Constitution challenging the constitutional validity of the Electoral Bond Scheme[1] which introduced anonymous financial contributions to political parties. The petitioners have also challenged the provisions of the Finance Act 2017[2] which, among other things, amended the provisions of the Reserve Bank of India Act 1934[3], the Representation of the People Act 1951[4], the Income Tax Act 1961[5], and the Companies Act 2013[6].

A. Background

2. Section 31 of the RBI Act stipulates that only the RBI or the Central Government authorized by the RBI Act shall draw, accept, make, or issue any bill of exchange or promissory note for payment of money to the bearer of the note or bond. The Finance Act amended the RBI Act by including Section 31(3) which permits the Central Government to authorize any scheduled bank to issue electoral bonds.

3. To understand the context in which the legislative amendments were introduced, it is necessary to juxtapose the amendments with the regime on financial contributions to political parties. The law relating to financial contributions to political parties focusses on (a) contributions by corporate entities; (b) disclosure of information on contributions; and (c) income tax exemptions for donations.

i. Corporate Contributions

4. The Companies Act 1956 and the provisions of the RPA, when they were enacted did not regulate contributions to political parties by companies and individuals. The Companies (Amendment) Act 1960 included Section 293A[7] to regulate contributions by companies.

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1 "Electoral Bond Scheme" or "Scheme"

2 "Finance Act"

3 Section 135 of the Finance Act 2017; "RBI Act"

4 Section 137 of the Finance Act 2017;"RPA"

5 Section 11 of the Finance Act 2017; "IT Act"

6 Section 154 of the Finance Act 2017; "Companies Act"

7 "293A. (1) Notwithstanding anything contained in section 293, neither a company in general meeting nor its Board of directors shall, after the commencement of the Companies (Amendment) Act, 1960, contribute-
(a) To any political party, or
(b) For any political purpose to any individual or body, any amount or amounts which or the aggregate of which will, in any financial year, exceed twenty-five thousand rupees or five per cent of its average net profits as determined in accordance with the provisions of sections 349 and 350 during

The provision stipulated that companies cannot contribute to (a) any political party; and (b) to any individual or body for any political purpose, amounts exceeding twenty-five thousand rupees in a financial year or five percent of its average net profits during the three financial years immediately preceding the contribution, whichever is greater. Companies were also required to disclose the amount contributed in a financial year in their profit and loss accounts and furnish particulars of the total amount contributed and the name of the party, individual or entity to which or to whom such amount was contributed. Companies defaulting in complying with the disclosure requirement were punishable with a fine which could extend to rupees five thousand.

5. The Companies (Amendment) Act 1969 amended Section 293A[8] so as to ban contributions to political parties and for political purposes. Companies acting in contravention of the prohibition were punishable with a fine which could extend to five thousand rupees, and every officer who defaulted was punishable with imprisonment which could extend to three years, besides being liable to fine.

6. The Companies (Amendment) Act 1985 amended Section 293A[9] to

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the three financial years immediately preceding, whichever is greater.

Explanation- Where a portion of a financial year of the company falls before the commencement of the Companies (Amendment) Act, 1960, and a portion falls after such commencement, the latter portion shall be deemed to be a financial year within the meaning, and for the purposes, of this sub-section.

(2) Every company shall disclose in its profit and loss account any amount or amounts contributed by it under sub-section (1) to any political party or for any political purpose to any individual or body during the financial year to which the account relates, giving particulars of the total amount contributed and the name of the party, individual or body to which or to whom such amount has been contributed.

(3) If a company makes a default in complying with the provisions of sub-section (2), the company, and every officer of the company who is in default shall be punishable with fine which may extend to five thousand rupees."

8 "Section 293A. (1) Notwithstanding anything contained in any other provision of this Act, neither a company in general meeting nor its Board of directors shall, after the commencement of the Companies (Amendment) Act 1960 contribute any amount or amounts-

(a) To any political party or

(b) For any political purpose to an individual or body.

(2) If a company contravenes the provisions of sub-section (1) then-

(i) the company shall be punishable with fine which may extend to five thousand rupees; and

(ii) every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine"

9 "293A. (1) Notwithstanding anything contained in any other provision of this Act-

(a) No Government company; and

(b) No other company which has been in existence for less than three financial years,

shall contribute any amount or amounts, directly or indirectly, -

(i) To any political party; or

(ii) For any political purpose to any person.

(2) A company, not being a company referred to in clause (a) or clause (b) of sub-section (1), may

permit contributions to political parties and for political purposes once again. The explanation of the phrase "political purpose" included donations made to a person who in the knowledge of the donor is carrying out any activity at the time of donation which can be regarded as public support to a political party. Further, the direct or indirect expenditure by companies on advertisements by or on behalf of political parties or publications for the advantage of a political party were also regarded as contributions for political purposes. Three other restrictions, in addition to the earlier restriction prescribing a cap on contributions and disclosure requirement were included. First, the company (which is not a government company) should have been in existence for more than three years; second, contributions could only be made when a resolution authorizing the contributions had been passed at a meeting of the Board of Directors; and third, the penal consequences attached to the violations of the provision were

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contribute any amount or amounts directly or indirectly-

(a) to any political party,-

(b) for any political purpose to any person:

Provided that the amount or, as the case may be, the aggregate of the amounts which may be so contributed by a company in any financial year shall not exceed five percent of its average net profits determined in accordance with the provisions of sections 349 and 350 during the three preceding financial years.

Explanation.- Where a portion of a financial year of the company falls before the commencement of the Companies (Amendment) Act, 1985, and a portion falls after such commencement, the latter portion shall be deemed to be a financial year within the meaning, and for the purposes of this sub-section:

Provided further that no such contribution shall be made by a company unless a resolution authorizing the making of such contribution is passed at a meeting of the Board of Directors and such resolution shall, subject to the other provisions of this section, be deemed to be justification in law for the making and the acceptance of the contribution authorized by it.

(3) Without prejudice to the generality of the provisions of sub-sections (1) and (2)-

(a) a donation or subscription or payment caused to be given by a company on its behalf or on its account to a person who, to its knowledge, is carrying on any activity which, at the time at which such donation or subscription or payment was given or made, can reasonably be regarded as likely to effect public support for a political party shall also be deemed to be contribution of the amount of such donation, subscription or payment to such person for a political purpose;

(b) the amount of expenditure incurred, directly or indirectly, by a company on advertisement in any publication (being a publication in the nature of a souvenir brochure, tract, pamphlet or the like) by or on behalf of a political party or for its advantage, shall also be deemed,-

  (i) where such publication is by or on behalf of a political party, to be a contribution of such amount to such political party, and

  (ii) where such publication is not by or on behalf of but for the advantage of a political party, to be a contribution for a political purpose to the publishing it.

(4) Every company shall disclose in its profit and loss account any amount or amounts contributed by it to any political party or for any political purpose to any person during the financial year to which that account relates, giving particulars of the total amount contributed and the name of the party or person to which or to whom such amount has been contributed.

(5) If a company makes any contribution in contravention of the provisions of this section-

(a) the company shall be punishable with fine which may extend to three times the amount so contributed; and

(b) every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine.

made more stringent. A fine extendable to three times the amount contributed could be imposed, and every officer of the company who was in default of the provision was punishable for a term which could extend to three years and be liable for fine.

7. Section 182 of the Companies Act 2013 substantively incorporated the provisions of Section 293-A of the 1956 Act, as amended in 1985. Section 182 enables a company to contribute any amount directly or indirectly to any political party. The provision bars a Government company and a company which has been in existence for less than three financial years from contributing to a political party. The provisos to the provision prescribe the following two conditions:

   a. The aggregate of the amount contributed by the company in any financial year shall not exceed seven and a half per cent of its average net profits during the three immediately preceding financial years;[10] and

   b. A contribution can be made only if the Board of Directors issues a resolution authorizing the contribution at a meeting. Such a resolution shall, subject to the other provisions of the Section, be deemed to be a justification in law for the making and acceptance of the contribution authorized by the Board.[11]

8. Sub-section (3) of Section 182 mandates every company to disclose in its profit and loss account any amount contributed by it to any political party during the financial year with specific particulars of the total amount contributed along with the name of the political party to which the contribution was made.

9. Section 182 of the Companies Act 2013 made two modifications from Section 293-A of the Companies Act 1956: (a) the cap on the contributions which can be made by companies was increased from 5 % to 7.5% of their average net profits; and (b) more stringent consequences for violation of were imposed. The fine was extendable to five times (instead of three times prescribed in the earlier provision) of the contribution.

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10 Companies Act, First proviso to Section 182(1).

11 Companies Act, second proviso to Section 182(1)

10. The Finance Act 2017 made three changes to Section 182 of the Companies Act:

    a. The first proviso to Section 182(1) which prescribed a cap on corporate funding was omitted;

    b. Section 182(3) was amended to only require a disclosure of the **total** amount contributed to political parties by a company in a financial year and excluded the requirement to disclose the particulars of the amount contributed to each political party; and

    c. Sub-section 3A was introduced, by which a company could contribute to a political party only by a cheque, bank draft, or electronic clearing system. The proviso to the sub-section states that a company may also contribute through any instrument issued pursuant to any scheme notified under any law for the time being in force for contribution to political parties.

    ii. Curbing black money

11. The Taxation Laws (Amendment) Act 1978 included Section 13A to the IT Act exempting the income of political parties through financial contributions and investments from income tax. The objects and reasons of the Amending Act stipulated that tax exemption would increase disposable funds from "legitimate sources". However, to secure the benefit of exemption, the following conditions prescribed in the proviso were required to be fulfilled:

    a. The political party was required to keep and maintain books of account and other documents which would enable the Assessing Officer to properly deduce its income;[12]

    b. The political party had to maintain a record of voluntary contributions in excess of twenty thousand rupees[13], along with the name and address of the person who made such contributions;[14] and

12 IT Act, Proviso (a) to Section 13A

13 It was ten thousand rupees when Section 13A was introduced. It was increased to twenty thousand rupees by the Election and Other Related Laws (Amendment) Act 2003

14 IT Act, Proviso (b) to Section 13A

c. The accounts of the political party were required to be audited by an accountant.[15]

12. By the Election and Other Related Laws (Amendment) Act 2003, Sections 80GGB[16] and 80GGC[17] were inserted in the IT Act making contributions made to political parties tax deductible. The speech of Mr Arun Jaitley, the then Minister of Law and Justice while moving the Bill indicates that contributions were made tax deductible to "incentivize contributions" through cheque and other banking channels.

13. The Finance Act 2017 made the following amendments to Section 13A of the IT Act:

a. The political party was not required to maintain a record of contributions if the contribution was received by electoral bonds;[18] and

b. The political party must receive a donation in excess of two thousand rupees only by a cheque, bank draft, electronic clearing system or through an electoral bond.[19]

iii. Transparency

14. The Election and Other Related Laws (Amendment) Act 2003 amended the provisions of the RPA. Section 29C of the RP Act was introduced for requiring each political party to declare the details of the contributions received. The treasurer of a political party or any other person authorized by the political party must in each financial year prepare a report in respect of the contributions in excess of twenty thousand rupees received by the party from a person or company

15 IT Act, Proviso (c) to Section 13A

16 80GGB. "Deduction in respect of contributions made by companies to political parties-In computing the total income of an assessee, being an Indian company, there shall be deducted any sum contributed by it, in the previous year to any political party or an electoral trust:
Provided that no deduction shall be allowed under this section in respect of any sum contributed by way of cash."

17 80 GGC. "Deduction in respect of contributions made by any person to political parties- In computing the total income of an assessee, being any person, except local authority and every artificial juridical person wholly or partly funded by the Government, there shall be deducted any amount of contribution made by him, in the previous year, to a political party [or an electoral trust] :
[Provided that no deduction shall be allowed under this section in respect of any sum contributed by way of cash.]
Explanation.—For the purposes of sections 80GGB and 80GGC, "political party" means a political party registered under section 29A of the Representation of the People Act, 1951 (43 of 1951)."

18 IT Act, amendment to Proviso (b) to Section 13A

19 IT Act, Proviso (d) to Section 13A

other than Government companies in that financial year. The report prepared must be submitted to the Election Commission before the due date for furnishing a return of income of that financial year under the IT Act.[20] A political party which fails to submit the report shall not be entitled to any tax relief as provided under the IT Act.[21]

15. The provision was amended by the Finance Act 2017 to include a proviso by which the political party was not required to disclose details of contributions received by electoral bonds.

Annexure I to this Judgment depicts in a tabular form the amendments to the provisions of the RP Act, the IT Act, the Companies Act, and the RBI Act by the Finance Act 2017.

16. The effect of the amendments introduced by the Finance Act to the above legislations is that:

a. A new scheme for financial contribution to political parties is introduced in the form of electoral bonds;

b. The political parties need not disclose the contributions received through electoral bonds;

c. Companies are not required to disclose the details of contributions made in any form; and

d. Unlimited corporate funding is permissible.

iv. Objections of RBI and ECI to the Electoral Bond Scheme

17. On 2 January 2017, the RBI wrote a letter to the Joint Secretary in the Ministry of Finance on the proposal of the Government of India to enable Scheduled Banks to issue electoral bearer bonds for the purpose of donations to political parties before the Finance Act 2017 was enacted. The RBI objected to the proposal on the ground that:

a. The amendment would enable multiple non-sovereign entities to issue bearer instruments. The proposal militated against RBI's sole authority for issuing bearer instruments which has the potential of becoming currency. Electoral bonds can undermine the faith in banknotes issued by the Central Bank if the bonds are issued in sizable quantities;

20 RPA, Section 29C (3)

21 RPA, Section 29C (4)

b. Though the identity of the person or entity purchasing the bearer bond will be known because of the Know Your Customer[22] requirement, the identities of the intervening persons/entities will not be known. This would impact the principles of the Prevention of Money Laundering Act 2002; and

c. The intention of introducing electoral bonds can be accomplished by cheque, demand draft, and electronic and digital payments. There is no special need for introducing a new bearer bond in the form of electoral bonds.

18. On 30 January 2017, the Finance Ministry responded to the observations of RBI and stated that:

a. RBI has not understood the core purpose of electoral bonds which is to keep the identity of the donor secret while at the same time ensuring that the donation is only made from tax paid money; and

b. The fear that electoral bonds might be used as currency is unfounded because there is a time limit for redeeming the bonds.

19. By a letter dated 4 August 2017, the Deputy Governor of the RBI stated that India can consider issuing the electoral bonds on a transitional basis through the RBI under the existing provisions of Section 31(1) of the RBI Act. The RBI recommended the incorporation of the following safeguards to minimize the inherent scope of misuse of the bonds for undesirable activities:

a. The electoral bonds may have a maximum tenure of fifteen days;

b. The electoral bonds can be purchased for any value in multiples of a thousand, ten thousand, or a lakh of rupees;

c. The purchase of electoral bonds would be allowed from a KYC compliant bank account of the purchaser;

d. The electoral bonds can be redeemed only upon being deposited into the designated bank account of an eligible political party;

e. The sale of electoral bonds will be open only for a limited period, may be twice a year for seven days each; and

f. The electoral bonds will be issued only at RBI, Mumbai.

22 "KYC"

20. The draft of the Electoral Bond Scheme was circulated to the RBI for its comments. The draft conferred notified scheduled commercial banks, apart from the RBI, with the power to issue electoral bonds. The RBI objected to the draft Scheme by a letter dated 14 September 2017. The RBI stated that permitting a commercial bank to issue bonds would "have an adverse impact on public perception about the Scheme, as also the credibility of India's financial system in general and the central bank in particular." The RBI again flagged the possibility of shell companies misusing bearer bonds for money laundering transactions. The RBI recommended that electoral bonds may be issued in electronic form because it would (a) reduce the risk of their being used for money laundering; (b) reduce the cost; and (c) be more secure.

21. The Electoral Bond Scheme was placed for deliberation and guidance by the RBI before the Committee of the Central Board. The Committee conveyed serious reservations on the issuance of electoral bonds in the physical form. The reservations were communicated by the RBI to the Finance Minister by a letter dated 27 September 2017. The reservations are catalogued below:

    a. Issuance of currency is a 'monopolistic function' of a central authority which is why Section 31 of the RBI Act bars any person other than the RBI from issuing bearer bonds;

    b. Issuance of electoral bonds in the scrips will run the risk of money laundering since the consideration for transfer of scrips from the original subscriber to a transferee will be paid in cash. This will not leave any trail of transactions. While this would provide anonymity to the contributor, it will also provide anonymity to several others in the chain of transfer;

    c. Issuance of electoral bonds in the scrip form could also expose it to the risk of forgery and cross-border counterfeiting besides offering a convenient vehicle for abuse by "aggregators"; and

    d. The electoral bond may not only be seen as facilitating money laundering but could also be projected (albeit wrongly) as enabling it.

22. On 26 May 2017, the Election Commission of India[23] wrote to the Ministry of Law and Justice that the amendments to the IT Act,

23 "ECI"

RPA, and Companies Act introduced by the Finance Act 2017 will have a "serious impact on transparency of political finance/ funding of political parties." The letter notes that the amendment to the RPA by which donations through electoral bonds were not required to be disclosed is a retrograde step towards transparency of donations:

> "2(ii) It is evident from the Amendment which has been made, that any donation received by a political party through electoral bond has been taken out of the ambit of reporting under the Contribution Report as prescribed under Section 29C of the Representation of the People Act 1951 and therefore, this is a retrograde step as far as transparency of donations is concerned and this proviso needs to be withdrawn.
>
> (iii) Moreover, in a situation where contributions received through Electoral Bonds is not reported, on perusal of the Contribution reports of the political parties, it cannot be ascertained whether the political party has taken any donation in violation of provisions under Section 29B of the Representation of the People Act 1951 which prohibits the political parties from donations from Government Companies and Foreign sources."

23. Referring to the deletion of the provision in the Companies Act requiring companies to disclose particulars of the amount contributed to specific political parties, the ECI recommended that companies contributing to political parties must declare party-wise contributions in the profit and loss account to maintain transparency in the financial funding of political parties. Further, the ECI also expressed its apprehension to the deletion of the first proviso to Section 182(1) by which the cap on corporate donations was removed. The ECI recommended that the earlier provision prescribing a cap on corporate funding be reintroduced because:

    a. Unlimited corporate funding would increase the use of black money for political funding through shell companies; and

    b. Capped corporate funding ensured that only profitable companies with a proven track record could donate to political parties.

v. Electoral Bond Scheme

24. On 2 January 2018, the Ministry of Finance in the Department of Economic Affairs notified the Electoral Bond Scheme 2018 in exercise of the power under Section 31(3) of the RBI Act. The Electoral Bond is a bond issued in the nature of promissory note which is a bearer banking instrument and does not carry the name of the buyer.[24] The features of the Scheme are as follows:

a. The Bond may be purchased by a person who is (i) a citizen of India; or (ii) incorporated or established in India.[25] 'Person' includes (a) an individual; (b) a Hindu undivided family; (c) a company; (c) a firm; (d) an association of persons or a body of individuals, whether incorporated or not; (e) every artificial juridical person, not falling within any of the above categories; and (f) any agency, office, or branch owned or controlled by such a person. An individual can buy bonds either singly or jointly with other individuals;[26]

b. An Electoral Bond can only be encashed by an eligible political party.[27] A political party, to be eligible to receive an electoral bond, has to be registered under Section 29A of the RP Act, and ought to have secured not less than one per cent of the votes polled in the last general election to the House of the People or the Legislative Assembly of the State.[28] An eligible political party can encash a bond only through a bank account with an authorised bank.[29] The scheme has notified the State Bank of India as the bank authorised to issue and encash bonds;[30]

c. The instructions issued by the Reserve Bank of India regarding KYC apply to buyers of the bond. The authorised bank may call for additional KYC documents if necessary;[31]

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24 Electoral Bond Scheme, Clause 2(a)

25 Electoral Bond Scheme, Clause 3(1)

26 Electoral Bond Scheme, clause 3(3)

27 Electoral Bond Scheme, Clause 12

28 Electoral Bond Scheme, Clause 3(3)

29 Electoral Bond Scheme, Clause 3(4)

30 Electoral Bond Scheme, Clause 2(b)

31 Electoral Bond Scheme, Clause 4(2)

d. Payments for the issuance of the bond are accepted in Indian rupees, through demand draft, cheque, Electronic Clearing System or direct debit to the buyer's account. Where payment is made by cheque or demand draft, it must be drawn in favour of the issuing bank at the place of issue;[32]

e. The bonds are issued in denominations of Rs 1000, 10,000, 1,00,000, 10,00,000 and 1,00,00,000;[33]

f. The bond is valid for fifteen days from the date of issue. No payment will be made to a political party if the bond is deposited after the expiry of fifteen days[34]. If the bond is not encashed within fifteen days, it will be deposited by the authorised bank with the Prime Minister's Relief Fund;[35]

g. A buyer who wishes to purchase electoral bond(s) can apply in the format specified in Annexure II of the Scheme.[36] The issuing branch shall issue the bond if all the requirements are fulfilled.[37] The application shall be rejected if the application is not KYC compliant or if the application does not meet the requirements of the scheme;[38]

h. The bond issued is non-refundable;[39]

i. The information furnished by the buyer is to be treated as confidential by the authorized bank. It shall be disclosed only when demanded by a competent court or upon the registration of criminal case by any law enforcement agency;[40]

j. The bond shall be available for purchase for a period of ten days on a quarterly basis, in the months of January, April, July, and October as specified by the Central Government.[41] Bonds will

32 Electoral Bond Scheme, Clause 11
33 Electoral Bond Scheme, Clause 5
34 Electoral Bond Scheme, Clause 6
35 Electoral Bond Scheme, Clause 12(2)
36 Electoral Bond Scheme, Clause 7(1)
37 Electoral Bond Scheme, Clause 7(3)
38 Electoral Bond Scheme, Clause 7(4)
39 Electoral Bond Scheme, Clause 7(6)
40 Electoral Bond Scheme, Clause 7(4)
41 Electoral Bond Scheme, Clause 8(1)

be available for an additional period of thirty days as specified by the Central Government in a year when General Elections to the House of People are to be held;[42]

k. No interest is payable on the bond.[43] No commission, brokerage, or any other charges for issue of a bond shall be payable by the buyer against purchase of the bond;[44]

l. The value of the bonds shall be considered as income by way of voluntary contributions received by an eligible political party for the purpose of exemption from Income Tax under Section 13A of the IT Act;[45] and

m. The bonds are not eligible for trading.[46]

25. The petitioners instituted proceedings under Article 32 seeking a declaration that Electoral Bond Scheme and the following provisions be declared unconstitutional:

a. Section 135 of the Finance Act 2017 and the corresponding amendment in Section 31 of the RBI Act;

b. Section 137 of the Finance Act 2017 and the corresponding amendment in Section 29C of the RP Act;

c. Section 11 of the Finance Act 2017 and the corresponding amendment in Section 13A of the IT Act; and

d. Section 154 of the Finance Act 2017 and the corresponding amendment to Section 182 of the Companies Act.

26. In its order dated 13 April 2019, this Court observed that the amendments which have been challenged give rise to weighty issues which have a bearing on the sanctity of the electoral process. This Court directed all political parties, in the interim to submit details of contributions received through electoral bonds (with particulars of the credit received against each bond, date of credit, and particulars of the bank account to which the amount

42 Electoral Bond Scheme, Clause 8(2)

43 Electoral Bond Scheme, Clause 9

44 Electoral Bond Scheme, Clause 10

45 Electoral Bond Scheme, Clause 13

46 Electoral Bond Scheme, Clause 14

has been credited) to the ECI in a sealed cover. The prayer for interim relief was rejected by observing that the operations under the scheme are not placed behind "iron curtains incapable of being pierced":

> "25. The financial statements of companies registered under the Companies Act, 2013 which are filed with the Registrar of Companies, are accessible online on the website of the Ministry of Corporate Affairs for anyone. They can also be obtained in physical form from the Registrar of Companies upon payment of prescribed fee. Since the Scheme mandates political parties to file audited statement of accounts and also since the Companies Act requires financial statements of registered companies to be filed with the Registrar of Companies, the purchase as well as encashment of the bonds, happening only through banking channels, is always reflected in documents that eventually come to the public domain. All that is required is a little more effort to cull out such information from both sides (purchaser of bond and political party) and do some "match the following". Therefore, it is not as though the operations under the Scheme are behind iron curtains incapable of being pierced."

27. The petitioners have also challenged the introduction of the Finance Act as a Money Bill under Article 110 of the Constitution. The issue of the scope of Article 110 has been referred to a seven-Judge Bench and is pending adjudication.[47] The petitioners submitted that they would press the grounds of challenge to the Finance Act independent of the issue on Money Bills in view of the upcoming elections to Parliament.

28. By an order dated 31 October 2023, the batch of petitions was directed to be listed before a Bench of at least five-Judges in view of the provisions of Article 145(3) of the Constitution. It is in this background that the challenge to the Electoral Bond Scheme and the amendments is before the Constitution Bench.

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47 Roger Mathew v. South Bank of India, CA No. 8588/2019

B. Issues

29. The present batch of petitions gives rise to the following issues:

a. Whether unlimited corporate funding to political parties, as envisaged by the amendment to Section 182(1) of the Companies Act infringes the principle of free and fair elections and violates Article 14 of the Constitution; and

b. Whether the non-disclosure of information on voluntary contributions to political parties under the Electoral Bond Scheme and the amendments to Section 29C of the RPA, Section 182(3) of the Companies Act and Section 13A(b) of the IT Act are violative of the right to information of citizens under Article 19(1)(a) of the Constitution.

C. Submissions

i. Submissions of petitioners

30. Mr Prashant Bhushan, learned counsel made the following submissions:

a. There is no rational basis for the introduction of electoral bonds. The main objective of introducing the Electoral Bond Scheme as reflected in the article written by the then Finance Minister, Mr. Arun Jaitley was that it would enhance transparency in electoral funding since electoral bond transactions can only be made through legitimate banking channels. However, cash donations are still permitted even after the introduction of the Electoral Bond Scheme;

b. The Central Government ignored the objections which were raised by both the RBI and the ECI to the Electoral Bond Scheme;

c. The statutory amendments and the Electoral Bond Scheme which mandates non-disclosure of information of electoral funding are unconstitutional because:

i. They defeat the purpose of introducing provisions mandating disclosure of information on political funding in the RPA and the Companies Act which was to enhance transparency in electoral funding;

ii. They violate Article 19(1)(a) which guarantees to the voter the right to information concerning the affairs of the public

and the government.[48] This includes the right to information about financial contributions to political parties because the Constitution through the Tenth Schedule recognizes that political parties have a decisive control over the formation of Government and voting by members of the Legislature in the Legislative Assembly;

iii. They violate Article 21 because the non-disclosure of information of political contributions promotes corruption[49] and *quid pro quo* arrangements. The available data indicates that more than ninety four percent of the total electoral bonds are purchased in denominations of rupees one crore. This indicates that bonds are purchased by corporates and not individuals. The limited disclosure clause in the Electoral Bond Scheme prevents investigating agencies such as the Central Bureau of Investigation and Enforcement Directorate from identifying corruption; and

d. They violate the rights of shareholders of Companies who are donating money to political parties by preventing disclosure of information to them; and

e. The statutory amendments and the Electoral Bond Scheme subvert democracy and interfere with free and fair elections because the huge difference in the funds received by ruling parties in the States and Centre vitiates a level playing field between different parties and between parties and independent candidates.

31. Mr Kapil Sibal, learned senior counsel made the following submissions:

a. The amendments and the Electoral Bond Scheme skew free and fair elections by permitting unlimited contributions to political parties by corporate entities and removing the requirement of disclosure of information about political funding;

b. Freedom of a voter in the negative connotation refers to the freedom to cast their vote without interference and intimidation. Freedom in the positive connotation includes the freedom to

48 Relied on PUCL v. Union of India, [2003] 2 SCR 1136 : (2003) 4 SCC 399; ADR v. Union of India, [2002] 3 SCR 696 : (2002) 5 SCC 294; Anjali Bhardwaj v. Union of India, [2019] 2 SCR 199 : (2019) 18 SCC 246

49 Relied on Kanwar Lal Gupta v. Amar Nath Chawla, [1975] 2 SCR 259 : 1975 SCC (3) 646

vote on the basis of complete and relevant information. This includes information about financial contributions to political parties;

c. The argument of the Union of India that Courts should show judicial restraint is erroneous because the amendments in question relate to the electoral process and do not pertain to economic policy;

d. The presumption of constitutionality should not apply to statutes which alter the ground rules of the electoral process. The principle underlying the presumption of constitutionality is that the legislature represents the will of the people and that it is validly constituted through free and fair elections. It would be paradoxical to accord a presumption of constitutionality to the very laws or rules that set the conditions under which the legislature comes into being[50];

e. Corporate funding *per se* is violative of the Constitution because corporate entities are not citizens and thus, are not entitled to rights under Article 19(1)(a);

f. The funds contributed to the Electoral Bond Scheme can be used in any manner and their use is not restricted to electoral campaigns;

g. The Electoral Bond Scheme severs the link between elections and representative democracy because those elected are inclined to fulfill the wishes of the contributors and not the voters. This could be through direct *quid pro quo* where an express promise is made to enact a policy in favour of the donor and indirect *quid pro quo* where there is an influence through *access* to policy makers;

h. The Scheme promotes information asymmetry where the information about political donations is not disclosed to voters but the Central Government is privy to such information through the State Bank of India which is the authorized bank under the Scheme. The information asymmetry will ensure that a larger portion of the donations would be made to the ruling party at the

50 Relied on Subash Chandra v. Delhi Subordinate Services Selection Board, [2009] 12 SCR 978 : (2009) 15 SCC 458

Centre. According to the data, the political party at the center has received fifty seven percent of the total contributions made through electoral bonds;

i. The Electoral Bond Scheme skews the principle of one person, one vote because it gives the corporates a greater opportunity to influence political parties and electoral outcomes;

j. The amendment to Section 182(3) permits: (i) loss making companies to contribute to political parties; (ii) unlimited contributions to political parties enabling significant policy influence; and (iii) non-disclosure of information on political funding to shareholders;

k. The amendments permitting non-disclosure of information on political funding are violative of the right to information under Article 19(1)(a). The right to information on funding of political parties is a natural consequence of the judgment of this Court in **ADR** (supra) and **PUCL** (supra) because the underlying principle in the judgments is that an informed voter is essential for a functioning democracy. Information about funding to political parties is necessary for an informed voter since the Symbols Order 1968 and the provisions of the Tenth Schedule allow political parties to influence legislative outcomes and policies;

l. The infringement of the right to information does not satisfy the proportionality standard vis-à-vis the purpose of curbing black money. Even if the argument that the Electoral Bond Scheme fulfills the purpose is accepted, non-disclosure of information on political funding is not the least restrictive means to achieve the purpose;

m. The infringement of the right to information does not satisfy the proportionality standard vis-à-vis the purpose of guaranteeing informational privacy because:

    i. Protecting donor privacy is not a legitimate purpose. There is no legitimate expectation of informational privacy to political contributions. The argument that it lies at the heart of privacy conflates speech with money. Secrecy of voting cannot be equated to political donations because while the former is an expression of political equality, the latter is contrary to political equality because it depends on the economic capacity of the contributor;

ii. Political funding is made to influence public policy. They are public acts which are by their very nature subject to public scrutiny; and

iii. Even if donor privacy is necessary, on a balance, the public interest in free and fair elections trumps the private interest in confidentiality. Further, this Court has to balance between the *possibility* of victimization on the disclosure of information and the *infringement* of the right to know; and

n. The amendment to Section 31 of the RBI Act is unconstitutional because of excessive delegation since it does not set out the contours of the Scheme.

32. Mr Shadan Farasat, learned counsel made the following submissions:

a. The Scheme does not effectively curb black money. Clause 14 of the Electoral Bond Scheme prohibits *de jure* trading of the bonds. However, trading is *de facto* permissible. Nothing prevents person A from purchasing the bond and trading it with person B who pays through cash;

b. The right to information on political funding which is traceable to Article 19(1)(a) can only be restricted on the grounds stipulated in Article 19(2). The purposes of curbing black money and recognizing donor privacy is not traceable to the grounds in Article 19(2);

c. Even if the purposes are traceable to Article 19(2), the Scheme is unreasonable and disproportionate to the purpose of "increasing political funding through banking channels and reducing political funding through non-banking channels" because:

i. The purpose is not satisfied: The regime still permits cash funding up to Rupees two thousand. The operation of the Scheme increases anonymous funding through electoral bonds at the cost of contributions through regular banking channels;

ii. There is no rational nexus between the means and the purpose;

iii. Other less restrictive means of contributing through banking channels are available; and

iv. The fifth prong of the proportionality analysis as laid down in Gujarat Mazdoor Sabha v. State of Gujarat[51] and Ramesh Chandra Sharma v. State of Uttar Pradesh[52] that the legislation should have sufficient safeguard to prevent abuse has also not been satisfied.

d. The statutory amendments and the Scheme are manifestly arbitrary because (i) large scale corruption and *quid pro quo* arrangements would go unidentified due to the non-disclosure of information about political funding; (ii) they enable capture of democracy by wealthy interests; and (iii) they infringe the principle of 'one person-one vote' because a selected few overpower the voice of the masses because of their economic wealth;

e. The deletion of the limit on corporate contributions is manifestly arbitrary[53] because it (i) permits donations by loss making companies; (ii) removes the control of shareholders over the decisions of the Board; (iii) permits unlimited contribution by corporates and thereby abrogates democratic principles;

f. The provision permitting non-disclosure of funding by companies is violative of the shareholders' rights under:

i. Article 25 which includes the right of the shareholder to know how the resources generated from their property are utilized. Once a shareholder comes to know that a company is financing a political party and their conscience does not permit it, as an exercise of the right to conscience, the shareholder should be entitled to sell those shares; and

ii. If the shareholder feels that the political contributions are not a sound business decision, they must be entitled to exit the business by selling the shares. The information that would enable the shareholder to make such a decision is not disclosed, thus, infringing upon their right under Article 19(1)(g).

51 [2020] 13 SCR 886 : (2020) 10 SCC 459

52 [2023] 2 SCR 422 : 2023 SCC OnLine SC 162

53 Relied on Shayara Bano v. Union of India, [2017] 9 SCR 797 : (2017) 9 SCC 1

33. Mr Nizam Pasha, learned counsel made the following submissions:

    a. The Electoral Bond Scheme and the amendments are arbitrary as they permit Indian registered companies to purchase electoral bonds without considering their ownership and control. This goes against foreign investment laws in India, treating companies owned or controlled by non-resident Indian citizens as *'foreign owned or controlled companies,'* without rational justification;

    b. The Electoral Bond Scheme is arbitrary due to its discriminatory and non-transparent nature. It contradicts existing laws requiring transparency and verification of the beneficial ownership and source of funds; and

    c. The amendments to Section 29C of the RPA and Section 182 of the Companies Act serve no purpose other than perpetuating illegal ends, as they exempt companies' purchase of electoral bonds from public disclosure. This fails to achieve the scheme's stated objective of curbing cash donations.

34. Mr Vijay Hansaria, learned senior counsel made the following submissions:

    a. The objects and reasons of the Election and Other Related Laws (Amendment) Act 2003 which amended the Companies Act 1956, IT Act 1961, and the RPA indicates that the amendments were made to incentivize contributions through banking channels. Thus, the amendments to Section 13A of the Income Tax Act and Section 29C of the RPA are contrary to the object of inserting Section 13A and Section 80GGB and Section 80GGC of the Income Tax Act;

    b. Since 1959, when companies were permitted to contribute to political parties, all companies were required to mandatorily disclose the total contributions made and the name of party to which they have contributed. Further, ceiling limits for total contribution by companies were prescribed. The Finance Act 2017 does away with these transparency requirements; and

    c. International perspectives on political funding regulations, including those from the United States, the United Kingdom, Switzerland and Singapore, emphasize the importance of transparency, disclosure, and reporting in political contributions.

These examples underscore the global consensus on transparency in the political funding process.

