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India's Electoral Bonds Scheme poses money laundering risks and a threat to Democracy

1 Introduction

The Financial Action Task Force (FATF) has largely remained focused on the threat of money laundering and terrorist financing risk in vulnerable sectors like the drug business, the non-profit sector,¹ and the art and antiques market,² but there has been negligible focus on the political funding arena. FATF's anti-money laundering and combatting the financing of terrorism (AML/CFT) framework have not yet been applied in the realm of political donations where there is a growing threat of the use of illicit money. United Nations Convention Against Corruption (UNCAC) acknowledges such a threat and specifically requires countries to take appropriate measures to enhance transparency in the donations made to political parties and elected officials.³

The controversial Electoral Bond Scheme (EBS) designed to regulate political funding in India presents a serious risk of money laundering and channeling illegal money in the electoral processes. The scheme was officially notified by the Ministry of Finance on January 2, 2018.⁴ In 2017, the Government of India introduced EBS with a promise "to cleanse the system of political funding in the country."⁵ On the contrary, EBS further aggravates the risk of the use of illicit money in the election process, disguised as a legitimate act.⁶ The Scheme incentivizes anonymous corporate donations, contributions through shell companies, and other opaque financial systems.⁷ This newly introduced scheme has amended several laws relaxing the norms for political contributions and prioritizing the anonymity of the donors.⁸ This scheme clandestinely facilitates political donations from foreign corporations to political parties which hitherto was not permissible in India.⁹ Investigative journalists, through obtaining official government documents, have exposed the lies of the government and revealed that the objective behind introducing EBS

¹ FATF, Recommendation 8

² FATF, Money Laundering and Terrorist Financing in The Art and Antiquities Market, February 2023

³ Article 7 (3) of the United Nations Convention Against Corruption states: "Each State Party shall also consider taking appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties."

⁴ The copy of the EBS is available at

https://incometaxindia.gov.in/communications/notification/notificationso29_2018.pdf

⁵ https://dea.gov.in/sites/default/files/Electoral%20Bonds_Press%20RELEASE_2-1-2018.pdf

⁶ <https://theleaflet.in/electoral-bonds-no-solution-to-illegal-political-funding/>

⁷ <https://indianexpress.com/article/opinion/electoral-bonds-prize-anonymity-you-wont-know-whos-bought-them-5015810/>

⁸ <https://carnegieendowment.org/2019/11/25/electoral-bonds-safeguards-of-indian-democracy-are-crumbling-pub-80428>

⁹ <https://carnegieendowment.org/2018/02/06/don-t-believe-bjp-and-congress-claims-that-they-re-cleaning-up-poll-funding-pub-75458>

was never to bring transparency in the electoral funding but to ensure secrecy of the donors making political donations.”¹⁰

While the EBS is replete with money laundering risks, its opaqueness and non-transparent method of political funding also pose a threat to the free and fair election process, which forms the bedrock of a healthy democracy. It is worth noting the decline of many democracies in the world has started through the rigging of elections and bypassing them. Authoritarian leaders have often used illicit finance systems to continue in power and amass huge wealth.¹¹ EBS facilitates the unaccounted flow of money to the political parties and fails to put a check on the misuse of monies in the election process. The said scheme has been severely criticized by the highest government functionaries and institutions for its opaqueness and inherent risks of money laundering.¹² The constitutional bodies like the Election Commission of India (ECI)— entrusted with the regulation of elections in India, and the Reserve Bank of India— the top bank regulation institution in India, have warned the government against introducing the EBS.¹³ The ECI opposed this scheme stating it as a retrograde step that would lead to black money in elections through shell companies.¹⁴ ECI specifically stated that EBS “*will have serious impact on the transparency aspect of political finance of political parties*”.¹⁵

However, the government ignored those suggestions and went ahead with the scheme. In its haste to move ahead with the scheme, the government on multiple occasions lied and spread misinformation. The government repeatedly stated that the provision to maintain the anonymity of the donors was introduced because the donors asked for secrecy but this was a lie.¹⁶ This was not the first time the Bharatiya Janta Party (BJP) government lied. Earlier, the minister of state for finance lied on the floor of the parliament that the ECI had not raised any concerns regarding the EBS.¹⁷ The present BJP government gets away with its lie on account of its brute majority in the parliament and control over the pliant media. The rise of this authoritarian government has also undermined the autonomy of the premier institutions including ECI.¹⁸ The present government through its brute majority in the parliament is hellbent on reversing the recent Supreme Court decision which laid down

¹⁰ https://www.huffpost.com/archive/in/entry/rbi-warned-electoral-bonds-arun-jaitley-black-money-modi-government_in_5dcbde68e4b0d43931ccd200?sbhttps://www.huffingtonpost.in/entry/rbi-warned-electoral-bonds-arun-jaitley-black-money-modi-government_in_5dcbde68e4b0d43931ccd200

¹¹ <https://www.atlanticcouncil.org/in-depth-research-reports/report/authoritarian-kleptocrats-are-thriving-on-the-vests-failures-can-they-be-stopped/>

¹² <https://carnegieendowment.org/2019/12/06/have-electoral-bonds-made-bad-system-worse-pub-80519>

¹³ https://www.huffpost.com/archive/in/entry/electoral-bonds-narendra-modi-election-commission-opposition-arun-jaitley_in_5dce3cd1e4b01f982eff5c62?ncid=other_trending_qeesnbnu018&utm_campaign=trending

