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NECESSARY REFORMS IN ELECTORAL FINANCE

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EXECUTIVE SUMMARY

Underlying India's vibrant democracy, the legal rules surrounding the funding of its key players have increasingly failed to meet minimum standards of probity. The regulation of electoral finance has been one of the oldest and most trenchant issues in our polity, enduring through a number of attempts to restructure it.

In this report, we assess the range of issues surrounding this sustained problem, tracing the steps that governments have taken in the past and identifying the entrenchment of political parties in their role as gatekeepers to meaningful reform. The need for the present study emerges from recent reforms made in relevant rules through the Finance Acts, 2016 and 2017. Various significant questions are raised as to the direction in which such reforms lead us.

In an attempt to deconstruct the reasons for the continuation of these issues, an analytical framework is presented to set out, in one place, the various considerations that must be taken into account and the range of criteria that need to be met for a good electoral finance regime to be designed. A representative set of jurisdictions are also analysed to outline the approaches that India can adopt as well as the potential benefits of each approach.

Our recommendations are broadly described below:

1. Electoral finance law must pivot towards transparency, strictly requiring disclosures of candidate assets and liabilities (including the source of assets), registration and reporting requirements for political parties, and the applicability of the Right to Information Act, 2005 to such parties.
2. Rules regarding funding and expenditure need to be tightened by placing an absolute cap on anonymous donations, banning corporate donations (except possibly to an Election Commission-controlled Trust), regulating political advertisements, preventing foreign sources of donations, outlining permissible categories of expenditure, regulating third-party expenditures, and laying a limited base for public funding.
3. The enforcement of the proposals above must be accompanied by the possibility of strict penalties such as the deregistration of defaulting political parties, along with increased provision for the independence of the Election Commission of India.

“We all ought to know that Swaraj will not at once or, I think, even for a long time to come, be better government or greater happiness for the people. Elections and their corruptions, injustice, and the power and tyranny of wealth, and inefficiency of administration, will make a hell of life as soon as freedom is given to us. Men will look regretfully back to the old regime of comparative justice, and efficient, peaceful, more or less honest administration. The only thing gained will be that as a race we will be saved from dishonour and subordination.”

- Chakravarti Rajagopalachari, *Jail Diary: a day to day record of life in Vellore Jail* (1920)

I. INTRODUCTION

A. Background

Money is central to the issue of political corruption in India and political parties are suspected to be the largest and most direct beneficiaries. Corruption in elections reduces accountability, distorts representation, and introduces asymmetry in policymaking and governance. It has been alleged that with an estimated spending of more than \$5 billion, the 2014 elections to the Lok Sabha ranks amongst the costliest in the history of democracy.¹

Free and fair elections are the cornerstone of a democracy and the Election Commission of India’s (‘ECI’) performance in carrying out of its constitutional mandate has been commendable and has been lauded frequently. But challenges continue to present themselves and every challenge met has continued to generate further challenges whose complexity has been limited only by the ingenuity of human imagination and the lure of elected office. However, money power in recent elections poses the most direct threat and could vitiate the entire edifice of Indian democracy if not effectively checked.

In May 2016, in an unprecedented move, the Election Commission of India was forced to rescind the poll notification for two Assembly constituencies in Tamil Nadu, where ECI Officials reported large scale distribution of money and gifts to electors by candidates and political parties.² Again, in April 2017, the ECI cancelled a by-poll to the RK Nagar constituency in Chennai amidst allegations that the

¹Michael Collins, “Money Power in Indian Elections,” *The Hindu BusinessLine* (July 29, 2014) <<http://www.thehindubusinessline.com/opinion/money-power-in-indian-elections/article6261173.ece>> last accessed 10/11/2017.

² Dennis S. Jesudasan, “ECI rescinds poll notification for Aravakurichi, Thanjavur constituencies,” *The Hindu* (May 28, 2016) available at <<http://www.thehindu.com/news/national/tamil-nadu/eci-rescinds-poll-notification-for-aravakurichi-thanjavur-constituencies/article8659843.ece>> last accessed 20/1/2018; Election Commission of India, Order, available at <http://eci.nic.in/eci_main1/current/Postponement_15052016.pdf> last accessed 20/1/2018.

State Health Minister may have distributed as much as Rs. 89,00,00,000 (Rupees Eighty Nine Crore) to the voters.³ These are just some isolated instances of the ECI attempting to cope with the problem.⁴

B. An Early Judicial Warning

In a remarkable judgement, a bench headed by Chief Justice M.C. Chagla of the Bombay High Court in 1957, had issued an early warning to Parliament about the great danger inherent in permitting companies to make contributions to the funds of political parties' which may "ultimately overwhelm and even throttle democracy." In this case, the Tata Iron and Steel Co. Ltd. had originally approached the Bombay High Court for amendment of its memorandum of association to include the making of contribution to political parties. In the appellate proceedings, the Court noted that "Democracy in this country is nascent and it is necessary that democracy should be looked after, tended and nurtured so that it should rise to its full and proper stature" and any "proposal or suggestion which is likely to strangle that democracy almost in its cradle must be looked at not only with considerable hesitation but with a great deal of suspicion." The court also observed that:

"any attempt on the part of anyone to finance a political party is likely to contaminate the very springs of democracy. Democracy would be vitiated if results were to be arrived at not on their merits but because money played a part in the bringing about of those decisions. The form and trappings of democracy may continue, but the spirit underlying democratic institutions will disappear. History of democracy has proved that in other countries democracy has been smothered by big business and money bags playing an important part in the working of democratic institutions and it is the duty not only of politicians, not only of citizens, but even of a Court of law, to the extent that it has got the power, 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."⁵

C. Electoral Bonds and Electoral Trusts

The latest government-led legislative reform has been the introduction of electoral bonds by the finance minister which were mentioned in his 2017 budget speech. The necessary legislative amendments to the Income Tax Act, 1961, Reserve Bank of India Act, 1934 and the Representation

³ Gaurav Vivek Bhatnagar, "Breaking Down EC Order on R.K. Nagar By-Poll Cancellation," *The Wire* (April 10, 2017) available at <<https://thewire.in/122540/breaking-down-ec-order-on-r-k-nagar-by-poll-cancellation/>> last accessed 20/1/2018.

⁴ More instances are related in SY Quraishi, *An Undocumented Wonder: The Making of the Great Indian Elections* (Rainlight Rupa, 2014) 259.

⁵ *Jayantilal Ranchhoddas Koticha v. Tata Iron & Steel Co. Ltd.*, (1957) 27 Comp Cas 604.

of Peoples Act, 1951 were made vide the Finance Act 2017.⁶ The issue of whether these amendments can be passed as a Money Bill without the concurrence of the Rajya Sabha has also been challenged.⁷ The government has also notified the scheme of electoral bonds.⁸

An electoral bond is intended to be a bearer instrument having limited validity. It is intended to protect the identity of the donor and at the same time ensure that banking channels are used for their purchase. The donor will get a deduction and the recipient political party will get the consequent tax exemption, provided returns are filed by the political party. The bonds will be issued in multiples of Rs. 1,000, Rs. 10,000, Rs. 1 lakh, Rs. 10 lakh and Rs. 1 crore and will be available at specified branches of State Bank of India.

It must be noted, however, that the introduction of the electoral bonds scheme is part of what appears to be a growing trend away from transparency and accountability, two values which were already sparse in relation to Indian political parties. The Finance Act, 2017 coupled the introduction of electoral bonds with amendments to the Companies Act, 2013, lifting the cap on corporate contributions to political parties and removing the obligation to report such contributions in the company's profit and loss account.⁹ Further back in 2013, while companies were still required to report political contributions, the Central Government sought to create a layer of opacity in the process by recognising electoral trusts.¹⁰ Electoral trusts could receive contributions from various companies and disburse them to various parties, making it unclear to the public at large as to which company was really channelling funds to which party and preventing the identification of *quid pro quo* transactions.¹¹ Even back then, the scheme was counterintuitively forwarded as one to promote transparency.¹²

⁶ Sections 11, 135, and 137 of the Finance Act, 2017.

⁷ W.P.(C) 880 of 2017 filed by Association for Democratic Reforms and Common Cause. Notice was ordered by the Supreme Court on 3.10.2017 and tagged along with earlier pending petitions, namely, W.P.(C) 330/2015 AND SLP (C) NO. 18190/2014. The petition can be accessed at: Live Law News Network, "Political Funding: SC Issues Notices To Centre, EC On PIL Challenging Finance Act Amendments [Read Petition]," *LiveLaw*(October 3, 2017), available at <<http://www.livelaw.in/political-funding-sc-issues-notices-centre-ec-pil-challenging-finance-act-amendments-read-petition/>> last accessed 28/12/2017.

⁸ PIB Delhi, "The Government of India notifies the Scheme of Electoral Bonds to cleanse the system of political funding in the country..." available at <<http://pib.nic.in/PressReleaselframePage.aspx?PRID=1515123>> last accessed 20/1/2018.

⁹ See, Section 154 of the Finance Act, 2017 (amending Section 182 of the Companies Act, 2013).

¹⁰ Electoral trusts originally gained recognition through Rule 17CA of Income Tax Rules, 1962 and the Electoral Trust Scheme, 2013 notified under Notification No. 9/2013/SO 309(E).

¹¹ Harry Stevens & Aman Sethi, "Electoral trusts: How some of India's biggest companies route money to political parties," *Hindustan Times* (April 14, 2017) available at <<https://www.hindustantimes.com/interactives/electoral-trusts-explained/>> last accessed 21/1/2018.

¹² Press Trust of India, "Electoral trusts to make poll-funding more transparent: Pilot," *Business Standard* (January 12, 2014) available at <http://www.business-standard.com/article/current-affairs/electoral-trusts-to-make-poll-funding-more-transparent-pilot-114011200326_1.html> last accessed 21/1/2018.

These have largely been retrograde steps away from meaningful electoral reforms in India and highlight the unique problems in legislating such reforms: that parliamentarians, belonging to political parties, who are beneficiaries of the existing legislative framework and its loopholes are required to legislate reforms.