35. Mr Sanjay R. Hegde, learned senior counsel made the following submissions:

    a. Public listed companies are subject to scrutiny since they raise funds from the public. Information pertaining to the company is essential to be brought to the public domain. This will enable informed debates and discussions regarding the use of money by such companies. Such information must particularly be made available to shareholders to enable them to make an informed choice with regard to trading of securities. Thus, the amendment to the Companies Act which removes the requirement of disclosure of information about political contributions is violative of the right to information of shareholders which flows from Article 19(1)(a);

    b. Public listed companies should not be allowed to make contributions without the consent of the majority of the shareholders or the consent of three-fourths of shareholders;

    c. Non-disclosure of information about political funding denies shareholders the right to choice that flows from Article 21. Shareholders are incapacitated from making a choice about whether they wish to invest in shares of a company which has contributed to a political party whose ideology that shareholder does not agree with; and

    d. The amendment to Section 182(3) perpetuates the pre-existing inequality in power between shareholders and the Board/ Promoters/management and puts the shareholders in an even weaker position violating the right to substantive equality under Article 14.

36. Mr PB Suresh, learned counsel made the following submissions:

    a. The Scheme and amendments violate Articles 14 and 15 by disproportionately impacting regional political parties and political parties which represent marginalised and backward sections of the society. The representation of the backward classes is low in the corporate sector. Thus, the Scheme has a disparate impact on parties whose social base is derived from the SC/ STs and backward classes;

b. The presumption of constitutionality does not apply in full rigour to electoral laws because the incumbent legislators have a vested interest in shaping the laws that would make it easier for them to be re-elected;

c. The removal of the cap on corporate donations has strengthened the position of major political parties and created more barriers for the entry of new political parties; and

d. Political parties have a right to know the funding sources of rival political parties to enable them to critique it before the public.

ii. Submissions of Union of India

37. The learned Attorney General for India made the following submissions:

a. Political parties are an integral product of a free and open society and play an important role in the administration of the affairs of the community. Accordingly, they are entitled to receive all support, including financial contributions;

b. The Electoral Bond Scheme allows any person to transfer funds to political parties of their choice through legitimate banking channels instead of other unregulated ways such as direct transfer through cash;

c. The Scheme ensures confidentiality of the contributions made to political parties. The benefit of confidentiality to contributors ensures and promotes contribution of clean money to political parties;

d. Citizens do not have a general right to know regarding the funding of political parties. Right to know is not a general right available to citizens;

e. This Court has evolved the right to know for the specific purpose of enabling and furthering the voter's choice of electing candidates free from blemish; and

f. The influence of contributions by companies to political parties ought not to be examined by this Court. It is an issue of democratic significance and should be best left to the legislature.

38. The learned Solicitor General of India made the following submissions:

a. The legal framework prior to the enactment of the Electoral Bond Scheme was mostly cash-based which incentivized infusion of

black money into political parties, and consequently, into the electoral process in India. The Electoral Bond Scheme is an improvement on the prior legal framework;

b. Donors to a political party often apprehended retribution from other political parties. Such apprehension incentivized donors to contribute unaccounted money to political parties to avoid identification and victimization by other political parties. The Electoral Bond Scheme maintains the confidentiality of donors and thereby incentivizes them to contribute clean money to political parties;

c. In case the donor is a public company, they will have to declare the amount contributed in their books of account without disclosing the name of the political party. Similarly, the political parties will also have to disclose the total amount received through electoral bonds in their annual audited accounts filed before the Election Commission of India. This framework ensures a balance between clean money coming into the system as against the right to information of citizens;

d. The state has a positive obligation to safeguard the privacy of its citizens, which necessarily includes the citizens' right to political affiliation. The right of a buyer to purchase electoral bonds without having to disclose their preference of political party secures the buyer's right to privacy;

e. The Electoral Bond Scheme has been enacted in pursuance of a legitimate state interest - to shift from cash driven, unregulated and unaccounted cash based political donations to a regulated, digital and legal political donation framework. The provisions of the Electoral Bond Scheme have a specific object and purpose of curbing black money and protecting donor privacy:

    i. Clause 3(3) imposes a pre-condition that only a registered political party which has secured at least 1 per cent of the votes polled in the last general election would be eligible to receive bonds. This provision ensures that ghost political parties are barred from seeking and receiving political funding;

ii. Clause 4 requires a buyer of electoral bonds to meet the requisite KYC Norms. This ensures that only KYC compliant persons are entitled to buy electoral bonds;

iii. The limited validity period of fifteen days ensures that the bond is not used as a parallel currency;

iv. Clause 7(4) mandates the authorized bank to treat the information furnished by a buyer as confidential which shall not be disclosed to any authority, except when directed by a competent court or upon registration of criminal case by any law enforcement agency. This provision protects the privacy and personal details of the buyer vis-à-vis the state; and

v. Clause 11 mandates that all payments for the purchase of electoral bonds shall be accepted through banking channels. This provision curbs the circulation of black money.

f. The right of a citizen to know how political parties are being funded must be balanced against the right of a person to maintain privacy of their political affiliations. Donating money to one's preferred party is a form political self-expression, which lies at the heart of privacy;

g. Maintaining anonymity of donations to political parties is a part of the concept of secret ballot because it enables a person to make political choices without any fear of victimization or retaliation;

h. The right to information only operates against information in the possession or in the knowledge of the state. It cannot operate for seeking information not in the knowledge or possession of the state;

i. The amendments to the RBI Act, RPA, and the IT Act are intended to curb donations made by way of cash and other means to political parties and secure the anonymity of donors;

j. The amendment to Section 182 of the Companies Act removes the limitation of seven and a half percent of the net profits on the amount contributed by political parties. The removal of the contribution limit was intended to disincentivize creation of shell companies;

k. This Court has recognized that the legislature has a wide latitude in matters concerning economic policy. Further, the mere possibility that the law might be abused cannot be a ground for holding the provision procedurally or substantially unreasonable; and

l. The fact that one party receives substantially more support through donations than other parties cannot in itself be a legal ground to challenge the validity of the Electoral Bond Scheme.

D. The Scope of Judicial Review

39. The Union of India submitted that this Court must exercise judicial restraint while deciding the challenge to the Electoral Bond Scheme and the statutory amendments because they relate to economic policy. For this purpose, the Union of India relied on a series of decisions where this Court has held that Courts must follow judicial restraint in matters concerning economic and financial policy.[54]

40. It is a settled position of law that Courts must adopt a less stringent form of judicial review while adjudicating challenges to legislation and executive action which relate to economic policy as compared to laws relating to civil rights such as the freedom of speech or the freedom of religion.[55] More recently, in Swiss Ribbons v. Union of India[56], this Court while deciding a challenge to the constitutional validity of provisions of the Insolvency and Bankruptcy Code 2016 observed that the legislature must be given "free play" in the joints to experiment with economic policy. This position was also followed in Pioneer Urban Land and Infrastructure Limited v. Union of India[57], where amendments to the Insolvency and Bankruptcy Code were challenged.

41. The question is whether the amendments under challenge relate to economic policy. While deciding on a constitutional challenge, the Court does not rely on the ipse dixit of the government, that a

54 Rustom Cavasjee Cooper v. Union of India, [1970] 3 SCR 530 : (1970) 1 SCC 248; R.K Garg v. Union of India, [1982] 1 SCR 947 : (1981) 4 SCC 675; Premium Granites v. State of Tamil Nadu, [1994] 1 SCR 579 : (1994) 2 SCC 691; Peerless General Finance and Investment Co v. RBI, [1992] 1 SCR 406 : (1992) 2 SCC 343, BALCO Employees Union v. Union of India, [2001] Suppl. 5 SCR 511 : (2002) 2 SCC 333.

55 RK Garg v. Union of India, [1982] 1 SCR 947 : (1981) 4 SCC 675 [8]; See Balco Employees Union v. Union of India, [2001] Suppl. 5 SCR 511 : (2002) 2 SCC 333; DG of Foreign Trade v. Kanak Exports, (2016) 2 SCC 226

56 [2019] 3 SCR 535 : (2019) 4 SCC 17

57 [2019] 10 SCR 381 : (2019) 8 SCC 416

legislation is an economic legislation. Courts before classifying the policy underlying a legislation as economic policy must undertake an analysis of the true nature of the law. The amendment to Section 31 of the RBI Act can be classified as a financial provision to the extent that it seeks to introduce a new form of a bearer banking instrument. However, any resemblance to an economic policy ends there. The amendments in question can be clubbed into two heads: first, provisions mandating non-disclosure of information on electoral financing; and second, provisions permitting unlimited corporate funding to political parties. Both these amendments relate to the electoral process.

42. In fact, it is evident from the correspondence between the Ministry of Finance and RBI (which have been summarized above) on the apprehensions of the Bonds being used as an alternative currency that the Bonds were introduced only to curb black money in the electoral process, and protect informational privacy of financial contributors to political parties. The Union of India has itself classified the amendments as an "electoral reform". Thus, the submission of the Union of India that the amendments deal with economic policy cannot be accepted.

43. The second argument that this Court needs to address is to determine the scope of judicial review to decide this batch of petitions. The petitioners submitted that the presumption of constitutionality does not apply since the Scheme deals with the electoral process. The premise of the argument is that the presumption of constitutionality is based on the principle that the elected body must be trusted to make decisions and that principle should not be applied when the rules changing the electoral process are themselves in challenge.[58] It was submitted that in such cases if a *prima facie* case of constitutional violation is made out, the State bears a heavy burden of justifying the law.

44. The presumption of constitutionality is based on two premises. First, it is based on democratic accountability, that is, legislators are *elected* representatives who are aware of the needs of the citizens and are

58 For this purpose, the petitioners referred to the representation-reinforcement model of judicial review propounded by John Hart Ely in his book Democracy and Distrust: A Theory of Judicial Review (Harvard University Press, 2002) and the judgment of this Court in Subash Chandra v. Delhi Subordinate Service Selection Board, [2009] 12 SCR 978 : (2009) 15 SCC 458

best placed to frame policies to resolve them[59]. Second, legislators are privy to information necessary for policy making which the Courts as an adjudicating authority are not. However, the policy underlying the legislation must not violate the freedoms and rights which are entrenched in Part III of the Constitution and other constitutional provisions. It is for this reason that previous judgments of this Court have held that the presumption of constitutionality is rebutted when a *prima facie* case of violation of a fundamental right is established. The onus then shifts on the State to prove that the violation of the fundamental right is justified. In **Dharam Dutt v. Union of India**[60], a two-Judge Bench of this Court elucidated the principle in the following terms:

> "49. In spite of there being a general presumption in favour of the constitutionality of the legislation, in a challenge laid to the validity of any legislation allegedly violating any right or freedom guaranteed by clause (1) of Article 19 of the Constitution, on a prima facie case of such violation having been made out, the onus would shift upon the respondent State to show that the legislation comes within the permissible limits of the most relevant out of clauses (2) to (6) of Article 19 of the Constitution, and that the restriction is reasonable. The Constitutional Court would expect the State to place before it sufficient material justifying the restriction and its reasonability. On the State succeeding in bringing the restriction within the scope of any of the permissible restrictions, such as, the sovereignty and integrity of India or public order, decency or morality etc. the onus of showing that restriction is unreasonable would shift back to the petitioner. Where the restriction on its face appears to be unreasonable, nothing more would be required to substantiate the plea of unreasonability. Thus the onus of proof in such like cases is an ongoing shifting process to be consciously observed by the Court called upon to decide the constitutional validity of a legislation by reference to Article 19 of the Constitution."

59 See State of Bombay v. FN Balsara, [1951] 1 SCR 682

60 [2003] Supp. 6 SCR 151 : AIR 2004 SC 1295; Also see Ramlila Maidan Incident, In re, [2012] 4 SCR 971 : (2012) 5 SCC 1; State of Bombay v. FN Balsara, [1951] 1 SCR 682; Ameerunissa Begum v. Mahboob Begum, [1953] 1 SCR 404 : (1952) 2 SCC 697

45. The broad argument of the petitioners that the presumption of constitutionality should not apply to a specific class of statutes, that is, laws which deal with electoral processes cannot be accepted. Courts cannot carve out an exception to the evidentiary principle which is available to the legislature based on the democratic legitimacy which it enjoys. In the challenge to electoral law, like all legislation, the petitioners would have to *prima facie* prove that the law infringes fundamental rights or constitutional provisions, upon which the onus would shift to the State to justify the infringement.

E. The close association of politics and money

46. The law does not bar electoral financing by the public. Both corporates and individuals are permitted to contribute to political parties. The legal regime has not prescribed a cap on the financial contributions which can be received by a political party or a candidate contesting elections. However, Section 77 of the RPA read with Rule 90 of the Conduct of Election Rules 1961[61] prescribes a cap on the total expenditure which can be incurred by a candidate or their agent in connection with Parliamentary and Assembly elections between the date on which they are nominated and the date of the declaration of the result. The maximum limit for the expenditure in a Parliamentary constituency is between Rupees seventy five lakhs to ninety five lakhs depending on the size of the State and the Union Territory.[62] The maximum limit of election expenses in an Assembly constituency varies between rupees twenty eight lakhs and forty lakhs depending on the size of the State.[63] However, the law does not prescribe any limits for the expenditure by a **political party**. Explanation 1 to Section 77 stipulates that the expenditure incurred by "leaders of a political party" on account of travel for propagating the programme

61 Section 77 of the RPA read with Section 169 provides the Central Government in consultation with the Election Commission, the power to prescribe the amount over which the total expenditure incurred by the candidate or their agent in connection with Parliamentary election and Assembly election shall not be exceeded. The total expenditure cap is prescribed in Rule 90 of the Conduct of Election Rules 1961 which is amended from time to time.

62 The expenditure limit is capped at seventy-five Lakhs for the states of Arunachal Pradesh, Goa, and Sikkim, and the Union Territories of Andaman and Nicobar Islands, Chandigarh, Dadra and Nagar Haveli and Daman and Diu, Lakshadweep, Puducherry, and Ladakh. For the remaining States and Union Territories, the expenditure limit is capped at ninety-five Lakhs.

63 For State Assembly elections, the expenditure is capped at twenty-eight lakhs for the States of Arunachal Pradesh, Goa, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, and Tripura. Amongst the Union Territories, the expenditure is capped at twenty-eight Lakhs for Puducherry and forty Lakhs for Delhi and Jammu and Kashmir.

of the political party shall not be deemed to be election expenditure. Thus, there is an underlying dicohotomy in the legal regime. The law does not regulate contributions to candidates. It only regulates contributions to political parties. However, expenditure by the candidates and not the political party is regulated. Be that as it may, the underlying understanding of the legal regime regulating electoral finance is that finance is crucial for the sustenance and progression of electoral politics.

47. It is believed that money does not vote but people do. However, studies have revealed the direct and indirect influence of money on electoral politics.[64] The primary way through which money directly influences politics is through its impact on electoral outcomes.

48. One way in which money influences electoral outcomes is through vote buying. Another way in which money influences electoral outcomes is through incurring electoral expenditure for political campaigns. Campaigns have a measurable influence on voting behavior because of the impact of television advertisements, campaign events, and personal canvassing.[65] An informed voter is one who is assumed to be aware of the policy positions of the candidate or the party they represent and votes on a thorough analysis of the pros and cons of electing a candidate. On the other hand, an uninformed voter is assumed to not possess knowledge of the policy positions of the candidates.[66] Campaigns have an effect on the voting behavior of both an informed and an uninformed voter. The impact of campaigns on an informed voter is supplementary because campaign activities enable an informed voter to be further informed about the policies and ideology of the political party and the candidate, and their views on specific issues. Electoral campaigns reduce the uncertainty about candidates for an informed voter. For an uninformed voter, electoral campaigns play a much more persuasive role in influencing electoral behavior because campaigns throw more light on candidates.

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64 See Conrad Foreman, Money in Politics: Campaign Finance and its Influence over the Political Process and Public Policy, 52 UIC J. Marshall L. Rev. 185 (2018)

65 See D Sunshine Hillygus, Campaign Effects on Vote Choice in "The Oxford Handbook of American Elections and Political Behavior" (Ed. Jan E. Leighley 2010)

66 See David P. Baron, Electoral Competition with informed and uninformed voters, American Political Science Review, Vol. 88, No. 1 March 1994

49. Political parties use innovative techniques of campaigning by going beyond the traditional methods of advertisements, door-to-door campaigning and processions to increase outreach. For example, political parties sponsor religious festivals and community fairs, organize sporting matches and literary competitions where cash awards are given.[67] These outreach techniques leave a lasting impression on the minds of uninformed voters. Thus, enhanced campaign expenditure proportionately increases campaign outreach which influences the voting behavior of voters.

50. Money also creates entry-barriers to politics by limiting the kind of candidates and political parties which enter the electoral fray. Studies have shown that money influences the selection of candidates by political parties because parties would prefer fielding candidates who would be able to substantially self-finance their campaign without relying on the party for finance.[68] In this manner, candidates who belong to socio-economically weaker sections face added barriers because of the close association of money and politics.

51. Money also excludes parties which are new to the electoral fray, and in particular, parties representing the cause of marginalized communities. Political parties which do not have enough finance have had to form electoral coalitions with other established political parties who would in exchange shoulder a lion's share of the campaign expenditure of the newly established political party extending to costs related to coalition propaganda, print and digital advertising, vehicle and equipment hire, political rallies, food transportation, and daily expenditure for party cadres[69]. The compromises which newly formed political parties have to make lead to a dilution of the ideology of the party in exchange of its political sustenance. In this manner, money creates an exclusionary impact by reducing the democratic space for participation for both candidates and newer and smaller political parties.

52. The judgments of this Court have recognized the influence of money on politics. They take a critical view of the role played by

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67 Michael A. Collins, Navigating Fiscal Constraints in "Costs of Democracy: Political Finance in India" (edited by Devesh Kapur and Milan Vaishnav) OUP 2018

68 See Neelanjan Sircar, Money in Elections: the Role of Personal Wealth in Election Outcomes in Costs of Democracy: Political Finance in India (ed. By Devesh Kapur and Milan Vaishnav) OUP 2018

69 Michael A. Collins, Navigating Fiscal Constraints in "Costs of Democracy: Political Finance in India" (edited by Devesh Kapur and Milan Vaishnav) OUP 2018

big business and "big money" in the electoral process in India. The decision in Kanwar Lal Gupta v. Amar Nath Chawla,[70] notices that money serves as an asset for advertising and other forms of political solicitation that increases a candidate's exposure to the public. The court observed that the availability of large funds allows a candidate or political party "significantly greater opportunity for the propagation of its programme" in comparison to their political rivals. Such political disparity, it was observed, results in "serious discrimination between one political party or individual and another on the basis of money power and that in turn would mean that "some voters are denied an 'equal' voice and some candidates are denied an 'equal chance'".

53. In Vatal Nagaraj v. R Dayanand Sagar,[71] Justice V R Krishna Iyer noted that candidates often evade the legal ceiling on expenditure by using big money channelled by political parties. The court acknowledged that large monetary inputs are "necessary evils of modern elections", which they hoped would be eradicated sooner rather than later. In P Nalla Thampy Terah v. Union of India,[72] a Constitution Bench of this Court was called upon to decide the validity of Explanation 1 to Section 77 of the RPA which allowed unlimited channelling of funds by political parties for the election of their candidates. While upholding the constitutional validity of the explanation, the Court noted that the petitioners were justified in criticizing the statute for "diluting the principle of free and fair elections."

54. In Common Cause (A Registered Society) v. Union of India,[73] this Court dwelt on the ostentatious use of money by political parties in elections to further the prospects of candidates set up by them. Justice Kuldip Singh described the role of money in the electoral process, which is relevant for contextualizing the issue:

> "18. ... [The General Elections] is an enormous exercise and a mammoth venture in terms of money spent. Hundreds and thousands of vehicles of various kinds are pressed on to the roads in 543 parliamentary constituencies on behalf of thousands of aspirants to power, many days

70 [1975] 2 SCR 259 : (1975) 3 SCC 646

71 [1975] 2 SCR 384 : (1975) 4 SCC 127

72 [1985] Supp. 1 SCR 622 : 1985 Supp SCC 189

73 [1996] 3 SCR 1208 : (1996) 2 SCC 752

> before the general elections are actually held. Millions of leaflets and many million posters are printed and distributed or pasted all over the country. Banners by the lakhs are hoisted. Flags go up, walls are painted, and hundreds of thousands of loudspeakers play out the loud exhortations and extravagant promises. VIPs and VVIPs come and go, some of them in helicopters and air-taxis. The political parties in their quest for power spend more than one thousand crore of rupees on the General Election (Parliament alone), yet nobody accounts for the bulk of money so spent and there is no accountability anywhere. Nobody discloses the source of the money. There are no proper accounts and no audit. From where does the money come from nobody knows. In a democracy where rule of law prevails this naked display of black money, by violating the mandatory provisions of law, cannot be permitted."

55. The challenge to the statutory amendments and the Electoral Bond Scheme cannot be adjudicated in isolation without a reference to the actual impact of money on electoral politics. This Court has in numerous judgments held that the *effect* and not the *object* of the law on fundamental rights and other constitutional provisions must be determined while adjudicating its constitutional validity. The effect of provisions dealing with electoral finance cannot be determined without recognizing the influence of money on politics. Therefore, we must bear in mind the nexus between money and electoral democracy while deciding on the issues which are before us in this batch of petitions.

F. The challenge to non-disclosure of information on electoral financing

56. Section 29C of the RPA as amended by the Finance Act 2017 stipulates that the political party need not disclose financial contributions received through electoral bonds. Similarly, Section 13A of the IT Act as amended does not require the political party to maintain a record of contributions for contributions received through electoral bonds. Section 182 of the Companies Act 2013 as amended by the Finance Act 2017 by which the earlier requirement of disclosure of particulars of the amount contributed by companies to political parties in their profit and loss accounts was deleted. The company which has made

financial contributions is now only required to disclose the total amount contributed to political parties without disclosing specific particulars about the political party to which the contribution was made.

57. Maintaining the anonymity of the contributor is a crucial and primary characteristic of the Electoral Bond Scheme. The electoral bond is defined as a bearer banking instrument which does not carry the name of the buyer.[74] The law mandates the authorized bank to not disclose the information furnished by the buyer except when demanded by a competent court or upon the registration of a criminal case by law enforcement agencies.[75]

58. The amendments introduced by the Finance Act 2017 and the Electoral Bond Scheme are challenged on the ground that the non-disclosure of information about electoral contributions is violative of the right to information of the voter which is traceable to Article 19(1)(a) of the Constitution.

i. Infringement of the right to information of the voter

59. This segment of the judgment will discuss whether the amendments and the Electoral Bond Scheme infringe the right to information of the voter. For this purpose, we will discuss the scope of the right to information, and whether the right extends to information on contributions to political parties.

a. The scope of Article 19(1)(a): tracing the right to information

60. Article 19(1)(a) has been held to guarantee the right to information to citizens. The judgments of this Court on the right to information can be divided into two phases. In the first phase, this Court traced the right to information to the values of good governance, transparency and accountability. These judgments recognize that it is the role of citizens to hold the State accountable for its actions and inactions and they must possess information about State action for them to accomplish this role effectively.

61. In the first phase, this Court delineated the scope of the right to information in the context of deciding the disclosure of evidence relating to affairs of the State. Provisions of the Indian Evidence Act

74 Electoral Bond Scheme, Clause 2(a)

75 Electoral Bond Scheme, Clause 7(4)

stipulate that evidence which is relevant and material to proceedings need not be disclosed to the party if the disclosure would violate public interest.[76] In the 1960's, this Court framed the issue of disclosure of documents related to the affairs of the State in terms of a conflict between public interest and private interest. This Court observed that the underlying principle in the provisions of the Indian Evidence Act bearing on the disclosure of evidence related to the affairs of the State is that if such disclosure is denied, it would violate the private interest of the party.[77] So, when a party seeks the disclosure of documents, and when such disclosure is denied on the ground that it would violate public interest, there is a conflict between private interest and public interest. In subsequent cases, the courts cast the principle underlying the provisions of disclosure in the Indian Evidence Act as a conflict between two conceptions of public interest. This Court held that disclosure of information aids the party to the proceedings. But beyond that, disclosure also serves the public interest in the administration of justice.[78]

62. In State of Uttar Pradesh v. Raj Narain[79], the respondent sought to summon documents in an election petition. The State made a claim of privilege from disclosure of documents. In his concurring opinion in the Constitution Bench, Justice KK Mathew observed that there is a public interest in the impartial administration of justice which can only be secured by the disclosure of relevant and material documents. 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

76 Indian Evidence Act 1872, Section 124

77 See State of Punjab v. Sodhi Sukhdev Singh, [1961] 2 SCR 371 : (1961) 2 SCR 371 [13]

78 See State of Punjab v. Sodhi Sukhdev Singh, [1961] 2 SCR 371 : (1961) 2 SCR 371 [Subba Rao J]

79 [1975] 3 SCR 333 : (1975) 4 SCC 428

> absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security.[...]"

63. This principle was further elucidated in **SP Gupta** v. **Union of India**[80]. The Union of India claimed immunity against the disclosure of the correspondence between the Law Minister, the Chief Justice of the High Court of Delhi, and the Chief Justice of India on the reappointment of Additional Judges. Justice P N Bhagwati while discussing the position of law on claims of non-disclosure, observed that the Constitution guarantees the "right to know" which is necessary to secure "true facts" about the administration of the country. The opinion recognised accountability and transparency of governance as important features of democratic governance. Democratic governance, the learned Judge remarked, is not restricted to voting once in every five years but is a continuous process by which the citizens not merely choose the members to represent themselves but also hold the government accountable for their actions and inactions for which citizens need to possess information[81].

64. Our discussion indicates that the first phase of the jurisprudence on the right to information in India focussed on the close relationship between the right and open governance. The judgments in this phase were premised on the principle that the citizens have a duty to hold the government of the day accountable for their actions and inactions, and they can effectively fulfil this duty only if the government is open and not clothed in secrecy.

65. In the second phase of the evolution of the jurisprudence on the right to information, this Court recognised the importance of information to form views on social, cultural and political issues, and participate in and contribute to discussions.[82] Courts recognised that the relevance of information is to not only to hold the government accountable but also to discover the truth in a marketplace of ideas which would

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80 1981 Supp SCC 87

81 Also see Dinesh Trivedi v. Union of India, [1997] 3 SCR 93 : (1997) 4 SCC 306 where this Court observed that sunlight is the best disinfectant.

82 Secy., Ministry of Information & Broadcasting, Govt. of India v. Cricket Assn. of Bengal, [1995] 1 SCR 1036 : (1995) 2 SCC 161; Indian Express Newspapers v. Union of India, [1985] 2 SCR 287 : AIR 1986 SC 515 ; Romesh Thappar v. State of Madras, [1950] 1 SCR 594 : AIR 1950 SC 124

ultimately secure the goal of self-development.[83] This Court also recognised that freedom of speech and expression includes the right to acquire information which would enable people to debate on social, moral and political issues. These debates would not only foster the spirit of representative democracy but would also curb the prevalence of misinformation and monopolies on information. Thus, in the second phase, the Court went beyond viewing the purpose of freedom of speech and expression through the lens of holding the government accountable, by recognising the inherent value in effective participation of the citizenry in democracy. This Court recognised that effective participation in democratic governance is not just a means to an end but is an end in itself. This interpretation of Article 19(1)(a) is in line with the now established position that fundamental freedoms and the Constitution as a whole seek to secure conditions for self-development at both an individual and group level.[84] A crucial aspect of the expansion of the right to information in the second phase is that right to information is not restricted to information about state affairs, that is, public information. It includes information which would be necessary to further participatory democracy in other forms and is not restricted to information about the functioning of public officials. The right to information has an instrumental exegesis, which recognizes the value of the right in facilitating the realization of democratic goals. But beyond that, the right to information has an intrinsic constitutional value; one that recognizes that it is not just a means to an end but an end in itself.

b. Right to information of a voter: exploring the judgments in ADR and PUCL

66. In **Union of India v. Association for Democratic Reforms**[85] **("ADR")**, this Court traced the right of voters to have information about the antecedents, including the criminal past, of candidates contesting elections, to Article 19(1)(a) of the Constitution. In **ADR** (supra), proceedings under Article 226 of the Constitution were instituted before the High Court of Delhi seeking a direction to implement the Law Commission's recommendations to (a) debar candidates from

83 DC Saxena v. Hon'ble The Chief Justice of India, [1996] Supp. 3 SCR 677 : (1996) 5 SCC 216 [29]

84 See Supriyo v. Union of India, 2023 INSC 920 [213, 214]

85 [2002] 3 SCR 696 : (2002) 5 SCC 294.

contesting elections if charges have been framed against them by a Court in respect of certain offences; and (b) ensure that candidates furnish details regarding criminal cases which are pending against them. The High Court held that the Court cannot direct Parliament to implement the recommendations of the Law Commission. However, the High Court directed the ECI to secure information relating to (a) the details of cases in which a candidate is accused of any offences punishable with imprisonment;(b) assets possessed by a candidate, their spouse and dependents; (c) facts bearing on the candidate's competence, capacity, and suitability for representing the people; and (d) any other information which ECI considers necessary for judging the capacity of the candidate fielded by the political party.

67. The Union of India appealed against the decision of the High Court before this Court. This Court held that voters have a right to be sufficiently informed about candidates so as to enable them to exercise their democratic will through elections in an intelligent manner. Such information was held to be necessary for elections to be conducted in a "free and fair manner":

> "34. ...the members of a democratic society should be sufficiently informed so that they may influence intelligently the decisions which may affect themselves and this would include their decision of casting votes in favour of a particular candidate. If there is a disclosure by a candidate as sought for then it would strengthen the voters in taking appropriate decision of casting their votes.
>
> [...] we fail to understand why the right of a citizen/voter — a little man — to know about the antecedents of his candidate cannot be held to be a fundamental right under Article 19(1)(a). In our view, democracy cannot survive without free and fair election, without free and fairly informed voters. Votes cast by uninformed voters in favour of X or Y candidate would be meaningless. As stated in the aforesaid passage, one-sided information, disinformation, misinformation and non-information, all equally create an uninformed citizenry which makes democracy a farce. Therefore, casting of a vote by a misinformed and non-informed voter or a voter having one-sided information only is bound to affect the democracy seriously. Freedom of speech and expression

includes right to impart and receive information which includes freedom to hold opinions."

68. This Court rejected the argument that information about a candidate contesting elections cannot be compelled to be disclosed because it is not "public information". The three-Judge Bench held that information that candidates are required to disclose is only limited to aiding the voters in assessing whether they could cast their vote in a candidate's favour. The Court observed that the criminal background of a candidate and assets of the candidate (through which it could be assessed if the candidate has amassed wealth through corruption when they were elected previously) would aid the voters to cast their vote in an informed manner. This Court directed the ECI to call for the following information on affidavit as a part of nomination:

    a. Whether the candidate has been convicted, acquitted or discharged of any criminal offence in the past and if convicted, whether they are punished with imprisonment or fine;

    b. In the six months prior to the filling of nomination papers, whether the candidate was accused in any pending case for an offence punishable with imprisonment for two years or more, and in which a charge is framed or cognizance is taken by the court of law;

    c. The assets (immovable, movable, bank balances and others) of a candidate and of his/her spouse and that of dependents;

    d. Liabilities, if any, particularly whether there are any over dues to any public financial institution or government dues; and

    e. The educational qualifications of the candidate.

69. This Court observed that the ECI can ask candidates to disclose information about the expenditure incurred by political parties to maintain the purity of elections.[86] However, the operative portion of the judgment did not reflect this observation.

86 Paragraph 64(4): "To maintain the purity of elections and in particular to bring transparency in the process of election, the Commission can ask the candidates about the expenditure incurred by the political parties and this transparency in the process of election would include transparency of a candidate who seeks election or re-election. In a democracy, the electoral process has a strategic role. The little man of this country would have basic elementary right to know full particulars of a candidate who is to represent him in Parliament where laws to bind his liberty and property may be enacted."

70. Pursuant to the decision of this Court in ADR (supra), Parliament amended the RPA to incorporate some of the directions issued by this Court.[87] Section 33-B of RPA stipulated that the candidate need not disclose any other information (other than the information required by law) notwithstanding any judgment. In PUCL v. Union of India[88], proceedings were initiated before this Court under Article 32 for challenging Section 33-B of the RPA. Justice M B Shah, writing for the majority, noted that the decision of the three-Judge Bench in ADR (supra) tracing the right to know the antecedents of candidates contesting elections had attained finality and Section 33-B was unconstitutional because it had the effect of rendering the judgment of this Court inoperative. The learned Judge on an independent interpretation also held that the right to information of a voter is a facet of Article 19(1)(a).[89]

71. Justice Venkatarama Reddi observed in his concurring opinion that there are two postulates which govern the right to vote : first, the formulation of an opinion about candidates, and second, the expression of choice based on the opinion formulated by casting votes in favour of a preferred candidate. A voter must possess relevant and essential information that would enable them to evaluate a candidate and form an opinion for the purpose of casting votes.[90] The learned Judge observed that the Constitution recognises the right of a voter to know the antecedents of a candidate though the right to vote is a statutory right[91] because the **action** of voting is a form of expression protected by Article 19(1)(a):

> "Though the initial right cannot be placed on the pedestal of a fundamental right, but, at the stage when the voter goes to the polling booth and casts his vote, his freedom to express arises. The casting of vote in favour of one

87 Section 33-A of the RPA required the candidate to furnish the following information:
(a) He is accused of any offence punishable with imprisonment for two years or more in a pending case in which a charge has been framed by the court of competent jurisdiction; and
(b) He has been convicted of an offence other than any offence referred to in sub-section (1) or sub-section (2), or covered in sub-section (3), of Section 8 and sentenced to imprisonment for one year or more.

88 [2003] 2 SCR 1136 : (2003) 4 SCC 399

89 [2003] 2 SCR 1136 : (2003) 4 SCC 399 [18, 27]

90 [2003] 2 SCR 1136 : (2003) 4 SCC 399 [96]

91 The right to vote is classified as a statutory vote because only citizens who fulfill certain conditions (such as the age) laid down in a statute can vote.

> or the other candidate tantamounts to expression of his opinion and preference and that final stage in the exercise of voting right marks the accomplishment of freedom of expression of the voter. That is where Article 19(1)(a) is attracted."

72. In the context of the decision of this Court in ADR (supra), the learned Judge observed that the Court issued specific directions for the disclosure of certain information about candidates because of a legislative vacuum, and that the directions issued to the ECI will fill the vacuum until Parliament legislates on the subject. Thus, the five directions which were issued by this Court in ADR (supra) were not construed to be inflexible and immutable theorems. The learned Judge observed that though the voters have a fundamental right to know the antecedents of candidates, all the conceptions of this right formulated by this Court in ADR (supra) cannot be elevated to the realm of fundamental rights.

73. The majority was of the view that the voters have a fundamental right to **all** the information which was directed to be declared by this Court in ADR (supra). Justice Venkatarama Reddi disagreed. In the opinion of the learned Judge, only certain information directed to be disclosed in ADR (supra) is "crucial" and "essential" to the right to information of the voter:

> "109. In my view, the points of disclosure spelt out by this Court in Assn. for Democratic Reforms case [Ed.: See full text at 2003 Current Central Legislation, Pt. II, at p. 3] should serve as broad indicators or parameters in enacting the legislation for the purpose of securing the right to information about the candidate. The paradigms set by the Court, though pro tempore in nature as clarified supra, are entitled to due weight. If the legislature in utter disregard of the indicators enunciated by this Court proceeds to make a legislation providing only for a semblance or pittance of information or omits to provide for disclosure on certain essential points, the law would then fail to pass the muster of Article 19(1)(a). Though certain amount of deviation from the aspects of disclosure spelt out by this Court is not impermissible, a substantial departure cannot be countenanced. The legislative provision should be such as

> to promote the right to information to a reasonable extent, if not to the fullest extent on details of concern to the voters and citizens at large. While enacting the legislation, the legislature has to ensure that the fundamental right to know about the candidate is reasonably secured and information which is crucial, by any objective standards, is not denied. [...] The Court has to take a holistic view and adopt a balanced approach, keeping in view the twin principles that the citizens' right to information to know about the personal details of a candidate is not an unlimited right and that at any rate, it has no fixed concept and the legislature has freedom to choose between two reasonable alternatives. [...] But, I reiterate that the shape of the legislation need not be solely controlled by the directives issued to the Election Commission to meet an ad hoc situation. As I said earlier, the right to information cannot be placed in straitjacket formulae and the perceptions regarding the extent and amplitude of this right are bound to vary."