¹⁴ <https://www.news18.com/news/india/govts-electoral-bonds-scheme-lets-shell-firms-give-black-money-to-political-parties-ec-tells-sc-2079971.html>

¹⁵ https://www.huffpost.com/archive/in/entry/electoral-bonds-narendra-modi-election-commission-opposition-arun-jaitley_in_5dce3cd1e4b01f982eff5c62?ncid=other_trending_qeesnbnu018&utm_campaign=trending

¹⁶ https://www.huffpost.com/archive/in/entry/electoral-bonds-modi-govt-donors-secrecy_in_5dd89391e4b0d50f328ff4f6?utm_hp_ref=in-paisapolitics

¹⁷ https://www.huffpost.com/archive/in/entry/electoral-bonds-narendra-modi-election-commission-opposition-arun-jaitley_in_5dce3cd1e4b01f982eff5c62?ncid=other_trending_qeesnbnu018&utm_campaign=trending

¹⁸ <https://indianexpress.com/article/opinion/columns/control-election-commissioners-bjp-government-is-undermining-democracy-8898655/>

guidelines to ensure the independence of the ECI.¹⁹ These changes if successful will convert ECI into a pliant body and ECI will no longer have powers to ensure free and fair elections in India. It is pretty clear that the attack on the ECI is to ensure the free flow of money in the electoral process of which the BJP is the biggest beneficiary. Studies have shown that the illegal flow of money in the election process is one of the key factors allowing authoritarian leaders across the globe to undermine the sanctity of free and fair elections.²⁰

Against this backdrop, this report relies on the relevant FATF standards to highlight the risk of money laundering and illegality embedded in the EBS and the mischief played by the Indian government in bringing this controversial scheme. FATF standards aim to ensure transparency in the financial system and support the fight against corruption.²¹ This report aims to raise awareness and understanding of the risks associated with the EBS and demands its complete scrapping. It provides FATF with sound legal and empirical grounds against EBS. The findings of this report can be relied upon by the evaluators during its 2023 Mutual Evaluation Review (MER) while assessing India's compliance with the FATF recommendations. It also presents an excellent opportunity for FATF to ensure India adheres to its promises of complying with FATF standards. The timely intervention by FATF will not only ensure transparency in the financial system in India but will go a long way to promote democratic values by ensuring illicit monies are not being used in the electoral processes.

2 Relevant FATF Standards for Analyzing EBS

FATF is committed to ensuring countries have a robust financial and regulatory framework that ensures a transparent flow of money transactions within their financial institutions to prevent the risk of money laundering and terrorist financing. Though combatting money laundering and terrorist financing remains the top priority of FATF, it has also endorsed the fight against corruption.²² FATF emphasizes the link between corruption and money laundering and encourages countries to comply with the FATF standards as it creates an environment in which thriving of corruption is difficult.²³ It also promises to safeguard the integrity of the public sector.²⁴

FATF recommendations requires countries to adopt measures to combat money laundering and directs them to apply the crime of money laundering to the widest range of predicate offenses.²⁵ The emphasis to include predicate offenses stems from the complex nature of

¹⁹ <https://www.wionews.com/india-news/pm-modi-led-govt-brings-a-bill-excluding-chief-justice-from-panel-selecting-poll-officers-624380>

²⁰ <https://www.atlanticcouncil.org/in-depth-research-reports/report/authoritarian-kleptocrats-are-thriving-on-the-vests-failures-can-they-be-stopped/>

²¹ FATF, A Reference Guide and Information Note on the use of the FATF Recommendations to support the fight against Corruption

²² Ibid, p.3

²³ FATF, A Reference Guide and Information Note on the use of the FATF Recommendations to support the fight against Corruption, 2012

²⁴ Ibid

²⁵ FATF, Recommendation 3

financial transactions which is often adopted by the criminals to evade the legal framework. To ensure transparency FATF standards specifically focus on customer due diligence and prohibit financial institutions from keeping anonymous accounts.²⁶ The due diligence standards are meant to ensure that the financial institutions are aware of the profile of their customer and their source of funds, and also allows financial institutions to check the authenticity of business transactions.²⁷ FATF also acknowledges the heightened risk of money laundering and terrorist financing along with corruption and bribery through Politically Exposed Persons (PEPs) on account of their position and influence.²⁸ Therefore, it suggests the application of additional AML/CFT preventive measures with respect to transactions with PEPs.²⁹

The emphasis on maintaining transparency runs throughout the payment chain starting from the originator to the beneficiary.³⁰ Additionally, Recommendation 25 requires countries to take measures to prevent the misuse of legal arrangements, for money laundering and terrorist financing. Similarly, Recommendation 26 specifically prohibits the establishment or continued operation of shell banks. Based on these FATF recommendations and standards, the inherent money laundering risks and corruption within EBS can be analyzed.

3 What is an Electoral Bond

An electoral Bond is a financial instrument “*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*”.³¹ Since electoral bonds are bearer in character, they do not carry the name of the buyer or payee. It also does not mention name of the political party to which it is donated and the holder of the instrument i.e., political party is presumed to be its owner.³² Only Indian citizens or a body incorporated and established in India can purchase and donate bonds to the political party of their choice.³³ No foreign entity/individual can make donations through bonds. To be eligible to purchase and encashment of an electoral bonds, the political parties must be registered under section 29A of the Representation of the People Act, 1951 and must have secured not less than one percent of the votes polled in the last general election to the House of the People or the Legislative Assembly, as the case may be.³⁴

The bonds are sold in multiple denominations INR 1,000 (USD 12); INR 10,000 (USD 120); INR 100,000 (USD 1200), INR 10,00,000 (USD 12000), and INR 100,00,000 (USD 120,000).³⁵ The bonds are sold only by the Nationalized Bank, i.e. the State Bank of India.