D. Structure of the Report

In the following pages, issues at the core of India's democratic enterprise are analysed to identify and address shortcomings in the electoral machinery. In the chapter that follows, a broad overview is presented of the manner in which successive governments have dealt with electoral finance laws since Independence, illustrating the pace of developments. In the third chapter, an attempt is made to formulate a framework against which to assess potential solutions to the issues outlined above. The aim of this analytical framework is to draw up a set of considerations and criteria specific to the situation of electoral finance in India. For the ease of application of this framework, a brief outline of existing electoral finance rules is presented in chapter four. The fifth chapter then juxtaposes Indian law against international practice in some democracies that have attempted to deal with similar issues before. Finally, chapter six lays down a set of recommendations on the basis of the foregoing study.

II. Historical Overview Since Independence

Historically, political parties in India had been largely funded by private donations and membership dues. In the absence of the Muslim League, the Indian National Congress became the largest political organisation in the country with no real rival of equal standing. The Representation of Peoples Acts of 1950 ('RPA 1950') and 1951 ('RPA 1951') were passed by the Constituent Assembly in this atmosphere and concentrated on regulation of individual candidates while putting in place no provision for the regulation of political parties. The only provision relating to political funding was the Election Expense provisions contained in Chapter VIII of the RPA 1951.

The Companies Act, 1956 sought to introduce some regulation on political funding by companies by requiring them to seek shareholder approval in a general meeting for any donation above Rs. 25,000 or 5% of the average net profit of the previous three years.

The Santhanam Committee on Prevention of Corruption (1964) had highlighted the fact that black money was being channelled back to political parties and candidates to garner favourable policy decisions.¹³ The Indira Gandhi government decided to ban corporate donations to political parties completely by amendment of the Companies Act, 1956. While the ostensible reason was to prevent large corporates from exercising undue political influence, there is considerable evidence to show that this and bank nationalisation was done by the government to target the funding of the free-market oriented Swatantra Party led by C. Rajagopalachari and the Congress (O).¹⁴

In 1974, the Supreme Court took a leap and attempted to fill the loophole in the RPA 1951 that was increasingly resorted to and declared that a party's expenditure on behalf of its candidate be included in the calculation of a candidate's election expenses. The Court noted that the "objective of limiting expenditure is to eliminate, as far as possible, the influence of big money in the electoral process. If there were no limit on expenditure, political parties would go all out for collecting contributions and obviously the largest contributions would be from the rich and affluent who constitute but a fraction of the electorate. The pernicious influence of big money would then play a decisive role in controlling the democratic process in the country. This would inevitably lead to the worst form of political corruption and that in its wake is bound to produce other vices at all levels."¹⁵

Parliament responded by inserting Explanations 1 and 2 to Section 77(1) of the RPA 1951 to specifically provide that unauthorised expenditure by a political party or supporters of a candidate would not be included in a candidate's election expenses. In effect, this would give the candidate a

¹³ Ministry of Home Affairs, Government of India, *Report of the Committee on the Prevention of Corruption* (1964), available at <http://cvc.nic.in/scr_rpt_cvc.pdf> last accessed 20/1/2018.

¹⁴ V. Venkatesan, "Chequered relations," *Frontline* (August 13, 1999) available at <<http://www.frontline.in/static/html/fl1616/16160100.htm>> last accessed 20/1/2018.

¹⁵ *Kanwar Lal Gupta v. Amar Nath Chawla*, (1975) 3 SCC 646.

final say on what could or could not be included in his election expenses defeating in large part the purpose of this provision. However, the challenge to this amendment was upheld by the Supreme Court.

In 1979, political parties were exempted from income and wealth taxes, provided they filed annual returns including audited accounts, listed donations of Rs. 10,000 and above, and disclosed the identities of such donors.

In 1985, the Rajiv Gandhi government removed the ban on corporate donations by amending Section 293A of the Companies Act, 1956 to permit corporate donations, subject to certain restrictions.¹⁶ The difference from the pre-1969 regime was donations did not require meeting at a general meeting but only at a meeting of the board of directors.

In 1989, Parliament inserted Part IVA into the RPA 1951 providing for registration of political parties. But the courts have held that this power will not extend to deregistration of parties or any inquiry by the ECI into the affairs of the political party.¹⁷

In 1996, the Supreme Court mandated that to take advantage of the exemptions under the Income Tax Act, 1961 and Section 77 of the RPA 1951, political parties have to comply with the requirements to file returns.¹⁸ It should be highlighted here that even though law require filing of returns, no political party had submitted audited accounts at that time.

Both the Goswami Committee on Electoral Reforms (1990)¹⁹ and Indrajit Gupta Committee on State Funding of Elections (1998)²⁰ recommended partial state funding of elections. It is interesting to note that both reports were commissioned by coalition governments when the smaller national and regional parties were part of the government.

In 2003, the NDA government under Prime Minister Vajpayee, introduced the Election and Other Related Laws (Amendment) Act, 2003 which made all company and individual donations tax deductible under Section 80 GGB and 80 GGC of the Income Tax Act, 1961. It also mandated that any donation above Rs. 20,000 required a declaration and a report to be submitted to the ECI. It also

¹⁶ The Law Commission in its 170th Report on Reform of the Electoral Laws (1999) had observed that this was an unfortunate step.