74. Justice Reddi held that Section 33-B was unconstitutional because:

    a. Parliament cannot impose a blanket ban on the disclosure of information other than the disclosure of information required by the provisions of RPA. The scope of the fundamental right to information may be expanded in the future to respond to future exigencies and necessities. The provision had the effect of emasculating the freedom of speech and expression of which the right to information is a facet; and

    b. The provision failed to give effect to an essential aspect of the fundamental right, namely the disclosure of assets and liabilities of the candidates.

75. Justice Reddi then proceeded to juxtapose the directions for disclosure issued by this Court in **ADR** (supra) with the scope of the provisions of the RPA mandating disclosure. The learned judge observed that the extent of disclosure mandated in RPA is fairly adequate with respect to past criminal records but not with regard to pending cases.[92]

92 ADR required disclosure related to information of whether the candidate has been convicted/acquitted or discharged of any criminal offence in the past, and whether six months prior to the filing of the nomination paper, whether the candidate has been accused in any pending case for an offence punishable with

With respect to assets and liabilities, the learned Judge observed that the disclosure of assets and liabilities is essential to the right to information of the voter because it would enable voters to form an opinion about whether the candidate, upon being elected in the past, had amassed wealth in their name or their family Additionally, information about dues which are payable by the candidate to public institutions would enable voters to know the candidate's dealing with public money in the past.

76. Justice Reddi observed that the requirement to disclose assets of the candidate's family was justified because of the prevalence of *Benami* transactions. Though mandating the disclosure of assets and liabilities would infringe the right to privacy of the candidate and their family, the learned Judge observed that disclosure which is in furtherance of the right to information would trump the former because it serves the larger public interest. Justice Reddi then observed that disclosure of the educational qualifications of a candidate is not an essential component of the right to information because educational qualifications do not serve any purpose for the voter to decide which candidate to cast a vote for since the characteristics of duty and concern of the people is not "monopolised by the educated". A conclusion to the contrary, in the learned Judge's opinion, would overlook the stark realities of the society.[93]

77. The following principles can be deduced from the decisions of this Court in **ADR** (supra) and **PUCL** (supra):

    a. The right to information of voters which is traced to Article 19(1)(a) is built upon the jurisprudence of both the first and the second phases in the evolution of the doctrine, identified above. The common thread of reasoning which runs through both the first and the second phases is that information which furthers democratic participation must be provided to citizens.

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imprisonment for more than two years and in which charge has been framed or cognizance is taken by the Court. With respect to the first direction, law created a distinction between serious and non-serious offences and mandates disclosure only if a candidate has been convicted of a serious offence. With respect to the second direction, the provision only mandated the disclosure of cases in which charge has been framed and excluded the disclosure of cases in which cognizance has been taken. The learned Judge held that while the non-disclosure of conviction in a serious offence is a reasonable balance which does not infringe the right to information, the non-disclosure of cases in which cognizance has been taken would seriously violate the right to information of the voter particularly because framing of charges gets delayed in a lot of cases.

93 [2003] 2 SCR 1136 : (2003) 4 SCC 399 [122]

Voters have a right to information which would enable them to cast their votes rationally and intelligently because voting is one of the foremost forms of democratic participation;

b. In **ADR** (supra), this Court observed that while the disclosure of information may violate the right to privacy of candidates and their families, such information must be disclosed because it furthers public interest.[94] The opinion of Justice Venkatarama Reddi in **PUCL** (supra) also followed the same line of reasoning. Justice M B Shah writing for himself and Justice D M Dharmadhikari held that the right to privacy would not be infringed because information about whether a candidate is involved in a criminal case is a matter of public record. Similarly, the assets or income are normally required to be disclosed under the provisions of the Income Tax Act; and

c. The voters have a right to the disclosure of information which is "essential" for choosing the candidate for whom a vote should be cast. The learned Judges in **PUCL** (supra) differed to the extent of what they considered "essential" information for exercising the choice of voting.

78. While relying on the judgments of this Court in **ADR** (supra) and **PUCL** (supra) the petitioners argue that non-disclosure of information on the funding of political parties is violative of the right to information under Article 19(1)(a). This Court needs to consider the following two issues to answer the question:

a. Whether the requirements of disclosure of information about "candidates" can be extended to "political parties"; and

b. If the answer to (a) above is in the affirmative, whether information on the funding of political parties is "essential" for exercising choice on voting.

c. The focal point of the electoral process: candidate or political party

79. The decisions in **ADR** (supra) and **PUCL** (supra) recognise the right to information of a voter about **candidates,** which enables them to

94 In **ADR** (supra), this Court notes that such information would enable voters to determine if the candidate is corrupt and would further openness in democracy. [Paragraph 41].

cast their vote in an effective manner. The relief which was granted by this Court in PUCL (supra) and ADR (supra) was restricted to the disclosure of information about **candidates** contesting the election because of the limited nature of the reliefs sought. The ratio decidendi of the two judgments of this Court is that voters have a right to receive information which is **essential** for them to cast their votes. This Court has to first analyse if the 'political party' is a relevant 'political unit' in the electoral process to answer the question whether funding details of political parties are essential information for the voter to possess.

80. The Constitution of India did not make a reference to political parties when it was adopted. A reference was made when the Tenth Schedule was included in the Constitution by the Constitution (Fifty-Second) Amendment Act 1985. However, even though the Constitution on its adoption did not make a reference to political parties, statutory provisions relating to elections accorded considerable importance to political parties, signifying that political parties have been the focal point of elections.

81. The ECI notified the Election Symbols (Reservation and Allotment) Order 1968[95] in exercise of the powers conferred by Article 344 of the Constitution read with Section 29A of the RPA and Rules 5[96] and 10[97] of the Conduct of Election Rules 1961. In terms of the provisions of the Symbols Order, the ECI shall allot a symbol to every candidate contesting the election. The Symbols Order classifies political parties into recognised political parties and unrecognised political parties. The difference in the procedure under the Symbols Order for allotting symbols to recognised political parties, registered but unrecognised political parties and independent candidates indicates both the relevance and significance of political parties in elections in India.

95 "Symbols Order 1968"

96 Rule 5 provides the ECI the power to specify by notification, the symbols which may be chosen by candidates at elections in parliamentary or assembly constituencies.

97 Rule 10 deals with the preparation of list of contesting candidates. Rule 10(5) states that the allotment of the returning officer of any symbol to a candidate shall be final except where it is inconsistent with the directions issued by the ECI, in which case the ECI may revise the allotment. Rule 10(6) states that every candidate shall be informed of the symbol allotted to the candidate.

82. A party is classified a National[98] or a State recognised party[99] based on the total percentage of votes secured at the last general elections and (or) the number of candidates who have been returned to the Legislative Assembly. Symbols are reserved for allocation to recognised political parties.[100] All candidates who are being set up by a national or a State recognised party are to be allotted the symbol reserved for that party for the purpose of contesting elections.[101]

83. Symbols other than those reserved for recognised political parties shall be available for allotment to independent candidates and candidates set up by political parties which are not recognised political parties in terms of the Symbols Order.[102] Candidates set up by a registered but unrecognised political party may also be allotted a common symbol if they fulfil certain conditions laid down in the Symbols Order.[103]

84. Thus, the Symbols Order creates a demarcation between candidates set up by political parties and candidates contesting individually. Political parties are allotted a Symbol such that all candidates who are set up by that political party are allotted the Symbol of their political party while contesting elections. Even within candidates who are set up by political parties, the Symbols Order creates a distinction between unrecognised but registered political parties and recognised political parties. Recognised political parties shall continue to be allotted the same symbol for all General elections until the time these political parties fulfil the conditions for recognition under the Symbols Order.[104] The effect of the provisions of the Symbols Order is that the symbols of certain political parties, particularly those which have enjoyed the status of a recognised political party for long are entrenched in the minds of the voters that they associate the symbol with the political party.

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98 Symbols Order 1968, Rule 6B

99 Symbols Order 1968, Rule 6A

100 Symbols Order 1968, Rule 5

101 Symbols Order 1968, Rule 8(1)

102 Ibid.

103 Symbols Order 1968, Rule 10B. The party is required to set up candidates in at least five percent of the assembly constituencies.

104 A recognised National or a State Party shall continue to be treated as a recognised party even if the political party does not fulfil the conditions at the next election to the General Assembly stipulated for recognition as a recognised political party. However, it shall continue to be treated as a recognised political party at the subsequent general election only if the party fulfils the conditions laid down.

85. For unrecognised but registered political parties, though a common symbol is allotted for all candidates being set up by the political parties, the symbol is not "reserved" for the Party. The ECI could allot different symbols to that political party in each General election. The candidates of a registered but unrecognised political party may be represented by a common symbol but the people would not attach a specific symbol to the political party because the symbol by which it is represented may change with every election.

86. The purpose of allotting symbols to political parties is to aid voters in identifying and remembering the political party. The law recognises the inextricable link between a political party and the candidate though the vote is cast for a candidate. The literacy rate in India was 18.33 percent when the first General Election was held in 1951. Most of the voters identified a political party only with its symbol and this still continues to the day. In a few cases, the voters would not possess any knowledge of the candidate being set up by the political party. They would vote solely based on the symbol which is allotted to the political party; knowledge of which they have obtained through campaigning activities or its sustained presence in the electoral fray. Gayatri Devi, the third Maharani consort of Jaipur who was later set up as a candidate by the Swatantra Party, recalls in her Autobiography that her team spent hours trying to persuade the voters that they had to vote for the Symbol Star (which was the symbol of the Swatantra Party) and not a symbol showing a horse and a rider because she also rode a horse;[105]

> "Since most of India is illiterate, at the polls people vote according to a visual symbol of their party. [...] The Swatantra Party had a star. Baby, all my other helpers and I spent endless frustrating hours trying to instruct the women about voting for the star. On the ballot sheet, we said, over and over again, this is where the Maharani's name will appear and next to it will be a star. But it was not as simple as that. They noticed a symbol showing a horse and a rider, agree with each other that the Maharani rides so that must be her symbol. Repeatedly we said,

105 Gayatri Devi and Santha Rama Rau, A Princess remembers: The Memoirs of the Maharani of Jaipur, (Rupa Publications 1995) [301].

> "No, no, that's not the right one." Then they caught sight of the emblem of a flower. Ah, the flower of Jaipur – who else could it mean but the Maharani? "No, no, no, not the flower." All right, the star. Yes, that seems appropriate for the Maharani, but look, here is the sun. If the Maharani is a star, then the sun must certainly mean the Maharaja. We'll vote for both. Immediately the vote would have been invalidated. Even up to the final day, Baby and I were far from sure that we had managed to get our point across."

87. Symbols also gain significance when the names of political parties sound similar. For example, political parties by the names of "Dravida Munnetra Kazhagam", "All Indian Anna Dravida Munnetra Kazhagam", "Dravida Kazhagam", "Desiya Murpokku Dravida Kazhagam", "Makkal Desiya Murpokku Dravida Kazhagam", "Kongu Desa Makkal Katchi", "Kongunadu Makkal Desia Katchi", and "Kongunadu Makkal Katchi" contest elections in Tamil Nadu. The names of all the political parties bear similarities due to the usage of the same words with certain additions or deletions. The allocation of Symbols to political parties would help voters identify and distinguish between political parties which have similar sounding names. It is precisely because of the close association of the symbol with the political party by voters that both factions of the party vie for the symbol that is allotted to the Party when there is a split in a recognised political party.

88. India follows the open-list first past the post form of election in which votes are cast for a candidate and the candidate who secures the highest number of votes is chosen to represent the people of that constituency. It could be argued that this system of elections gives prominence to candidates and not political parties unlike the system of closed list of elections where the voters do not have any knowledge of the candidates that are set up by the Political Party.[106]

89. However, it cannot be concluded that the decision of voting is solely based on the individual candidate's capabilities and not the political party merely because the voter has knowledge of the candidate who has been set up by the political party. Such a conclusion cannot be

106 See Dominik Hangartner, Nelson A Ruiz, Janne Tukiainen, Open or Closed? How List Type Affects Electoral Performance, Candidate Selection, and Campaign Effort, VAT Institute for Economic Research Working Papers 120 (2019)

definitively drawn particularly in view of the design of the electoral voting machine which has a list of the names of the candidates who are contesting the election from the constituency along with the symbol of the political party which is fielding the candidate. Voters casts their votes based on two considerations: the capability of the candidate as a representative and the ideology of the political party.

90. Political parties publish electoral manifestos containing the ideology of the party, major policies of the political party, plans, programmes and other considerations of governance which would be implemented if they came to power.[107] While political manifestos do not necessarily always translate to policies when the party is elected to power, they throw light upon the integral nature of political parties in the electoral system. By publishing an election manifesto, a political party communicates to the voters that they must accord preference to the political party. Party manifestos prod voters to look away from a candidate centric and towards a party centric perception of elections.

91. Lastly, the prominence of political parties as electoral units is further heightened by the form of government in India. India follows a Westminister system of government which confers prominence to political parties without strictly separating between the legislature and the executive. The time-honoured convention of the cabinet form of government is that the leader of the political party with absolute majority must be called to form the government.[108] The Council of Ministers is appointed by the President on the aid and advice of the Prime Minister.[109] Political parties are intrinsic to this form of government because of the very process of government formation. The recommendations of the Sarkaria Commission on the exercise of discretion by the Governor when no single political party commands an absolute majority, which has been given judicial recognition in **Rameshwar Prasad v. Union of India,**[110] also prioritises political parties making them central to the governance structure.[111]

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107 Election Commission of India, Instructions to political parties on manifestos dated 24.04.2015, https://www.eci.gov.in/election-manifestos/

108 Constitution of India 1950, Article 75. See, Aradhya Sethia, "Where's the party?: towards a constitutional biography of political parties, Indian Law Review, 3:1, 1-32 (2019)

109 Ibid.

110 [2006] 1 SCR 562 : (2006) 2 SCC 1

111 65. "Para 4.11.04 of the Sarkaria Commission Report specifically deals with the situation where no single party obtains absolute majority and provides the order of preference the Governor should follow in

92. The centrality of political parties in the electoral system is further accentuated by the inclusion of the Tenth Schedule. The Tenth Schedule deals with disqualification on the ground of defection from the political party which set up the elected individual as its candidate. Paragraph 2 provides the following grounds of defection:

    a. Voluntarily giving up membership of the political party; and

    b. Voting or abstaining from voting in the House contrary to direction issued by the political party without obtaining prior permission from the political party and when such voting has not been condoned by the political party.

93. The underlying principle of anti-defection law which has been recognised by a seven-Judge Bench of this Court in **Kihoto Hollohon v. Zachillhu,**[112] is that a candidate set up by a political party is elected on the basis of the programme of that political party. In the course of years, while deciding disputes related to the Tenth Schedule, judgments of this Court have further strengthened the centrality of political parties in the electoral system. In **Ravi S Naik v. Union of India**[113], this Court observed that voluntarily giving up membership of a political party has a wider connotation and includes not just resignation of the member from the party and an inference can also be drawn from the conduct of the member. In **Subash Desai** v. **Principal Secretary, Governor of Maharashtra,**[114] a Constitution Bench of this Court while interpreting the provisions of the Tenth Schedule held that the political party and not the legislature party (which consists of the members of the House belonging to a particular political party) appoints the Whip of a political party for the purposes of Paragraph 2(1)(b) of the Tenth Schedule.[115]

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selecting a Chief Minister. The order of preference suggested is:
a. An alliance of parties that was formed prior to the elections.;
b. The largest single party staking a claim to form the Government with the support of others, including "independents";
c. A post-electoral coalition of parties, with all the partners in the coalition joining the Government;
d. A post-electoral alliance of parties, with some of the parties in the alliance forming a Government and the remaining parties, including "Independents" supporting the Government from outside."

112 [1992] 1 SCR 686 : (1992) Supp (2) SCC 651 [4]

113 [1994] 1 SCR 754 : AIR 1994 SC 1558

114 WP (C) No. 493 of 2022

115 Subash Desai [113]

94. In summation, a 'political party' is a relevant political unit in the democratic electoral process in India for the following three reasons:

    a. Voters associate voting with political parties because of the centrality of symbols in the electoral process;

    b. The form of government where the executive is chosen from the legislature based on the political party or coalition of political parties which has secured the majority; and

    c. The prominence accorded to political parties by the Tenth Schedule of the Constitution.

    d. The essentiality of information about political funding for the effective exercise of the choice of voting

95. In **ADR** (supra) and **PUCL** (supra), this Court held that a voter has a right to information which is **essential** for them to exercise their freedom to vote. In the previous section, we have concluded that political parties are a relevant political unit. Thus, the observations of this Court in **PUCL** (supra) and **ADR** (supra) on the right to information about a **candidate** contesting elections is also applicable to **political parties**. The issue whether information about the funding received by political parties is **essential** for an informed voter must be answered in the context of the core tenets of electoral democracy. The Preamble to the Constitution resolves to constitute a social, economic, and politically just society where there is equality of status and opportunity. The discourse which has emanated within and outside the Courts is often restricted to the ideals of social and economic justice and rarely includes political inequality.

96. Electoral democracy in India is premised on the principle of political equality which the Constitution guarantees in two ways. First, by guaranteeing the principle of "one person one vote" which assures equal representation in voting. The Constitution prescribes two conditions with respect to elections to seats in Parliament which guarantee the principle of "one person one vote" with respect to every voter and amongst every State:

    a. Each State shall be divided into territorial constituencies in such a manner that the ratio between the population of each

constituency and the number of seats allotted to it shall be the same throughout the State;[116] and

b. The total number of seats allotted to each State in Parliament should be such that the ratio between the number of seats, and the population of the State is the same for all States.[117]

97. Second, the Constitution ensures that socio-economic inequality does not perpetuate political inequality by mandating reservation of seats for Scheduled Castes and Scheduled Tribes in Parliament[118] and State Assemblies.[119]

98. The Constitution guarantees political equality by focusing on the 'elector' and the 'elected'. These two constitutional precepts foster political equality in the following two ways. First, the Constitution mandates that the value of each vote is equal. This guarantee ensures formal political equality where every person's vote is accorded equal weightage. Second, the Constitution ensures that members of socially marginalized groups are not excluded from the political process. This guarantee ensures (a) equality in *representation*; and (b) equality in *influence* over political decisions.

99. However, political inequality continues to persist in spite of the constitutional guarantees. One of the factors which contributes to the inequality is the difference in the ability of persons to influence political decisions because of economic inequality. In a politically equal society, the citizens must have an equal voice to influence the political process.[120] We have already in the preceding section elucidated the close association of money and politics where we explained the influence of money over electoral outcomes. However, the influence of money over electoral politics is not limited to its impact over electoral outcomes. It also spills over to governmental

116 Constitution of India 1950, Article 81 (2)(b). Also see Constitution of India, Article 170(2) where the Constitution prescribes the same principle with respect to the composition of seats in Legislative Assemblies of State

117 Constitution of India 1950, Article 81(2)(b)

118 Constitution of India 1950, Article 330 guarantees "as nearly as may be" proportional representation for Scheduled Castes and Scheduled Tribes in Parliament.

119 Constitution of India 1950, Article 332 guarantees "as nearly as may be" proportional representation for Scheduled Castes and Scheduled Tribes in Legislative Assemblies of the States.

120 See Ben Ansell and Jean Gingrich J (2021). Political Inequality. The IFS Deaton Review of Inequalities, London: Institute for Fiscal Studies

decisions. It must be recalled here that the legal regime in India does not distinguish between campaign funding and electoral funding. The money which is donated to political parties is not used by the political party only for the purposes of electoral campaign. Party donations are also used, for instance, to build offices for the political party and pay party workers. Similarly, the window for contributions is not open for a limited period only prior to the elections. Money can be contributed to political parties throughout the year and the contributed money can be spent by the political party for reasons other than just election campaigning. It is in light of the nexus between economic inequality and political inequality, and the legal regime in India regulating party financing that the essentiality of the information on political financing for an informed voter must be analyzed.

100. Economic inequality leads to differing levels of political engagement because of the deep association between money and politics. At a primary level, political contributions give a "seat at the table" to the contributor. That is, it enhances access to legislators.[121] This access also translates into influence over policy-making. An economically affluent person has a higher ability to make financial contributions to political parties, and there is a legitimate possibility that financial contribution to a political party would lead to *quid pro quo* arrangements because of the close nexus between money and politics. *Quid pro quo* arrangements could be in the form of introducing a policy change, or granting a license to the contributor. The money that is contributed could not only influence electoral outcomes but also policies particularly because contributions are not merely limited to the campaign or pre-campaign period. Financial contributions could be made even after a political party or coalition of parties form Government. The possibility of a *quid pro quo* arrangement in such situations is even higher. Information about political funding would enable a voter to assess if there is a correlation between policy making and financial contributions.

121 See Joshua L. Kalla and David E. Broockman, "Campaign Contributions Facilitate Access to Congressional Officials: A Randomized Field Experiment" (2016 60(3)) American Journal of Political Science. A political organization conducted an experiment to determine if there is a link between political contributions and access to the policy makers. The Organization scheduled meetings between 191 Congressional offices and the organization's members who were campaign donors. When the Congressional offices were informed that prospective attendees were political donor, policymakers made themselves available for the meeting three to four times more often.

101. For the information on donor contributions to be relevant and essential, it is not necessary that voters have to take the initiative to peruse the list of contributors to find relevant information which would enable them to cast their vote effectively. Electronic and print media would present the information on contributions received by political parties, and the probable link between the contribution and the licenses which were given to the company in an accessible format. The responses to such information by the Government and political parties would go a long way in informing the voter.

102. However, to establish the argument of quid pro quo arrangements between the contributor and the political party, it is necessary that the political party has knowledge of the particulars of funding to its party. The political party to whom contributions are made cannot enter into a *quid pro quo* arrangements if it is unaware of the donor. The Scheme defines electoral bond "as 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 payee."[122] The Scheme also stipulates that the information furnished by the buyer shall be treated as confidential which shall not be disclosed by any authority except when demanded by a competent court or by a law enforcement agency upon the registration of criminal case.[123]

103. The submission of the Union of India is that the political party which receives the contribution does not know of identity of the contributor because neither the bond would have their name nor could the bank discloses such details to the political party. We do not agree with this submission. While it is true that the law prescribes anonymity as a central characteristic of electoral bonds, the *de jure* anonymity of the contributors does not translate to *de facto* anonymity. The Scheme is not fool-proof. There are sufficient gaps in the Scheme which enable political parties to know the particulars of the contributions made to them. Clause 12 of the Scheme states that the bond can be encashed only by the political party by depositing it in the designated bank account. The contributor could physically hand over the electoral bond to an office bearer of the political party or to the legislator belonging to the political party, or it could have been sent

122 Electoral Bond Scheme; Clause 2(a)

123 Electoral Bond Scheme; Clause 7(4)

to the office of the political party with the name of the contributor, or the contributor could after depositing the electoral bond disclose the particulars of the contribution to a member of the political party for them to cross-verify. Further, according to the data on contributions made through electoral bonds, ninety four percent of the contributions through electoral bonds have been made in the denomination of one crore. Electoral bonds provide economically resourced contributors who already have a seat at the table selective anonymity vis-à-vis the public and not the political party.

104. In view of the above discussion, we are of the opinion that the information about funding to a political party is essential for a voter to exercise their freedom to vote in an effective manner. The Electoral Bond Scheme and the impugned provisions to the extent that they infringe upon the right to information of the voter by anonymizing contributions through electoral bonds are violative of Article 19(1)(a).

ii. Whether the infringement of the right to information of the voter is justified

105. The next issue which falls for analysis is whether the violation of the right to information is justified. This Court has laid down the proportionality standard to determine if the violation of the fundamental right is justified.[124] The proportionality standard is as follows:

a. The measure restricting a right must have a legitimate goal (legitimate goal stage);

b. The measure must be a suitable means for furthering the goal (suitability or rational connection stage);

c. The measure must be least restrictive and equally effective (necessity stage); and

d. The measure must not have a disproportionate impact on the right holder (balancing stage).

106. The legitimate goal stage requires this Court to analyze if the objective of introducing the law is a legitimate purpose for the infringement of rights. At this stage, the State is required to discharge two burdens. First, the State must demonstrate that the objective is legitimate.

124 Modern Dental College & Research Centre v. State of Madhya Pradesh, [2016] 3 SCR 575 : (2016) 4 SCC 346

Second, the State must establish that the law is indeed in furtherance of the legitimate aim that is contended to be served.[125]

107. The then Finance Minister, Mr. Arun Jaitley encapsulated the objective of introducing the Electoral Bond Scheme thus:

    a. An attempt was made in the past to incentivize donations to political party through banking channels. Both the donor and the donee were granted exemption from payment of tax if accounts of contributions were maintained and returns were filed. However, the situation had only marginally improved. Political parties continued to receive funds through anonymous sources; and

    b. Donors have been reluctant in donating through the banking channel because the disclosure of donor identity would entail adverse consequences.

108. In other words, Mr. Jaitley stated 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 is, donor privacy is a **means** to incentivize contributions through the banking channel. However, Mr. Tushar Mehta argued that protecting donor privacy is an end in itself. We will now proceed to determine if the infringement of the right to information of the voters is justified vis-à-vis the purposes of (a) curbing black money; and (b) protecting donor privacy.

    a. *Curbing Black money*

109. The petitioners argue that the infringement of the right to information which is traceable to Article 19(1)(a) can only be justified if the purpose of the restriction is traceable to the grounds stipulated in Article 19(2). They argue that the purpose of curbing of black money cannot be traced to any of the grounds in Article 19(2), and thus, is not a legitimate purpose for restricting the right to information.

110. Article 19(2) stipulates that the right to freedom of speech and expression can only be restricted on the grounds of: (a) the sovereignty and integrity of India; (b) the security of the State; (c) friendly relations with foreign states, (d) public order; (e) decency

125 See Media One v. Union of India, Civil Appeal No. 8129 of 2022 [77-79]

or morality; (f) contempt of court; (g) defamation; and (h) incitement to an offence. The purpose of curbing black money is traceable to public interest. However, public interest is not one of the grounds stipulated in Article 19(2). Of the rights recognized under Article 19, only Article 19(1)(g) which guarantees the freedom to practice any profession or to carry on any occupation, trade or business can be restricted on the ground of public interest.[126]

111. In Sakal Papers v. The Union of India[127], the constitutional validity of the Newspaper (Price and Page) Act 1965 and the Daily Newspaper (Price and Page) Order 1960 which regulated the number of pages according to the price charged, prescribed the number of supplements to be published and regulated the area for advertisements in the newspapers was challenged on the ground that it violated the freedom of press under Article 19(1)(a). The Union of India submitted that the restriction on the freedom of press was justified because the purpose of the law was to prevent unfair competition which was in furtherance of public interest. It was argued that the restriction was justified because the activities carried out by newspapers were also traceable to the freedom to carry out a profession which could be restricted on the ground of public interest under Article 19(6). Justice JR Mudholkar writing for the Constitution Bench observed that the impugned legislation "directly and immediately" curtails the freedom of speech guaranteed under Article 19(1)(a), and the freedom cannot be restricted on any ground other than the grounds stipulated in Article 19(2).[128] In Express Newspapers v. Union of India,[129] a Constitution Bench while deciding the constitutional challenge to the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act 1955 held that a law violating Article 19(1)(a) would be unconstitutional unless the purpose of the law falls "squarely within the provisions of Article 19(2)".[130] In Kaushal Kishor v. State of Uttar

126 Constitution of India 1950; Article 19(6)

127 [1962] 3 SCR 842 : AIR 1962 SC 305

128 Ibid; Paragraph 36:"If a law directly affecting it is challenged, it is no answer that the restriction enacted by it are justifiable under clauses (3) to (6). For the scheme of Article 19 is to enumerate different freedoms separately and then to specify the extent of restrictions to which they may be subjected and the objects for securing which this could be done."

129 [1959] 1 SCR 12 : AIR 1958 SC 578

130 Also see, Indian Express Newspapers (Bombay) Pvt Limited v. Union of India, AIR 1986 SC 515;Sodhi Shamsher v. State of Pepsu, AIR 1954 SC 276; Romesh Thappar v. State of Madras, [1950] 1 SCR 594

Pradesh,[131] a Constitution Bench of this Court answered the issue whether the grounds stipulated in Article 19(1)(a) are exhaustive of the restrictions which can be placed on the right to free speech under Article 19(1)(a) affirmatively.

112. However, in the specific context of the right to information, this Court has observed that the right can be restricted on grounds not traceable to Article 19(1)(a). In PUCL (supra), one of the submissions was that dangerous consequences would follow if the right to information is culled out from Article 19(1)(a) because the grounds on which the right can be restricted as prescribed in Article 19(2) are very limited. Justice Reddi in his concurring opinion in PUCL (supra) observed that the right under Article 19(1)(a) can be restricted on grounds which are not "strictly within the confines of Article 19(2)".[132] For this purpose, Justice Reddi referred to the observations of Justice Jeevan Reddy in The Secretary, Ministry of Information v. Cricket Association of Bengal[133]:

> "99. [...] This raises the larger question whether apart from the heads of restriction envisaged by sub-article (2) of Article 19, certain inherent limitations should not be read into the article, if it becomes necessary to do so in national or societal interest. The discussion on this aspect finds its echo in the separate opinion of Jeevan Reddy, J. in Cricket Assn. case [(1975) 4 SCC 428] . The learned Judge was of the view that the freedom of speech and expression cannot be so exercised as to endanger the interest of the nation or the interest of the society, even if the expression "national interest" or "public interest" has not been used in Article 19(2). It was pointed out that such implied limitation has been read into the First Amendment of the US Constitution which guarantees the freedom of speech and expression in unqualified terms."

113. In Cricket Association of Bengal (supra), one of the submissions of the petitioner (Union of India) was that the right to broadcast can be restricted on grounds other than those stipulated in Article 19(2).

131 Writ Petition (Criminal) No. 113 of 2016

132 PUCL (supra), [111]

133 [1995] 1 SCR 1036 : 1995 AIR 1236

Justice P B Sawant writing for himself and Justice S Mohan observed while summarizing the law on freedom of speech and expression that Article 19(1)(a) can only be restricted on the grounds mentioned in Article 19(2).[134] The learned Judge specifically refuted the argument that the right can be restricted on grounds other than those stipulated in Article 19(2). Such an argument, the learned Judge states, is to plead for unconstitutional measures. However, while observing so, Justice P B Sawant states that the right to telecast can be restricted on the grounds mentioned in Article 19(2) and the "dictates of public interest":

> "78. [...] If the right to freedom of speech and expression includes the right to disseminate information to as wide a section of the population as is possible, the access which enables the right to be so exercised is also an integral part of the said right. The wider range of circulation of information or its greater impact cannot restrict the content of the right nor can it justify its denial. The virtues of the electronic media cannot become its enemies. It may warrant a greater regulation over licensing and control and vigilance on the content of the programme telecast. However, this control can only be exercised within the framework of Article 19(2) and **the dictates of public interest.**"
>
> (emphasis supplied)

114. Justice Jeevan Reddy in the concurring opinion segregated the grounds stipulated in Article 19(2) into grounds in furtherance of "national interest" and "societal interest". The learned Judge observed that the grounds of sovereignty and integrity of India, the security of the State, friendly relations with foreign State and public order are grounds referable to national interest, and the grounds of decency, morality, contempt of court, defamation and incitement of offence are referable to state interest. The learned Judge then referred to the judgment of the Supreme Court of the United States in FCC v. National Citizens Committee for Broadcasting[135], where it was held that a station license can be denied on the ground of public

134 Ibid; [45].

135 436 US 775 (1978)

interest. Justice Reddy observed that public interest is synonymous to state interest which is one of the grounds underlying Article 19(2):

> "189. Reference may also be made in this connection to the decision of the United States Supreme Court in *FCC* v. *National Citizens Committee for Broadcasting* [56 L Ed 2d 697 : 436 US 775 (1978)] referred to hereinbefore, where it has been held that "to deny a station licence because the public interest requires it is not a denial of free speech". It is significant that this was so said with reference to First Amendment to the United States Constitution which guarantees the freedom of speech and expression in absolute terms. The reason is obvious. **The right cannot rise above the national interest and the interest of society which is but another name for the interest of general public**. It is true that Article 19(2) does not use the words "national interest", "interest of society" or "public interest" but as pointed hereinabove, **the several grounds mentioned in clause (2) are ultimately referable to the interests of the nation and of the society.**"
>
> (emphasis supplied)

115. The observations of Justice Sawant and the concurring opinion of Justice Jeevan Reddy in **Cricket Association of Bengal** (supra) that the right under Article 19(1)(a) can be restricted on the ground of public interest even though it is not stipulated in Article 19(2) must be understood in the specific context of that case. **Cricket Association of Bengal** (supra), dealt with the access to and use of a public good (that is, airwaves) for dissemination of information. The Court distinguished airways from other means of dissemination of information such as newsprint and held that since broadcasting involves the use of a public good, it must be utilized to advance free speech rights and plurality of opinion (that is, public interest).[136] The observations in **Cricket Association of Bengal** (supra) cannot be interpreted to mean that other implied grounds of restrictions have been read into Article 19(2).

136 Cricket Association of Bengal [201 (1)(a) and 201(1)(b)]

116. From the above discussion, it is clear that the right to information under Article 19(1)(a) can only be restricted based on the grounds stipulated in Article 19(2). It could be argued that curbing black money can be traced to the ground of "public order". However, a Constitution Bench of this Court has interpreted the ground "public order" to mean "public safety and tranquility" and "disorder involving breaches of local significance in contradistinction to national upheavals, such as civil strife, war, affecting the security of the State."[137] Thus, the purpose of curbing black money is not traceable to any of the grounds in Article 19(2).

117. We proceed to apply the subsequent prongs of the proportionality standard, even assuming that curbing black money is a legitimate purpose for restricting the right to information. The second prong of the proportionality analysis requires the State to assess whether the means used are rationally connected to the purpose. At this stage, the court is required to assess whether the means, if realised, would increase the likelihood of curbing black money. It is not necessary that the means chosen should be the only means capable of realising the purpose. It is sufficient if the means used constitute one of the many methods by which the purpose can be realised, even if it only partially gives effect to the purpose.[138]

118. The respondents submit that before the introduction of the Electoral Bond Scheme, a major portion of the total contributions received by political parties was from "unknown sources". For example, immediately preceding the financial year (2016-17) in which the Electoral Bond Scheme was introduced, eighty one percent of the contributions (Rupees 580.52 Crores) were received by political parties through voluntary contributions. Since the amount of voluntary contributions is not regulated, it allowed the circulation of black money. However, after the introduction of the Electoral Bond Scheme, forty-seven percent of the contributions were received through electoral bonds which is regulated money. The Union of India submitted that providing anonymity to the contributors incentivizes them to contribute through the banking channel. Assuming, for the purpose of hypothesis that the Union of India is right on this prong, what it

137 Superintendent, Central Prison, Fatehgarh v. Dr Ram Manohar Lohia, [1960] 2 SCR 821 : AIR 1960 SC 633 [18]

138 Media One (supra) [100]

urges is that non-disclosure of information about political expenditure has a rational nexus with the goal, that is, curbing black money or unregulated money.

119. The next stage of the proportionality standard is the least restrictive means stage. At this stage, this Court is required to determine if the means adopted (that is, anonymity of the contributor) is the least restrictive means to give effect to the purpose based on the following standard:[139]

    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';

    c. Whether the alternative identified and the means used by the State impact fundamental rights differently; and

    d. Whether on an overall comparison (and balancing) of the measure and the alternative, the alternative is better suited considering the degree of realizing the government objective and the impact on fundamental rights.

120. Before we proceed to determine if the Electoral Bond Scheme is the least restrictive means to curb black money in electoral funding, it is important that we recall the regime on electoral funding. After the amendments introduced by the Finance Act 2017, donations to political parties exceeding rupees two thousand can only be made by an account payee cheque drawn on a bank, an account payee bank draft, the use of electronic clearing system through a bank account or through an electoral bond.[140] All contributions to political parties through cash cannot be assumed to be black money. For example, individuals who contribute to political parties in small donations during party rallies usually contribute through cash. On the other hand, contributions through the banking channel are certainly a form of accounted transaction. Restricting the contributions to political parties in cash to less than rupees two thousand and prescribing that contributions above the threshold amount must only be made

139 See Justice KS Puttaswamy (5J) (supra) and Media One Broadcasting (supra) [103];

140 IT Act, Section 13A(d)

through banking channels is itself intended to curb black money. Thus, the legal regime itself provides other alternatives to curb black money: contributions through cheques, bank draft, or electronic clearing system. The Union of India submits that though there are other alternatives through which circulation of black money in electoral financing can be curbed, these alternatives do not realize the objective in a "substantial manner" because most contributors resort to cash donations as they "fear consequences from political opponents" to whom donations were not made.