²⁶ FATF, Recommendation 10 “Customer Due Diligence”

²⁷ Ibid

²⁸ FATF Guidance, Politically Exposed Persons (Recommendations 12 and 22), June 2013, p.3

²⁹ Ibid, p.3

³⁰ FATF, Recommendation 16

³¹ See Clause (2) (a) of EBS, 2018.

³² https://adrindia.org/sites/default/files/Background%20Note_Electoral%20Bonds_June%202022.pdf

³³ See clause 3 of EBS, 2018

³⁴ Ibid

³⁵ See Clause 5 of EBS, 2018

The receiver of the bond, i.e., the political party must redeem the bond with 15 days (from the date of sale).³⁶ In other words, if the bond is sold on 1st January, then it must be redeemed by 15th January, else it will expire. If electoral bonds amount is not redeemed within the validity period, then the State Bank of India will deposit the money to the Prime Minister National Relief Fund (PMNRF).³⁷

Based on the Association for Democratic Reform (ADR) report published on June 2023, “183 bonds amounting to a total of INR 23.8368 crore (USD 2.86 million) were deposited in the PMRF which is only 0.1837% worth of all bonds purchased till then. Thus, 99.8163% of the bonds purchased during the twenty-six phases were encashed by the political parties within the validity period.”³⁸ The scheme provides no limit on the number of bonds that a person or any corporation can buy and donate to a political party.

4 Threats posed by the EBS

This section outlines the threats posed by EBS, which include (a) money laundering risk (b) threat of Corruption, (c) a violation of citizens’ constitutional right to know, and (d) favors to the ruling party.

4.1 Money Laundering risk inherent in the EBS

EBS is not merely opaque and non-transparent but opens a floodgate for money laundering through legal means. It encourages mysterious and indefinite donations which will be impossible to track down. The threat of money laundering through EBS has been emphasized by India’s top bank i.e. Reserve Bank of India. In its 2017 letter addressed to the Ministry of Finance, RBI objected to the introduction of EBS on the ground that it does not disclose the identity of the intervening persons/entities buying the bonds and therefore said EBS will affect the principles and spirit of the Prevention of Money Laundering Act (PMLA).³⁹ Emphasizing the money laundering risk, the then Governor of the RBI wrote a letter stating “*electoral bonds in physical form may exchange hands several times before reaching the political party, which would “leave no trail of the transactions and in the process of providing anonymity to the contributor and to the political party, anonymity will be provided to several others in the chain of transfer of the electoral bonds. This can render the scheme open to abuse by unscrupulous elements”*.”⁴⁰

Threat of money laundering through shell banks was also raised by the ECI in a separate letter addressed to the Ministry of Law and Justice, which stated “*This opens up the*

³⁶ See Clause 6 of EBS, 2018

³⁷ See Clause 12 of EBS, 2018

³⁸ https://adrindia.org/sites/default/files/Updated_Background%20Note_Electoral%20Bonds_April_2023.pdf

³⁹ https://www.huffpost.com/archive/in/entry/rbi-warned-electoral-bonds-arun-jaitley-black-money-modi-government_in_5dcbde68e4b0d43931ccd200?sbhttps://www.huffingtonpost.in/entry/rbi-warned-electoral-bonds-arun-jaitley-black-money-modi-government_in_5dcbde68e4b0d43931ccd200

⁴⁰ <https://thewire.in/government/finance-ministry-electoral-bonds-rbi>

*possibility of shell companies being set up for the sole purpose of making donations to the political parties, with no other business of consequence having disburseable profits”.*⁴¹

EBS clearly violates the mandate of FATF’s recommendation 3 which requires countries to take effective measures to criminalize money laundering and give a wider meaning to the offense by including predicate offenses. Recommendation 3 designates counterfeiting currency as a predicate offense for money laundering.⁴² FATF’s report on Money Laundering and Terrorist Financing Related to Counterfeiting of Currency notes that counterfeiting is also a growing method of terrorist financing.⁴³ Criminal groups have been active in using their covert network to introduce counterfeit currency into the financial system.⁴⁴ EBS through its opaque design is prone to the risk of counterfeiting and channeling of illicit money in India’s financial system. RBI clearly warned the government of the risk of cross-border counterfeiting and increased risk of forgery if electoral bonds were issued in scrip form, and therefore, proposed the issuance of electoral bonds in digital forms.⁴⁵ Further, EBS is also fraught with the risk of laundering money through shell banks which also runs contrary to the provision of Recommendation 26 which prohibits the operation of shell banks.

EBS enhanced the risk of money laundering by relaxing the provisions of different laws which ensured checks and balances on anonymous political donations and required a mandatory reporting system of all the donations. The amendments made by the EBS in election law, allow the corporations to not disclose their donations in their yearly profit and loss statement, which earlier was mandatory.⁴⁶ It has been suggested that EBS would enable dying companies, shell companies, and loss-making companies to make anonymous and unlimited donations.⁴⁷ Thus, EBS paves the way to route unaccounted money through electoral bonds.⁴⁸ Unfortunately, none of the objections raised by the ECI and RBI were considered by the government, and the EBS was formally introduced. Not only were the objections disregarded, but even the suggestions made to make the Scheme less vulnerable to fraud were ignored by the government.