¹⁷ *Indian National Congress (I) v. Institute of Social Welfare*, (2002) 5 SCC 685, at page 705

¹⁸ *Common Cause (A Registered Society) v. Union of India*, (1996) 2 SCC 752, at page 767

¹⁹ Government of India, *Report of the Committee on Electoral Reforms* (May 1990), available at <<http://lawmin.nic.in/ld/erreports/Dinesh%20Goswami%20Report%20on%20Electoral%20Reforms.pdf>> last accessed 20/1/2018.

²⁰ Government of India, *Report of the Committee on the State Funding of Elections* (December 1998), available at <<http://lawmin.nic.in/ld/erreports/Indrajit%20Gupta%20Committee%20Report.pdf>> last accessed 20/1/2018.

amended Explanation 1 to Section 77 requiring inclusion and reporting of third party expenditure to the candidate's expenditure ceiling.

In 2013, the government introduced electoral trusts by amendment to Income Tax Rules, 1962.²¹ The ostensible purpose of these trusts was to ensure that the anonymity of donors, especially corporate donors while ensuring that they could still claim the income tax benefits for donation to political parties.²² The failure of this scheme can be seen from the fact that in 2015-16, 90% of contributions vide electoral trusts went to the ruling party at the centre.²³ It must be stated that a large part of the mischief that could have been committed through electoral trusts were negated by the ECI issuing guidelines for the submission of contribution reports to electoral trusts.²⁴ This was done in exercise of their plenary powers under Article 324.

In 2017, the government introduced the concept of electoral bonds, and lowered the limit of anonymous donations from Rs. 20,000 to Rs. 2,000. The former is clearly a retrograde step intended to protect the identity of the donor, while the latter is meaningless without the second part of the Law Commission of India ('LCI') recommendation in its 255th report to cap the entire donation received through anonymous sources at Rs. 20 crores or 20% of the total funding of a political party. Needless to say, electoral bonds will allow political parties to bypass the Rs. 2000 anonymous donation limit introduced vide the Finance Act, 2017 to the Income Tax Act, 1961.²⁵

That the majority of legislative or government-initiated electoral reforms have been to protect the anonymity of donors, to secure the interests of political parties, and to overrule particular judicial decisions is indicative that the dangers predicted by Chief Justice Chagla have largely played in the manner that he had foreseen in 1957.²⁶ That the electoral process is still seen as largely free and fair is to the credit of the ECI which with the support of the judiciary has acted as a counter-majoritarian check on retrograde reforms.

²¹Income Tax (First Amendment) Rules, 2013, vide Notification No. 9/2013/SO 309(E) dated 31.1.2013.

²² Section 80GGB of the Income Tax Act, 1961 provides that all corporate contributions to political parties and electoral trusts are entitled to income tax deduction, while Section 80GGC of the Act has similar provisions with respect to contributions made by individual persons to political parties or electoral trusts.

²³ The Hindu Business Line Bureau, "In 2015-16, over 90% corporate donations went to BJP via 2 electoral trusts," *The Hindu BusinessLine* (August 30, 2017) available at <<http://www.thehindubusinessline.com/news/national/in-201516-over-90-corporate-donations-went-to-bjp-via-2-electoral-trusts/article9836654.ece>> last accessed 20/1/2018.

²⁴ Election Commission of India, Letter No. 56/Electoral Trust/2014/PPEMS (June 6, 2014), available at <http://eci.nic.in/eci_main1/PolPar/ElectoralTrust_06062014.pdf> last accessed 20/1/2018.

²⁵ Section 13A(d) of the Income Tax Act, 1961 as amended by section 11 of the Finance Act, 2017

²⁶ *Jayantilal Ranchchoddas Koticha v. Tata Iron & Steel Co. Ltd.*, (1957) 27 Comp Cas 604.

III. ANALYTICAL FRAMEWORK FOR ELECTORAL FINANCE LAWS IN INDIA

In engaging with questions of election law and campaign finance, it is important to bear in mind a number of relevant governance objectives. It would be simple to say that electoral reforms must be aimed at reflecting the “collective will of the people”. However, the institutions behind the electoral process are crucial in determining what that “collective will” means.²⁷ The proximity of political funding to the actual functioning of politics raises fears of the subversion of democratic values. Judgments related to election law may rely on the importance of “free and fair elections”, “free verdict of the electorate”, and “purity of elections” but while these values point in the right direction, they do not always help in assessing the efficacy of specific reform alternatives. Underlying these broad acknowledgments of democratic tenets are certain identifiable policy objectives against which we may evaluate electoral reform, especially in relation with campaign finance.

Electoral processes are meant to establish a representative government in which the views of the elected representatives are aligned with and responsive to the views of the electorate.²⁸ Without an electoral system that effectively promotes such alignment, governments cannot claim to be truly representative of or accountable to the electorate. The lack of effective regulation of electoral expenditures, for example, directly misaligns electoral outcomes when contenders seek to employ money power to simply buy votes that may have otherwise been cast to a different candidate.²⁹ A number of instances of such bribery present only one view of the role of money in politics.