121. In addition to the alternatives identified above, the existing legal regime provides another alternative in the form of Electoral Trusts through which the objective of curbing black money in electoral financing can be achieved. Section 2(22AA) of the IT Act defines an Electoral Trust as a trust approved by the Board in accordance with the scheme made in this regard by the Central Government. Section 13B of the IT Act states that any voluntary contributions received by an electoral trust shall not be included in the total income of the previous year of such electoral trust if the it distributes ninety five percent of the aggregate donations received during the previous year. In terms of Rule 17CA of the IT Rules 1962, the features of an electoral trust are as follows:

a. An Electoral Trust may receive voluntary contribution from (i) an individual who is a citizen of India; (ii) a company registered in India; (iii) a firm or Hindu undivided family or an Association of persons or a body of individuals residing in India;

b. When a contribution is made to an electoral trust, a receipt recording the following information shall, *inter alia,* be provided: (i) Name and address of the contributor; (ii) Permanent account number of the contributor or the passport number if the contributor is not a resident of India; (iii) Amount contributed; (iv) The mode of contribution including the name and branch of the bank and the date of receipt of such contribution; and (v) PAN of the electoral trust;

c. Contributions to the electoral trust can only be made through cheque, bank draft and electronic transfer. Contributions made in cash shall not be accepted by the Electoral Trust;

d. The Electoral Trust shall spend five percent of the total contributions received in a year subject to a limit of Rupees five

hundred thousand in the first year of incorporation and Rupees three hundred thousand in the second year.[141] The remaining money (that is, ninety five percent of the total contributions received in that financial year along with any surplus from the previous year) shall be distributed to political parties registered under Section 29A of the RP Act;[142]

e. The political party to which the trust donated money shall provide a receipt indicating the name of the political party, the PAN and the amount of contribution received from the trust;[143]

f. The trust shall also maintain a list of persons from whom contributions have been received and to whom they have been distributed;[144] and

g. The trust shall furnish a certified copy of the list of contributors and list of political parties to whom contributions have been made to the Commissioner of Income Tax along with the audit report.[145]

122. In summary, an Electoral Trust is formed only for collecting political contributions from donors. An electoral trust can contribute to more than one party. To illustrate, if ten individuals and one company have contributed to an Electoral Trust and the donations are contributed to three political parties equally or unequally, the information about which of the individuals contributed to which of the political parties will not be disclosed. In this manner, the purpose of curbing black money in electoral financing will be met. At the same time, there would be no fear of consequences from political opponents because the information as to which political party were made is not disclosed.

123. On 6 June 2014, the ECI circulated Guidelines for submission of contribution reports of Electoral Trusts mandating in the interest of transparency that all Electoral Trusts shall submit an Annual Report containing details of contributions received and disbursed by them to political parties. Pursuant to the Guidelines, Electoral Trusts submit

141 IT Rules 1962, Rule 17CA(8)(i)

142 IT Rules 1962, Rule 17CA(7) and Rules 17CA(8)(ii)

143 IT Rules 1962, Rule 17CA(9)

144 IT Rules 1962, Rule 17CA(11)(ii)

145 IT Rules 1962, Rule 17CA(14)

Annual Reports to the ECI every year. For example, according to the Annual Report of the Prudent Electoral Trust for the financial year 2021-22, the Trust received contributions of a total of Rupees 4,64,83,00,116 from seventy contributors including individuals and companies. The contributions were unequally distributed to the Aam Aadmi Party, All India Congress Committee, Bharatiya Janata Party, Goa Congress Committee, Goa Forward Party, Indian National Congress, Punjab Lok Congress, Samajwadi Party, Shiromani Akali Dal, Telangana Rashtra Samiti, and YSR Congress. From the report, it cannot be discerned if contributor 'A' contributed to a particular political party. It can only be concluded that contributor 'A' could have contributed to the Party.

124. Thus, even if the argument of the Union of India that the other alternative means such as the other modes of electronic transfer do not realize 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). However, in that case, it is a choice expressly made by the contributors. Additionally, the law mandates disclosure only of contributions made above twenty thousand in a financial year. So, for contributions less than twenty-five thousand, cheques and other modes of electronic transfer are an effective alternative.

125. When these three methods of political contribution (electronic transfer other than electoral bonds, contribution to Electoral Trust, and Electoral Bonds) are placed on a continuum, transfer through electronic means (other than electoral bonds) would be placed on one end and Electoral Bonds would be placed on the other end. A voter would receive complete information about contributions made above twenty thousand to a political party in the case of electronic transfer made directly to a political party other than through electoral bonds.[146]

146 RPA; Section 29A

126. With respect to contributions through electoral bonds, the voter would not receive any information about financial contributions in terms of Section 29C of RPA as amended by the Finance Act. This Court in the interim order dated 31 October 2023 in the specific context of contributions made by companies through electoral bonds *prima facie* observed the voter would be able to secure information about the funding by matching the information of the aggregate sum contributed by the Company (as required to be disclosed under Section 182(3) of the Companies Act as amended by the Finance Act) with the information disclosed by the political party. However, on a detailed analysis of the Scheme and the amendments we are of the opinion that such an exercise would not reveal the particulars of the donations because the Company under the provisions of Section 182 and the political party are only required to disclose the consolidated amount contributed and received through Electoral Bonds respectively. The particulars about the political party to which the contributions were made which is crucial to the right to information of political funding cannot be identified through the matching exercise.

127. With respect to contributions to an Electoral Trust, a voter receives partial information. The voter would know the total amount contributed by the donor and that the donor contributed to one of the political parties (in case the Electoral Trust has made contributions to multiple parties). But the donor would not be aware of the exact details of the contribution.

128. Assuming that anonymity incentivizes contributions through banking channels (which would lead to curbing black money in the electoral process), electoral bonds would be the most effective means in curbing black money, followed by Electoral Trust, and then other means of electronic transfer. This conclusion is premised on the belief that the Electoral Bond curbs black money. However, the Scheme is not fool-proof. The Electoral Bond Scheme does not provide any regulatory check to prevent the trading of bonds though Clause 14 of the Electoral Bond Scheme states that the bonds shall not be eligible for trading.

129. On an overall balance of the impact of the alternative means on the right to information and its ability to fulfill the purpose, for contributions below twenty thousand rupees, contributions through other means of electronic transfer is the least restrictive means. For contributions

above twenty thousand rupees, contributions through Electoral Trust is the least restrictive means. Having concluded that the Electoral Bond Scheme is not the least restrictive means to achieve the purpose of curbing black money in electoral process, there is no necessity of applying the balancing prong of the proportionality standard.

130. Based on the above discussion, we conclude that 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.

b. Donor Privacy

131. The Union of India submitted that information about financial contributions to political parties is not disclosed to protect the contributor's informational privacy to political affiliation. There are two limbs to the argument of the Union of India with respect to the purpose of donor privacy. First, that the State interest in introducing the Electoral Bond Scheme which guarantees confidentiality (or anonymity) to financial contributions is that it furthers donor privacy; and second, this State interest facilitates a guaranteed fundamental right. Thus, the submission of the State is 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. This Court needs to decide the following issues to determine if the right to information of voters can be restricted on the ground of donor privacy:

a. Whether the fundamental right to informational privacy recognized by this Court in **Justice KS Puttaswamy (9J) v. Union of India**[147], includes information about a citizen's political affiliation; and

b. If (a) above is answered in the affirmative, whether financial contribution to a political party is a facet of political affiliation.

If the right to informational privacy extends to financial contributions to a political party, this Court needs to decide if the Electoral Bond

147 [2017] 10 SCR 569 : (2017) 10 SCC 1

Scheme adequately balances the right to information and right to informational privacy of political affiliation.

I. Informational privacy of financial contributions to political parties

132. In Justice KS Puttaswamy (9J) (supra), a nine-Judge Bench of this Court held that the Constitution guarantees the right to privacy. This Court traced the right to privacy to the constitutional ideals of dignity, liberty, and the thread of non-arbitrariness that runs through the provisions of Part III. The scope of the right to privacy discussed in Justice KS Puttaswamy (9J) (supra) is summarized below:

a. The right to privacy includes "repose", that is, the freedom from unwanted stimuli, "sanctuary", the protection against intrusive observation into intimate decisions and autonomy with respect to personal choices;

b. Privacy over intimate decisions includes decisions related to the mind and body. Privacy extends to both the decision and the **process** of arriving at the decision. A lack of privacy over **thought** (which leads to decision-making) would suppress voices and lead to homogeneity which is contrary to the values that the Constitution espouses[148];

c. Privacy over decisions and choices would enable the exercise of fundamental freedoms such as the freedom of thought, expression, and association freely without coercion;[149]

d. Privacy is attached to a person and not a space. The scope of privacy cannot be restricted only to the "private" space; and

e. Privacy includes informational privacy. Information which may seem inconsequential in silos can be used to influence decision making behavior when aggregated.[150]

133. The content of privacy is not limited to "private" actions and decisions such as the choice of a life partner, procreation and sexuality. Neither is privacy merely defined from the point of direct State intrusion.

148 Justice Chandrachud (Paragraph 168), Justice Kaul (Paragraph 19)

149 Justice Chandrachud, Justice Chellameshwar, Justice Bobde (paragraph 25 and 29)

150 Justice Chandrachud (paragraph 170): "[...] Individually, these information silos may seem inconsequential. In aggregation, they disclose the nature of the personality: food habits, language, health, hobbies, sexual preferences, friendships, ways of dress and political affiliation. Justice Chelameshwar (Paragraph 38), Justice Kaul (Paragaph 19)

Privacy is defined as essential protection for the exercise and development of other freedoms protected by the Constitution, and from direct or indirect influence by both State and non-State actors. Viewed in this manner, privacy takes within its fold, decisions which also have a 'public component'.

134. The expression of political beliefs is guaranteed under Article 19(1)(a). Forming political beliefs and opinion is the first stage of political expression. The freedom of political expression cannot be exercised freely in the absence of privacy of political **affiliation**. Information about a person's political beliefs can be used by the State at a political level, to suppress dissent, and at a personal level, to discriminate by denying employment or subjecting them to trolls. The lack of privacy of political affiliation would also disproportionately affect those whose political views do not match the views of the mainstream.

135. In the specific context of exercising electoral franchise, the lack of privacy of political affiliation would be catastrophic. It is crucial to electoral democracy that the exercise of the freedom to vote is not subject to undue influence. It is precisely for this reason that the law recognizes certain 'corrupt practices' by candidates. These 'corrupt practices' do not merely include 'financial' corrupt practices such as bribery. They also include undue influence of the voters by an attempt to interfere with the free exercise of electoral right[151], publication of false information about the personal character of any candidate[152], and providing vehicles for the free conveyance of electors[153]. The law penalizes practices which have the effect of dis-franchising the voter through illegitimate means.

136. Information about a person's political affiliation can be used to dis-enfranchise voters through voter surveillance.[154] Voter databases which are developed through surveillance identify voting patterns of the electors and attempt to interfere with their opinions based on the information. For example, the data of online purchase histories such as the books purchased (which would indicate the ideological leaning

151 RPA, Section 123(2). The provision includes the threatening with injury including social ostracism and ex-communication from any caste or community.

152 RPA; Section 123(4)

153 RPA; Section 123(5)

154 See Philip N Howard and Daniel Kreiss, Political Parties and Voter privacy: Australia, Canada, the United Kingdom, and United States in Comparative Perspective, *First Monday* 15(12) 2010

of the individual), clothing brands used (which would indicate the social class to which the individual belongs) or the news consumed or the newspapers subscribed (which would indicate the political leanings or ideologies) can be used to draw on the relative political affiliation of people. This information about the political affiliation of individuals can then be used to influence their votes. Voter surveillance gains particular significance when fewer people have attachments to political parties.[155]

137. At a systemic level, information secured through voter surveillance could be used to invalidate the foundation of the electoral system. Information about political affiliation could be used to engage in gerrymandering, the practice by which constituencies are delimited based on the electoral preference of the voters.

138. Informational privacy to political affiliation is necessary to protect the freedom of political affiliation and exercise of electoral franchise. Thus, it follows from the judgment of this Court in **Justice KS Puttaswamy (9J)** (supra) and the observations above that the Constitution guarantees the right to informational privacy of political affiliation.

139. Having concluded that the Constitution guarantees a right to informational privacy of political affiliation, it needs to be decided if the right can be extended to the contributions to political parties. The Electoral Bond Scheme has two manifestations of privacy: first, informational privacy by prescribing confidentiality vis-à-vis the political party; and second, informational privacy by prescribing non-disclosure of the information of political contributions to the public. The Union of India submitted that contributions made to political parties must be protected both from the political party itself and the public because donor privacy is an extension of the principle of secret ballot and is a facet of free and fair elections. The petitioners argue that equating political contributions with expression of political preference through voting is flawed because it conflates money with speech. The petitioners also argue that informational privacy does not extend to political contributions because they are by their very nature **public acts** which influence public policy, and thus, must be subject to public scrutiny.

155 Colin Bennet, The politics of privacy and privacy of politics: Parties, elections, and voter surveillance in Western Democracies. *First Monday*, *18*(8) 2013

140. The issue before this Court is not whether public funding of political parties is permissible. Neither is the issue whether a restriction can be placed on the contribution which can be made by a citizen to a political party. If it was, then the question of whether financial contribution to a political party is in furtherance of the right to freedom of political speech and expression under Article 19(1)(a) or the right to freedom to form associations under Article 19(1)(c) would arise. However, that not being the case, this Court is not required to decide whether financial contribution to a political party is protected by Articles 19(1)(a) and 19(1)(c).

141. This Court in Justice KS Puttaswamy (9J) (supra) did not trace the right to privacy to a particular provision of the Constitution such as Article 21. Rather, this Court observed that privacy is crucial for the fulfilment of the constitutional values of self-determination, autonomy and liberty in addition to its essentiality for realizing the fundamental freedoms such as the freedom of speech and expression. This Court further held that the non-intrusion of the mind (the ability to preserve beliefs, thoughts and ideologies) is as important as the non-intrusion of the body. This Court (supra) did not hold that privacy is extendable to the **action** of speech or the **action** of expression, both of which are required to possess a communicative element to receive the protection under Article 19(1)(a).[156] Rather, the proposition in Justice KS Puttaswamy (9J) is that privacy (including informational privacy) is extendable to thoughts, beliefs, and opinions formed for the exercise of speech and action. Thus, informational privacy would extend to financial contributions to political parties even if contributions are not traceable to Article 19(1)(a) provided that the information on political contributions indicates the political affiliation of the contributor.

142. Financial contributions to political parties are usually made for two reasons. First, they may constitute an expression of support to the political party and second, the contribution may be based on a *quid pro quo*. The law as it currently stands permits contributions to political parties by both corporations and individuals. The huge political contributions made by corporations and companies should not be allowed to conceal the reason for financial contributions made by another section of the population: a student, a daily wage worker,

156 See Romesh Thappar v. State of Madras, [1950] 1 SCR 594 (602)

an artist, or a teacher. When the law permits political contributions and such contributions could be made as an expression of political support which would indicate the political affiliation of a person, it is the duty of the Constitution to protect them. Not all political contributions are made with the intent of attempting to alter public policy. Contributions are also made to political parties which are not substantially represented in the legislatures. Contributions to such political parties are made purely with the intent of expressing support. At this juncture, the close association of money and politics which has been explained above needs to be recounted. Money is not only essential for electoral outcomes and for influencing policies. It is also necessary for true democratic participation. It is necessary for enhancing the number of political parties and candidates contesting the elections which would in-turn impact the demographics of representatives in the Assembly. 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.

II. Privacy vis-à-vis political party

143. The second issue is whether the right to privacy of political contributions can be extended to include privacy vis-à-vis the political party to which contributions are made since according to the Union of India under the Electoral Bond Scheme, the political party to which the contribution is made would not know the particulars of the contributor. Hence, it is submitted that the scheme is akin to the secret ballot.

144. We are unable to see how the disclosure of information about contributors to the political party to which the contribution is made would infringe political expression. The disclosure of the particulars of the contributions may affect the freedom of individuals to the limited extent that the political party with the information could coerce those who have not contributed to them. However, we have already held above that the scheme only grants *de jure* and not *de facto* confidentiality vis-à-vis the political party. Under the current Scheme, it is still open to the political party to coerce persons to contribute. Thus, the argument of the Union of India that the Electoral Bond

Scheme protects the confidentiality of the contributor akin to the system of secret ballot is erroneous.

III. Balancing the right to information and the right to informational privacy

a) Judicial Approach towards balancing fundamental rights: establishing the double proportionality standard

145. At the core of governance is the conflict between different constitutional values or different conceptions of the same constitutional value. Countries with a written Constitution attempt to resolve these conflicts by creating a hierarchy of rights within the constitutional order where a few fundamental rights are subjected to others. For example, Article 25 of the Indian Constitution which guarantees the freedom of conscience, and the profession, practice and propagation of religion is subject to public order, morality, health and **other provisions of Part III**. The first exercise that the Court must undertake while balancing two fundamental rights is to determine if the Constitution creates a hierarchy between the two rights in conflict. If the Constitution does not create a hierarchy between the conflicting rights, the Courts must use judicial tools to balance the conflict between the two rights.

146. The judicial approach towards balancing fundamental rights has evolved over the course of years. Courts have used the collective interest or the public interest standard, the single proportionality standard, and the double proportionality standard to balance the competing interests of fundamental rights.

147. Before the proportionality standard was employed to test the validity of the justification for the infringement of fundamental rights, Courts balanced conflicting fundamental rights by according prominence to one fundamental right over the other based on public interest. This approach was undertaken through two modalities. In the first modality, the Court while identifying the fundamental rights in conflict circumscribed one of the fundamental rights in question such that there was no **real** conflict between the rights. The Court while circumscribing the right undertook an exercise of weighing the relative constitutional values of the rights based on public interest. In Re Noise Pollution[157], writ petitions were filed seeking to curb noise

157 [2005] Suppl. 1 SCR 624 : (2005) 5 SCC 733

pollution. A two-Judge Bench of this Court observed that those who make noise often justify their actions based on freedom of speech and expression guaranteed under Article 19(1)(a). However, this Court observed that the right to freedom of speech and expression does not include the freedom to "engage in aural aggression". In this case, there was no necessity for this Court to "balance" two fundamental rights because the right in question (freedom of speech and expression) was circumscribed to not include the actions challenged (noise pollution). In **Subramanian Swamy v. Union of India**[158], Sections 499 and 500 of the Indian Penal Code 1860 which criminalized defamation were challenged. A two-Judge Bench of this Court framed the issue as a conflict between the right to speech and expression under Article 19(1)(a) and the right to reputation traceable to Article 21. In this case, the two Judge Bench held that the right to speech and expression does not include the right to defame a person. Justice Dipak Misra (as the learned Chief Justice then was) observed that a contrary interpretation would completely abrogate the right to reputation.[159]

148. In the second modality of the public interest approach, the Courts undertook a comparison of the values which the rights (and the conceptions of the rights) espouse and gave more weightage to the right which was in furtherance of a higher degree of public or collective interest. In **Asha Ranjan v. State of Bihar**[160], this Court held that when there is a conflict between two individuals with respect to their right under Article 21, the facts and circumstances must be weighed "on the scale of constitutional norms and sensibility and larger public interest." In **PUCL** (supra), one of the issues before this Court was

158 [2016] 3 SCR 865 : (2016) 7 SCC 221; Paragraph 11 "While one has a right to speech, others have a right to listen or decline to listen. [...] Nobody can indulge in aural aggression. If anyone increases his volume of speech and that too with the assistance of artificial devices so as to compulsorily expose unwilling persons to hear a noise raised to unpleasant or obnoxious levels, then the person speaking is violating the right of others to a peaceful, comfortable and pollution-free life guaranteed by Article 21. Article 19(1)(*a*) cannot be pressed into service for defeating the fundamental right guaranteed by Article 21."

159 144: "[...] Reputation being an inherent component of Article 21, we do not think it should be allowed to be sullied solely because another individual can have its freedom. It is not a restriction that has an inevitable consequence which impairs circulation of thought and ideas. In fact, it is control regard being had to another person's right to go to court and state that he has been wronged and abused. He can take recourse to a procedure recognised and accepted in law to retrieve and redeem his reputation. Therefore, the balance between the two rights needs to be struck. "Reputation" of one cannot be allowed to be crucified at the altar of the other's right of free speech. The legislature in its wisdom has not thought it appropriate to abolish criminality of defamation in the obtaining social climate."

160 [2017] 1 SCR 945 : (2017) 4 SCC 397

whether the disclosure of the assets of the candidates contesting the elections in furtherance of the right to information of the voters violates the right to privacy of candidates.[161] Justice Reddi authoring the concurring opinion observed that the right to information of the assets of candidates contesting elections trumps the right to privacy because the former serves a larger public interest. In Mazdoor Kisan Shakti Sangathan v. Union of India[162], proceedings under Article 32 were initiated challenging orders issued under Section 144 of the Code of Criminal Procedure prohibiting protests in certain areas in Delhi. The issue before this Court was whether the total ban of protests at the Jantar Mantar Road would violate the right to protest which is traceable to Articles 19(1)(a) and 19(1)(b). One of the inter-related issues was whether the right to hold peaceful demonstrations violates the right of peaceful residence under Article 21, and if it does, how this Court should balance the conflicting fundamental rights. This Court observed that the Court must while balancing two fundamental rights examine where the larger public interest lies.[163] This Court framed the following issue in the specific context of the case: whether disturbances caused to residents by the protest is a larger public interest which outweighs the rights of protestors. The two-Judge Bench held that "demonstrations as it has been happening" are causing serious discomfort to the residents, and that the right to protest could be balanced with the right to peaceful residence if authorities had taken adequate safeguards such as earmarking specific areas for protest, placing restrictions on the use of loudspeakers and on parking of vehicles around residential places.

149. The judgment of this Court in Mazdoor Kisan Shakti (supra), represents the gradual shift from the pre-proportionality phase to the proportionality stage which signifies a shift in the degree of justification and the employment of a structured analysis for balancing fundamental rights. In Mazdoor Kisan Shakti (supra), this Court applied one of the prongs of the proportionality standard (the least restrictive means prong) while balancing the right to protest and the right to peaceful residence. The Court identified other means

161 Ibid, [121]

162 [2018] 11 SCR 586 : (2018) 17 SCC 324

163 (2018) 17 SCC 324 [58]

which would have infringed the right to a peaceful residence to a lesser extent.

150. In 2012, a five-Judge Bench of this Court in Sahara India Real Estate Corporation Limited v. Securities and Exchange Board of India[164], used a standard which resembled the structured proportionality standard used in Justice KS Puttaswamy (5J) v. Union of India[165] to balance the conflict between two fundamental rights. This judgment marked the first departure from the series of cases in which this Court balanced two fundamental rights based on doctrinal predominance. In Sahara (supra), the petitioner submitted a proposal for the repayment of OFCDs (optionally fully convertible bonds) to the investors. The details of the proposals were published by a news channel. Interlocutory applications were filed in the Court praying for the issuance of guidelines for reporting matters which are sub-judice. This Court resolved the conflict between the freedom of press protected under Article 19(1)(a) and the right to free trial under Article 21 by evolving a neutralizing device. This Court held that it has the power to evolve neutralizing devices such as the postponement of trial, retrial, change of venue, and in appropriate cases, grant acquittal in case of excessive media prejudicial publicity to neutralize the conflicting rights. This Court followed the Canadian approach in evolving a two prong standard to balance fundamental rights through neutralizing devices which partly resembled the structured proportionality standard. The two-pronged test was as follows:[166]

    a. There is no other reasonable alternative measure available (necessity test); and

    b. The salutary effects of the measure must outweigh the deleterious effects on the fundamental rights (proportionality standard).

151. Finally, this Court in Justice KS Puttaswamy (5J) (supra) applied the structured proportionality standard to balance two fundamental rights. In this case, a Constitution Bench of this Court while testing the validity of the Aadhar Act 2016 had to resolve the conflict between the

164 [2012] 12 SCR 256 : (2012) 10 SCC 603

165 [2018] 8 SCR 1 : (2019) 1 SCC 1

166 (2012) 10 SCC 603 [42, 22]

right to informational privacy and the right to food. Justice Sikri writing for the majority held that the Aadhar Act fulfills all the four prongs of the proportionality standard. In the final prong of the proportionality stage, that is the balancing stage, this Court held that one of the considerations was to balance the right to privacy and the right to food. On balancing the fundamental rights, this Court held that the provisions furthering the right to food satisfy a larger public interest whereas the invasion of privacy rights was minimal.[167]

152. However, the single proportionality standard which is used to test whether the fundamental right in question can be restricted for the **State interest** (that is, the legitimate purpose) and if it can, whether the measure used to restrict the right is proportional to the objective is insufficient for balancing the conflict between two fundamental rights. The proportionality standard is an effective standard to test whether the infringement of the fundamental right is justified. It would prove to be ineffective when the State interest in question is also a reflection of a fundamental right.

153. The proportionality standard is by nature curated to give prominence to the fundamental right and minimize the restriction on it. If this Court were to employ the single proportionality standard to the considerations in this case, at the suitability prong, this Court would determine if non-disclosure is a suitable means for furthering the right to privacy. At the necessity stage, the Court would determine if non-disclosure is the least restrictive means to give effect to the right to privacy. At the balancing stage, the Court would determine if non-disclosure has a disproportionate effect on the right holder. In this analysis, the necessity and the suitability prongs will inevitably be satisfied because the purpose is substantial: it is a fundamental right. The balancing stage will only account for the disproportionate impact of the measure on the right to information (the right) and not the right to privacy (the purpose) since the Court is required to balance the impact on the right with the fulfillment of the purpose through the selected means. Thus, the Court while applying the proportionality standard to resolve the conflict between two fundamental rights preferentially frames the standard to give prominence to the fundamental right which is alleged to be violated

167 (2019) 1 SCC 1 [308]

by the petitioners (in this case, the right to information).[168] This could well be critiqued for its limitations.

154. In Campbell v. MGM Limited[169], Baroness Hale adopted the double proportionality standard to adequately balance two conflicting fundamental rights. In this case, the claimant, a public figure, instituted proceedings against a newspaper for publishing details of her efforts to overcome drug addiction. Baroness Hale applied the following standard to balance the right to privacy of the claimant and the right to a free press:

> "141. [...] This involved looking first at the comparative importance of the actual rights being claimed in the individual case; then at the justifications for interfering with or restricting each of those rights; and applying the proportionality test to each"

155. In Central Public Information Officer, Supreme Court of India v. Subash Chandra Agarwal[170], one of us (Justice D Y Chandrachud) while authoring the concurring opinion adopted the double proportionality standard as formulated in **Campbell** (supra). Referring to the double proportionality standard, the concurring opinion observes that the Court while balancing between two fundamental rights must identify the precise interests weighing in favour of both disclosure and privacy and not merely undertake a doctrinal analysis to determine if one of the fundamental rights takes precedence over the other:

> "113. Take the example of where an information applicant sought the disclosure of how many leaves were taken by a public employee and the reasons for such leave. The need to ensure accountability of public employees is of clear public interest in favour of disclosure. The reasons for the leave may also include medical information with respect to the public employee, creating a clear privacy interest in favour of non-disclosure. It is insufficient to state that the privacy interest in medical records is extremely high and

168 Hon'ble Mr Justice Andrew Cheung PJ, Conflict of fundamental rights and the double proportionality test, A lecture in the Common Law Lecture Series 2019 delivered at the University of Hong Kong (17 September 2019)

169 [2004] UKHL 22

170 Civil Appeal No. 10044 of 2010

> therefore the outcome should be blanket non-disclosure. The principle of proportionality may necessitate that the number of and reasons for the leaves be disclosed and the medical reasons for the leave be omitted. This would ensure that the interest in accountability is only abridged to the extent necessary to protect the legitimate aim of the privacy of the public employee."

156. Baroness Hale in **Campbell** (supra) employed a three step approach to balance fundamental rights. The first step is to analyse the comparative importance of the actual rights claimed. The second step is to lay down the justifications for the infringement of the rights. The third is to apply the proportionality standard to both the rights. The approach adopted by Baroness Hale must be slightly tempered to suit our jurisprudence on proportionality. The Indian Courts adopt a four prong structured proportionality standard to test the infringement of the fundamental rights. In the last stage of the analysis, the Court undertakes a balancing exercise to analyse if the cost of the interference with the right is proportional to the extent of fulfilment of the purpose. It is in this step that the Court undertakes an analysis of the comparative importance of the considerations involved in the case, the justifications for the infringement of the rights, and if the effect of infringement of one right is proportional to achieve the goal. Thus, the first two steps laid down by Baroness Hale are subsumed within the balancing prong of the proportionality analysis.

157. Based on the above discussion, the standard which must be followed by Courts to balance the conflict between two fundamental rights is as follows:

    a. Does the Constitution create a hierarchy between the rights in conflict? If yes, then the right which has been granted a higher status will prevail over the other right involved. If not, the following standard must be employed from the perspective of both the rights where rights A and B are in conflict;

    b. Whether the measure is a suitable means for furthering right A and right B;

    c. Whether the measure is least restrictive and equally effective to realise right A and right B; and

d. Whether the measure has a disproportionate impact on right A and right B.

b) Validity of the Electoral Bond Scheme, Section 11 of the Finance Act and Section 137 of the Finance Act

158. To recall, Section 13A of the IT Act before the amendment mandated that the political party must maintain a record of contributions in excess of rupees twenty thousand. Section 11 of the Finance Act 2017 amended Section 13A creating an exception for contributions made through Electoral Bonds. Upon the amendment, political parties are not required to maintain a record of any contribution received through electoral bonds. Section 29C of the RPA mandated the political party to prepare a report with respect to contributions received in excess of twenty thousand rupees from a person or company in a financial year. Section 137 of the Finance Act amended Section 29C of the RPA by which a political party is now not required to include contributions received by electoral bonds in its report. As explained earlier, the feature of anonymity of the contributor vis-à-vis the public is intrinsic to the Electoral Bond Scheme. Amendments had to be made to Section 13A of the IT Act and Section 29C of the RPA to implement the Electoral Bond Scheme because the EBS mandates anonymity of the contributor. In this Section, we will answer the question of whether the EBS adequately balances the right to informational privacy of the contributor and the right to information of the voter.

159. In Justice KS Puttaswamy (9J) (supra), this Court did not trace the right to privacy only to Article 21. This Court considered privacy as an essential component for the effective fulfillment of the all entrenched rights. Article 25 of the Constitution is the only provision in Part III which subjects the right to other fundamental rights. Article 25 guarantees the freedom of conscience which means the freedom to judge the moral qualities of one's conduct.[171] Financial contributions to a political party (as a form of expression of political support and belief) can be traced to the exercise of the freedom of conscience under Article 25.[172] It can very well be argued that the right to information of the voter prevails over the right to anonymity of political contributions which may be traceable to the freedom of

171 See Supriyo (supra) [238 , 239]; Aishat Shifa v. State of Karnataka, [2022] 5 SCR 426 : (2023) 2 SCC 1;

172 See Justice KS Puttaswamy v. Union of India, [2017] 10 SCR 569 : (2017) 10 SCC 1 [372] (opinion of Justice Chelameswar);

conscience recognized under Article 25 since it is subject to all other fundamental rights, including Article 19(1)(a). However, the right to privacy of financial contributions to political parties can also be traced to Article 19(1) because the informational privacy of a person's political affiliation is necessary to enjoy the right to political speech under Article 19(1)(a), the right to political protests under Article 19(1)(b), the right to form a political association under Article 19(1)(c), and the right to life and liberty under Article 21. The Constitution does not create a hierarchy amongst these rights. Thus, there is no constitutional hierarchy between the right to information and the right to informational privacy of political affiliation.

160. This Court must now apply the double proportionality standard, that is, the proportionality standard to both the rights (as purposes) to determine if the means used are suitable, necessary and proportionate to the fundamental rights. The Union of India submitted that Clause 7(4) of the Electoral Bond Scheme balances the right to information of the voter and the right to informational privacy of the contributor. Clause 7(4) stipulates that the information furnished by the buyer shall be treated as confidential by the authorized bank. The bank has to disclose the information when it is demanded by a competent court or upon the registration of a criminal case by a law enforcement agency. It needs to be analyzed if the measure employed (Clause 7(4)) balances the rights or tilts the balance towards one of the fundamental rights.

161. The first prong of the analysis is whether the means has a rational connection with both the purposes, that is, informational privacy of the political contributions and disclosure of information to the voter. It is not necessary that the means chosen should be the only means capable of realising the purpose of the state action. This stage of the analysis does not prescribe an efficiency standard. It is sufficient if the means constitute one of the many methods by which the purpose can be realised, even if it only partially gives effect to the purpose.[173]

162. This Court while applying the suitability prong to the purpose of privacy of political contribution must consider whether the non-disclosure of information to the voter and its disclosure only when demanded by a competent court and upon the registration of criminal

173 Media One Broadcasting (supra), [101]

case has a rational nexus with the purpose of achieving privacy of political contribution. Undoubtedly, the measure by prescribing non-disclosure of information about political funding shares a nexus with the purpose. The non-disclosure of information grants anonymity to the contributor, thereby protecting information privacy. It is certainly one of the ways capable of realizing the purpose of informational privacy of political affiliation.

163. The suitability prong must next be applied to the purpose of disclosure of information about political contributions to voters. There is no nexus between the balancing measure adopted with the purpose of disclosure of information to the voter. According to Clause 7(4) of the Electoral Bond Scheme and the amendments, the information about contributions made through the Electoral Bond Scheme is exempted from disclosure requirements. This information is **never** disclosed to the voter. The purpose of securing information about political funding can never be fulfilled by absolute non-disclosure. The measure adopted does not satisfy the suitability prong vis-à-vis the purpose of information of political funding. However, let us proceed to apply the subsequent prongs of the double proportionality analysis assuming that the means adopted has a rational nexus with the purpose of securing information about political funding to voters.

164. The next stage of the analysis is the necessity prong. At this stage, the Court determines if the measure identified is the least restrictive and equally effective measure. To recall, the Court must determine if there are other possible means which could have been adopted to fulfill the purpose, and whether such alternative means (a) realize the purpose in a real and substantial manner; (b) impact fundamental rights differently; and (c) are better suited on an overall comparison of the degree of realizing the purpose and the impact on fundamental rights.

165. The provisions of the RPA provide an alternative measure. Section 29C states that contributions in excess of rupees twenty thousand received from a person or company for that financial year must be disclosed by the political party through a report. The report must be filled in the format prescribed in Form 24A of the Conduct of Election Rules 1961. The form is annexed as Annexure II to this judgment. A crucial component of this provision when juxtaposed with Section 13A of the IT Act must be noted. Section 13A of the IT Act requires

the political party to maintain a record of the contributions made in excess of rupees twenty thousand. Section 29C of the RPA requires the political party to disclose information about contributions in excess of rupees twenty thousand made by a person or company **in a financial year**. Section 13A mandates record keeping of every contribution. On the other hand, Section 29C mandates disclosure of information of contributions beyond rupees twenty thousand per person or per company in one financial year.

166. Section 29C(1) is one of the means to achieve the purpose of protecting the informational privacy of political affiliation of individuals. Parliament in its wisdom has prescribed rupees twenty thousand as the threshold where the considerations of disclosure of information of political contribution outweigh the considerations of informational privacy. It could very well be debated whether rupees twenty thousand is on the lower or higher range of the spectrum. However, that is not a question for this Court to answer in this batch of petitions. The petitioners have not challenged the threshold of rupees twenty thousand prescribed for the disclosure of information prescribed by Section 29C. They have only raised a challenge to the disclosure exception granted to contributions by Electoral Bonds. Thus, this Court need not determine if the threshold tilts the balance in favour of one of the interests. We are only required to determine if the disclosure of information on financial contributions in a year beyond rupees twenty thousand is an alternative means to achieve the purposes of securing the information on financial contributions and informational privacy regarding political affiliation.