4.2 Threat of Corruption

EBS promotes corruption and corporate influence in the electoral processes. It is well known that corporate funding in the electoral processes poses a threat of corruption where

⁴¹ https://www.huffpost.com/archive/in/entry/electoral-bonds-narendra-modi-election-commission-opposition-arun-jaitley_in_5dce3cd1e4b01f982eff5c62?ncid=other_trending_geesnbnu018&utm_campaign=trending

⁴² FATF, Money Laundering and Terrorist Financing Related to Counterfeiting of Currency, 2013

⁴³ Ibid

⁴⁴ Ibid

⁴⁵ <https://thewire.in/government/finance-ministry-electoral-bonds-rbi>

⁴⁶ See amendment to Section 29 C of the Representation of the People Act, 1951. A tabular analysis of all the amendments brought by EBS in different legislations are presented in the Supreme Court order dated April 12, 2019, in Association for Democratic Reforms v Union of India in Writ Petition (Civil) No. 333 of 2015, which is available at https://main.sci.gov.in/supremecourt/2015/16902/16902_2015_Order_12-Apr-2019.pdf

⁴⁷ <https://www.hindustantimes.com/analysis/the-electoral-bonds-scheme-is-a-threat-to-democracy/story-PpSiDdUjIw5WNBuZDsSzxI.html>

⁴⁸ <https://www.indialawjournal.org/electoral-bond-scheme-the-paragon-of-paradoxe.php>

corporations can influence government policies.⁴⁹ Money has been the most effective way of influencing policies and capturing regulatory frameworks.⁵⁰ In recent times, the influence of corporates in Indian polity has been raised vociferously and Prime Minister Modi is accused of favoring big corporates.⁵¹ EBS has been introduced by the BJP government and the record shows that it has been the biggest beneficiary of this scheme.

FATF acknowledges the risk of money laundering through politically exposed persons and prescribes additional AML/CFT measures to business relationships with PEPs.⁵² EBS poses a serious threat of bribery and corruption, as the donations made by individuals and corporations remain anonymous. Additionally, the design of EBS is such that the ruling party can access details of the donors, which can result in fear among donors of retaliation by the ruling government. Also, donors can exercise influence over the policy decision and extract favors by donating money to the political parties. Since corruption flourishes in an environment where higher government functionaries can misuse their position, EBS accentuates such risk. Such risks are higher in the context of India, where the government is infamous for misusing investigating agencies for their political gains.⁵³

The risk of corruption is further aggravated by the ill-informed amendments made by the EBS in the Income Tax Act. Amendment of Section 13A of Income-Tax Act, 1961 said that political parties can receive a maximum donation of up to INR 2,000 (USD 24) in cash to maintain transparency in the political funding system. But the government did not amend the Section 29C of the Representation of the People's Act which compels political parties to declare to EC all donations above INR 20,000 (USD 240). Hence, the ECI has requested the government to bring IT and RP Acts in consonance with each other.⁵⁴ Therefore, cash donations between INR 2,000 (USD 24) and INR 20,000 (USD 240) will continue to escape the EC's scrutiny.

Further, the amendments brought through the Act do not require political parties to mention the names and addresses of those contributing by way of electoral bonds in their contribution reports filed with the Election Commission of India (ECI) annually. Parties just need to inform ECI of the total amount they receive through bonds annually. This will lead to more corruption in the political funding arena, where criminals and their illegal money will escape the scrutiny of regulatory institutions.

4.3 EBS infringes on the citizen's fundamental 'Right to Know'

In a democratic setup, when citizens choose their representatives, they have the right to know about their candidates. They can only make an informed choice based on the full and

⁴⁹ <https://rm.coe.int/16806cbff2>

⁵⁰ <https://www.thehindu.com/opinion/lead/here-is-why-the-electoral-bonds-scheme-must-go/article34163851.ece>

⁵¹ <https://www.tribuneindia.com/news/india/adani-group-fleecing-people-rahul-gandhi-554403>

⁵² FATF Guidance, Politically Exposed Persons (Recommendations 12 and 22), June 2013, p.3

⁵³ Nileena MS, *The Enforcers: How the ED became a political tool*, The Caravan, 31 May 2023, <https://caravanmagazine.in/law/ed-political-tool>

⁵⁴ https://www.huffpost.com/archive/in/entry/electoral-bonds-narendra-modi-election-commission-opposition-arun-jaitley-in_5dce3cd1e4b01f982eff5c62?ncid=other_trending_qeesnbnu018&utm_campaign=trending

complete information about their candidate's credentials which includes their source of funds. The Indian Supreme Court has held every Indian citizen has a fundamental right to information.⁵⁵ Such rights extend to the personal information of election candidates such as personal assets, educational qualification, and criminal antecedents, in the light of larger public interest.⁵⁶ But this scheme doesn't allow Indian citizens to seek information about the electoral bonds' donors under even the Right to Information Act (equivalent to the United States' Freedom of Information Act).