The funding of political activity in India and the expenditures involved in carrying out such activity are problematic in other ways as well. These problems need to be analysed from two angles: first, the practical role that money plays in the electoral process, and second, the role it plays in determining electoral and governance outcomes. These are discussed below:

²⁷In fact, as Pildes & Anderson point out: “Before institutions are formed, however, no such collective will exists. Political institutions and decision procedures must create the conditions out of which, for the first time, a political community can forge for itself a collective will. ... No uniquely “rational” institutional architecture exists for constructing that will. Each bundle of institutions and practices represents a distinct social constitution of the collective will.” Richard H. Pildes & Elizabeth S. Anderson, “Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics,” 90 *Columbia Law Review* 2121, 2197-98 (1990).

²⁸Samuel Issacharoff & Richard H. Pildes, “Politics as Markets: Partisan Lockups of the Democratic Process,” 50 *Stanford Law Review* 643, 646 (1998); Jeffrey R. Lax & Justin H. Phillips, “The Democratic Deficit in the States,” 56 *American Journal of Political Science* 148 (2011); Nicholas Stephanopoulos et al, “The Realities of Electoral Reform,” 68 *Vanderbilt Law Review* 761 (2015).

²⁹ See, for instance, *Ashok Shankarrao Chavan v. Madhavrao Kinhalakar* (2014) 7 SCC 99 ¶55 (“In recent times, when elections are being held it is widely reported in the Press and Media that money power plays a very vital role. Going by such reports and if it is true then it is highly unfortunate that many of the voters are prepared to sell their votes for a few hundred rupees.”)

A. Money in the Electoral Process

1. Electioneering Costs

To understand the manner in which the electoral process is structured, it is necessary to take into account the role of campaign finance in that structure. The candidates for seats in various legislatures and the political parties backing them (unless they are independent candidates) compete with rival candidates and parties to persuade electors to vote for them. The process involves the communication of various points of information deemed relevant in electoral choice through election campaigns. Unless these campaigns seek to rely entirely on unpaid workers and supporters for the propagation of information, they must spend money to access voters physically and through various means of communication.

In examining electoral finance laws, it is important to keep in mind the realities of the costs incurred to be able to reach out and communicate relevant information to voters so that they are able to choose the candidates that best suit their interests.³⁰ The sheer costs involved in effectively reaching out in this manner are the fundamental driver behind the phenomenon of electoral finance in the first place. Arguably, it is difficult to identify how much campaign spending is needed to relay the information required for electoral choice. Beyond a point, increased spending may merely be symptomatic of competition between rival parties instead of an accurate estimate of necessary costs. Nonetheless, the recent reforms in electoral finance laws that remove public disclosure requirements under the Companies Act, 1956 (as well as the anonymity of donors under the electoral bond scheme) have been defended as necessary to incentivise the required donations.³¹

2. Vertical Integration

Election campaigns are run both by candidates and by political parties. As the two are often associated in the minds of voters, election law should at least have to take into account the effects of party campaigns on the chances of its candidates generally. Financial support can often be an

³⁰National parties incurred Rs. 1308.75 Crores in the 2014 Lok Sabha elections (See Association of Democratic Reforms & National Election Watch, “Analysis of Funds Collected and Expenditure Incurred by National Political Parties - Lok Sabha 2004, 2009 & 2014,” *Association for Democratic Rights* (March 2, 2015) available at <<https://adrindia.org/research-and-report/political-party-watch/combined-reports/2015/analysis-funds-collected-and>> last accessed 14/1/2018. In this regard, it is also important to note that the government spent as much as Rs. 3426 Crores to conduct the 2014 Lok Sabha elections (See Press Trust of India, “Govt. spent Rs. 3,426 cr on Lok Sabha polls,” *The Hindu* (May 13, 2014) available at <<http://www.thehindu.com/news/national/govt-spent-rs-3426-cr-on-lok-sabha-polls/article6005247.ece>> last accessed 14/1/2018.

³¹ Press Trust of India, “LS rejects RS amendments to Fin Bill, FM defends taxmen power” (March 30, 2017) available at <http://www.ptinews.com/news/8558700_LS-rejects-RS-amendments-to-Fin-Bill--FM-defends-taxmen-power-> last accessed 16/1/2018 (“Stating that the country cannot be run on slogans, Jaitley said disclosure of name of political donors (sic) would lead to drying up of the donations as they may feel the change of the government may lead to vindictive actions against them and any contract if they win will be attached to the donations that they gave.”)

important reason for candidates to integrate with parties. To gain assurance regarding their investment and maintain the coherence of various candidate campaigns, parties can then keep candidates in line and determine the views expressed in their campaigns and later held by them in office. On the other hand, criminal candidates with large amounts of personal wealth can seek to vertically integrate with the legislative process to secure their investments elsewhere from state intervention and law enforcement. To do this effectively, they may support other candidates through the structure of a political party.

3. Electoral Competition

Competition for electoral seats is, in this sense, not unlike market competition with expenditures over advertisements to market an enterprise's goods and services. Economic advantages can militate against the idea of a fair or level playing field on which political parties compete for legislative control on the basis of their policy proposals. Better campaign finance can determine election outcomes before a single vote is cast or a single policy discussed. Though more popular and competent parties may automatically get higher funding, financial superiority can often be unrelated to any evaluation of policies and leaders by an electorate. The level of competition manifested in elections is an essential part of what allows for democratic accountability.³² Without meaningful choices, voters cannot signal what governance they really desire.³³

Significantly, one of the ways in which electoral competition suffers most is through the advantages of incumbency and one of the most troublesome methods by which incumbent political parties seek to entrench themselves is by modifying election law in their own favour.³⁴ One method often

³² Such views that focus on the structure of democratic processes instead of solely on individual rights have been most prominently forwarded by Samuel Issacharoff and Richard H. Pildes, who forward competition as a prime instrumental value in elections. See, Samuel Issacharoff & Richard H. Pildes, "Politics as Markets: Partisan Lockups of the Democratic Process," 50 *Stanford Law Review* 643 (1998).