167. It must be recalled that we have held above that the right to information of the voter includes the right to information of financial contributions to a political party because of the influence of money in electoral politics (through electoral outcomes) and governmental decisions (through a seat at the table and *quid pro quo* arrangements between the contributor and the political party). The underlying rationale of Section 29C(1) is that contributions below the threshold do not have the ability to influence decisions, and the right to information of financial contributions does not extend to contributions which do not have the ability to influence decisions. Similarly, the right to privacy of political affiliations does not extend to contributions which may be made to influence policies. It only extends to contributions made as a genuine form of political support that the disclosure of such

information would indicate their political affiliation and curb various forms of political expression and association.

168. It is quite possible that contributions which are made beyond the threshold could also be a form of political support and not necessarily a *quid pro quo* arrangement, and contributions below the threshold could influence electoral outcomes. However, the restriction on the right to information and informational privacy of such contributions is minimal when compared to a blanket non-disclosure of information on contributions to political parties. Thus, this alternative realizes the objective of securing disclosure for an informed voter and informational privacy to political affiliation in a 'real and substantial manner'. The measure in the Electoral Bond Scheme completely tilts the balance in favor of the purpose of informational privacy and abrogates informational interests. On an overall comparison of the measure and the alternative, the alternative is better suited because it realizes the purposes to a considerable extent and imposes a lesser restriction on the fundamental rights. Having concluded that Clause 7(4) of the Scheme is not the least restrictive means to balance the fundamental rights, there is no necessity of applying the balancing prong of the proportionality standard.

169. 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 question is whether this Court should only strike down the non-disclosure provision in the Electoral Bond Scheme, that is Clause 7(4). However, as explained above, the anonymity of the contributor is intrinsic to the Electoral Bond Scheme. 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 consequentially have to be struck down as unconstitutional.

c. Validity of Section 154 of the Finance Act amending Section 182(3) to the Companies Act

170. Before the 2017 amendment, Section 182(3) of the Companies Act, mandated companies to disclose the details of the amount contributed to a political party along with the name of the political party to which the amount was contributed in its profit and loss account. After the amendment, Section 182(3) only requires the disclosure of the total amount contributed to political parties in a financial year. For example, under Section 182(3) as it existed before the amendment, if a Company contributed rupees twenty thousand to a political party, the company was required to disclose in its profit and loss account, the details of the specific contributions made to that political party. However, after the 2017 amendment, the Company is only required to disclose that it contributed rupees twenty thousand to a political party under the provision without disclosing the details of the contribution, that is, the political party to which the contribution was made. The profit and loss account of a company is included in the financial statement which companies are mandated to prepare.[174] A copy of the financial statement adopted at the annual general meeting of the company must be filed with the Registrar of Companies.[175]

171. As discussed in the earlier segment of this judgment, the Companies Act 1956 was amended in 1960 to include Section 293A by which contributions by companies to political parties and for political purposes were regulated. Companies were permitted to contribute within the cap prescribed. All such contributions were required to be disclosed by the Company in its profit and loss account with details. Companies which contravened the disclosure requirement were subject to fine. It is crucial to note here that contributions to political parties by companies were regulated long before the IT Act was amended in 1978 to exempt the income of political parties through voluntary contributions for tax purposes (ostensibly to curb black money). It is clear as day light that the purpose of mandating the disclosure of contributions made by companies was not merely to curb black money in electoral financing but crucially to make the financial transactions between companies and political parties transparent. Contributions for "political purposes" was widely defined in the 1985 amendment (which was later incorporated in Section 182 of the Companies Act 2013) to include expenditure (either directly or

174 The Companies Act 2013; Section 2(40)

175 The Companies At 2013; Section 137

indirectly) for advertisement on behalf of political parties and payment to a person "who is carrying activity which can be regarded as likely to affect public support to a political party". This indicates that the legislative intent of the provision mandating disclosure was to bring transparency to political contributions by companies. Companies have always been subject to a higher disclosure requirement because of their huge financial presence and the higher possibility of *quid pro quo* transactions between companies and political parties. The disclosure requirements in Section 182(3) were included to ensure that corporate interests do not have an undue influence in electoral democracy, and if they do, the electorate must be made aware of it.

172. Section 182(3) as amended by the Finance Act 2017 mandates the disclosure of **total** contributions made by political parties. This requirement would ensure that the money which is contributed to political parties is accounted for. However, the deletion of the mandate of disclosing the **particulars** of contributions violates the right to information of the voter since they would not possess information about the political party to which the contribution was made which, as we have held above, is necessary to identify corruption and *quid pro quo* transactions in governance. Such information is also necessary for exercising an informed vote.

173. Section 182(3) of the Companies Act and Section 29C of the RPA as amended by the Finance Act must be read together. Section 29C exempts political parties from disclosing information of contributions received through Electoral Bonds. However, Section 182(3) not only applies to contributions made through electoral bonds but through all modes of transfer. In terms of the provisions of the RPA, if a company made contributions to political parties through cheque or ECS, the political party had to disclose the details in its report. Thus, the information about contributions by the company would be in the public domain. The only purpose of amending Section 182(3) was to bring the provision in tune with the amendment under the RPA exempting disclosure requirements for contributions through electoral bonds. The amendment to Section 182(3) of the Companies Act becomes otiose in terms of our holding in the preceding section that the Electoral Bond Scheme and relevant amendments to the RPA and the IT Act mandating non-disclosure of particulars on political contributions through electoral bonds is unconstitutional.

174. 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. We do 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 is unconstitutional.

G. Challenge to unlimited corporate funding

175. The Companies Act 1956,[176] as originally enacted, did not contain any provision relating to political contributions by companies. Regardless of the same, many companies sought to make contributions to political parties by amending their memorandum. In **Jayantilal Ranchhoddas Koticha** v. **Tata Iron and Steel Co. Ltd.**,[177] the decision of the company to amend its memorandum enabling it to make contributions to political parties was challenged before the High Court of Judicature at Bombay. The High Court upheld the decision of the company to amend its memorandum on the ground that there was no law prohibiting companies from contributing to the funds of a party. Chief Justice M C Chagla, cautioned against the influential role of "big business and money bags" in throttling democracy. The learned Judge emphasized that it is the duty of Courts to "prevent any influence being exercised upon the voter which is an improper influence or which may be looked at from any point of view as a corrupt influence." Chief Justice Chagla highlighted the grave danger inherent in permitting companies to donate to political parties and hoped Parliament would "consider under what circumstances and under what limitations companies should be permitted to make these contributions".

176 "1956 Act"

177 AIR 1958 Bom 155

176. Subsequently, Parliament enacted the Companies (Amendment) Act 1960 to incorporate Section 293A in the 1956 Act. The new provision allowed a company to contribute to: (a) any political party; or (b) for any political purpose to any individual or body. However, the amount of contribution was restricted to either twenty-five thousand rupees in a financial year or five percent of the average net profits during the preceding three financial years, whichever was greater. The provision also mandated every company to disclose in its profit and loss account any amount contributed by it to any political party or for any political purpose to any individual or body during the financial year to which that account relates by giving particulars of the total amount contributed and the name of the party, individual, or body to which or to whom such amount has been contributed.

177. In 1963, the Report of the Santhanam Committee on Prevention of Corruption highlighted the prevalence of corruption at high political levels due to unregulated collection of funds and electioneering by political parties.[178] The Committee suggested "a total ban on all donations by incorporated bodies to political parties." Subsequently, Section 293A of the 1956 Act was amended through the Companies (Amendment) Act 1969 to prohibit companies from contributing funds to any political party or to any individual or body for any political purpose.

178. In 1985, Parliament again amended Section 293A, in the process reversing its previous ban on political contributions by companies. It allowed a company, other than a government company and any other company with less than three years of existence, to contribute any amount or amounts to any political party or to any person for any political purpose. It further provided that the aggregate of amounts which may be contributed by a company in any financial year shall not exceed five percent of its average net profits during the three immediately preceding financial years. This provision was retained under Section 182 of the Companies Act 2013. The only change was that the aggregate amount donated by a company was increased to seven and a half percent of its average net profits during the three immediately preceding financial years. Section 154 of the Finance Act 2017 amended Section 182 of the 2013 Act to delete this limit contained in the first proviso of the provision.

178 Report of the Committee on Prevention of Corruption, 1964 [11.5].

179. At the outset, it is important to be mindful of the fact that the petitioners are not challenging the vires of Section 182 of the 2013 Act. Neither are the petitioners challenging the legality of contributions made by companies to political parties. The challenge is restricted to Section 154 of the Finance Act 2017 which amended Section 182 of the 2013 Act.

i. The application of the principle of non-arbitrariness

180. The petitioners argue that Section 154 of the Finance Act 2017 violates Article 14 of the Constitution. The primary ground of challenge is that the amendment to Section 182 of the 2013 Act is manifestly arbitrary as it allows companies, including loss-making companies, to contribute unlimited amounts to political parties. It has also been argued that the law now facilitates the creation of shell companies solely for the purposes of contributing funds to political parties. On the other hand, the respondent has questioned the applicability of the doctrine of manifest arbitrariness for invalidating legislation.

a. Arbitrariness as a facet of Article 14

181. At the outset, the relevant question that this Court has to answer is whether a legislative enactment can be challenged on the sole ground of manifest arbitrariness. Article 14 of the Constitution provides that the State shall not deny to any person equality before the law or the equal protection of laws within the territory of India. Article 14 is an injunction to both the legislative as well the executive organs of the State to secure to all persons within the territory of India equality before law and equal protection of the laws.[179] Traditionally, Article 14 was understood to only guarantee non-discrimination. In this context, Courts held that Article 14 does not forbid all classifications but only that which is discriminatory. In **State of West Bengal v. Anwar Ali Sarkar,**[180] Justice S R Das (as the learned Chief Justice then was) laid down the following two conditions which a legislation must satisfy to get over the inhibition of Article 14: first, the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others; and second, the differentia must have a rational relation to the object sought to be achieved

179 Basheshar Nath v. CIT, [1959] Supp 1 SCR 528

180 [1952] 1 SCR 284 : (1951) 1 SCC 1; Also see State of Bombay v. FN Balsara, [1951] 1 SCR 682

by the legislation. In the ensuing years, this Court followed this "traditional approach" to test the constitutionality of a legislation on the touchstone of Article 14.[181]

182. In E P Royappa v. State of Tamil Nadu,[182] this Court expanded the ambit of Article 14 by laying down non-arbitrariness as a limiting principle in the context of executive actions. Justice P N Bhagwati (as the learned Chief Justice then was), speaking for the Bench, observed that equality is a dynamic concept with many aspects and dimensions which cannot be confined within traditional and doctrinaire limits. The opinion declared that equality is antithetic to arbitrariness, further finding that equality belongs to the rule of law in a republic, while arbitrariness belongs to the whim and caprice of an absolute monarch. In Ajay Hasia v. Khalid Mujib Seheravardi,[183] a Constitution Bench of this Court considered it to be well settled that any action that is arbitrary necessarily involves negation of equality. Justice Bhagwati observed that the doctrine of non-arbitrariness can also be extended to a legislative action. He observed that:

> "[w]herever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of an "authority" under Article 12, Article 14 immediately springs into action and strikes down such State action."

183. Immediately after the judgment in Ajay Hasia (supra), Justice E S Venkataramaiah (as the learned Chief Justice then was) in Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India,[184] laid down the test of manifest arbitrariness with respect to subordinate legislation. It was held that a subordinate legislation does not carry the same degree of immunity enjoyed by a statute passed by a competent legislature. Therefore, this Court held that a subordinate legislation "may also be questioned on the ground that it is unreasonable, unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary."

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181 Kathi Raning Rawat v. State of Saurashtra, [1952] 1 SCR 435 : (1952) 1 SCC 215; Budhan Chowdhury v. State of Bihar, [1955] 1 SCR 1045; Ram Krishna Dalmia v. S R Tendolkar, [1959] SCR 279.

182 [1974] 2 SCR 348 : (1974) 4 SCC 3

183 [1981] 2 SCR 79 : (1981) 1 SCC 722

184 [1985] 2 SCR 287 : (1985) 1 SCC 641

In Sharma Transport v. Government of Andhra Pradesh,[185] this Court reiterated Indian Express Newspapers (supra) by observing that the test of arbitrariness as applied to an executive action cannot be applied to delegated legislation. It was held that to declare a delegated legislation as arbitrary, "it must be shown that it was not reasonable and manifestly arbitrary." This Court further went on to define "arbitrarily" to mean "in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone."

184. While this Court accepted it as a settled proposition of law that a subordinate legislation can be challenged on the ground of manifest arbitrariness, there was still some divergence as to the doctrine's application with respect to plenary legislation. In State of Tamil Nadu v. Ananthi Ammal,[186] a three-Judge Bench of this Court held that a statute can be declared invalid under Article 14 if it is found to be arbitrary or unreasonable. Similarly, in Dr. K R Lakshmanan v. State of Tamil Nadu,[187] a three-Judge Bench of this Court invalidated a legislation on the ground that it was arbitrary and in violation of Article 14. However, in State of Andhra Pradesh v. McDowell & Co.,[188] another three-Judge Bench of this Court held that a plenary legislation cannot be struck down on the ground that it is arbitrary or unreasonable. In McDowell (supra), this Court held that a legislation can be invalidated on only two grounds: first, the lack of legislative competence; and second, on the violation of any fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision.

185. This divergence became more apparent when a three-Judge Bench of this Court in Malpe Vishwanath Acharya v. State of Maharashtra,[189] invalidated certain provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act 1947 relating to the determination and fixation of the standard rent. This Court declared the provisions in question unreasonable, arbitrary, and violative of Article 14. However, the Court

185 [2001] Suppl. 5 SCR 390 : (2002) 2 SCC 188

186 [1994] Suppl. 5 SCR 666 : (1995) 1 SCC 519

187 [1996] 1 SCR 395 : (1996) 2 SCC 226

188 [1996] 3 SCR 721 : (1996) 3 SCC 709

189 [1997] Suppl. 6 SCR 717 : (1998) 2 SCC 1

did not strike down the provisions on the ground that the extended period of the statute was to come to an end very soon, requiring the government to reconsider the statutory provisions. Similarly, in Mardia Chemicals Ltd. v. Union of India,[190] another three-Judge Bench of this Court invalidated Section 17(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 for being unreasonable and arbitrary.

186. In Natural Resources Allocation, In Re Special Reference No. 1 of 2012,[191] a Constitution Bench of this Court referred to McDowell (supra) to observe that a law may not be struck down as arbitrary without a constitutional infirmity. Thus, it was held that a mere finding of arbitrariness was not sufficient to invalidate a legislation. The Court has to enquire whether the legislation contravened any other constitutional provision or principle.

b. Beyond Shayara Bano: entrenching manifest arbitrariness in Indian jurisprudence

187. In Shayara Bano v. Union of India,[192] a Constitution Bench of this Court set aside the practice of Talaq-e-Bidaat (Triple Talaq). Section 2 of the Muslim Personal Law (Shariat) Act 1937 was also impugned before this Court. The provision provides that the personal law of the Muslims, that is Shariat, will be applicable in matters relating to marriage, dissolution of marriage and talaq. Justice R F Nariman, speaking for the majority, held that Triple Talaq is manifestly arbitrary because it allows a Muslim man to capriciously and whimsically break a marital tie without any attempt at reconciliation to save it. Thus, Justice Nariman applied the principle of manifest arbitrariness for the purpose of testing the constitutional validity of the legislation on the touchstone of Article 14.

188. Justice Nariman traced the evolution of non-arbitrariness jurisprudence in India to observe that McDowells (supra) failed to consider two binding precedents, namely, Ajay Hasia (supra) and K R Lakshmanan (supra). This Court further observed that McDowells (supra) did not notice Maneka Gandhi v. Union of India,[193] where this Court held

190 [2004] 3 SCR 982 : (2004) 4 SCC 311

191 [2012] 9 SCR 311 : (2012) 10 SCC 1

192 [2017] 9 SCR 797 : (2017) 9 SCC 1

193 [1978] 2 SCR 621 : (1978) 1 SCC 248

that substantive due process is a part of Article 21 which has to be read along with Articles 14 and 19 of the Constitution. Therefore, Justice Nariman held that arbitrariness of a legislation is a facet of unreasonableness in Articles 19(2) to (6) and therefore arbitrariness can also be used as a standard to strike down legislation under Article 14. It held McDowells (supra) to be per incuriam and bad in law.

189. Shayara Bano (supra) clarified In Re Special Reference No. 1 of 2012 (supra) by holding that a finding of manifest arbitrariness is in itself a constitutional infirmity and, therefore, a ground for invalidating legislation for the violation of Article 14. Moreover, it was held that there is no rational distinction between subordinate legislation and plenary legislation for the purposes of Article 14. Accordingly, the test of manifest arbitrariness laid down by this Court in Indian Express Newspapers (supra) in the context of subordinate legislation was also held to be applicable to plenary legislation. In conclusion, this Court held that manifest arbitrariness "must be something done by the legislature capriciously, irrationally and/or without adequate determining principle." It was further held that a legislation which is excessive and disproportionate would also be manifestly arbitrary. The doctrine of manifest arbitrariness has been subsequently reiterated by this Court in numerous other judgments.

190. The standard of manifest arbitrariness was further cemented by the Constitution Bench of this Court in Navtej Singh Johar v. Union of India.[194] In Navtej Singh Johar (supra), Section 377 of the Indian Penal Code 1860 was challenged, *inter alia,* on the ground it is manifestly arbitrary. Section 377 criminalized any person who has had "voluntary carnal intercourse against the order of nature". Chief Justice Dipak Misra (writing for himself and Justice AM Khanwilkar) held that Section 377 is manifestly arbitrary for failing to make a distinction between consensual and non-consensual sexual acts between consenting adults.[195] Justice Nariman, in the concurring opinion, observed that Section 377 is manifestly arbitrary for penalizing "consensual gay sex". Justice Nariman faulted the provision for (a) not distinguishing between consensual and non-consensual sex for the purpose of criminalization; and (b) criminalizing sexual activity

194 [2018] 7 SCR 379 : (2018) 10 SCC 1

195 WP (Criminal) 76 of 2016 [Chief Justice Misra, 239]

between two persons of the same gender.[196] Justice DY Chandrachud noted that Section 377 to the extent that it penalizes physical manifestation of love by a section of the population (the LGBTQ+ community) is manifestly arbitrary.[197] Similarly, Justice Indu Malhotra observed that the provision is manifestly arbitrary because the basis of criminalization is the sexual orientation of a person which is not a "rationale principle"[198].

191. In **Joseph Shine v. Union of India**,[199] a Constitution Bench of this Court expressly concurred with the doctrine of manifest arbitrariness as evolved in **Shayara Bano** (supra). In **Joseph Shine** (supra), one of us (Justice D Y Chandrachud) observed that the doctrine of manifest arbitrariness serves as a check against state action or legislation "which has elements of caprice, irrationality or lacks an adequate determining principle." In **Joseph Shine** (supra), the validity of Section 497 of the Indian Penal Code was challenged. Section 497 penalized a man who has sexual intercourse with a woman who is and whom he knows or has a reason to believe to be the wife of another man, without the "consent and connivance of that man" for the offence of adultery. Justice Nariman observed that the provision has paternalistic undertones because the provision does not penalize a married man for having sexual intercourse with a married woman if he obtains her husband's consent. The learned Judge observed that the provision treats a woman like a chattel:

> "23. [...] This can only be on the paternalistic notion of a woman being likened to chattel, for if one is to use the chattel or is licensed to use the chattel by the — licensorII, namely, the husband, no offence is committed. Consequently, the wife who has committed adultery is not the subject matter of the offence, and cannot, for the reason that she is regarded only as chattel, even be punished as an abettor. This is also for the chauvinistic reason that the third-party male has seduced her, she being his victim. What is clear, therefore, is that this archaic law has long

196 Ibid,[Justice Nariman, 82]

197 Ibid, [Justice DY Chandrachud, 29]

198 Ibid, [Justice Malhotra, paragraph 14.9]

199 [2018] 11 SCR 765 : (2019) 3 SCC 39

> outlived its purpose and does not square with today's constitutional morality, in that the very object with which it was made has since become manifestly arbitrary, having lost its rationale long ago and having become in today's day and age, utterly irrational. On this basis alone, the law deserves to be struck down, for with the passage of time, Article 14 springs into action and interdicts such law as being manifestly arbitrary."

192. The learned Judge further observed that the "ostensible object of Section 497" as pleaded by the State which is to preserve the sanctity of marriage is not in fact the object of the provision because: (a) the sanctity of marriage can be destroyed even if a married man has sexual intercourse with an unmarried woman or a widow; and (b) the offence is not committed if the consent of the husband of the woman is sought.

193. Justice DY Chandrachud in his opinion observed that a provision is manifestly arbitrary if the determining principle of it is not in consonance with constitutional values. The opinion noted that Section 497 makes an "ostensible" effort to protect the sanctity of marriage but in essence is based on the notion of marital subordination of women which is inconsistent with constitutional values.[200] Chief Justice Misra (writing for himself and Justice AM Khanwilkar) held that the provision is manifestly arbitrary for lacking "logical consistency" since it does not treat the wife of the adulterer as an aggrieved person and confers a 'license' to the husband of the woman.

194. It is now a settled position of law that a statute can be challenged on the ground it is manifestly arbitrary. The standard laid down by Justice Nariman in Shayara Bano (supra), has been citied with approval by the Constitution Benches in Navtej Singh Johar (supra) and Joseph Shine (supra). Courts while testing the validity of a law on the ground of manifest arbitrariness have to determine if the statute is capricious, irrational and without adequate determining principle, or something which is excessive and disproportionate. This Court has applied the standard of "manifest arbitrariness" in the following manner:

200 (2019) 3 SCC 39 [Paragraph 35]

a. A provision lacks an "adequate determining principle" if the purpose is not in consonance with constitutional values. In applying this standard, Courts must make a distinction between the "ostensible purpose", that is, the purpose which is claimed by the State and the "real purpose", the purpose identified by Courts based on the available material such as a reading of the provision[201]; and

b. A provision is manifestly arbitrary even if the provision does **not** make a classification.[202]

195. This Court in previous judgments has discussed the first of the above applications of the doctrine by distinguishing between the "ostensible purpose" and the "real purpose" of a provision with sufficient clarity. The application of the doctrine of manifest arbitrariness by Chief Justice Misra and Justice Nariman in Navtej Singh Johar (supra) to strike down a provision for **not** classifying between consensual and non-consensual sex must be understood in the background of two jurisprudential developments on the interpretation of Part III of the Constitution. The first, is the shift from reading the provisions of Part III of the Constitution as isolated silos to understanding the thread of reasonableness which runs through all the provisions and elevating unreasonable (and arbitrary) action to the realm of fundamental rights. The second is the reading of Article 14 to include the facets of formal equality and substantive equality. Article 14 consists of two components. "Equality before the law" which means that the law must treat everybody equally in the formal sense. "Equal protection of the laws" signifies a guarantee to secure factual equality. The legislature and the executive makes classifications to achieve factual equality. The underlying premise of substantive equality is the recognition that not everybody is equally placed and that the degree of harm suffered by a group of persons (or an individual) varies because of unequal situations. This Court has in numerous judgments recognized that the legislature is free to recognize the degrees of harm and confine its benefits or restrictions to those cases where the need is the clearest.[203] The corollary of the proposition that it is reasonable to

201 Justice Chandrachud, Justice Malhotra, and Justice Nariman in Navtej Singh Johar (supra); Justices Chandrachud and Nariman in Joseph Shine (supra).

202 Chief Justice Misra in Navtej Singh Johar (supra)

203 Mohd. Hanif Quareshi v. State of Bihar, AIR 1958 SC 731; Binoy Viswam v. Union of India, [2017] 7 SCR 1 : (2017) 7 SCC 59; Charanjit Lal Chowdhuri v. Union of India, (1950) SCC 833

identify the degrees of harm, is that it is unreasonable, unjust, and arbitrary if the Legislature does not identify the degrees of harm for the purpose of law.

196. It is undoubtedly true that it is not the constitutional role of this Court to second guess the intention of the legislature in enacting a particular statute. The legislature represents the democratic will of the people, and therefore, the courts will always presume that the legislature is supposed to know and will be aware of the needs of the people. Moreover, this Court must be mindful of falling into an error of equating a plenary legislation with a subordinate legislation. **In Re Delhi Laws Act 1912**,[204] Justice Fazl Ali summed up the extent and scope of plenary legislation and delegated legislation, in the following terms:

> "32. The conclusions at which I have arrived so far may now be summed up:
>
> (1) The legislature must normally discharge its primary legislative function itself and not through others.
>
> (2) Once it is established that it has sovereign powers within a certain sphere, it must follow as a corollary that it is free to legislate within that sphere in any way which appears to it to be the best way to give effect to its intention and policy in making a particular law, and that it may utilise any outside agency to any extent it finds necessary for doing things which it is unable to do itself or finds it inconvenient to do. In other words, it can do everything which is ancillary to and necessary for the full and effective exercise of its power of legislation.
>
> (3) It cannot abdicate its legislative functions, and therefore while entrusting power to an outside agency, it must see that such agency acts as a subordinate authority and does not become a parallel legislature.
>
> (4) The doctrine of separation of powers and the judicial interpretation it has received in America ever since the American Constitution was framed, enables the American courts to check undue and excessive

204 (1951) SCC 568

> delegation but the courts of this country are not committed to that doctrine and cannot apply it in the same way as it has been applied in America. Therefore, there are only two main checks in this country on the power of the legislature to delegate, these being its good sense and the principle that it should not cross the line beyond which delegation amounts to "abdication and self-effacement".

197. In Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd. v. Assistant Commissioner of Sales Tax and others,[205] a Constitution Bench of this Court held that a subordinate legislation is ancillary to the statute. Therefore, the delegate must enact the subordinate legislation "consistent with the law under which it is made and cannot go beyond the limits of the policy and standard laid down in the law." Since the power delegated by a statute is limited by its terms, the delegate is expected to "act in good faith, reasonably, intra vires the power granted and on relevant consideration of material facts."[206] This Court has to be cognizant of this distinction. In fact, the doctrine of manifest arbitrariness, as developed by this Court in Indian Express Newspapers (supra) in the context of subordinate legislation, was applicable to the extent that "it is so arbitrary that it could not be said to be in conformity with the statute or that it offends Article 14 of the Constitution."[207]

198. The above discussion shows that manifest arbitrariness of a subordinate legislation has to be primarily tested vis-a-vis its conformity with the parent statute. Therefore, in situations where a subordinate legislation is challenged on the ground of manifest arbitrariness, this Court will proceed to determine whether the delegate has failed "to take into account very vital facts which either expressly or by necessary implication are required to be taken into consideration by the statute or, say, the Constitution."[208] In contrast,

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205 [1974] 2 SCR 879 : (1974) 4 SCC 98

206 Shri Sitaram Sugar Co. Ltd. v. Union of India, (1990) 3 SCC 223

207 In Khoday Distilleries Ltd. V. State of Karnataka, (1996) 10 SCC 304, this Court reiterated Indian Express Newspapers (supra) by holding that a delegated legislation is manifestly arbitrary if it "could not be reasonably expected to emanate from an authority delegated with the law-making power." Similarly, in **State of Tamil Nadu** v. **P Krishnamurthy**, [2006] 3 SCR 396 : (2006) 4 SCC 517 this Court held that subordinate legislation can be challenged on the ground of manifest arbitrariness to an extent "where the court might well say that the legislature never intended to give authority to make such rules."

208 Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India, [1985] 2 SCR 287 : (1985) 1 SCC 641

application of manifest arbitrariness to a plenary legislation passed by a competent legislation requires the Court to adopt a different standard because it carries greater immunity than a subordinate legislation. We concur with Shayara Bano (supra) that a legislative action can also be tested for being manifestly arbitrary. However, we wish to clarify that there is, and ought to be, a distinction between plenary legislation and subordinate legislation when they are challenged for being manifestly arbitrary.

ii. Validity of Section 154 of the Finance Act 2017 omitting the first proviso to Section 182 of the Companies Act

199. We now turn to examine the vires of Section 154 of the Finance Act 2017. The result of the amendment is that: (a) a company, other than a government company and a company which has been in existence for less than three financial years, can contribute unlimited amounts to any political party; and (b) companies, regardless of the fact whether they are profit making or otherwise, can contribute funds to political parties. The issue that arises for consideration is whether the removal of contribution restrictions is manifestly arbitrary and violates Article 14 of the Constitution.

200. As discussed in the earlier section, this Court has consistently pointed out the pernicious effect of money on the integrity of the electoral process in India. The Law Commission of India in its 170th Report also observed that "most business houses already know where their interest lies and they make their contributions accordingly to that political party which is likely to advance their interest more."[209] This issue becomes particularly problematic when we look at the avenues through which political parties accumulate their capital. Section 182 of the 2013 Act is one such legal provision allowing companies to contribute to political parties. The question before us is not how political parties expend their financial resources, but how they acquire their financial resources in the first instance.

201. The Preamble to the Constitution describes India as a "democratic republic": a democracy in which citizens are guaranteed political equality irrespective of caste and class and where the value of

209 Law Commission of India, 170th Report on the Reform of the Electoral Laws (1999)

every vote is equal. Democracy does not begin and end with elections. Democracy sustains because the elected are responsive to the electors who hold them accountable for their actions and inactions. Would we remain a democracy if the elected do not heed to the hue and cry of the needy? We have established the close relationship between money and politics above where we explained the importance of money for entry to politics, for winning elections, and for remaining in power. That being the case, the question that we ask ourselves is whether the elected would truly be responsive to the electorate if companies which bring with them huge finances and engage in *quid pro quo* arrangements with parties are permitted to contribute **unlimited** amounts. The reason for political contributions by companies is as open as day light. Even the learned Solicitor General did not deny during the course of the hearings that corporate donations are made to receive favors through *quid pro quo* arrangements.

202. In Kesavananda Bharati v. State of Kerala,[210] the majority of this Court held that "republican and democratic form of government" form the basic elements of the constitutional structure. Subsequently, in Indira Nehru Gandhi v. Raj Narain,[211] Justice H R Khanna reiterated that the democratic set up of government is a part of the basic features of the Constitution. Elections matter in democracy because they are the most profound expression of the will of the people. Our parliamentary democracy enables citizens to express their will through their elected representatives. The integrity of the electoral process is a necessary concomitant to the maintenance of the democratic form of government.[212]

203. This Court has also consistently held that free and fair elections form an important concomitant of democracy.[213] In Kuldip Nayar

210 [1973] Suppl. 1 SCR 1 : (1973) 4 SCC 225

211 [1978] 2 SCR 405 : (1975) Supp SCC 1

212 In **Indira Nehru Gandhi** v. **Raj Narain**, [1978] 2 SCR 405 : (1975) Supp SCC 1, Justice Khanna observed that periodical elections are a necessary postulate of a democratic setup as it allows citizens to elect their representatives. He further observed that democracy can function "only upon the faith that elections are free and fair and not rigged and manipulated, that they are effective instruments of ascertaining popular will both in reality and form and are not mere rituals calculated to generate illusion of defence to mass opinion."

213 Digvijay Mote v. Union of India, (1993) 4 SCC 175; Union of India v. Association for Democratic Reforms, (2002) 5 SCC 294.

v. Union of India,[214] a Constitution Bench of this Court held that a democratic form of government depends on a free and fair election system. In People's Union for Civil Liberties v. Union of India,[215] this Court held that free and fair elections denote equal opportunity to all people. It was further observed that a free and fair election is one which is not "rigged and manipulated and the candidates and their agents are not able to resort to unfair means and malpractices."

204. The integrity of the election process is pivotal for sustaining the democratic form of government. The Constitution also places the conduct of free and fair elections in India on a high pedestal. To this purpose, Article 324 puts the Election Commission in charge of the entire electoral process commencing with the issue of the notification by the President to the final declaration of the result.[216] However, it is not the sole duty of the Election Commission to secure the purity and integrity of the electoral process. There is also a positive constitutional duty on the other organs of the government, including the legislature, executive and the judiciary, to secure the integrity of the electoral process.

205. During the course of the arguments, the learned Solicitor General submitted that the limit of seven and a half percent of the **average net profits** in the preceding three financial years was perceived as a restriction on companies who would want to donate in excess of the statutory cap. The learned Solicitor General further submitted that companies who wanted to donate in excess of the statutory cap would create shell companies and route their contributions through them. Therefore, it was suggested that the statutory cap was removed to discourage the creation of shell companies.

206. The limit on restrictions to political parties was incorporated in Section 293A of the 1956 Act through the Companies (Amendment) Bill 1985. The original restriction on contribution was five per cent of a company's average net profits during the three immediately preceding financial years. The Lok Sabha debates pertaining to the Companies Bill furnish an insight into why contribution restrictions

214 [2006] Suppl. 5 SCR 1 : (2006) 7 SCC 1

215 [2013] 12 SCR 283 : (2013) 10 SCC 1

216 Mohinder Singh Gill v. Chief Election Commissioner, [1978] 2 SCR 272 : (1978) 1 SCC 405

were imposed in the first place. The then Minister of Chemicals and Fertilizers and Industry and Company Affairs justified the contribution restrictions, stating that:

> "Since companies not having profits should not be encouraged to make political contributions, monetary ceiling as an alternative to a certain percentage of profits for arriving at the permissible amount of political donation has been done away with."[217]

207. Thus, the object behind limiting contributions was to discourage loss-making companies from contributing to political parties. In 1985, Parliament prescribed the condition that only companies which have been in existence for more than three years can contribute. This condition was also included to prevent loss-making companies and shell companies from making financial contributions to political parties. If the ostensible object of the amendment, as contended by the learned Solicitor General, was to discourage the creation of shell companies, there is no justification for removing the cap on contributions which was included for the very same purpose: to deter shell companies from making political contributions. In fact, when the proposal to amend Section 182 of the 2013 Act was mooted by the Government in 2017, the Election Commission of India opposed the amendment and suggested that the Government reconsider its decision on the ground that it would open up the possibility of creating shell companies. The relevant portion of the opinion of the ECI is reproduced below:

> "Certain amendments have been proposed in Section 182 of the Companies Act, where the first proviso has been omitted and consequently the limit of seven and a half percent (7.5 %) of the average net profits in the preceding three financial years on contributions by companies has been removed from the statute. This opens up the possibility of shell companies being set up for the sole purpose of making donations to political parties with no other business of consequence having disbursable profits."[218]

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217 Lok Sabha Debates, Companies Bill (16 May 1985).

218 Election Commission of India, Letter dated 26 May 2017, No. 56/PPEMS/Transparency/2017

208. After the amendment, companies similar to individuals, can make unlimited contributions and contributions can be made by both profit-making and loss-making companies to political parties. Thus, in essence, it could be argued that the amendment is merely removing classification for the purpose of political contribution between companies and individuals on the one hand and loss-making and profit-making companies on the other.

209. The proposition on the principle of manifest arbitrariness culled out above needs to be recalled. The doctrine of manifest arbitrariness can be used to strike down a provision where: (a) the legislature fails to make a classification by recognizing the degrees of harm; and (b) the purpose is not in consonance with constitutional values.

210. One of the reasons for which companies may contribute to political parties could be to secure income tax benefit.[219] However, companies have been contributing to political parties much before the Indian legal regime in 2003 exempted contributions to political parties. Contributions are made for reasons other than saving on the Income Tax. The chief reason for corporate funding of political parties is to influence the political process which may in turn improve the company's business performance.[220] A company, whatever may be its form or character, is principally incorporated to carry out the objects contained in the memorandum. However, the amendment now allows a company, through its Board of Directors, to contribute unlimited amounts to political parties without any accountability and scrutiny. Unlimited contribution by companies to political parties is antithetical to free and fair elections because it allows certain persons/companies to wield their clout and resources to influence policy making. The purpose of Section 182 is to curb corruption in electoral financing. For instance, the purpose of banning a Government company from contributing is to prevent such companies from entering into the political fray by making contributions to political parties. The amendment to Section 182 by permitting unlimited corporate contributions (including by shell companies) authorizes unrestrained influence of companies on the electoral process. This is violative of the principle of free and

219 IT Act, Section 80 GGB

220 Jayantilal Ranchhoddas Koticha v. Tata Iron & Steel Co. Ltd (supra)

fair elections and political equality captured in the value of "one person one vote".