The EBS amended the provisions of the Companies Act, 2013 ('Companies Act') and Representation of People's Act, 1951 ('RP Act'), which mandated the political parties to reveal the details of their donations, and now there is complete opacity about the donor of the bonds, allowing political parties to not disclose the source of their donations.⁵⁷ As a result, the constitutional body ECI, which is responsible for holding elections in the World's largest democracy, does not have the power to seek information about donors of the bonds from political parties. This makes the whole political funding process opaque. The political parties would only inform the total amount they had received through bonds in their annual reports to the ECI. ECI in its letter of May 2017 letter addressed to the Ministry of Law and Justice, called the amendment permitting political parties to not disclose their source of funds to the ECI a retrograde step and specifically recommended withdrawal of such amendment.⁵⁸

Further, in 2020, the Central Information Commission ('CIC'), a body authorized under the Right to Information Act ('RTI Act') dismissed an application seeking details regarding political donations through the EBS and held there was no "larger public interest" involved, therefore the institution is not required to furnish those details.⁵⁹ However, the said decision of the CIC has been criticized for not applying the standards set out by the courts in its earlier judgments and for not following the objective of the Right to Information Act.⁶⁰

The provisions of EBS and the decision of the CIC present a severe blow to the fundamentals of transparency and accountability which form the basis of the rule of law. In democratic setup citizens are supreme and by withholding such crucial information from voters, EBS shakes the very foundation of democracy. It is further pertinent to note that the cost of the printing of these bonds, and the sale and purchase of these bonds are borne out of taxpayers' money.⁶¹ As per media reports, "the cost of printing one electoral bond comes to Rs 25 with an additional GST" charged to the government.⁶² In other words, the cost of bonds, which are used to make donations to political parties, are borne by the taxpayers which is a misuse of taxpayers' money.

⁵⁵ <https://indconlawphil.wordpress.com/tag/electoral-bonds/>

⁵⁶ Ibid

⁵⁷ <https://indconlawphil.wordpress.com/tag/electoral-bonds/>

⁵⁸ https://www.huffpost.com/archive/in/entry/electoral-bonds-narendra-modi-election-commission-opposition-arun-jaitley_in_5dce3cd1e4b01f982eff5c62?ncid=other_trending_qeesnbnu018&utm_campaign=trending

⁵⁹ <https://indconlawphil.wordpress.com/tag/electoral-bonds/>

⁶⁰ Ibid

⁶¹ https://www.huffpost.com/archive/in/entry/electoral-bonds-taxes-used-for-sbi-bank-charges_in_5e317c96c5b693878a89ac2e

⁶² <https://thewire.in/rights/electoral-bonds-tax-payers-cost-printing-bank-commission>

Unlike India, in other countries like Bhutan, Nepal, Germany, France, Italy, Brazil, Bulgaria, the US, and Japan, details of political donations are public, and citizens can access full information regarding donations made to political parties.

4.4 EBS favors the ruling party

While no information regarding the electoral bonds is provided to the citizens, the said anonymity does not apply to the government, which can easily retrieve the donor details. Clause 7 (4) of the EBS, 2018 states that no one except the bank shall have details of the donors it “*shall not be disclosed to any authority for any purposes, except when demanded by a competent court or upon registration of criminal case by any law enforcement agency*”. However, the practice shows that the enforcement agencies have been frequently misused by the ruling party to achieve political goals.⁶³ Further, the banks are largely under the control of Ministry of Finance, therefore, the details of the donors can also be accessed by the ruling party.⁶⁴ Having exclusive access to the donors’ details will allow the ruling party to track donations made to opposition political parties and arm-twist donors, and force them to make donations to the ruling party only, creating an uneven playing field.

BJP, the ruling party is the biggest beneficiary of the EBS and bagged more than 95% of the electoral bonds funds.⁶⁵ As reported in a July 2023 report by the transparency organization Association for Democratic Reforms, during the six-year period (2016-2022), more than 52% of BJP’s total donations came from Electoral Bonds worth INR 5271.9751 crore (USD 633.4 million), while all other National parties amassed only INR 1783.9331 crore (USD 214.3 million).⁶⁶ The principal opposition party Indian National Congress (INC) declared the second highest donations from bonds of INR 952.2955 crore (USD 114.4 million). The fact that a majority of the bonds were received by a single party and a huge proportion of these bonds were purchased and redeemed (by parties) during the time of elections severely impacts the level-playing field.

In April 2019 the Supreme Court, through the Election Commission, had asked all political parties receiving donations through these secretive electoral bonds to submit details of the same in a ‘sealed cover’.⁶⁷ As many as 105 parties submitted the data in a 'sealed cover' in May 2019, while the apex court was hearing petitions challenging the legality of the bonds. This created an impression that all 105 political parties received donations through bonds. However, in an expose by The Reporters' Collective, it was revealed that only 17 political parties of the 105 named in the EC's sealed envelope received funds through electoral

⁶³ Nileena MS, *The Enforcers: How the ED became a political tool*, The Caravan, 31 May 2023, <https://caravanmagazine.in/law/ed-political-tool>

⁶⁴ <https://theleaflet.in/electoral-bonds-no-solution-to-illegal-political-funding/>

⁶⁵ <https://economictimes.indiatimes.com/news/politics-and-nation/electoral-bonds-ruling-bjp-bags-95-of-funds/articleshow/66858037.cms?from=mdr>

⁶⁶ ADR, *Analysis of Donations to Registered Recognised Political Parties*, 11 July 2023, <https://adrindia.org/content/analysis-donations-registered-recognised-political-parties-fy-2016-17-fy-2021-22-0>

⁶⁷ See order dated April 12, 2019, in *Association for Democratic Reforms v Union of India* in Writ Petition (Civil) No. 333 of 2015.

bonds.⁶⁸ The journalists ferreted out the information in the sealed envelopes by interviewing the heads of 54 of 70 registered, unrecognized parties that replied to the commission, reviewing the letters the parties sent, and crunching data from the annual audit report filings of political parties. Thus, it was clear that not all parties were receiving donations through EBS, and it only favored a few.