³³ "All theories of representative democracy require, at a minimum, that those who exercise power be regularly accountable through elections to those they represent; accountability is a necessary, even if not sufficient, condition of democracy. And just as meaningful personal autonomy requires a range of options from which to choose, electoral accountability can exist only when effective political competition generates genuine political choices." Richard H. Pildes, "The Constitutionalization of Democratic Politics," 118 *Harvard Law Review* 29, 43 (2004).

³⁴ Just as is the case in "lockups" in corporate governance, dominant parties can "manipulate and capture the ground rules of political competition so as to freeze out serious challengers." (See Issacharoff & Pildes, *Politics as Markets*, 644.) Arguably, similar methods of entrenchment may have been employed in Indian electoral finance laws as well. On the other hand, it appears that political competition is on the rise in India, in terms of both the number of political parties contesting and the margin of victory. The number of political parties in the general elections has increased by over 30 times since Independence to 1687, with a considerably sharp increase in 2014. (See Press Trust of India, "Number of Political Parties Increased Over 30 Times Since Independence," *NDTV* (May 18, 2014), available at <<https://www.ndtv.com/elections-news/number-of-political-parties-increased-over-30-times-since-independence-562601>> last accessed 8/1/2018. The margin by which the winning candidate takes a seat in the general elections had been getting smaller but grew again in 2014 (See Milan Vaishnav & Danielle Smogard, "A New Era in Indian Politics?" *Carnegie Endowment for International Peace* (June 10, 2014), available at <<http://carnegieendowment.org/2014/06/10/new-era-in-indian-politics-pub-55883>> last accessed 8/1/2018).

suggested to give challengers a good chance is the imposition of limits on donations.³⁵ It is important that electoral finance laws be structured so as to lower entry barriers into politics and promote competition to increase the number of choices available to voters.

4. Access to Politics and Black Money

The role of money in raising barriers to politics can be seen in two ways. The first barrier is described above. If candidates require vast sums of money to enter into politics, this can mean a reduction in the sheer number or quantity of competitors in elections, reducing the range of choices available to voters. A second lens to view this issue is that financial demands can create qualitative constraints on Indian politics. If substantial finance is essential for a prospective politician to realise any electoral ambitions, they may have to align their views not with the electorate but with their financiers' demands. This issue is dealt with in greater detail in 'Political Equality and Capture' below, but for the purposes of the electoral process, financial constraints in politics can mean that only certain views might ever make it into the race for electoral office and other views unable to draw the support of financiers may never even have the opportunity to compete. Put in a different way, political donors are able to gain access to politicians in a way that others do not have the chance to.³⁶

It is important to consider, in this sense, as to what the possible sources of political finance are. In the Indian context, considerable stress has been placed on the pre-existing entrenchment of candidates running campaigns on illegally acquired and illegally retained unaccounted wealth or black money. The focus of the reforms in the Finance Act, 2017 on cleaning of political funding has brought concerns regarding black money in politics back into focus. However, the issue is an old one and has been previously linked to the low ceiling on campaign expenditures.³⁷

B. Money in Electoral Outcomes

1. Political Equality, Capture and Criminalisation

Donors to political campaigns can demand for favourable laws and policies, favourable government contracts, and exceptionalism in law enforcement as returns on their investments (often referred to as a "*quid pro quo*"). This would also mean that contributors with greater economic power can exert a disproportionately greater influence on political outcomes than other citizens. Whether or not such transactions and relationships amount to corruption, permitting them is problematic as it allows

³⁵ Ciara Torres-Spelliscy et al, "Electoral Competition and Low Contribution Limits," *Brennan Center for Justice* (2009), available at <<https://www.brennancenter.org/sites/default/files/legacy/publications/Electoral.Competition.pdf>> last accessed 9/1/2018.

³⁶ Richard L. Hasen, "Lobbying, Rent-Seeking, and the Constitution," 64 *Stanford Law Review* 191, 216-225 (2012).

³⁷ Rajeev Gowda & E. Sridharan, "Reforming India's Party Financing and Election Expenditure Laws," 11(2) *Election Law Journal* 226, 232-235 (2012).

money power to directly determine legal rules which could otherwise be formulated with broader concern for all the members of an electorate. Lobbying for such advantageous laws can simply redistribute advantages to particular groups instead of allocating them more fairly and productively. Such issues deserve to be viewed as problematic for any meaningful political equality.³⁸ At worst, they can be seen to involve dangerous pressures on elected officials to deviate from their mandate for the private interests of donors.³⁹

While this form of ‘capture’ can be viewed as largely rooted in business interests, it is also important to consider the various sources from which black money could be financing politics. This may be a driver for another sustained concern in Indian democracy: the persistence of criminal elements in politics. Analysing the issue, political scientist Milan Vaishnav found that a lack of information and awareness regarding the criminality of candidates was not a binding constraint. More likely causes involved the lack of probity in political finance and the failure of successive governments to carry out basic governance tasks.⁴⁰

Greater economic power in elections should be viewed as a force that misaligns electoral outcomes and prevents effective democratic governance. The law around electoral finance could instead promote the public interest inherent in more broad-based governance.