211. The amendment to Section 182 of the Companies Act must be read along with other provisions on financial contributions to political parties under the RPA and the IT Act. Neither the RPA nor the IT Act place a cap on the contributions which can be made by an individual. The amendment to the Companies Act when viewed along with other provisions on electoral funding, seek to equalize an individual and a company for the purposes of electoral funding.

212. The ability of a company to influence the electoral process through political contributions is much higher when compared to that of an individual. A company has a much graver influence on the political process, both in terms of the quantum of money contributed to political parties and the purpose of making such contributions. Contributions made by individuals have a degree of support or affiliation to a political association. However, contributions made by companies are purely business transactions, made with the intent of securing benefits in return. In **Citizens United v. Federal Election Commission**,[221] the issue before the Supreme Court of the United States was whether a corporation can use the general treasury funds to pay for electioneering communication. The majority held that limitations on corporate funding bans political speech (through contributions) based on the corporate identity of the contributor. Justice Steven writing for the minority on the issue of corporate funding observed that companies and natural persons cannot be treated alike for the purposes of political funding:

> "In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. Because they may be managed and controlled by non-residents, their interests may conflict in fundamental respects with the interests of eligible voters. The financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process."

221 558 U.S 310

213. In view of the above discussion, we are of the opinion that companies and individuals cannot be equated for the purpose of political contributions.

214. Further, Companies before the amendment to Section 182 could only contribute a certain percentage of the net aggregate **profits**. The provision classified between loss-making companies and profit-making companies for the purpose of political contributions and for good reason. The underlying principle of this distinction was that it is more plausible that loss-making companies will contribute to political parties with a *quid pro quo* and not for the purpose of income tax benefits. The provision (as amended by the Finance Act 2017) does not recognize that the harm of contributions by loss-making companies in the form of *quid pro quo* is much higher. Thus, the amendment to Section 182 is also manifestly arbitrary for not making a distinction between profit-making and loss-making companies for the purposes of political contributions.

215. Thus, the amendment to Section 182 is manifestly arbitrary for (a) treating political contributions by companies and individuals alike; (b) permitting the unregulated influence of companies in the governance and political process violating the principle of free and fair elections; and (c) treating contributions made by profit-making and loss-making companies to political parties alike. The observations made above must not be construed to mean that the Legislature cannot place a cap on the contributions made by individuals. The exposition is that the law must not treat companies and individual contributors alike because of the variance in the degree of harm on free and fair elections.

H. Conclusion and Directions

216. In view of the discussion above, the following are our conclusions:

a. The Electoral Bond Scheme, the proviso to Section 29C(1) of the Representation of the People Act 1951 (as amended by Section 137 of Finance Act 2017), Section 182(3) of the Companies Act (as amended by Section 154 of the Finance Act 2017), and Section 13A(b) (as amended by Section 11 of Finance Act 2017) are violative of Article 19(1)(a) and unconstitutional; and

b. The deletion of the proviso to Section 182(1) of the Companies Act permitting unlimited corporate contributions to political parties is arbitrary and violative of Article 14.

217. We direct the disclosure of information on contributions received by political parties under the Electoral Bond Scheme to give logical and complete effect to our ruling. On 12 April 2019, this Court issued an interim order directing that the information of donations received and donations which will be received must be submitted by political parties to the ECI in a sealed cover. This Court directed that political parties submit detailed particulars of the donors as against each Bond, the amount of each bond and the full particulars of the credit received against each bond, namely, the particulars of the bank account to which the amount has been credited and the date on which each such credit was made. During the course of the hearing, Mr Amit Sharma, Counsel for the ECI, stated that the ECI had only collected information on contributions made in 2019 because a reading of Paragraph 14 of the interim order indicates that the direction was only limited to contributions made in that year. Paragraphs 13 and 14 of the interim order are extracted below:

> "13. In the above perspective, according to us, the just and proper interim direction would be to require all the political parties who have received donations through Electoral Bonds to submit to the Election Commission of India in sealed cover, detailed particulars of the donors as against each bond; the amount of each such bond and the full particulars of the credit received against each bond, namely, the particulars of the bank account to which the amount has been credited and the date of each such credit.
>
> 14. The above details will be furnished forthwith in respect of Electoral Bonds received by a political party till date. The details of such other bonds that may be received by such a political party upto the date fixed for issuing such bonds as per the Note of the Ministry of Finance dated 28.2.2019, i.e 15.5.2019 will be submitted on or before 30th May, 2019. The sealed covers will remain in the custody of the Election Commission of India and will abide by such orders as may be passed by the Court."

218. Paragraph 14 of the interim order does not limit the operation of Paragraph 13. Paragraph 13 contains a direction in unequivocal

terms to political parties to submit particulars of contributions received through Electoral Bonds to the ECI. Paragraph 14 only prescribes a timeline for the submission of particulars on contributions when the window for Electoral Bond contributions was open in 2019. In view of the interim direction of this Court, the ECI must have collected particulars of contributions made to political parties through Electoral Bonds.

219. In view of our discussion above, the following directions are issued:

a. The issuing bank shall herewith stop the issuance of Electoral Bonds;

b. SBI shall submit details of the Electoral Bonds purchased since the interim order of this Court dated 12 April 2019 till date to the ECI. The details shall include the date of purchase of each Electoral Bond, the name of the purchaser of the bond and the denomination of the Electoral Bond purchased;

c. SBI shall submit the details of political parties which have received contributions through Electoral Bonds since the interim order of this Court dated 12 April 2019 till date to the ECI. SBI must disclose details of **each** Electoral Bond encashed by political parties which shall include the date of encashment and the denomination of the Electoral Bond;

d. SBI shall submit the above information to the ECI within three weeks from the date of this judgment, that is, by 6 March 2024;

e. The ECI shall publish the information shared by the SBI on its official website within one week of the receipt of the information, that is, by 13 March 2024; and

f. Electoral Bonds which are within the validity period of fifteen days but that which have not been encashed by the political party yet shall be returned by the political party or the purchaser depending on who is in possession of the bond to the issuing bank. The issuing bank, upon the return of the valid bond, shall refund the amount to the purchaser's account.

220. Writ petitions are disposed of in terms of the above judgment.

221. Pending applications(s), if any, stand disposed of.

ANNEXURE I

Section 29C, Representation of the People Act 1951	
Prior to Amendment by the Finance Act 2017	Upon Amendment by Section 137 of the Finance Act, 2017
29C. Declaration of donation received by the political parties. -	Section 29C. Declaration of donation received by the political parties. –
(1) The treasurer of a political party or any other person authorized by the political party in this behalf shall, in each financial year, prepare a report in respect of the following, namely; (a) the contribution in excess of twenty thousand rupees received by such political party from any person in that financial year; (b) the contribution in excess of twenty thousand rupees received by such political party from companies other than Government companies in that financial year.	(1) The treasurer of a political party or any other person authorized by the political party in this behalf shall, in each financial year, prepare a report in respect of the following, namely: (a) the contribution in excess of twenty thousand rupees received by such political party from any person in that financial year; (b) the contribution in excess of twenty thousand rupees received by such political party from companies other than Government companies in that financial year.
(2) The report under sub-section (1) shall be in such form as may be prescribed.	**Provided that nothing contained in this subsection shall apply to the contributions received by way of an electoral bond. Explanation – For the purposes of this subsection, "electoral bond" means a bond referred to in the Explanation to sub-section (3) of section 31 of the Reserve Bank of India Act, 1934.**
(3) The report for a financial year under subsection (1) shall be submitted by the treasurer of a political party or any other person authorized by the political party in this behalf before the due date for furnishing a return of income of that financial year under section 139 of the Income-tax Act, 1961 (43 of 1961), to the Election Commission.	(2) The report under sub-section (1) shall be in such form as may be prescribed.

(4) Where the treasurer of any political party or any other person authorized by the political party in this behalf fails to submit a report under sub-section (3) then, notwithstanding anything contained in the Income-tax Act, 1961 (43 of 1961), such political party shall not be entitled to any tax relief under that Act.	(3) The report for a financial year under subsection (1) shall be submitted by the treasurer of a political party or any other person authorized by the political party in this behalf before the due date for furnishing a return of income of that financial year under section 139 of the Income-tax Act, 1961 (43 of 1961), to the Election Commission. (4) Where the treasurer of any political party or any other person authorized by the political party in this behalf fails to submit a report under sub-section (3) then, notwithstanding anything contained in the Income-tax Act, 1961 (43 of 1961), such political party shall not be entitled to any tax relief under that Act.
Section 182, Companies Act 2013	
Prior to Amendment by the Finance Act, 2017	Upon Amendment by Section 154 of the Finance Act, 2017
182.Prohibitions and restrictions regarding political contributions.	**182.Prohibitions and restrictions regarding political contributions.**
1) Notwithstanding anything contained in any other provision of this Act, a company, other than a Government company and a company which has been in existence for less than three financial years, may contribute any amount directly or indirectly to any political party:	1) Notwithstanding anything contained in any other provision of this Act, a company, other than a Government company and a company which has been in existence for less than three financial years, may contribute any amount directly or indirectly to any political party:

Provided that the amount referred to in subsection (1) or, as the case may be, the aggregate of the amount which may be so contributed by the company in any financial year shall not exceed seven and a half per cent of its average net profits during the three immediately preceding financial years: Provided further that no such contribution shall be made by a company unless a resolution authorising the making of such contribution is passed at a meeting of the Board of Directors and such resolution shall, subject to the other provisions of this section, be deemed to be justification in law for the making and the acceptance of the contribution authorised by it.	**(First proviso omitted)** Provided that no such contribution shall be made by a company unless a resolution authorising the making of such contribution is passed at a meeting of the Board of Directors and such resolution shall, subject to the other provisions of this section, be deemed to be justification in law for the making of the contribution authorised by it.
Section 182 (3) Every company shall disclose in its profit and loss account **any amount** or amounts contributed by it to any political party during the financial year to which that account relates, **giving particulars of the total amount contributed and the name of the party to which such amount has been contributed.**	**Section 182 (3)** Every company shall disclose in its profit and loss account the total amount contributed by it under this section during the financial year to which the account relates. (3A) Notwithstanding anything contained in subsection (1), the contribution under this section shall not be made except by an account payee cheque drawn on a bank or an account payee bank draft or use of electronic clearing system through a bank account: ***Provided that a company may make contribution through any instruments, issued pursuant to any scheme notified under any law for the time being in force, for contribution to the political parties.***

Section 13A, Income Tax Act 1995	
Prior to Amendment by the Finance Act, 2017	Upon Amendment by Section 11 of the Finance Act, 2017
13A. Special provision relating to incomes of political parties Any income of a political party which is chargeable under the head "Income from house property" or "Income from other sources" or any income by way of voluntary contributions received by a political party from any person shall not be included in the total income of the previous year of such political party: Provided that- (a) such political party keeps and maintains such books of account and other documents as would enable the Assessing Officer to properly deduce its income therefrom; (b) in respect of each such voluntary contribution in excess of ten thousand rupees, such political party keeps and maintains a record of such contribution and the name and address of the person who has made such contribution; and (c) the accounts of such political party are audited by an accountant as defined in the Explanation below sub- section (2) of section 288.	**13A. Special provision relating to incomes of political parties** Any income of a political party which is chargeable under the head "Income from house property" or "Income from other sources" or any income by way of voluntary contributions received by a political party from any person shall not be included in the total income of the previous year of such political party: Provided that- (a) such political party keeps and maintains such books of account and other documents as would enable the Assessing Officer to properly deduce its income therefrom; (b) in respect of each such voluntary contribution **other than contribution by way of electoral bond** in excess of ten thousand rupees, such political party keeps and maintains a record of such contribution and the name and address of the person who has made such contribution; and (c) the accounts of such political party are audited by an accountant as defined in the Explanation below sub-section (2) of section 288; and

Explanation.- For the purposes of this section, "political party" means an association or body of individual citizens of India registered with the Election Commission of India as a political party under paragraph 3 of the Election Symbols (Reservation and Allotment) Order, 1968, and includes a political party deemed to be registered with that Commission under the proviso to subparagraph (2) of that paragraph.	**(d) no donation exceeding two thousand rupees is received by such political party otherwise than by an account payee cheque drawn on a bank or an account payee bank draft or use of electronic clearing system through a bank account or through electoral bond.** Explanation.- For the purposes of this proviso, **"electoral bond" means a bond referred to in the Explanation to sub- section (3) of section 31 of the Reserve Bank of India Act, 1934;** Provided also that such political party furnishes a return of income for the previous year in accordance with the provisions of sub-section (4B) of section 139 on or before the due date under that section.
Section 31, Reserve Bank of India Act 1931	
Prior to Amendment by the Finance Act, 2017	Upon Amendment by Section 11 of the Finance Act, 2017
31. Issue of demand bills and notes. 1) No person in India other than the Bank or, as expressly authorized by this Act, the Central Government shall draw, accept, make or issue any bill of exchange, hundi, promissory note or engagement for the payment of money payable to bearer on demand, or borrow, owe or take up any sum or sums of money on the bills, hundis or notes payable to bearer on demand of any such person:	**31. Issue of demand bills and notes.** 1) No person in India other than the Bank or, as expressly authorized by this Act, the Central Government shall draw, accept, make or issue any bill of exchange, hundi, promissory note or engagement for the payment of money payable to bearer on demand, or borrow, owe or take up any sum or sums of money on the bills, hundis or notes payable to bearer on demand of any such person:

Provided that cheques or drafts, including hundis, payable to bearer on demand or otherwise may be drawn on a person's account with a banker, shroff or agent.	Provided that cheques or drafts, including hundis, payable to bearer on demand or otherwise may be drawn on a person's account with a banker, shroff or agent.
2) Notwithstanding anything contained in the Negotiable Instruments Act, 1881, no person in India other than the Bank or, as expressly authorised by this Act, the Central Government shall make or issue any promissory note expressed to be payable to the bearer of the instrument.	2) Notwithstanding anything contained in the Negotiable Instruments Act, 1881, no person in India other than the Bank or, as expressly authorised by this Act, the Central Government shall make or issue any promissory note expressed to be payable to the bearer of the instrument.
	3) Notwithstanding anything contained in this section, the Central Government may authorise any scheduled bank to issue electoral bond
	Explanation.-For the purposes of this subsection, 'electoral bond' means a bond issued by any scheduled bank under the scheme as may be notified by the Central Government.

ANNEXURE II

Conduct of Elections Rules, 1961
(Statutory Rules and Order)

[222][FORM 24A
(See rule 85B)

[This form should be filed with the Election Commission before the due date for furnishing a return of the Political Party's income of the concerned financial year under section 139 of the Income-tax Act, 1961 (43 of 1961) and a certificate to this effect should be attached with the Income-tax return to claim exemption under the Income-tax Act, 1961 (43 of 1961).]

1. Name of Political Party:
2. Status of the Political Party:
(recognised/unrecognised)
3. Address of the headquarters of the Political Party:
4. Date of registration of Political Party with Election Commission:
5. Permanent Account Number (PAN) and Income-tax Ward/ Circle where return of the political party is filed:_____
6. Details of the contributions received, in excess of rupees twenty thousand, during the Financial Year:20 – . –20 .

Serial number	Name and complete address of the contributing person/ company	PAN (if any_ and Income-Tax Ward/Circle	Amount of contribution (Rs.)	Mode of contribution *(cheque/ demand draft/cash)	Remarks

222 Ins. By Notifin. No. S.O. 1283(E), dated the 10th November, 2003.

*In case of payment by cheque/demand draft, indicate name of the bank and branch of the bank on which the cheque/demand draft has been drawn.

7. In case the contributor is a company, whether the conditions laid down under section 293A of the Companies Act, 1956 (1 of 1956) have been complied with (A copy of the certificate to this obtained from the company should be attached).

Verification

I,_____(full name in Block letters), son/daughter of _____solemnly declare that to the best of my knowledge and belief, the information given in this Form is correct, complete and truly stated.

I further declare that I am verifying this form in my capacity as _____on behalf of the Political Party above named and I am also competent to do so.

(Signature and name of the Treasurer/Authorised person)]

Date:_____

Place:_____

Sanjiv Khanna, J.

I have had the benefit of perusing the judgment authored by Dr. D.Y. Chandrachud, the Hon'ble Chief Justice. I respectfully agree with the findings and conclusions recorded therein. However, since my reasoning is different to arrive at the same conclusion, including application of the doctrine of proportionality, I am penning down my separate opinion.

2. To avoid prolixity, the contentions of the parties are not referred to separately and the facts are narrated in brief.

3. Corporate funding of political parties has been a contentious issue with the legislature's approach varying from time to time. The amendments to the Companies Act, 1956 reveal the spectrum of views of the legislature. It began with regulations and restrictions in 1960[1] to a complete ban on contributions to political parties in 1969[2]. The ban was partially lifted in 1985 with restrictions and stipulations.[3] The aggregate amount contributed to a political party in a financial year could not exceed 5% of the average net profit during the three immediately preceding financial years.[4] A new condition stipulated that the board of directors[5] in their meeting would pass a resolution giving legitimacy and authorisation to contributions to a political party.[6]

4. The Companies Act of 2013 replaced the Companies Act of 1956. Section 182(1) of the Companies Act, 2013[7] permitted contributions by companies of any amount to any political party, if the said company had been in existence for more than three immediately preceding financial years and is not a government company. The requirement of authorisation *vide* Board resolution is retained.[8] The cap of 5% is enhanced to 7.5% of the average net profits during the three

1 The Companies (Amendment) Act 1960, s 100 inserted into the Companies Act 1956, s 293A which stipulates that contributions to political parties cannot exceed 5% of the average net profit of the company during the three immediately preceding financial years.

2 The Companies (Amendment) Act 1969, s 3 substituted of the Companies Act 1956, s 293A introducing a ban on contributions to political parties.

3 The Companies (Amendment) Act 1985, s 2 replaced of the Companies Act 1956, s 293A bringing back the 5% cap on contributions to political parties.

4 The Companies Act 1956, s 293A.

5 For short, the "Board".

6 Second *proviso* to Section 293A(2), Companies Act, 1956.

7 As originally enacted.

8 Unamended second *proviso* to Section 182(1) of the Companies Act, 2013. This condition continues to remain.

immediately preceding financial years.[9] It is also mandated that the company must disclose the amount contributed by it to political parties in the profit and loss account, including particulars of name of political party and the amount contributed.[10] In case of violation of the terms, penalties stand prescribed.

5. The Finance Act, 2017 made several amendments to the Companies Act, 2013, Income Tax Act, 1961, Reserve Bank of India[11] Act, 1934, the Representation of the People Act, 1951, and the Foreign Contribution Regulation Act, 2010. These changes were brought in to allow contributions/donations through Electoral Bonds[12]. The changes made by the Finance Act, 2017 to these legislations were provided in a tabular format by the petitioners. For clarity, I have reproduced the table below. The specific changes are highlighted in bold and italics for ease of reference:

Section 182 of the Companies Act, 2013	
Prior to Amendment by the Finance Act, 2017	*Post Amendment by Section 154 of the Finance Act, 2017*
182. Prohibitions and restrictions regarding political contributions-	182. Prohibitions and restrictions regarding political contributions-
(1) Notwithstanding anything contained in any other provision of this Act, a company, other than a Government company and a company which has been in existence for less than three financial years, may contribute any amount directly or indirectly to any political party:	(1) Notwithstanding anything contained in any other provision of this Act, a company, other than a Government company and a company which has been in existence for less than three financial years, may contribute any amount directly or indirectly to any political party:
Provided that the amount referred to in sub-section (1) or, as the case may be, the aggregate of the amount which may be so contributed by the company in any financial year shall not exceed seven and a half per cent of its average net profits during the three immediately preceding financial years:	***[First proviso omitted]***

9 Unamended first *proviso* to Section 182(1) of the Companies Act, 2013.

10 Unamended Section 182(3) of the Companies Act, 2013.

11 For short, "RBI".

12 For short, "Bonds".

Provided further that no such contribution shall be made by a company unless a resolution authorising the making of such contribution is passed at a meeting of the Board of Directors and such resolution shall, subject to the other provisions of this section, be deemed to be justification in law for the making and the acceptance of the contribution authorised by it.	Provided that no such contribution shall be made by a company unless a resolution authorising the making of such contribution is passed at a meeting of the Board of Directors and such resolution shall, subject to the other provisions of this section, be deemed to be justification in law for the making of the contribution authorised by it.
182 (3) Every company shall disclose in its profit and loss account ***any amount or amounts*** contributed by it to any political party during the financial year to which that account relates, ***giving particulars of the total amount contributed and the name of the party to which such amount has been*** contributed.	182 (3) Every company shall disclose in its profit and loss account ***the total amount*** contributed by it under this section during the financial year to which the account relates. ***(3A) Notwithstanding anything contained in sub-section (1), the contribution under this section shall not be made except by an account payee cheque drawn on a bank or an account payee bank draft or use of electronic clearing system through a bank account:*** ***Provided that a company may make contribution through any instrument, issued pursuant to any scheme notified under any law for the time being in force, for contribution to the political parties.***

Section 13-A of the Income Tax Act, 1961	
Prior to Amendment by the Finance Act, 2017	*Post Amendment by Section 11 of the Finance Act, 2017*
13-A. Special provision relating to incomes of political parties.— Any income of a political party which is chargeable under the head "Income from house property" or "Income from other sources" or "*capital gains or*" any income by way of voluntary contributions received by a political party from any person shall not be included in the total income of the previous year of such political party:	13-A. Special provision relating to incomes of political parties.— Any income of a political party which is chargeable under the head "Income from house property" or "Income from other sources" or "*capital gains or*" any income by way of voluntary contributions received by a political party from any person shall not be included in the total income of the previous year of such political party:

Provided that—	Provided that—
(*a*) such political party keeps and maintains such books of account and other documents as would enable the Assessing Officer to properly deduce its income therefrom;	(*a*) such political party keeps and maintains such books of account and other documents as would enable the Assessing Officer to properly deduce its income therefrom;
(*b*) in respect of each such voluntary contribution in excess of twenty thousand rupees, such political party keeps and maintains a record of such contribution and the name and address of the person who has made such contribution; and	(*b*) in respect of each such voluntary contribution ***other than contribution by way of electoral bond*** in excess of twenty thousand rupees, such political party keeps and maintains a record of such contribution and the name and address of the person who has made such contribution;
(*c*) the accounts of such political party are audited by an accountant as defined in the Explanation below sub-section (2) of Section 288:	(*c*) the accounts of such political party are audited by an accountant as defined in the Explanation below sub-section (2) of Section 288 and:
Provided further that if the Treasurer of such political party or any other person authorised by that political party in this behalf fails to submit a report under sub-section (3) of Section 29-C of the Representation of the People Act, 1951 (43 of 1951) for a financial year, no exemption under this section shall be available for that political party for such financial year.	***(d)* no donation exceeding two *thousand* rupees is received by such political party otherwise than by an account payee cheque drawn on a bank or an account payee bank draft or use of electronic clearing system through a bank account or through electoral bond.**
Explanation.—For the purposes of this section, "political party" means a political party registered under Section 29-A of the Representation of the People Act, 1951 (43 of 1951).	*Explanation.*— For the purposes of this proviso, **"electoral bond" means a bond referred to in the *Explanation* to sub-section (3) of Section 31 of the Reserve Bank of India Act, 1934 (2 of 1934).**
	Provided further that if the Treasurer of such political party or any other person authorised by that political party in this behalf fails to submit a report under sub-section (3) of Section 29-C of the Representation of the People Act, 1951 (43 of 1951) for a financial year, no exemption under this section shall be available for that political party for such financial year.

	Provided also that such political party furnishes a return of income for the previous year in accordance with the provisions of sub-section (*4B*) of Section 139 on or before the due date under that section. *Explanation.*—For the purposes of this section, "political party" means a political party registered under Section 29-A of the Representation of the People Act, 1951 (43 of 1951).

Section 31 of the Reserve Bank of India Act, 1934	
Prior to Amendment by the Finance Act 2017	*Post Amendment by Section 135 of the Finance Act 2017*
Section 31. Issue of demand bills and notes.—	Section 31. Issue of demand bills and notes.—
(1) No person in India other than the Bank, or, as expressly authorized by this Act the Central Government shall draw, accept, make or issue any bill of exchange, hundi, promissory note or engagement for the payment of money payable to bearer on demand, or borrow, owe or take up any sum or sums of money on the bills, hundis or notes payable to bearer on demand of any such person:	(1) No person in India other than the Bank, or, as expressly authorized by this Act the Central Government shall draw, accept, make or issue any bill of exchange, hundi, promissory note or engagement for the payment of money payable to bearer on demand, or borrow, owe or take up any sum or sums of money on the bills, hundis or notes payable to bearer on demand of any such person:
Provided that cheques or drafts, including hundis, payable to bearer on demand or otherwise may be drawn on a person's account with a banker, shroff or agent.	Provided that cheques or drafts, including hundis, payable to bearer on demand or otherwise may be drawn on a person's account with a banker, shroff or agent.
(2) Notwithstanding anything contained in the Negotiable Instruments Act, 1881 (26 of 1881), no person in India other than the Bank or, as expressly authorised by this Act, the Central Government shall make or issue any promissory note expressed to be payable to the bearer of the instrument.	2) Notwithstanding anything contained in the Negotiable Instruments Act, 1881 (26 of 1881), no person in India other than the Bank or, as expressly authorised by this Act, the Central Government shall make or issue any promissory note expressed to be payable to the bearer of the instrument.

	(3) Notwithstanding anything contained in this section, the Central Government may authorise any scheduled bank to issue electoral bond. ***Explanation.— For the purposes of this sub-section, "electroal bond" means a bond issued by any scheduled bank under the scheme as may be notified by the Central Government.***

Section 29-C of the Representation of the People Act 1951	
Prior to Amendment by the Finance Act 2017	*Post Amendment by Section 137 of the Finance Act 2017*
29-C. Declaration of donation received by the political parties.—	29-C. Declaration of donation received by the political parties.—
(1) The treasurer of the political party or any other person authorised by the political party in this behalf shall, in each financial year, prepare a report in respect of the following, namely:—	(1) The treasurer of the political party or any other person authorised by the political party in this behalf shall, in each financial year, prepare a report in respect of the following, namely:—
(*a*) the contribution in excess of twenty thousand rupees received by such political party from any person in that financial year;	(*a*) the contribution in excess of twenty thousand rupees received by such political party from any person in that financial year;
(*b*) the contribution in excess of twenty thousand rupees received by such political party from companies other than Government companies in that financial year.	(*b*) the contribution in excess of twenty thousand rupees received by such political party from companies other than Government companies in that financial year.
(2) The report under sub-section (1) shall be in such form as may be prescribed.	***Provided that nothing contained in this sub-section shall apply to the contributions received by way of an electoral bond.***
(3) The report for a financial year under sub-section (1) shall be submitted by the treasurer of a political party or any other person authorised by the political party in this behalf before the due date for furnishing a return of its income of that financial year under Section 139 of the Income Tax, 1961 (43 of 1961) to the Election Commission.	***Explanation.— For the purposes of this sub-section, "electoral bond" means a bond referred to in the Explanation to sub-section (3) of Section 31 of the Reserve Bank of India Act, 1934 (2 of 1934).*** (2) The report under sub-section (1) shall be in such form as may be prescribed.

(4) Where the treasurer of any political party or any other person authorised by the political party in this behalf fails to submit a report under sub-section (3), then, notwithstanding anything contained in the Income Tax Act, 1961 (43 of 1961), such political party shall not be entitled to any tax relief under that Act.	(3) The report for a financial year under sub-section (1) shall be submitted by the treasurer of a political party or any other person authorised by the political party in this behalf before the due date for furnishing a return of its income of that financial year under Section 139 of the Income Tax, 1961 (43 of 1961) to the Election Commission. (4) Where the treasurer of any political party or any other person authorised by the political party in this behalf fails to submit a report under sub-section (3), then, notwithstanding anything contained in the Income Tax Act, 1961 (43 of 1961), such political party shall not be entitled to any tax relief under that Act.

Section 2 of the Foreign Contribution Regulation Act, 2010	
Prior to Amendment by the Finance Act 2017	*Post Amendment by Section 236 the Finance Act 2017*
Section 2 (1) (j)	Section 2 (1) (j)
(*j*) "foreign source" includes,—	(*j*) "foreign source" includes,—
(*i*) the Government of any foreign country or territory and any agency of such Government;	(*i*) the Government of any foreign country or territory and any agency of such Government;
(*ii*) any international agency, not being the United Nations or any of its specialised agencies, the World Bank, International Monetary Fund or such other agency as the Central Government may, by notification, specify in this behalf;	(*ii*) any international agency, not being the United Nations or any of its specialised agencies, the World Bank, International Monetary Fund or such other agency as the Central Government may, by notification, specify in this behalf;
(*iii*) a foreign company;	(*iii*) a foreign company;
(*iv*) a corporation, not being a foreign company, incorporated in a foreign country or territory;	(*iv*) a corporation, not being a foreign company, incorporated in a foreign country or territory;
(*v*) a multi-national corporation referred to in sub-clause (*iv*) of clause (*g*);	(*v*) a multi-national corporation referred to in sub-clause (*iv*) of clause (*g*);

(*vi*) a company within the meaning of the Companies Act, 1956 (1 of 1956), and more than one-half of the nominal value of its share capital is held, either singly or in the aggregate, by one or more of the following, namely—	(*vi*) a company within the meaning of the Companies Act, 1956 (1 of 1956), and more than one-half of the nominal value of its share capital is held, either singly or in the aggregate, by one or more of the following, namely—
(A) the Government of a foreign country or territory;	(A) the Government of a foreign country or territory;
(B) the citizens of a foreign country or territory;	(B) the citizens of a foreign country or territory;
(C) corporations incorporated in a foreign country or territory;	(C) corporations incorporated in a foreign country or territory;
(D) trusts, societies or other associations of individuals (whether incorporated or not), formed or registered in a foreign country or territory;	(D) trusts, societies or other associations of individuals (whether incorporated or not), formed or registered in a foreign country or territory;
(E) foreign company;	(E) foreign company;
	Provided that where the nominal value of share capital is within the limits specified for foreign investment under the Foreign Exchange Management Act, 1999 (42 of 1999), or the rules or regulations made thereunder, then, notwithstanding the nominal value of share capital of a company being more than one-half of such value at the time of making the contribution, such company shall not be a foreign source.

6. The amended Companies Act, 2013 removes the cap on corporate funding.[13] The requirement that the contribution will require a resolution passed at the meeting of the Board is retained. In the profit and loss account, a company is now only required to disclose the total amount contributed to political parties in a financial year.[14] The requirement to disclose the specific amounts contributed and the names of the political parties is omitted. Section 182(3A), as introduced, stipulates that the company could contribute to a political party only by way

13 First *proviso* to Section 182(1), Companies Act, 2013 has been omitted *vide* the Finance Act, 2017.

14 Section 182(3) of the Companies Act, 2013.

of a cheque, Electronic Clearing System[15], or demand draft.[16] The *proviso* to Section 182(3A) permits a company to contribute through any instrument issued pursuant to any scheme notified under the law, for the time being in force, for contribution to political parties.

7. Section 13A of the Income Tax Act, 1961,[17] exempts income of political parties, including financial contributions and investments, from income tax. The object of providing a tax exemption is to increase the funds of political parties from legitimate sources. However, conditions imposed require political parties to maintain books of accounts and other documents to enable the assessing officer to properly deduce their income.[18] Political parties are required to maintain records of the name and addresses of persons who make voluntary contributions in excess of Rs.20,000/-.[19] Accounts of the political parties are required to be audited.[20]

8. In 2003, Section 80GGB and 80GGC were inserted in the Income Tax Act, 1961, permitting contributions to political parties. These contributions are tax deductible, though they are not expenditure for purposes of business, to incentivise contributions through banking channels.[21]

9. By the Finance Act, 2017, Section 13A of the Income Tax Act, 1961, was amended. Section 13A now stipulates that a political party is not required to maintain a record of the contributions received by Bonds.[22] Further, donations over Rs.2,000/- are only permitted through cheques, bank drafts, ECS or Bonds.[23]

10. Section 29C of the Representation of the People Act, 1951 was introduced in 2003.[24] The section requires each political party to file a report for all contributions over Rs.20,000/- to the Election

15 For short, "ECS".

16 Section 182(3A) of the Companies Act, 2013 was introduced *vide* Section 154 of the Finance Act, 2017.

17 As amended in 1978.

18 First *proviso* 1(a) to the unamended Section 13A of the Income Tax Act, 1961.

19 Second *proviso* to the unamended Section 13A of the Income Tax Act, 1961.

20 Third *proviso* to Section 13A Income Tax Act, 1961.

21 See Section 37 of the Income Tax Act, 1961.

22 Second *proviso* to Section 13A of the Income Tax Act, 1961.

23 Fourth *proviso* to Section 13A of the Income Tax Act, 1961.

24 Introduced *vide* Section 2, Election and Other Related Laws (Amendment) Act, 2003.

Commission of India.[25] The report is required to be filed before the due date of filing income tax returns of the financial year under the Income Tax Act, 1961. Failure to submit a report disentitles a political party from any tax relief, as provided under the Income Tax Act, 1961. Section 29C of the Finance Act, 2017, as amended, stipulates that political parties are not required to disclose the details of contributions received by Bonds.[26]

11. Section 31(3) of the RBI Act, 1934 was added by the Finance Act, 2017 to effectuate the issuance of the Bonds which, as envisaged, are not to mention the name of the political party to whom they are payable, and hence are in the nature of bearer demand bill or note.

12. On 02.01.2018, the Department of Economic Affairs, Ministry of Finance, notified the Electoral Bonds Scheme, 2018[27] in terms of Section 31(3) of the RBI Act, 1934.[28] The salient features of this Scheme are:

⇒ Bonds are in the nature of a promissory note and bearer instrument.[29] They do not carry the name of the buyer or payee.[30]

⇒ Bonds can be purchased by any 'person'[31] who is a citizen of India or who is a body corporate incorporated or established in India.[32] Any 'person' who is an individual can purchase Bonds either singly or jointly with other individuals.[33]

⇒ Bonds are to be issued in denominations of Rs.1,000/-, Rs.10,000/-, Rs.1,00,000/-, Rs.10,00,000/- and Rs.1,00,00,000/-.[34] They are valid for a period of 15 days from the date of issue.[35] The amount of Bonds not encashed within the validity period

25 For short, "ECI".

26 *Proviso* to Section 29C(1) of the Representation of the People Act, 1951.

27 For short, "the Scheme".

28 Finance Act, 2017 has also amended and added Section 31(3) to the RBI Act, 1934 as the Bonds in question are bearer bonds like Indian currency. However, we do not think this amendment is required to be separately adjudicated as it merely effectuates the Bonds scheme.

29 Paragraph 2(a) of the Scheme.

30 *Ibid.*

31 Paragraph 2(d) of the Scheme defines a 'person' to include an individual, Hindu undivided family, company, firm, an association of persons or body of individuals, whether incorporated or not. It also includes every artificial judicial person and any agency, office or branch owned by such 'person'.

32 Paragraph 3(1) of the Scheme.

33 Paragraph 3(2) of the Scheme.

34 Paragraph 5 of the Scheme.

35 Paragraph 6 of the Scheme.

of 15 days, would be deposited by the authorised bank to the Prime Minister Relief Fund.[36]

⇒ The Bond is non-refundable.[37]

⇒ A 'person' who wishes to purchase a Bond is required to apply in the specified format.[38] Non-compliant applications are to be rejected.

⇒ To purchase Bonds, a buyer is required to apply to the authorised bank.[39] RBI's Know Your Customer[40] requirements apply and the authorised bank could ask for additional KYC documents, if necessary.[41]

⇒ The payments for the issuance of Bonds are required to be made in Indian rupees through demand draft, cheque, ECS or direct debit to the buyer's account.[42]

⇒ The identity and information furnished by the buyer for the issuance of Bonds is to be treated as confidential by the authorised issuing bank.[43] The details, including identity, can be disclosed only when demanded by a competent court or on registration of any criminal case by any law enforcement agency.[44]

⇒ Only eligible political parties, meaning a party that is registered under Section 29A of the Representation of the People Act, 1951, and has secured not less than 1% of the votes polled in the last general election to the House of People or the Legislative Assembly, can receive a Bond.[45]

⇒ The eligible political party can encash the Bond through their bank account in the authorised bank.[46]

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36 Paragraph 12(2) of the Scheme.