5 Inherent Illegality in the EBS

EBS suffers from inherent illegality and it has been challenged before the Supreme Court of India. Constitutional Scholars have argued that this scheme goes against the principles of the Indian constitution and therefore, it must be struck down. There are three petitions challenging the scheme — one jointly filed in 2017 by ADR and non-profit Common Cause, another filed in 2018 by the Communist Party of India (Marxist), and the third is filed by Congress leader Dr. Jaya Thakur — all largely asking for the same relief to enhance the transparency in the political donation process. The petitions are pending in the Supreme Court. A five-judge Constitution Bench will hear the ADR petition on 31st October and 1st November 2023.

5.1 EBS was illegally introduced as a Money Bill in the Parliament

In 2017, the government introduced EBS in the Indian parliament as a Money Bill as it would not have required them to introduce the Bill in the upper house (Rajya Sabha), where they lacked a majority. The provision for a Money Bill is under Article 110 of the Indian constitution which permits only a few matters (mainly relating to tax, consolidated fund or contingency fund of India, and other financial issues) to be introduced as a money bill.⁶⁹ EBS which amended multiple laws (The Companies Act, Representation of People's Act, and the Foreign Contribution (Regulation) Act) was not confined to matters dealt with in Article 110, therefore, its introduction in the parliament as a money bill is illegal. The established legislative procedures have been bypassed to introduce this controversial scheme.

The investigation by transparency activists revealed that the government did not hold proper discussions while approving this scheme and relied on informal discussions, which goes against the directions of the Supreme Court of India.⁷⁰ The Ministry of Corporate Affairs failed to hold a proper discussion on the EBS before approving it. It did not hold a proper discussion on the amendment of Section 182 of the Companies Act as proposed under EBS, and the decision to amend was cleared by the Ministry based on the informal discussions.⁷¹ The file notings of the ministry, dated 16 March 2017, do not reveal who made the proposal, but they say “informal discussions” had taken place between officers

⁶⁸ <https://www.thequint.com/news/india/only-19-parties-received-money-from-electoral-bonds-bjp-got-68-investigation-bjp-reporters-collective-supreme-court-105-parties>

⁶⁹ https://www.business-standard.com/india-news/what-is-a-money-bill-what-are-its-provisions-and-what-is-its-significance-123080300628_1.html

⁷⁰ <https://thewire.in/rights/rti-electoral-bond-informal-discussion>

⁷¹ https://www.huffpost.com/archive/in/entry/electoral-bonds-rti-arun-jaitley-law-ministry-in_5e2eccb1c5b6d6767fd8733f

of the finance ministry's revenue department and the corporate affairs ministry.⁷² These informal discussions were illegal, as per an October 2013 ruling by the Supreme Court of India, where the court held "*We are of the view that the civil servants cannot function on the basis of verbal or oral instructions, orders, suggestions, proposals, etc. and they must also be protected against wrongful and arbitrary pressure exerted by the administrative superiors, political executive, business and other vested interests*".⁷³

The constitutional challenge to the EBS before the Supreme Court of India is currently pending and one of the grounds of challenge includes EBS being introduced as a money bill before the parliament. The petitions filed in the Supreme Court emphasize why Electoral Bonds do not fit into the category of Money Bill. Supreme Court of India has earlier held that the power of judicial review will be open in matters where the procedure is illegal and not merely irregular.⁷⁴

5.2 EBS is irrational and arbitrary

EBS makes the existing bad system of political donations in India worse.⁷⁵ It also fails the constitutional test of rationality and non-arbitrariness.⁷⁶ The doctrine of manifest arbitrariness as explained by Justice Rohinton Nariman in Shayara Bano's case means something done capriciously, irrationally, and/or without determining principle.⁷⁷ The test further states that when something is done that is excessive and disproportionate, such legislation would be manifestly arbitrary.⁷⁸ Applying the said test, it will be amply clear that the amendments brought in by the EBS are capricious and arbitrary. For example, EBS scraped the limit on the amount to which companies can make political donations, by removing the proviso part of Section 182 (3) of the Companies Act which prescribed that no company could make donations of more than 7.5% of their total profit in the preceding three financial years.⁷⁹ Thus, even a loss-making company or even a shell company can make donations through the EBS, and the same is irrational and arbitrary.⁸⁰ The Indian courts have explained arbitrariness as an act that has no reasonable nexus with the object of the legislation.⁸¹ In the present case, EBS was introduced with a promise of bringing transparency in the political funding whereas it promotes opaqueness, thus it runs contrary to its promise. Another example of how the EBS promotes opaqueness is the amended Section 182 (3) of the Companies Act, which mandated disclosing the particulars of political donations. After the amendment companies are under no obligation to disclose

⁷² Ibid

⁷³ T.S.R.Subramanian & Ors vs Union Of India, WRIT PETITION (CIVIL) NO.82 OF 2011, available at <https://indiankanoon.org/doc/183945465/>

⁷⁴ <https://www.indialawjournal.org/electoral-bond-scheme-the-paragon-of-paradoxe.php>

⁷⁵ <https://carnegieendowment.org/2019/12/06/have-electoral-bonds-made-bad-system-worse-pub-80519>

⁷⁶ <https://www.hindustantimes.com/analysis/the-electoral-bonds-scheme-is-a-threat-to-democracy/story-PpSiDdUjIw5WNBuzDsSzxI.html>

⁷⁷ Shayara Bano v. Union of India, AIR 2017 SC4609

⁷⁸ Ibid

⁷⁹ See order dated April 12, 2019, in Association for Democratic Reforms v Union of India in Writ Petition (Civil) No. 333 of 2015.