2. Transparency and the Right to Information of Voters

Unfortunately, the starkest issue at play in electoral finance in India is that any attempt to understand the sources of finance and modes of capture often lead to speculation. This makes the formulation of any strategy to clean up political finance difficult as different interests (e.g. both corporate and criminal elements) could simultaneously be involved. As the electoral trusts and electoral bonds schemes show, the first casualty in such situations is public transparency.

Various statutory rules related to election law seek to ensure transparency in relevant matters within the electoral process. Loopholes in these rules are largely suspected to make them redundant. It is additionally important to keep in mind judicial interpretations of statutory and constitutional provisions relevant to election law. In a line of judgments, the Apex Court has shown itself to be willing to intervene in this field to ensure that processes are in line with an ideal of “free and fair elections”.⁴¹ Within this broader concern, the Court has previously identified a fundamental right to

³⁸ David A. Strauss, “Corruption, Equality, and Campaign Finance Reform,” 94 *Columbia Law Review* 1369 (1994); Nicholas Stephanopoulos, “Elections and Alignment,” 114 *Columbia Law Review* 283, 337 (2014).

³⁹ The 20th Law Commission of India appropriately identifies this as a kind of governmental “capture” or “institutional corruption”. Law Commission of India, 255th Report on Electoral Reforms (March 2015) 10-11.

⁴⁰ Milan Vaishnav, *When Crime Pays: Money and Muscle in Indian Politics* (Yale University Press, 2017), Ch.7.

⁴¹ The principle of free and fair elections is considered an unalterable part of the Constitution of India. See *Indira Nehru Gandhi v. Raj Narain* 1975 Supp SCC 1 ¶198 (Khanna J. (Sep. Op.)); see also, *Kihoto Hollohan v. Zachillhu* 1992 Supp (2) SCC 651 ¶179 (Sharma & Verma JJ. (dissenting)) and *People’s Union for Civil Liberties v. Union of India* (2003) 4 SCC 399 ¶17, 29; apart from the above cases, the Supreme Court has variously stepped in to maintain the integrity of the election process in *Mohinder Singh Gill v. Chief Election Commissioner* (1978)

information regarding the antecedents of candidates. In the *PUCL* case, the Court pointed towards the need for voters to know the criminal antecedents, assets and liabilities, and educational qualifications of candidates, though there was some disagreement as to whether all these disclosures were necessitated under the right to free speech and expression under Article 19(1)(a) of the Constitution.⁴²

The broader legalisation of anonymous donations carried out through the Finance Act, 2017 is also currently under challenge in the Supreme Court on various grounds including the fundamental right to information discussed above.⁴³

These values would thus constraint potential solutions to electoral finance issues. It is understandable that donors fear a backlash from governments for the donations they provide to rival political parties and that these fears can have a chilling effect on the actual donations. These concerns can seem similar to concerns regarding the value of privacy. However, it is likely that the voter's right to information is a significant countervailing interest that would be considered superior to the privacy concerns impinged in the relevant mandatory disclosures.⁴⁴

However, in the context of electoral finance specifically, public awareness and transparency go beyond the question of a voter's informed choice. As mentioned above in relation with concerns regarding the criminalisation of politics, information to voters has not proved to be a sufficient solution in curbing undesirable trends. Election law must also consider the broader bolstering of the rule of law when transparency allows for the detection and redressal of exceptionalism in enforcement and *quid pro quo* policy-making. It must also take into account the need for a better understanding of political finance in formulating laws regarding the same. Without these steps, electoral outcomes are made meaningless, regardless of how substantive expenditure and donation rules are framed.

1 SCC 405, *Kanhiya Lal Omar v. R.K. Trivedi* (1985) 4 SCC 628, *Common Cause v. Union of India* (1996) 2 SCC 752, *Union of India v. Association for Democratic Reforms* (2002) 5 SCC 294, and *Abhiram Singh v. CD Commachen* (2017) 2 SCC 629.

⁴² *People's Union for Civil Liberties v. Union of India* (2003) 4 SCC 399 ¶122 (Reddi J. (partially concurring and partially dissenting)).

⁴³ Live Law News Network, "Political Funding: SC Issues Notices To Centre, EC On PIL Challenging Finance Act Amendments [Read Petition]," *LiveLaw* (October 3, 2017), available at <<http://www.livelaw.in/political-funding-sc-issues-notices-centre-ec-pil-challenging-finance-act-amendments-read-petition/>> last accessed 16/1/2017.

⁴⁴ See, for instance, *People's Union for Civil Liberties v. Union of India* (2003) 4 SCC 399 ¶ 47 (Shah J.), 121 (Reddi J.) ("When there is a competition between the right to privacy of an individual and the right to information of the citizens, the former right has to be subordinated to the latter right as it serves larger public interest.")