37 Paragraph 7(6) of the Scheme.

38 Paragraph 7 of the Scheme.

39 Paragraph 2(b) of the Scheme defines an authorized bank as the State Bank of India and its specified branches.

40 For short, "KYC".

41 Paragraph 4 of the Scheme.

42 Paragraph 11 of the Scheme.

43 Paragraph 7(4) of the Scheme.

44 *Ibid.*

45 Paragraph 3(3) of the Scheme.

46 Paragraph 3(4) of the Scheme.

⇒ The Bonds are made available for purchase for a period of 10 days every quarter, in the months of January, April, July and October, as may be specified by the Central Government.[47] They are also made available for an additional period of 30 days, as specified by the central government in a year where general elections to the House of People are held.[48]

⇒ The Bonds are not eligible for trading,[49] and commission, brokerage or other charges are not chargeable/payable for issuance of a Bond.[50]

⇒ The value of the Bond is considered as income by way of voluntary contributions to eligible political parties for the purposes of tax exemption under Section 13A of the Income Tax Act, 1961.[51]

13. In the afore-mentioned writ petitions filed under Article 32 of the Constitution of India,[52] the petitioners are seeking a declaration that the Scheme and the relevant amendments made by the Finance Act, 2017, are unconstitutional.

14. The question of the constitutional validity of the Scheme and the amendments introduced by the Finance Act, 2017 are being examined by us. The question of introducing these amendments through a money bill under Article 110 of the Constitution is not being examined by us.[53] The scope of Article 110 of the Constitution has been referred to a seven-judge Bench and is *sub-judice*.[54] Further, a batch of petitions challenging the amendments to the Foreign Contribution Regulation Act, 2010 by the Finance Acts of 2016 and 2018 are pending. The challenge to the said amendments is not being decided by us.

15. I fully agree with the Hon'ble Chief Justice, that the Scheme cannot be tested on the parameters applicable to economic policy. Matters of

47 Paragraph 8(1) of the Scheme.

48 Paragraph 8(2) of the Scheme.

49 Paragraph 14 of the Scheme.

50 Paragraph 12 of the Scheme.

51 Paragraph 13 of the Scheme.

52 For short, "the Constitution".

53 The Finance Act, 2017 was introduced and passed as a money bill by the Parliament under Article 110 of the Constitution.

54 *Rojer Matthew* v. *South Indian Bank Ltd. and Ors.*, [2019] 16 SCR 1 : Civil Appeal No. 8588 of 2019.

economic policy normally pertain to trade, business and commerce, whereas contributions to political parties relate to the democratic polity, citizens' right to know and accountability in our democracy. The primary objective of the Scheme, and relevant amendments introduced by the Finance Act, 2017, is electoral reform and not economic reform. Thus, the dictum and the principles enunciated by this Court in ***Swiss Ribbons (P.) Ltd. and Another v. Union of India and Others***,[55] and ***Pioneer Urban Land and Infrastructure and Another v. Union of India and Others***,[56] relating to judicial review on economic policy matters have no application to the present case. To give the legislation the latitude of economic policy, we will be diluting the principle of free and fair elections. Clearly, the importance of the issue and the nexus between money and electoral democracy requires us to undertake an in-depth review, albeit under the settled powers of judicial review.

16. Even otherwise, it is wrong to state as a principle that judicial review cannot be exercised over every matter pertaining to economic policy.[57] The law is that the legislature has to be given latitude in matters of economic policy as they involve complex financial issues.[58] The degree of deference to be shown by the court while exercising the power of judicial review cannot be put in a straitjacket.

17. On the question of burden of proof, I respectfully agree with the observations made by the Hon'ble Chief Justice, that once the petitioners are able to *prima facie* establish a breach of a fundamental right, then the onus is on the State to show that the right limiting measure pursues a proper purpose, has rational nexus with that purpose, the means adopted were necessary for achieving that purpose, and lastly proper balance has been incorporated.

18. The doctrine of presumption of constitutionality has its limitations when we apply the test of proportionality. In a way the structured proportionality places an obligation on the State at a higher level, as it is a polycentric examination, both empirical and normative. While

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55 [2019] 3 SCR 535 : (2019) 4 SCC 17.

56 [2019] 10 SCR 381 : (2019) 8 SCC 416.

57 *R.K. Garg* v. *Union of India and Others*, (1981) 4 SCC 675.

58 *Ibid.* See also *Bhavesh D. Parish and Others* v. *Union of India and Others*, (2000) 5 SCC 471, and *Directorate General of Foreign Trade and Others* v. *Kanak Exports and Another*, [2015] 15 SCR 287 : (2016) 2 SCC 226.

the courts do not pass a value judgment on contested questions of policy, and give weight and deference to the government decision by acknowledging the legislature's expertise to determine complex factual issues, the proportionality test is not based on preconceived notion or presumption. The standard of proof is a civil standard or a balance of probabilities;[59] where scientific or social science evidence is available, it is examined; and where such evidence is inconclusive or does not exist and cannot be developed, reason and logic may suffice.[60]

19. The right to vote is a constitutional and statutory right,[61] grounded in Article 19(1)(a) of the Constitution, as the casting of a vote amounts to expression of an opinion by the voter.[62] The citizens' right to know stems from this very right, as meaningfully exercising choice by voting requires information. Representatives elected as a result of the votes cast in their favour, enact new, and amend existing laws, and when in power, take policy decisions. Access to information which can materially shape the citizens' choice is necessary for them to have a say in how their lives are affected. Thus, the right to know is paramount for free and fair elections and democracy.

20. The decisions in ***Association for Democratic Reforms*** (supra) and ***People's Union of Civil Liberties (PUCL)*** (supra) should not be read as restricting the right to know the antecedents of a candidate contesting the elections.[63] The political parties select candidates who contest elections on the symbol allotted to the respective political parties[64]. Upon nomination, the candidates enjoy the patronage of the political parties, and are financed by them. The voters elect a candidate with the objective that the candidate's political party will come to power and fulfil the promises.

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59 *R.* v. *Oakes*, [1986] 1 SCR 103.

60 See *Libman* v. *Quebec (A.G.)*, [1997] 3 SCR 569; *RJR-MacDonald Inc.* v. *Canada (Attorney General)*, [1995] 3 SCR 199; *Thomson Newspapers Co.* v. *Canada (A.G.)*, [1998] 1 S.C.R. 877; *R.* v. *Sharpe*, [2001] 1 SCR 45; *Harper* v. *Canada (A.G.)*, [2004] 1 SCR 827, at paragraph 77; *R.* v. *Bryan*, [2007] 1 SCR 527, at paragraphs 16-19, 29; *Mounted Police Association of Ontario* v. *Canada (Attorney General)*, [2015] 1 SCR 3, at paragraphs 143-144.

61 Article 326, Constitution.

62 *Union of India v. Association for Democratic Reforms and Another*, [2002] 3 SCR 696 : (2002) 5 SCC 294, and *People's Union of Civil Liberties (PUCL) and Another v. Union of India and Another*, [2003] 2 SCR 1136 : (2003) 4 SCC 399.

63 *Ibid.*

64 The Representation of the People Act, 1951 permits candidates not set up by a recognized political party, that is independent candidates, to contest elections as well.

21. The Hon'ble Chief Justice has referred to the Tenth Schedule of the Constitution. The Schedule incorporates a provision for the disqualification of candidates on the ground of defection, which reflects the importance of political parties in our democracy. Section 77 of the Representation of the People Act, 1951, requires monetary limits to be prescribed for expenditures incurred by candidates.[65] As political parties are at the helm of the electoral process, including its finances, the argument that the right of the voter does not extend to knowing the funding of political parties and is restricted to antecedents of candidates, will lead to an incongruity. I, respectfully, agree with Hon'ble the Chief Justice, that denying voters the right to know the details of funding of political parties would lead to a dichotomous situation. The funding of political parties cannot be treated differently from that of the candidates who contest elections.[66]

22. Democratic legitimacy is drawn not only from representative democracy but also through the maintenance of an efficient participatory democracy. In the absence of fair and effective participation of all stakeholders, the notion of representation in a democracy would be rendered hollow. In a democratic set-up, public participation is meant to fulfil three functions; the epistemic function of ensuring reasonably sound decisions,[67] the ethical function of advancing mutual respect among citizens, and the democratic function of promoting "an inclusive process of collective choice".[68] James Fishkin lists five criteria which define the quality of a deliberative process.[69] These are:

    - Information (the extent to which participants are given access to accurate and reliable information);

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65 Under Explanation 1 to Section 77 of the Representation of the People Act, 1951, the expenditure incurred by 'leaders of political parties' on account of travel for propagating the programme of the political party, is not deemed to be election expenditure.

66 See observations of this court in *Kanwar Lal Gupta* v. *Amar Nath Chawla & Ors.*, [1975] 2 SCR 259 : (1975) 3 SCC 646.

67 This function is elaborated as to "produce preferences, opinions, and decisions that are appropriately informed by facts and logic and are the outcome of substantive and meaningful consideration of relevant reasons(...). Because the topics of these deliberations are issues of common concern, epistemically well-grounded preferences, opinions, and decisions must be informed by, and take into consideration, the preferences and opinions of fellow citizens", Jane Mansbridge and others, 'A Systemic Approach to Deliberative Democracy' in John Parkinson and Jane Mansbridge (eds), *Deliberative Systems* (1st edn, Cambridge University Press 2012) 11.

68 *Ibid* at 12.

69 James S Fishkin, *When the People Speak: Deliberative Democracy and Public Consultation* (Oxford University Press 2011) 33– 34.

- Substantive balance (the extent to which arguments offered by one side are answered by considerations offered by those who hold other perspectives);
- Diversity (the extent to which major positions in the public are represented by participants);
- Conscientiousness, (the degree to which participants sincerely weigh the merits of the arguments); and
- Equal consideration (the extent to which arguments offered by all participants are considered on its merits regardless of who offered them).[70]

23. The State has contested the writ petitions primarily on three grounds:

(i) Donors of a political party often apprehend retribution from other political parties or actors and thus their identities should remain anonymous. The Bonds uphold the right to privacy of donors by providing confidentiality. Further, donating money to one's preferred political party is a matter of self-expression by the donor. Therefore, revealing the identity invades the informational privacy of donors protected by the Constitution.[71] The identity of the donor can be revealed in exceptional cases, for instance on directions of a competent court, or registration of a criminal case by any law enforcement agency.[72]

(ii) The Scheme, by incentivising banking channels and providing confidentiality, checks the use of black or unaccounted money in political contributions.[73]

(iii) The Scheme is an improvement to the prior legal framework. It has inbuilt safeguards such as compliance of donors with KYC norms, bearer bonds having a limited validity of fifteen days and recipients belonging to a recognised political party that has secured more than 1% votes in the last general elections.

24. Hon'ble the Chief Justice has rejected the Union of India's submissions by applying the doctrine of proportionality. This is a principle applied

70 This is equally important from the perspective of the test of proportionality.

71 See *K.S. Puttaswamy and Anr.* v. *Union of India and Ors. (9J) (Privacy)*, (2017) 10 SCC 1.

72 Paragraph 7(4) of the Scheme.

73 See Arun Jaitley, 'Why Electoral Bonds Are Necessary', Press Information Bureau, 2018.

by courts when they exercise their power of judicial review in cases involving a restriction on fundamental rights. It is applied to strike an appropriate balance between the fundamental right and the pursued purpose and objective of the restriction.

25. The test of proportionality comprises four steps:[74]

(i) The first step is to examine whether the act/measure restricting the fundamental right has a legitimate aim (legitimate aim/ purpose).

(ii) The second step is to examine whether the restriction has rational connection with the aim (rational connection).

(iii) The third step is to examine whether there should have been a less restrictive alternate measure that is equally effective (minimal impairment/necessity test).

(iv) The last stage is to strike an appropriate balance between the fundamental right and the pursued public purpose (balancing act).

26. In ***Modern Dental College & Research Centre and Others v. State of Madhya Pradesh and Others***,[75] this Court had applied proportionality in its four-part doctrinal form[76] as a standard for reviewing right limitations in India. This test was modified in ***K.S. Puttaswamy (Retired) and Anr. (Aadhar) v. Union of India and Anr. (5J)***,[77] where this Court adopted a more tempered and nuanced approach.[78] The Court, *inter alia*, imposed a stricter test for the third and fourth prongs, namely necessity and balancing stages of the test of proportionality, as reproduced below.

> "155. ...In order to preserve a meaningful but not unduly strict role for the necessity stage, Bilchitz proposes the

74 See Aharon Barak, "Proportionality – Constitutional Rights and their Limitations", Cambridge University Press, 2012.

75 [2016] 3 SCR 579 : (2016) 7 SCC 353.

76 In *Gujarat Mazdoor Sabha and Another v. State of Gujarat*, (2020) 10 SCC 459, the Court added fifth prong to proportionality test. It stipulated that the state should provide sufficient safeguards against the abuse of such restriction. This was relied upon in *Ramesh Chandra Sharma and Others v. State of U.P. and Others*, 2023 SCC OnLine SC 162.

77 [2018] 8 SCR 1 : (2019) 1 SCC 1.

78 See David Bilchitz, "Necessity and Proportionality: Towards a Balance Approach?", (Hart Publishing, Oxford and Portland, Oregon 2016). Also see Aparna Chandra, "Proportionality: A Bridge to Nowhere?", (Oxford Human Rights Journal 2020).

following inquiry. First, a range of possible alternatives to the measure employed by the Government must be identified. Secondly, the effectiveness of these measures must be determined individually; the test here is not whether each respective measure realises the governmental objective to the same extent, but rather whether it realises it in a "real and substantial manner". Thirdly, the impact of the respective measures on the right at stake must be determined. Finally, an overall judgment must be made as to whether in light of the findings of the previous steps, there exists an alternative which is preferable; and this judgment will go beyond the strict means-ends assessment favoured by Grimm and the German version of the proportionality test; it will also require a form of balancing to be carried out at the necessity stage.

156. Insofar as second problem in German test is concerned, it can be taken care of by avoiding "ad hoc balancing" and instead proceeding on some "bright-line rules" i.e. by doing the act of balancing on the basis of some established rule or by creating a sound rule...

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158. ...This Court, in its earlier judgments, applied German approach while applying proportionality test to the case at hand. We would like to proceed on that very basis which, however, is tempered with more nuanced approach as suggested by Bilchitz. This, in fact, is the amalgam of German and Canadian approach. We feel that the stages, as mentioned in Modern Dental College & Research Centre and recapitulated above, would be the safe method in undertaking this exercise, with focus on the parameters as suggested by Bilchitz, as this projects an ideal approach that need to be adopted."

27. The said test was also referred to in ***Anuradha Bhasin v. Union of India and Others***,[79] with the observation that the principle of proportionality is inherently embedded in the Constitution under

79 [2020] 1 SCR 812 : (2020) 3 SCC 637.

the doctrine of reasonable restriction. This means that limitations imposed on a right should not be arbitrary or of excessive nature beyond what is required in the interest of public. This judgment thereupon references works of scholars/jurists who have argued that if the necessity prong of the proportionality test is applied strictly, legislations and policies, no matter how well intended, would fail the proportionality test even if any other slightly less drastic measure exists.[80] Thereupon, the Court accepted the suggestion in favour of a moderate interpretation of the necessity test. Necessity involves a process of reasoning designed to ensure that only measures with a strong relationship to the objective they seek to achieve can justify an invasion of fundamental rights. The process thus requires a court to reason through the various stages of moderate interpretation of necessity in the following manner:

> "(MN1) All feasible alternatives need to be identified, with courts being explicit as to criteria of feasibility;
>
> (MN2) The relationship between the government measure under consideration, the alternatives identified in MN1 and the objective sought to be achieved must be determined. An attempt must be made to retain only those alternatives to the measure that realise the objective in a real and substantial manner;
>
> (MN3) The differing impact of the measure and the alternatives (identified in MN2) upon fundamental rights must be determined, with it being recognised that this requires a recognition of approximate impact; and
>
> (MN4) Given the findings in MN2 and MN3, an overall comparison (and balancing exercise) must be undertaken between the measure and the alternatives. A judgment must be made whether the government measure is the best of all feasible alternatives, considering both the degree to which it realises the government objective and the degree of impact upon fundamental rights ("the comparative component").

28. Dr. Justice D.Y. Chandrachud, as his Lordship then was, in ***K.S.***

80 Anuradha Bhasin (supra) at paragraph 71.

Puttaswamy (5J)(Aadhar) (supra), had observed that the objective of the second prong of rational connection test is essential to the test of proportionality.[81] Sanjay Kishan Kaul, J. in his concurring opinion in ***K.S. Puttaswamy (9J) (Privacy)*** (supra) had held that actions not only should be sanctioned by law, but the proposed actions must be necessary in a democratic society for a legitimate aim. The extent of interference must be proportionate to the need for such interference and there must be procedural guarantees against abuse of such interference.

29. The test of proportionality is now widely recognised and employed by courts in various jurisdictions like Germany, Canada, South Africa, Australia and the United Kingdom.[82] However, there isn't uniformity in how the test is applied or the method of using the last two prongs in these jurisdictions.

30. The first two prongs of proportionality resemble a means-ends review of the traditional reasonableness analysis, and they are applied relatively consistently across jurisdictions. Courts first determine if the ends of the restriction serve a legitimate purpose, and then assess whether the proposed restriction is a suitable means for furthering the same ends, meaning it has a rational connection with the purpose.

31. In the third prong, courts examine whether the restriction is necessary to achieve the desired end. When assessing the necessity of the measure, the courts consider whether a less intrusive alternative is available to achieve the same ends, aiming for minimal impairment. As elaborated above, this Court ***Anuradha Bhasin*** (supra), relying on suggestions given by some jurists,[83] emphasised the need to employ a moderate interpretation of the necessity prong. To conclude its findings on the necessity prong, this Court is *inter alia* required to undertake an overall comparison between the measure and its feasible alternatives.[84]

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81 Dr. Justice D.Y. Chandrachud was in minority in *K.S. Puttaswamy (Aadhaar)* (supra), albeit his observations on the objective of the second prong of rational connection are good and in consonance with the law on the subject.

82 We will be referring to certain facets of the proportionality enquiry employed by these countries in our judgment. The test is also employed in various other jurisdictions like Israel, New Zealand, and the European Union.

83 See David Bilchitz at supra note 76.

84 In *Anuradha Bhasin* (supra), the Court stipulated the following requirement for a conclusion of findings on the necessity prong: "...A judgment must be made whether the government measure is the best of all feasible alternatives, considering both the degree to which it realises the government objective and the

32. We will now delve into the fourth prong, the balancing stage, in some detail. This stage has been a matter of debate amongst jurists and courts. Some jurists believe that balancing is ambiguous and value-based.[85] This stems from the premise of rule-based legal adjudication, where courts determine entitlements rather than balancing interests. However, proportionality is a standard-based review rather than a rule-based one. Given the diversity of factual scenarios, the balancing stage enables judges to consider various factors by analysing them against the standards proposed by the four prongs of proportionality. This ensures that all aspects of a case are carefully weighed in decision-making. This perspective finds support in the work of jurists who believe that constitutional rights and restrictions/measures are both principles, and thus they should be optimised/balanced to their fullest extent.[86]

33. While balancing is integral to the standard of proportionality, such an exercise should be rooted in empirical data and evidence. In most countries that adopt the proportionality test, the State places on record empirical data as evidence supporting the enactment and justification for the encroachment of rights.[87] This is essential because the proportionality enquiry necessitates objective evaluation of conflicting values rather than relying on perceptions and biases. Empirical deference is given to the legislature owing to their institutional competence and expertise to determine complex factual legislation and policies. However, factors like lack of parliamentary deliberation and a failure to make relevant enquiries weigh in on the court's decision. In the absence of data and figures, there is a lack of standards by which proportionality *stricto sensu* can be

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degree of impact upon fundamental rights..."

85 See Jochen von Bernstroff, Proportionality Without Balancing: Why Judicial Ad Hoc Balancing is Unnecessary and Potentially Detrimental to Realisation of Collective and Individual Self Determination, Reasoning Rights – Comparative Judicial Engagement, (Ed. Liaora Lazarus); Bernhard Schlink, 'Abwägung im Verfassungsrecht', Duncker & Humblot, 1976, and Francisco J. Urbina, 'Is It Really That Easy? A Critique of Proportionality and Balancing as Reasoning' Canadian Journal of Law and Jurisprudence, 2014.

86 According to Robert Alexy, the 'Law of Balancing' is as follows: "...the greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other..." See Robert Alexy, A Theory of Constitutional Rights (Julian Rivers, trans. Oxford Univ. Press 2002).

87 For instance, in Canada, where the doctrine of proportionality is employed by courts, a cabinet directive requires the standard to be incorporated into law-making. These guidelines stipulate that prior to enactment of laws, the matter and its alternate solutions must be analysed, the relevant ministerial department should engage in consultation with those who have an interest in the matter, and they should analyse the impact of the proposed solution. See Cabinet Directive on Law-making in Guide to Making Federal Acts and Regulations (2nd edn, Government of Canada).

determined. Nevertheless, many of the constitutional courts have employed the balancing stage 'normatively'[88] by examining the weight of the seriousness of the right infringement against the urgency of the factors that justify it. Examination under the first three stages requires the court to first examine scientific evidence, and where such evidence is inconclusive or does not exist and cannot be developed, reason and logic apply. We shall subsequently be referring to the balancing prong during our application of the test of proportionality.

34. In Germany, the courts enjoy a high judicial discretion. The parliament and the judiciary in Germany have the same goal, that is, to realise the values of the German Constitution.[89] Canadian courts, some believe, in practice give wider discretion to the legislature when a restriction is backed by sufficient data and evidence.[90] The constitutional court in South Africa, as per some jurists, collectively applies the four prongs of proportionality instead of a structured application.[91] While proportionality is the predominant doctrine in Australia, an alternate calibrated scrutiny test is applied by a few judges.[92] It is based on the premise that a contextual, instead of broad standard of review, is required to be adopted for constitutional adjudication.

35. Findings of empirical legal studies provide a more solid foundation for normative reasoning[93] and enhance understanding of the relationship between means and ends.[94] In our view, proportionality analyses would be more accurate when empirical inquiries on causal relations between a legislative measure under review and the ends of such a measure are considered. It also leads to better and more democratic governance. While one cannot jump from "is" to "ought", to reach an "ought" conclusion, one has to rely on accurate knowledge of "is", for "is" and "ought" to be united.[95] While we emphasise the need

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88 The first and second steps, legitimate aim and rational connection prong, and to some extent necessity prong, are factual.

89 See Article 1 and 20, Basic Law for the Federal Republic of Germany.

90 Niels Petersen, 'Proportionality and judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa, (CUP 2017).

91 *Ibid.*

92 See Annexure A.

93 See Yun-chien Chand & Peng-Hsiang Wang, *The Empirical Foundation of Normative Arguments in Legal Reasoning* (Univ. Chicago Coase-Sandor Inst. For L. & Econ., Res. Paper No. 745, 2016).

94 Lee Epstein & Andrew D. Martin, *An Introduction to Empirical Legal Research* 6 (2014).

95 *See* Joshua B. Fischman, *Reuniting "Is" and "Ought" in Empirical Legal Scholarship*, 162 U. Pa. L. Rev.

of addressing the quantitative/empirical deficit for a contextual and holistic balancing analysis, the pitfalls of selective data sharing must be kept in mind. After all, if a measure becomes a target, it ceases to be a good measure.[96]

36. To avoid this judgment from becoming complex, I have enclosed as an annexure a chart giving different viewpoints on the doctrine of proportionality as a test for judicial review exercised by the courts to test the validity of the legislation. The same is enclosed as Annexure-A to this judgment.[97]

37. When we turn to the reply or the defence of the Union of India in the present case, which we have referred to above,[98] the matter of concern is the first submission made regarding the purpose and rationale of the Scheme and amendments to the Finance Act of 2017. Lest remains any doubt, I would like to specifically quote from the transcript of hearing dated 01.11.2023, where on behalf of the Union of India it was submitted:

> "..the bottom line is this. What was really found? That what is the reason, why a person who contributes to a political party chooses the mode of unclean money as a payment mode and Your Lordships would immediately agree with me if we go by the practicalities of life. What happens is, suppose one state is going for an election. There are two parties, there are multiple parties, but by and large there are two parties which go neck to neck. Suppose I am a contractor. I'm not a company or anything. I am a contractor and I'm supposed to give my political contribution to Party A and Party B or Party A or Party B, as the case may be. But the fear was if I give by way of accounted money or by clean money, by way of cheque, it would be easily identifiable. If I give to party A and Party B forms the Government, I would be facing victimization and retribution and vice

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117 (2013).

96 Marilyn Strathern, Improving Ratings: Audit in the British University System, European review, Vol. 5 Issue 3, pp. 305-321 (1997).

97 Annexure A should not be read as an opinion of this Court or even as *obiter dicta* expressed by this Court. The Annexure is only for the purpose of pointing out different viewpoints on the test of proportionality.

98 See paragraph 23 of this judgment.

> versa. If I give money to Party B and Party A continues to be in Government, then I would be facing retribution or victimization. Therefore, the safest course was to pay by cash, so that none of the parties know what I paid to which party, and both parties are happy that I have paid something. So, that, the payment by cash ensured confidentiality. Both parties would say that one party would be given 100 crores, one party would be given 40 crores, depending upon my assessment of their winnability. But both would not know who is paid what. My Lord, sometimes what used to happen is in my business, I get only clean money or substantial part of the clean money, but practicalities require that I contribute to the political parties, and practicality again requires that I contribute with a degree of confidentiality so that I am not victimized in the future. And therefore clean money used to be converted into unclean money. White money is being converted into black money so that it can be paid, according to them anonymously, and according to me with confidentiality. And this is disastrous for the economy when white money is converted into black money."

While introducing the Finance Act of 2017, the then Finance Minister had elucidated that the main purpose of the Scheme was to curb the flow of black money in electoral finance.[99] This, it is stated, could be achieved only if information about political donations and the donor were kept confidential.[100] It was believed that this would incentivise donations to political parties through banking channels.

38. I am of the opinion that retribution, victimisation or retaliation cannot by any stretch be treated as a legitimate aim. This will not satisfy the legitimate purpose prong of the proportionality test. Neither is the Scheme nor the amendments to the Finance Act, 2017, rationally connected to the fulfilment of that purpose, namely, to counter retribution, victimisation or retaliation in political donations. In our opinion, it will also not satisfy the necessity stage of the proportionality even if we have to ignore the balancing stage.

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99 See Speech of Arun Jaitley, Minister of Finance, at paragraph 165, Budget 2017-18.

100 *Ibid.*

39. Retribution, victimisation or retaliation against any donor exercising their choice to donate to a political party is an abuse of law and power. This has to be checked and corrected. As it is a wrong, the wrong itself cannot be a justification or a purpose. The argument, therefore, suffers on the grounds of inconsistency and coherence as it seeks to perpetuate and accept the wrong rather than deal with the malady and correct it. The inconsistency is also apparent as the change in law, by giving a cloak of secrecy, leads to severe restriction and curtailment of the collective's right to information and the right to know, which is a check and counters cases of retribution, victimisation and retaliation. Transparency and not secrecy is the cure and antidote.

40. Similarly, the second argument that the donor may like to keep his identity anonymous is a mere *ipse dixit* assumption. The plea of infringement of the right to privacy has no application at all if the donor makes the contribution, that too through a banking channel, to a political party. It is the transaction between the donor and the third person. The fact that donation has been made to a political party has to be specified and is not left hidden and concealed.[101] What is not revealed is the quantum of the contribution and the political party to whom the contribution is made. Further, when a donor goes to purchase a Bond, he has to provide full particulars and fulfil the KYC norms of the bank.[102] His identity is then asymmetrically known to the person and the officers of the bank from where the Bond is purchased.[103] Similarly, the officers in the branch of the authorised bank[104] where the political party has an account and encashes the Bond are known to the officers in the said bank.[105]

41. The argument raised by the Union of India that details can be revealed when an order is passed by a court or when it is required for investigation pursuant to registration of a criminal case[106] overlooks the fact that it is their stand that the identities of the contributors/donors

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101 Section 182(3) of the Companies Act, 2013 requires companies to mention the total political contributions made.

102 Paragraph 4 of the Scheme.

103 In terms of paragraph 2(b) of the Scheme, only State Bank of India and its specified branches are allowed to issue Bonds.

104 *Ibid.*

105 Paragraph 3(4) of the Scheme.

106 See paragraph 7(4) of the Scheme.

should be concealed because of fear of retaliation, victimisation and reprisal. That fear would still exist as the identity of the purchaser of the Bond can always be revealed upon registration of a criminal case or by an order/direction of the court. Thus, the fear of reprisal and vindictiveness does not evaporate. The so-called protection exists only on paper but in practical terms is not a good safeguard even if we accept that the purpose is legitimate. It fails the rational nexus prong.

42. The fear of the identities of donors being revealed exists in another manner. Under the Scheme, political parties in power may have asymmetric access to information with the authorised bank. They also retain the ability to use their power and authority of investigation to compel the revelation of Bond related information.[107] Thus, the entire objective of the Scheme is contradictory and inconsistent.

43. Further, it is the case of the Union of India that parties in power at the Centre and State are the recipients of the highest amounts of donations through Bonds. If that is the case, the argument of retribution, victimisation and retaliation is tempered and loses much of its force.[108]

44. The rational connection test fails since the purpose of curtailing black or unaccounted-for money in the electoral process has no connection or relationship with the concealment of the identity of the donor. Payment through banking channels is easy and an existing antidote. On the other hand, obfuscation of the details may lead to unaccounted and laundered money getting legitimised.

45. The RBI had objected to the Scheme since the Bonds could change hands after they have been issued. There is no check for the same as the purchaser who has completed the KYC, whose identity is thereupon completely concealed, may not be the actual contributor/donor. In fact, the Scheme may enable the actual contributor/donor to not leave any traceability or money trail.

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107 *Ibid.*

108 In *Brown* v. *Socialist Workers Comm.*, 459 U.S. 87 (1982), the Supreme Court of the United States of America held that disclosure laws requiring the reporting of names and addresses of every campaign contributor could be waived when "specific evidence of hostility, threats, harassment and reprisals" existed, thus adopting a case-by-case approach. Marshall J., delivering the opinion of the court observed that the Socialist Workers Party, a minor political party had historically been the object of harassment by government officials and private parties. Therefore, the court held that the government was prohibited from compelling disclosures from the said party, a minor political party, since there existed a reasonable probability that the compelled disclosures would subject their donors, if identified, to threats, harassment or reprisals.

46. Money laundering can be undertaken in diverse ways. Political contributions for a *quid pro quo* may amount to money laundering, as defined under the Prevention of Money Laundering Act, 2002[109]. The Financial Action Task Force[110] has observed that the signatory States are required to check money laundering on account of contributions made to political parties.[111] Article 7(3) of the United Nations Convention against Corruption, 2003 mandates the state parties to enhance transparency in political funding of the candidates and parties.[112] The said convention is signed and ratified by India. By ensuring anonymity, the policy ensures that the money laundered on account of *quid pro quo* or illegal connection escapes eyeballs of the public.

47. The economic policies of the government have an impact on business and commerce. Political pressure groups promote different agendas, including perspectives on economic policies. As long as these pressure groups put forward their perspective with evidence and data, there should not be any objection even if they interact with elected representatives. The position would be different if monetary contributions to political parties were made as a *quid pro quo* to secure a favourable economic policy. This would be an offence under the Prevention of Corruption Act, 1988 and also under the PMLA. Such offences when committed by political parties in power can never see the light of the day if secrecy and anonymity of the donor is maintained.

48. In view of the aforesaid observations, the argument raised by the petitioners that there is no rational connection between the measure and the purpose, which is also illegitimate, has merit and should be accepted.

49. On the question of alternative measures, that is the necessity prong of the proportionality test, it is accepted that post the amendments brought about by the Finance Act, 2017, political parties cannot receive donations in cash for amounts above Rs.2,000/-. However, political parties do not have to record the details and particulars of

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109 For short, "PMLA".

110 For short, "FATF".

111 Paragraph 3, Section B, International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation – The FATF Recommendations, 2012.

112 See also United Nations General Assembly Resolution A/RES/S-32/1, 02.06.2021, para 12.

donations received for amounts less than Rs.20,000/-.[113] Therefore, the reduction of the upper limit of cash donations from Rs.20,000/- to Rs.2,000/- serves no purpose. It is open to the political parties to bifurcate the law and camouflage larger donations in smaller stacks. There is no way or method to verify the donor if the amount shown in the books of the political party is less than Rs.2,000/-.

50. It is an accepted position that the Electoral Trust Scheme[114] was introduced in 2013 to ensure the secrecy of contributors. As per the Trust Scheme, contributions could be made by a person or body corporate to the trust. The trust would thereafter transfer the amount to the political party. The trust is, therefore, treated as the contributor to the political party. Interestingly, it is the ECI that had issued guidelines dated 06.06.2014 whereby the trusts were required to specify and give full particulars to the ECI of the depositors with the trust and amounts which were subsequently transferred as a contribution to the political party. The guidelines were issued by the ECI to ensure transparency and openness in the electoral process.[115]

51. The trust can have multiple donors. Similarly, contributions are made by the trust to multiple political parties. The disclosure requirements provided in ECI's guidelines dated 06.06.2014 only impose disclosure requirements at the inflow and outflow points of the trust's donations, that is, the trust is required to provide particulars of its depositors and the amounts donated to political parties, including the names of the political parties. Thus, the Trust Scheme protects the anonymity of the donors *vis-à-vis* their contributions to the political party. When we apply the necessity test propounded in ***Anuradha Bhasin*** (supra)[116], the Trust Scheme achieves the objective of the Union of

113 This is inapplicable to Bonds under *proviso* (b) to Section 13A of the Income Tax Act, 1961.

114 For short, "Trust Scheme".

115 Similarly, early campaign finance laws in the United Kingdom permitted trusts to donate to political parties. It came to be disallowed since it was contrary to openness and accountability. See Suchindran Bhaskar Narayan and Lalit Panda, Money and Elections – Necessary Reforms in Electoral Finance, Vidhi 2018 at p. 19. See also Lord Neill of Bladen, QC, 'Fifth Report of the Committee on Standards in Public Life: The Funding of Political Parties in the United Kingdom', 1998 pp 61-62.

116 As elaborated in paragraph 27] of this judgement, *Anuradha Bhasin* (supra) proposes a four sub-pronged inquiry at the necessity stage of proportionality, that is (MN1) to (MN4). To arrive at the conclusion of the necessity inquiry, this Court has proposed at (MN4) that: "...an overall comparison (and balancing exercise) must be undertaken between the measure and the alternatives. A judgment must be made whether the government measure is the best of all feasible alternatives, considering both the degree to which it realises the government objective and the degree of impact upon fundamental rights (the comparative component)."

India in a real and substantial manner and is also a less restrictive alternate measure in view of the disclosure requirements, *viz.* the right to know of voters. The Trust Scheme is in force and is a result of the legislative process. In a comparison of limited alternatives, it is a measure that best realises the objective of the Union of India in a real and substantial manner without significantly impacting the fundamental right of the voter to know. The ECI, if required, can suitably modify the guidelines dated 06.06.2014.

52. I would now come to the fourth prong. I would begin by first referring to the judgment cited by Hon'ble the Chief Justice in the case of ***Campbell v. MGM Limited***[117]. This judgment adopts double proportionality standard to adequately balance two conflicting fundamental rights. Double proportionality has been distinguished from the single proportionality standard in paragraph 152 of the judgment authored by Hon'ble the Chief Justice. ***Campbell*** (supra) states that the single proportionality test and the principle of reasonableness are applied to determine whether a private right claim offers sufficient justification for the interference with the fundamental rights. However, this test may not apply when two fundamental rights are at conflict and one has to balance the application of one right and restriction of the other.

53. In ***Campbell*** (supra), Baroness Hale has suggested a three-step approach to balance conflicting fundamental rights, when two rights are in play. The first step is to analyse the comparative importance of the fundamental rights being claimed in the particular case. In the second step, the court should consider the justification for interfering with or restricting each of these rights. The third step requires the application of a proportionality standard to both these rights.

54. In a subsequent decision, the House of Lords (Lord Steyn) in ***In re.S***[118], distilled four principles to resolve the question of conflict of rights as under:

> "17. (...) First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the

117 [2004] 2 AC 457.