⁸⁰ <https://www.indialawjournal.org/electoral-bond-scheme-the-paragon-of-paradoxe.php>

⁸¹ Amit B. Thakker v. Air India, AIR 1999 Guj 341

their political contributions. The corporate and political nexus hinges upon the quid pro quo relationships and with the non-disclosure provision under the EBS, there is severe risk of corporates influencing the government policies by promising heavy donations to the political party in power. Other amendments brought in by the EBS like Section 29 (C) of the Representation of the People Act, 1951, which earlier mandated political parties to declare the donations received by them are no longer required because the EBS exempts political donations received through electoral bonds. Thus, the promise of bringing transparency in political funding through EBS is nothing but a legal façade created by the government to create a rather opaque and non-transparent method of political funding where black money and other illicit money can be routed through legal channels.

5.3 EBS facilitates foreign funding to political parties against Indian law

EBS facilitates foreign funding within Indian electoral processes which is not permissible under the law. Section 29B of the Representation of the People Act prohibits political parties from accepting political donations from foreign sources.⁸² In 2014, the Delhi High Court found both the BJP and the Indian National Congress guilty of accepting donations from foreign sources in violation of Section 2 (e) of the erstwhile Foreign Contribution (Regulation) Act, 1976.⁸³ To bypass the said judgment and to further facilitate political donations from foreign sources, EBS amended the provision relating to foreign donations under the Foreign Contribution (Regulation) Act, 2010, with retrospective effect i.e. 1976. It is pertinent to note that EBS as it stands today facilitates foreign companies to make donations through their subsidiary companies in India, but in the absence of such an amendment, the judgment of the Delhi High Court would have been binding, and political parties would have faced punitive consequences.

EBS by facilitating foreign donations to political parties not only poses a threat to a free and fair election but creates a legal tool that can be used by politicians and their associates to convert their illicit money into white money. FATF has joined the United Nations Convention against Corruption in endorsing the fight against corruption and the threat of money laundering through politically exposed persons.⁸⁴ Article 52 of the UNCAC prescribes to conduct enhanced scrutiny of accounts of people who are entrusted with prominent public functions.⁸⁵ Thus, the action of the Indian government in bringing EBS runs afoul of the FATF standards and its commitment to fight against corruption.

⁸² <https://indiankanoon.org/doc/98862296/>

⁸³ <https://adrindia.org/sites/default/files/ADR%20vs.%20UOI%20%28Delhi%20High%20Court%20judgment%20on%20foreign%20%20funding%20received%20by%20INC%20and%20BJP%29.pdf>

⁸⁴ FATF Guidance, Politically Exposed Persons (Recommendations 12 AND 22) 2013

⁸⁵ Article 52 (1) of the UNCAC- Without prejudice to article 14 of this Convention, each State Party shall take such measures as may be necessary, in accordance with its domestic law, to require financial institutions within its jurisdiction to verify the identity of customers, to take reasonable steps to determine the identity of beneficial owners of funds deposited into high-value accounts and to conduct enhanced scrutiny of accounts sought or maintained by or on behalf of individuals who are, or have been, entrusted with prominent public functions and their family members and close associates. Such enhanced scrutiny shall be reasonably designed to detect suspicious transactions for the purpose of reporting to competent authorities and should not be so construed as to discourage or prohibit financial institutions from doing business with any legitimate customer.

The threat of foreign donations into the Indian electoral process was also highlighted by the ECI which in its affidavit before the Supreme Court submitted that “*electoral bonds made the commission’s job of tracking donations from overseas and government companies – both legally barred at present – rather difficult...*”.⁸⁶

5.4 Secret Number in the Electoral Bond for tracing donors

The news reports show that there is a hidden number on the electoral bonds, which can be used by the government for secret surveillance to track down the donors.⁸⁷ In an expose in the Quint, it was revealed that electoral bonds carry hidden alphanumeric numbers which are not visible to the naked eye.⁸⁸ They are visible only under the Ultraviolet Rays. It appears that the government adopted a secret method to put secret surveillance on the donor who is completely unaware that he has been tracked by the government. Experts said this method of tracking is unprecedented.



(The above images reveal the hidden numbers on the bonds under the Ultraviolet Rays. Source: [The Quint](#))

Neither the government nor the State Bank of India informed the public about the hidden numbers. Rather the government always claimed the electoral bond donor cannot be tracked. But in reality, the hidden numbers are recorded by the State Bank of India before it is sold to a purchaser. When the State Bank of India receives it back from the political party to whom the bond is donated, the bank then matches the number which is mentioned next to the name of the purchaser.