118 [2005] 1 AC 593.

> individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test. This is how I will approach the present case."

55. The fourth principle, that is, the ultimate balancing test, was elaborated upon by Sir Mark Potter in ***In Re. W***[119] in the following terms:

> "53. (...) each Article propounds a fundamental right which there is a pressing social need to protect. Equally, each Article qualifies the right it propounds so far as it may be lawful, necessary and proportionate to do so in order to accommodate the other. The exercise to be performed is one of parallel analysis in which the starting point is presumptive parity, in that neither Article has precedence over or "trumps" the other. The exercise of parallel analysis requires the court to examine the justification for interfering with each right and the issue of proportionality is to be considered in respect of each. It is not a mechanical exercise to be decided upon the basis of rival generalities. An intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary before the ultimate balancing test in terms of proportionality is carried out."

56. Fundamental rights are not absolute, legislations/policies restricting the rights may be enacted in accordance with the scheme of the Constitution. However, it is now well settled that the provisions of fundamental rights in Part III of the Constitution are not independent silos and have to be read together as complementary rights.[120] Therefore, the thread of reasonableness applies to all such restrictions.[121] Secondly, Article 14, as observed by the Hon'ble Chief Justice in his judgment[122] includes the facet of formal equality and substantive equality. Thus, the principle 'equal protection of law' requires the legislature and the executive to achieve factual equality. This principle can be extended

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119 [2005] EWHC 1564 (Fam).

120 *Rustom Cavasjee Cooper* v. *Union of India*, (1970) 1 SCC 248; *K.S. Puttaswamy (9J) (Privacy)* (supra), and *Maneka Gandhi* v. *Union of India and Another*, (1978) 1 SCC 248.

121 The test of single proportionality will apply.

122 See paragraphs 191 to 195 of the Hon'ble Chief Justice's judgment.

to any restriction on fundamental rights which must be reasonable to the identified degree of harm. If the restriction is unreasonable, unjust or arbitrary, then the law should be struck down. Further, it is for the legislature to identify the degree of harm. I have referred to the said observation in the context that there appears to be a divergent opinion in ***K.S. Puttaswamy (9-J) (Privacy)*** (supra) as to whether right of privacy is an essential component for effective fulfilment of all fundamental rights or can be held to be a part or a component of Article 21 and Article 19(1)(a) of the Constitution.

57. When we apply the fourth prong, that is the balancing prong of proportionality, I have no hesitation or doubt, given the findings recorded above, that the Scheme falls foul and negates and overwhelmingly disavows and annuls the voters right in an electoral process as neither the right of privacy nor the purpose of incentivising donations to political parties through banking channels, justify the infringement of the right to voters. The voters right to know and access to information is far too important in a democratic set-up so as to curtail and deny 'essential' information on the pretext of privacy and the desire to check the flow of unaccounted for money to the political parties. While secret ballots are integral to fostering free and fair elections, transparency—not secrecy—in funding of political parties is a prerequisite for free and fair elections. The confidentiality of the voting booth does not extend to the anonymity in contributions to political parties.

58. In ***K.S. Puttasamy (9-J) (Privacy)*** (supra), all opinions accept that the right to privacy has to be tested and is not absolute. The right to privacy must yield in given circumstances when dissemination of information is legitimate and required in state or public interest. Therefore, the right to privacy is to be applied on balancing the said right with social or public interest. The reasonableness of the restriction should not outweigh the particular aspect of privacy claimed.[123] Sanjay Kishan Kaul, J., in his opinion in ***K.S. Puttasamy (9-J) (Privacy)*** (supra), has said that restriction on right to privacy may be justifiable and is subject to the principle of proportionality when considering the right to privacy in relation to its function in society.

123 While giving the aforesaid finding, we are applying the single proportionality test.

59. As observed above, the right to privacy operates in the personal realm, but as the person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks contextually.[124] In this context, the High Court of South Africa in ***My Vote Counts NPC v. President of the Republic of South Africa and Ors.***[125] observes that:

> "(...) given the public nature of political parties and the fact that the private funds they receive have a distinctly public purpose, their rights to privacy can justifiably be attenuated. **The same principles must, as a necessary corollary, apply to their donors.** (...)"
>
> (emphasis supplied)

60. The great underlying principle of the Constitution is that rights of individuals in a democratic set-up is sufficiently secured by ensuring each a share in political power.[126] This right gets affected when a few make large political donations to secure selective access to those in power. We have already commented on pressure groups that exert such persuasion, within the boundaries of law. However, when money is exchanged as *quid pro quo* then the line between persuasion and corruption gets blurred.

61. It is in this context that the High Court of Australia in ***Jeffery Raymond McCloy and Others v. State of New South Wales and Another***[127], observes that corruption can be of different kinds. When a wealthy donor makes contribution to a political party in return of a benefit, it is described as *quid pro quo* corruption. More subtle corruption arises when those in power decide issues not on merits or the desires of their constituencies, but according to the wishes and desires of those who make large contributions. This kind of corruption is described as 'clientelism'. This can arise from the dependence[128] on the financial support of a wealthy patron to a degree that it compromises the

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124 See *Bernstein and Ors.* v. *Bester NO and Others*, (1996) ZACC 2, para 67.

125 *My Vote Counts NPC* v. *President of the Republic of South Africa and Ors.* (2017) ZAWCHC 105, para 67.

126 Harrison Moore, The Constitution of the Commonwealth of Australia, p.329 (1902).

127 (2015) HCA 34.

128 James Madison in the Federalist Paper No. 52 notes that a government must "depend on the people alone". This condition, according to Professor Lawrence Lessig, has two elements – first, it identifies a proper dependency ("on the people") and second, it describes that dependence as exclusive ("alone").

expectation, fundamental to representative democracy, that public power will be exercised in public interest. This affects the vitality as well as integrity of the political branches of government. While *quid pro quo* and clientelistic corruption erodes quality and integrity of government decision making, the power of money may also pose threat to the electoral process itself. This phenomenon is referred to as 'war-chest' corruption.[129]

62. In ***Jefferey Raymond*** (supra), the High Court of Australia had referred to the decision of the Supreme Court of Canada in ***Harper v. Canada (Attorney General)***[130], which upheld the legislative restriction on electoral advertising. In ***Harper*** (supra), the Supreme Court of Canada has held that the State can provide a voice to those who otherwise might not be heard and the State can also restrict voices that dominate political discourse so that others can be heard as well.

63. The Supreme Court of the United States in ***Buckley v. R Valeo***[131] has commented on the concern of *quid pro quo* arrangements and its dangers to a fair and effective government. Improper influence erodes and harms the confidence in the system of representative government. Contrastingly, disclosure provides the electorate with information as to where the political campaign money comes from and how it is spent. This helps and aides the voter in evaluating those contesting elections. It allows the voter to identify interests which candidates are most likely to be responsive to, thereby facilitating prediction of future performance in office. Secondly, it checks actual corruption and helps avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. Relying upon ***Grosjean v. American Press Co.***[132], it holds that informed public opinion is the most potent of all restraints upon misgovernment. Thirdly, record keeping, reporting and disclosure are essential means of gathering data necessary to detect violations of contribution limitations.

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129 *See Federal Election Commission* v. *National Right to Work Committee*, 459 U.S. 197 (1982), where the petitioners submitted: "...substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political "war chests" which could be used to incur political debts from legislators who are aided by the contributions..."

130 [2004] 1 SCR 827.

131 424 U.S. 1 (1976).

132 297 U.S. 233 (1936).

64. In ***Nixon, Attorney General of Missouri, et al v. Shrink Missouri Government PAC et al***,[133] the Supreme Court of the United States observes that large contributions given to secure a political *quid pro quo* undermines the system of representative democracy. It stems public awareness of the opportunities for abuse inherent in a regime of large contributions. This effects the integrity of the electoral process not only in the form of corruption or *quid pro quo* arrangements, but also extending to the broader threat of the beneficiary being too compliant with the wishes of large contributors.

65. Recently, a five judge Constitution Bench of this Court in ***Anoop Baranwal v. Union of India***[134] has highlighted the importance of purity of electoral process in the following words:

> "215. ...Without attaining power, men organised as political parties cannot achieve their goals. Power becomes, therefore, a means to an end. The goal can only be to govern so that the lofty aims enshrined in the directive principles are achieved while observing the fundamental rights as also the mandate of all the laws. What is contemplated is a lawful Government. So far so good. What, however, is disturbing and forms as we understand the substratum of the complaints of the petitioner is the pollution of the stream or the sullying of the electoral process which precedes the gaining of power. Can ends justify the means?
>
> 216. There can be no doubt that the strength of a democracy and its credibility, and therefore, its enduring nature must depend upon the means employed to gain power being as fair as the conduct of the Government after the assumption of power by it. The assumption of power itself through the electoral process in the democracy cannot and should not be perceived as an end. The end at any rate cannot justify the means. The means to gain power in a democracy must remain wholly pure and abide by the Constitution and the laws. An unrelenting abuse of the electoral process over a period of time is the surest way to the grave of the democracy. Democracy can succeed

133 528 U.S. 377 (2000).

134 [2023] 9 SCR 1 : (2023) 6 SCC 161.

> only insofar as all stakeholders uncompromisingly work at it and the most important aspect of democracy is the very process, the electoral process, the purity of which alone will truly reflect the will of the people so that the fruits of democracy are truly reaped.
>
> 217. The essential hallmark of a genuine democracy is the transformation of the "Ruled" into a citizenry clothed with rights which in the case of the Indian Constitution also consist of fundamental rights, which are also being freely exercised and the concomitant and radical change of the ruler from an "Emperor" to a public servant. With the accumulation of wealth and emergence of near monopolies or duopolies and the rise of certain sections in the Media, the propensity for the electoral process to be afflicted with the vice of wholly unfair means being overlooked by those who are the guardians of the rights of the citizenry as declared by this Court would spell disastrous consequences."

66. The Law Commission of India in its 255th Report noted the concern of financial superiority translating into electoral advantage.[135] It was observed that lobbying and capture give undue importance to big donors and certain interest groups, at the expense of the ordinary citizen, violating "the right of equal participation of each citizen in the polity."[136] While noting the candidate-party dichotomy in the regulations under Section 77 of the Representation of the People Act, 1951, the Law Commission of India recommends to require candidates to maintain an account of contributions received from their political party (not in cash) or any other permissible donor.

67. At this stage, we would like to refer to the data as available on the website of the ECI and the data submitted by the petitioners for a limited purpose and objective to support our reasoning while applying balancing. We have not *stricto sensu* applied proportionality as the data is not sufficient for us. I also clarify that we have not opened the sealed envelope given by the ECI pursuant to the directions of this Court dated 02.11.2023.

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135 Law Commission of India, Electoral Reforms, Report No. 255, March 2015.

136 ***R.C.Poudyal*** v. ***Union of India and Others***, [1993] 1 SCR 891 : (1994) Supp 1 SCC 324.

68. An analysis of the annual audit reports of political parties from 2017-18 to 2022-23 showcases party-wise donations received through the Bonds as reproduced below:

PARTY-WISE DONATION THROUGH BONDS (IN RS. CR)

Party	2017-18	2018-19	2019-20	2020-21	2021-22	2022-23
BJP	210.00	1,450.890	2,555.000	22.385	1,033.7000	1294.1499
INC	5.00	383.260	317.861	10.075	236.0995	171.0200
AITC	0.00	97.280	100.4646	42.000	528.1430	325.1000
NCP	0.00	29.250	20.500	0.000	14.0000	--
TRS	0.00	141.500	89.153	0.000	153.0000	--
TDP	0.00	27.500	81.600	0.000	3.5000	34.0000
YSR-C	0.00	99.840	74.350	96.250	60.0000	52.0000
BJD	0.00	213.500	50.500	67.000	291.0000	152.0000
DMK	0.00	0.000	45.500	80.000	306.0000	185.0000
SHS	0.00	60.400	40.980	0.000	--	--
AAP*	0.00	--	17.765	5.950	25.1200	45.4500
JDU	0.00	0.000	13.000	1.400	10.0000	--
SP	0.00	0.000	10.840	0.000	3.2100	0.0000
JDS	6.03	35.250	7.500	0.000	0.0000	--
SAD	0.00	0.000	6.760	0.000	0.5000	0.0000
AIADMK	0.00	0.000	6.050	0.000	0.0000	0.0000
RJD	0.00	0.000	2.500	0.000	0.0000	--
JMM	0.00	0.000	1.000	0.000	0.0000	--
SDF	0.00	0.500	0.000	0.000	0.0000	0.0000
MGP	0.00	0.000	0.000	0.000	0.5500	--
TOTAL	221.03	2,539.170	3,441.324	325.060	2,664.8225	--

Asterisk (*) means that the AAP had declared their donations through Bonds/ Electoral Trust, but the party had not declared a separate amount for Bonds.

69. It is clear from the available data that majority of contribution through Bonds has gone to political parties which are ruling parties in the Centre and the States. There has also been a substantial increase in contribution/donation through Bonds.

70. Petitioner no. 1 – Association for Democratic Reforms has submitted the following table which showcases party-wise donation by corporate houses to national parties:

PARTY-WISE CORPORATE DONATION (NATIONAL PARTIES) (IN RS. Cr)

Party	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22	Total
BJP	515.500	400.200	698.140	720.407	416.794	548.808	3,299.8500
INC	36.060	19.298	127.602	133.040	35.890	54.567	406.4570
NCP	6.100	1.637	11.345	57.086	18.150	15.280	109.5980
CPI(M)	3.560	0.872	1.187	6.917	9.815	6.811	29.1615
AITC	2.030	0.000	42.986	4.500	0.000	0.250	49.7660
CPI	0.003	0.003	0.000	0.000	0.000	0.000	0.0055
BSP	0.000	0.000	0.000	0.000	0.000	0.000	0.0000
TOTAL	563.253	422.010	881.260	921.950	480.649	625.716	3,894.8380

As per the said table, the data shows that the party-wise donation by the corporate houses has been more or less stagnant from the years 2016-17 to 2021-22. We do not have the comments or official details in this regard from the Union of India or the ECI. The figures support our conclusion, but I would not, without certainty, base my analysis on these figures. However, we do have data of denomination/ sale of Bonds, as submitted by the petitioners, during the 27 phases from March 2018 to July 2023, which is as under:

DENOMINATION WISE SALE OF EB DURING 27 PHASES (MARCH, 2018-JULY, 2023)

Denomination	No. of Electoral Bonds Sold	Amount (In Rupees)
1 Crore	12,999 (54.13%)	12,999 Crore (94.25%)
10 Lakhs	7,618 (31.72%)	761.80 Crore (5.52%)
1 Lakh	3,088 (12.86%)	30.88 Crore (0.22%)
10 Thousand	208 (0.86%)	20.80 Lakh (0.001%)
1 Thousand	99 (0.41%)	99,000
Total	**24,012**	**13791.8979 Cr.**

Analysis of this data shows that more than 50% of the Bonds in number, and 94% of the Bonds in value terms were for Rs.1 crore. This supports our reasoning and conclusion on the application of the doctrine of proportionality. This is indicative of the quantum of corporate funding through the anonymous Bonds.

71. The share of income from unknown sources for national parties rose from 66% during the years 2014-15 to 2016-17 to 72% during the years 2018-19 to 2021-22. Between the years 2019-20 to 2021-22 the Bond income has been 81% of the total unknown income of national parties. The total unknown income, that is donations made under Rs.20,000/-, sale of coupons etc. has not shown ebbing and has substantially increased from Rs.2,550 crores during the years 2014-15 to 2016-17 to Rs.8,489 crores during the years 2018-19 to 2021-22. To this we can add total income of the national political parties without other known sources, which has increased from Rs.3,864 crores during the years 2014-15 to 2016-17 to Rs.11,829 crores during the years 2018-19 to 2021-22. The Bonds income between the years 2018-19 to 2021-22 constitutes 58% of the total income of the national political parties.[137]

72. Based on the analysis of the data currently available to us, along with our previous observation asserting that voters' right to know supersedes anonymity in political party funding, I arrive at the conclusion that the Scheme fails to meet the balancing prong of the proportionality test. However, I would like to reiterate that I have not applied proportionality *stricto sensu* due to the limited availability of data and evidence.

73. I respectfully agree with the reasoning and the finding recorded by Hon'ble the Chief Justice, holding that the amendment to Section 182 of the Companies Act, deleting the first *proviso* thereunder should be struck down. While doing so, I would rather apply the principle of proportionality which, in my opinion, would subsume the test of manifest arbitrariness.[138] In addition, the claim of privacy

137 "Parties' unknown income rise despite electoral bonds", The Hindu, 02.11.2023, pg.7.

138 The proportionality test, as adopted and applied by us, essentially checks, invalidates and does not condone manifest arbitrariness. Proportionality analysis recognizes the thread of reasonableness which

by a corporate or a company, especially a public limited company would be on very limited grounds, restricted possibly to protect the privacy of the individuals and persons responsible for conducting the business and commerce of the company. It will be rather difficult for a public (or even a private) limited company to claim a violation of privacy as its affairs have to be open to the shareholders and the public who are interacting with the body corporate/company. This principle would be equally, with some deference, apply to private limited companies, partnerships and sole proprietorships.

74. In consonance with the above reasoning and on application of the doctrine of proportionality, *proviso* to Section 29C(1) of the Representation of the People Act 1951, Section 182(3) of the Companies Act 2013 (as amended by the Finance Act 2017), Section 13A(b) of the Income Tax Act 1961 (as amended by the Finance Act 2017), are held to be unconstitutional. Similarly, Section 31(3) of the RBI Act 1934, along with the Explanation enacted by the Finance Act 2017, has to be struck down as unconstitutional, as it permits issuance of Bonds payable to a bearer on demand by such person.

75. The petitioners have not argued that corporate donations should be prohibited. However, it was argued by some of the petitioners that coercive threats are used to extract money from businesses as contributions virtually as protection money. Major opposition parties, which may come to power, are given smaller amounts to keep them happy. It was also submitted that there should be a cap on the quantum of donations and the law should stipulate funds to be utilised for political purposes given that the income of the political parties is exempt from income tax. Lastly, suggestions were made that corporate funds should be accumulated and the corpus equitably distributed amongst national and regional parties. I have not in-depth examined these aspects to make a pronouncement. However, the issues raised do require examination and study.

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is the underlying principle behind the first three prongs, legitimate aim, rational connection and necessity test. The balancing analysis of the permissible degree of harm for a constitutionally permissible purpose effectuates the guarantee of reasonableness. Therefore, any legislative action which is manifestly arbitrary, would be disproportionate and will fall foul when we apply the principle of proportionality. See also *Shayara Bano* v. *Union of India*, (2017) 9 SCC 1, where the Court held at paragraph 95, that rationality, logic and reasoning are the triple underpinnings of the test of manifest arbitrariness.

76. By an interim order dated 26.03.2021, this Court in the context of contributions made by companies through Bonds had *prima facie* observed that the voter would be able to secure information about the funding by matching the information of aggregate sum contributed by the company as required to be disclosed under Section 182(3) of the Companies Act, as amended by the Finance Act 2017, with the information disclosed by the political party. Dr. D.Y. Chandrachud, Hon'ble the Chief Justice, rightly observes in his judgment that this exercise would not reveal the particulars of donations, including the name of the donor.

77. By the order dated 02.11.2023, this Court had asked for ECI's compliance with the interim order of this Court dated 12.04.2019. Relevant portion whereof is reproduced below:

> "In the above perspective, according to us, the just and proper interim direction would be to require all the political parties who have received donations through Electoral Bonds to submit to the Election Commission of India in sealed cover, detailed particulars of the donors as against the each Bond; the amount of each such bond and the full particulars of the credit received against each bond, namely, the particulars of the bank account to which the amount has been credited and the date of each such credit."

The intent of the order dated 12.04.2019 is that the ECI will continue to maintain full particulars of the donors against each Bond; the amount of each such Bond and the full particulars of the credit received against each Bond, that is, the particulars of the bank account to which the amount has been credited and the date of each such credit. This is clear from paragraph 14 of the order dated 12.04.2019 which had directed that the details mentioned in paragraph 13 of the order dated 12.04.2019 will be furnished forthwith in respect of the Bonds received by a political party till the date of passing of the order.

78. In view of the findings recorded above, I would direct the ECI to disclose the full particular details of the donor and the amount donated to the particular political party through Bonds. I would restrict this direction to any donations made on or after the interim order dated

12.04.2019. The donors/purchasers being unknown and not parties, albeit the principle of *lis pendens* applies, and it is too obvious that the donors/purchasers would be aware of the present litigation. Hence, they cannot claim surprise.

79. I, therefore, respectfully agree and also conclude that:

(i) the Scheme is unconstitutional and is accordingly struck down;

(ii) *proviso* to Section 29C(1) of the Representation of the People Act, Section 182(3) of the Companies Act, 2013, and Section 13A(b) of the Income Tax Act, 1961, as amended by the Finance Act, 2017, are unconstitutional, and are struck down;

(iii) deletion of *proviso* to Section 182(1) to the Companies Act of 2013, thereby permitting unlimited contributions to political parties is unconstitutional, and is struck down;

(iv) sub-section (3) to Section 31 of the RBI Act, 1934 and the Explanation thereto introduced by the Finance Act, 2017 are unconstitutional, and are struck down;

(v) the ECI will ascertain the details from the political parties and the State Bank of India, which has issued the Bonds, and the bankers of the political parties and thereupon disclose the details and names of the donor/purchaser of the Bonds and the amounts donated to the political party. The said exercise would be completed as per the timelines fixed by the Hon'ble the Chief Justice;

(vi) Henceforth, as the Scheme has been declared unconstitutional, the issuance of fresh Bonds is prohibited;

(vii) In case the Bonds issued (within the validity period) are with the donor/purchaser, the donor/purchaser may return them to the authorised bank for refund of the amount. In case the Bonds (within the validity period) are with the donee/political party, the donee/political party will return the Bonds to the issuing bank, which will then refund the amount to the donor/purchaser. On failure, the amount will be credited to the Prime Ministers Relief Fund.

80. The writ petitions are allowed and disposed of in the above terms.

Annexure - A

Standards of Review - Proportionality & Alternatives

Proportionality is a standard-based model. It allows factual and contextual flexibility to judges who encounter diverse factual scenarios to analyse and decide the outcome of factual clashes against the standards. Proportionality, particularly its balancing prong, has been criticized by jurists who contend that legal adjudication should be rule-based rather than principle-based.[139] They argue that this provides legal certainty by virtue of rules being definitive in nature. In response, jurists in favour of balancing contend that neither rules nor principles are definitive but rather *prima facie*.[140] Therefore, both rights and legislations/policies are required to be balanced and realized to the optimum possible extent.

This jurisprudential clash is visible in the various forms and structures of adoptions of proportionality. Generally, two models can be differentiated from works of jurists.

1) **Model I** – Firstly, the traditional two stages of the means–end comparison is applied. After having ascertained the ***legitimate purpose*** of the law, the judge asks whether the imposed restriction is a suitable means of furthering this purpose (***rational connection***). Additionally in this model, the judge ascertains whether the restriction was ***necessary*** to achieve the desired end. The reasoning focuses on whether a less intrusive means existed to achieve the same ends (***minimal impairment/necessity***).

2) **Model II** – This model adds a fourth step to the first model, namely the ***balancing stage***, which weighs the seriousness of the infringement against the importance and urgency of the factors that justify it.

In the table provided below, we have summarised the different models of proportionality and its alternatives, as propounded by jurists and adopted by courts internationally. We have also summarized other traditional standards of review like the means-ends test and Wednesbury unreasonableness for contextual clarity. In the last column we have captured the relevant criticisms, as propounded by jurists, to each such model.

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139 Francisco J. Urbina, A Critique of Proportionality, American Journal of Jurisprudence, Vol 57, 2012. Also see Ronald Dworkin, Taking Rights Seriously (Bloomsbury 2013), pp 41-42.

140 Robert Alexy, A Theory of Constitutional Rights, (translated by Julian Rivers, first published 2002, OUP 2010), pp. 47-48.

Test/Model	*Scope of Test/Model*	*Jurisdictions Applied*	*Criticism*
Four-stage Proportionality	In this model, all the four prongs of proportionality test are employed, including the final balancing stage. According to Robert Alexy, values and interests (rights of citizens and objects of legislations/policies) are both principles and principles are optimization requirements.[141] They are norms and hence their threshold of satisfaction is not strict, and can happen in varying degrees. They must be satisfied to the greatest extent possible in the legal and factual scenarios, as they exist. All stages of the proportionality test therefore seek to optimize relative to what is legally and factually possible. ⇒ The rational connection and necessity prongs of the proportionality test are applicable to factual possibilities. ⇒ The balancing stage optimizes each principle within what is legally possible, by weighing the relevant competing principles.	**Germany** Balancing was adopted by the German Constitutional Court in the 1950s as a new methodology for intensive judicial review of rights-restricting legislation. It stems from the belief that the German Constitution posits an original idea of values, and the government and courts, both have a duty to realise these values.[142]	The main premise of the criticisms of balancing is the wide discretion available to judges. To capture three contemporary criticisms in brief: (i) it leads to a comparison of incommensurable values;[143] (ii) it fails to create predictability in the legal system and is potentially dangerous for human rights;[144] and (iii) conversely, it is equally intrusive from the perspective of separation of powers.[145]

141 See Robert Alexy, A Theory of Constitutional Rights (Julian Rivers, trans. Oxford Univ. Press 2002).

142 See Article 1 and 20, Basic Law for the Federal Republic of Germany.

143 See Francisco J. Urbina, 'Is It Really That Easy? A Critique of Proportionality and Balancing as Reasoning' Canadian Journal of Law and Jurisprudence, 2014; and Bernhard Schlink, 'Abwägung im Verfassungsrecht', Duncker & Humblot, 1976.

144 Jochen von Bernstroff, Proportionality Without Balancing: Why Judicial Ad Hoc Balancing is Unnecessary and Potentially Detrimental to Realisation of Collective and Individual Self Determination, Reasoning Rights – Comparative Judicial Engagement, (Ed. Liaora Lazarus);

145 Ibid.

Alexy proposes the 'weight formula', which quantifies competing values (rights of individuals) and interests (objective of legislation/policy) by reducing them to numbers. It is a method of thinking about conflicting values/interests. $W_{1,2} = (I_1 . W_1 . R_1) / (I_2 . W_2 . R_2)$ ⇒ $W_{1,2}$ represents the concrete weight of principle P_1 relative to the colliding principle P_2 ⇒ I_1 stand for intensity of interference with P_1. I_2 stands for importance of satisfying the colliding principle P_2. ⇒ W_1 and W_2 stand for abstract weights of colliding principles (P_1 and P_2). ⇒ When abstract weights are equal, as in case of collision of constitutional rights (W_1 and W_2) – they cancel each other out. ⇒ R_1 and R_2 stands for reliability of empirical and normative assumptions with regard to the question of how intensive the interpretation is. The weight formula is thereupon reduced to numbers on an exponential scale of 2. (i) The scale assigns following values to intensity of interference (**l**) and abstract weights (**W**)- light (**l**), moderate (**m**), and serious (**s**) – in numbers these are – 2^0, 2^1, 2^2 – **i.e., 1, 2 and 4** respectively. (ii) To reliability (**R**), i.e., the epistemic side, the values assigned are – reliable (**r**), plausible (**p**) and not evidently false (**e**) – in numbers these are - 2^0, 2^{-1}, 2^{-2} – **i.e., 1, 0.5 and 0.25**		

Three-stage Proportionality	This model proposes limiting the proportionality enquiry to its first three prongs, i.e., minus the balancing stage. Von Bernstorff argues against *ad hoc* balancing based on two principal reasons: (i) ad hoc balancing fails to erect stable and predictable standards of human rights protection, allowing even the most intensive infringements of civil liberties to be conveniently balanced out of existence when the stakes are high enough; and (ii) the lack of predictability leads to a situation where every act of parliament is threatened, however well intentioned, in the judicial balancing exercise and thus *ad hoc* balancing is potentially overly intrusive from a separation of powers perspective.[140] He, however, defends the use of judicially established bright-line rules for specific cases where intensive interferences are at stake. The bright line rule brings clarity to a law or regulation that could be interpreted in multiple ways. Bright line rules constitute the 'core', 'substance' or 'essence' of a particular right, making human rights categorical instead of open-ended in nature.	**Canada** Canada prefers to resolve cases in the first three prongs. Only in limited instances, does the Canadian Supreme Court decide that a measure survives the first three prongs but nevertheless fails at the final balancing stage.[150] Despite this, past jurisprudence in Canada does affirm the significance of final balancing stage.[151]	(i) In absence of the balancing stage, the courts must be mindful of certain analytical weaknesses of the necessity stage that can be dealt with at the balancing stage.[152] (ii) The core of the necessity test is whether an alternate measure is as effective in achieving the purpose as the measure under challenge, while being less restrictive. But often, considerations of balancing may become disguised in the necessity prong, as the court must confront uncertainty in weighing the efficacy of the alternatives.[153] (iii) Some jurists/courts have suggested a strict interpretation of necessity, where an alternate measure is only accepted as less restrictive when they prove to be as effective as the measure under challenge.

146 Jochen von Bernstroff, Proportionality Without Balancing: Why Judicial Ad Hoc Balancing is Unnecessary and Potentially Detrimental to Realisation of Collective and Individual Self Determination, Reasoning Rights – Comparative Judicial Engagement, (Ed. Liaora Lazarus); Also see Bernhard Schlink, 'Abwägung im Verfassungsrecht', Duncker & Humblot, 1976, pp. 192–219.

150 See Charterpedia, Department of Justice, Government of Canada, available at: https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art1.html. Also see Niels Petersen (supra).

151 *Ibid.* Also see Canada (Attorney General) v. JTI-Macdonald Corp., [2007] 2 S.C.R. 610, at paragraph 46; Alberta v. *Hutterian Brethren of Wilson Colony,* and [2009] 2 S.C.R. 567, at paragraphs 72-78.

152 Niels Petersen, 'Proportionality and judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa, (CUP 2017).

153 *Ibid.*

	A stricter evaluation of evidence becomes crucial at the necessity stage for an objective standard of review, in contrast to *ad hoc* balancing. In Canada for instance, the onus of proof is on the person seeking to justify the limit, which is generally the government.[147] ⇒ The standard of proof is the civil standard or balance of probabilities.[148] ⇒ Where scientific or social science evidence is available, it will be required; ⇒ However, where such evidence is inconclusive, or does not exist and cannot not be developed, reason and logic may suffice.[149]		David Bilchitz has also proposed that other alternatives must have both characteristics – equal realization of the purpose and lesser invasion/ restriction on the right in question.[154] David Blichitz's approach was followed in ***Aadhar (5J) (Privacy)*** (supra) case. This test was referenced in ***Anuradha Bhasin (supra)***, which applied a moderate interpretation of the necessity test. To conclude the findings of the necessity stage this Court in ***Anuradha Bhasin (supra)*** suggests that an overall comparison be undertaken between the measure and its feasible alternatives.
Means-ends Test	The doctrine is similar to a reasonableness inquiry, albeit with some variation. In Australia, for instance, courts enquire whether a law is 'reasonably appropriate and adapted' to achieving a legitimate end in a manner compatible with the constitutionally prescribed system of representative and responsible government.	**Australia** The test was followed in Australia before the development of proportionality and is not frequently used in contemporary times.	The test is simplistic and gives limited judicial flexibility. It does not account for diverse factual scenarios.

147 ***R. v. Oakes*** [1986] 1 S.C.R. 103.

148 ***Oakes*** (supra).

149 ***Libman v. Quebec (A.G.),*** [1997] 3 S.C.R. 569; ***RJR-MacDonald Inc.*** v. ***Canada (Attorney General),*** [1995] 3 S.C.R. 199; ***Thomson Newspapers Co. v. Canada (A.G.),*** [1998] 1 S.C.R. 877; ***R.*** v. ***Sharpe,*** [2001] 1 S.C.R. 45; ***Harper v. Canada (A.G.),*** [2004] 1 S.C.R. 827, at paragraph 77; ***R. v. Bryan,*** [2007] 1 S.C.R. 527, at paragraphs 16-19, 29; ***Mounted Police Association of Ontario v. Canada (Attorney General),*** [2015] 1 S.C.R. 3, at paragraphs 143-144.

154 David Bilchitz, Necessity and Proportionality: Towards a Balance Approach?, (Hart Publishing, Oxford and Portland, Oregon 2016).

Calibrated Scrutiny (evolved means-ends test)	The essential elements of the approach are as follows:[155] ⇒ First, a judge determines the nature and intensity of the burden on the right by the challenged law; ⇒ Second, the judge calibrates 'the appropriate level of scrutiny to the risk posed to maintenance of the constitutionally prescribed system of representative and responsible government; ⇒ Third, the judge isolates and assesses the importance of constitutionally permissible purpose of the prohibition; and ⇒ Finally the judge applies the appropriate level of scrutiny so as to determine whether the challenged law is justified as reasonably appropriate and adapted to achieve that purpose in a manner compatible with the maintenance of the constitutionally prescribed system of government, The test is similar to some prongs of the proportionality test. However, it is more rule oriented instead of being standard/principle oriented.	**Australia** While proportionality is the predominant doctrine in Australia, this alternate test is applied by a few judges. These judges raise concerns about the application of a test of structured proportionality and suggest that it was best understood as 'a tool' of analysis, or 'a means of setting out steps to a conclusion', 'not a constitutional doctrine'.	Critics of this approach have emphasized that it takes away from the flexibility that is required while considering factually diverse legal challenges. Therefore, the test cannot substitute a contextually guided judicial approach.[156]

155 Judgment by Gagler J. in ***Clubb v. Edwards***, (2019) 93 ALJR 448; Also see Adrienne Stone, Proportionality and its Alternatives, Melbourne Legal Studies Research Paper Series No. 848

156 See John Braithwaite, Rules and Principles: a Theory of Legal Certainty, Australian Journal of Legal Philosophy 47 (2002).

Strict Scrutiny Test	This is considered one of the heightened forms of judicial review that can be used to evaluate the constitutionality of laws, regulations, or other governmental policies under legal challenge.[157] Strict scrutiny is employed in cases of violation of the most fundamental liberties guaranteed to citizens in the United States of America. For instance, it is employed in cases of infringements on free speech. The test places the burden on the government to show a compelling, or strong interest in the law, and that the law is either very narrowly tailored or is the least speech-restrictive means available to the government. The usual presumption of constitutionality is removed, and the law must also pass the threshold of both – necessity/end and means.	**United States of America** The courts in the United States use a tiered approach of review with strict scrutiny, intermediate scrutiny and rational basis existing in decreasing degree of intensity.	Only a limited number of laws survive under the strict scrutiny test. Its application is reserved for instances where the most intensely protected fundamental rights are affected.

157 See Jennifer L. Greenblatt, Putting the Government to the (Heightened, Intermediate, or Strict) Scrutiny Test: Disparate Application Shows Not All Rights and Powers Are Created Equal, (2009) 10 Fla Coastal L Rev 421.

Unreasonableness / Wednesbury Principles	A standard of unreasonableness is used for the judicial review of a public authority's decision. A reasoning or decision is unreasonable (or irrational) when no person acting reasonably could have arrived at it. This test has two limbs: (i) The court is entitled to investigate the action to check whether the authority has considered and decided on matters which they ought not to have considered, or conversely, have refused to consider or neglected to consider matters which they ought to have considered. (ii) If the above query is answered in favour of the local authority, it may be held that, although the local authority has ruled on matters which they ought to have considered, the conclusion they have arrived at is nonetheless so unreasonable that no reasonable authority could ever have arrived at it.	***Associated Provincial Picture Houses Ltd*** v. ***Wednesbury Corporation***[158]	The test is simplistic and is traditionally only used for policies/ administrative decisions/delegated legislation.

Please note that:-

(i) The above table briefly summarises the different standards of constitutional review and it does not elaborate on the said tests in detail;

158 (1948) 1 KB 223.

(ii) the theories propounded by the jurists are not followed *in toto* across the jurisdictions and this has been pointed out appropriately; and

(iii) the table does not provide an exhaustive account of the full range of standards of review employed internationally and is restricted to the tests identified therein.

Headnotes prepared by: Nidhi Jain

Result of the case:
Writ Petitions disposed of.