In response to this expose, the government issued a press release on 17 April 2018 saying “Random Serial Number, invisible to the naked eye, present on the Bond not linked to any party transaction or cannot be used for tracking the transactions SBI does not share the serial number with anybody, including the Government and users”.⁸⁹ The press release also

⁸⁶ <https://timesofindia.indiatimes.com/blogs/straight-candid/part-2-electoral-bonds-the-tool-bjp-used-to-route-illicit-and-foreign-funding/>

⁸⁷ <https://www.thequint.com/news/politics/hidden-number-on-election-electoral-bond#read-more>

⁸⁸ Ibid

⁸⁹ <https://pib.gov.in/newsite/PrintRelease.aspx?relid=178726>

said, “This number is not noted by the SBI in any record associated with the buyer or political party depositing a particular electoral bond.”⁹⁰

But that’s not the truth. The documents received under the Right to Information Act (RTI) revealed that the Finance Ministry allowed the bank to record the hidden alphanumeric codes and asked it “to keep information highly confidential to prevent its leaking in any way”.⁹¹ The government once again lied to the public through its press release.

6 EBS has far-reaching consequences

EBS promotes exorbitant flow of money in the electoral process, which is often used to manipulate voters and in rigging the election. India’s 2019 parliamentary election has been the world’s most expensive election with a staggering INR 55,000-60,000 crore (USD 6.6-7.2 billion) estimated to have been spent during the 2019 Parliamentary elections.⁹² Overall, expenditure in the last six Lok Sabha elections between 1998 and 2019 had seen a near sixfold jump from INR 9,000 in 1998 to over INR 55,000 crore in 2019.⁹³ Lok Sabha, 2019 elections also witnessed the highest-ever anonymous funding through electoral bonds. Between FY 2017-18 & and 2018-19, political parties received a total of INR 2,760.20 crore (USD 331.6 million) from electoral bonds.⁹⁴ Such increasing expenditure on election processes runs contrary to the objective of the Representation of the People Act, 1951, which under Section 77 prescribes maximum expenses for elections for each candidate.⁹⁵ But no such limit is applicable to the expenditure of a political party. The electoral bonds are donated to political parties and not an individual candidate. It is for this reason that there has been a sudden increase in the number of political parties since EBS was introduced. An ADR report shows that there were 1,500 political parties till January 2017, but by 2021 this number increased to 2858.⁹⁶ Out of these 2858, 97.83% are unrecognized parties.⁹⁷ This sudden rise in the number of political parties points the needle of suspicion towards EBS.

While EBS poses serious risk of infusion of illicit money in electoral politics in India, it has the potential to affect economy and financial institutions of other countries too. Criminals have often used weak financial regulations of certain countries as safe tax heaven and to convert their illegal proceeds into legitimate funds, so EBS may act as a tool for

⁹⁰ Ibid

⁹¹ <https://www.reporters-collective.in/stories/electoral-bonds-are-traceable-documents-nail-govt-lies-on-anonymity>

⁹² <https://www.bqprime.com/elections/india-election-expenditure-2019-lok-sabha-elections-was-the-worlds-costliest>

⁹³ Ibid

⁹⁴ https://adrindia.org/sites/default/files/Analysis_of_Donations_to_Registered_Recognised_Political_Parties_FY_20_16-17_to_2021-22.pdf

⁹⁵ <https://indiankanoon.org/doc/117675817/>

⁹⁶ https://adrindia.org/sites/default/files/Background%20Note_Electoral%20Bonds_June%202022.pdf

⁹⁷ Ibid

such illegal acts and may encourage criminals to channel their illegal funds through political donations in India.

7 Conclusion

It is thus clear that the introduction of EBS under the pretext of ensuring transparency within the electoral funding in India was a lie propagated by the Indian government and the real motive behind it was to amass huge illicit wealth for political gains. While on one hand, the Indian government has aggressively cracked down on the civil society actors and Not for Profit Organizations (NPOs) under the pretext of maintaining transparency and putting a check on the misuse of foreign donations,⁹⁸ EBS on the other hand promotes opaqueness and non-transparency in the political donations.

This clearly shows the double standard adopted by the Indian government and establishes that it is not committed to ensuring compliance with FATF standards which promotes transparency in financial transactions across the globe. In today's globalized world where money flow has transcended borders and as a result, countries face the risk of money laundering and terrorist financing on account of weak and non-transparent financial systems in other countries, India is under obligation to comply with the FATF standards and EBS cannot be an exception to this. The inherent risk of money laundering coupled with the risk of corruption and fraud in EBS is not an isolated concern of India alone and it poses a serious threat to international financial systems.

The preceding sections clearly establish that EBS disregards FATF standards and violates the mandate of FATF's recommendations. Therefore, FATF must act immediately to put a check on the misuse of EBS by bad actors.

8 Recommendations

For the above-mentioned reasons, the FATF must make the following recommendations to the Indian government:

1. Complete abrogation of the Electoral Bond Scheme, 2018.
2. Suspend the implementation of the scheme until the Supreme Court of India decides the constitutional validity of the EBS.
3. Conduct risk assessment of the scheme and assess the threat of money laundering, terrorist financing, corruption and other threats of flow of illicit money through the EBS.
4. Implement measures to enhance transparency by removing the anonymity of the donors in the EBS.
5. Enforce stricter regulations for political parties to disclose and let the ECI examine the donation and make observation regarding both bonds and expenditure.

⁹⁸ <https://article-14.com/post/an-arbitrary-crackdown-on-foreign-donations-cripples-ngos-at-a-time-when-india-needs-them-most-61f20bac480a9>

6. Identify and rectify loopholes in the Electoral Bonds to prevent potential misuse, violation of donation limits, and risks such as crony capitalism and black money infusion.