C. Rationalising the Framework

In taking forward the electoral reform agenda, it is important to agree upon and crystallise the first order constraints before moving to issues that have proved trickier. The above concerns present an intermeshed set of criteria that a good electoral finance regime would need to meet. While some issues may seem irreconcilable and appear to require prioritization, careful efforts can allow for a balanced approach to meet multiple ends. For instance, it needs to be understood whether issues involving black money and the adequate accumulation of funds for electioneering can be achieved while respecting the voter's right to information as well as the political equality of various groups in Indian society.

Of the objectives highlighted above, a distinction in potential prescriptions may be noted. While promoting competition seems to require the regulation of the actual campaign expenditures so as to temper electoral speech that is magnified through funds, the prevention of governmental capture and maintenance of political equality would require constraints on the sources of donations. With practical issues such as third-party campaign expenditures (which may be incurred through tacit agreement with politicians but no actual transfer to them), the concerns can be seen to converge.

Potential solutions would, however, first have to resolve the coordination problems inherent in the failure of election law to identify political parties as key players in the process that cannot go unregulated. The lack of transparency surrounding powerful political players has inevitably meant that campaign finance law is itself made into an unproductive battleground for electoral competition. These issues need to be resolved first before we can even begin on the more arduous journey of actually freeing our rulers from their shackles.⁴⁵ If statutory or constitutionalised transparency is made a reality, further steps will then be necessary to bolster it with adequate enforcement.

Addressing the entrenchment of illegal funds and influential donors in campaigns should both be viewed as immediate next steps. The success of this should be seen as dependent upon achieving transparency first.

⁴⁵ Niranjan Sahoo, "Before the state funds elections," *Observer Research Foundation* (February 27, 2017), available at <<http://www.orfonline.org/research/before-the-state-funds-elections/>> last accessed 23/1/2018.

IV. CURRENT REGIME FOR ELECTORAL FINANCE IN INDIA

A. Funding

No limitations are currently in place regarding the amount that individuals or corporate entities may contribute. Foreign contributions are still prohibited under the Foreign Contribution (Regulation) Act, 2010 but the Finance Act, 2016 made amendments permitting contributions by certain foreign companies through their Indian subsidiaries.⁴⁶ Section 29B of the RPA 1951 permits political parties to accept any amount of voluntary contributions without limit. However, as per the same provision, they may not accept contributions from Government companies, local authorities or any entity funded by the Government. Cash donations to political parties are not permitted under Rs. 2000.⁴⁷ Rules on the disclosure of information related to candidate funding are dealt with below.

No direct public funding is in place as of now despite considerable discussion regarding the same. Parties are allocated free air time on state owned electronic media based on their past performance in elections⁴⁸ and also granted certain income tax exemptions as long as the political parties comply with the proviso to Section 13A and file their Income Tax Returns every Assessment Year along with their audited accounts, Income/Expenditure details and balance sheet. Free copies of electoral rolls and certain other items are also to be supplied to parties.⁴⁹

B. Spending

Section 77(3) of the RPA 1951 permits the prescription of limits to the total expenditure that can be incurred by a candidate in elections. This prescription has been done through Rule 90 of the Conduct of Election Rules, 1961 for parliamentary constituencies and assembly constituencies. These limits are different from state to state. As per Explanation 1(a) of Section 77(1) of the RPA 1951, these expenditures do not include the travel expenses of “leaders of a political party” for propagating the programme of the political party. The language of Section 77 generally refers to expenditures by the

⁴⁶ See, Section 236 of the Finance Act, 2016, amending the definition of “foreign source” under the Foreign Contribution (Regulation) Act, 2010. The amendment was deemed to be made from 26th September, 2010 and retrospectively validated certain contributions made to major political parties (PTI, “Foreign funding: BJP, Congress withdraw appeals from SC,” *The Indian Express* (November 29, 2016) available at <<http://indianexpress.com/article/india/india-news-india/foreign-funding-bjp-congress-withdraw-appeals-from-sc/>> last accessed 21/1/2018).

⁴⁷ Section 13A(d) of the Income Tax Act, 1961.

⁴⁸ Section 39A, Representation of the People Act, 1951. The formula for allocation is further detailed in Rule 85C of the Conduct of Election Rules, 1961.

⁴⁹ See, Sections 78A and 78B, Representation of the People Act, 1951. Section 78B does not specify the other items that can be provided and leaves it to the Central Government to determine the same in consultation with the Election Commission. Where such other items are provided, sub-section (2) permits the imposition of conditions for the reduction of maximum expenditure by a candidate.

candidate themselves and therefore expenditure limits on the same are not applicable to expenses incurred toward propagation of the programme of the party to which the candidate belongs. Further, regarding third-party expenditures incurred in campaigning for a candidate, there is a rebuttable presumption that this has been incurred with the authorisation of the candidate and is to be considered a part of the candidate's expenditure.⁵⁰

C. Disclosures

Candidates are required under Section 77 of the RPA 1951 to keep an accurate record of their election expenses from the date of their nomination up to the date of declaration of results. As per Section 78, the candidate is to submit a true account of their expenses to the district election officer within a prescribed period. Further details regarding the form and content of the accounts is made in Part VIII of the Conduct of Elections Rules, 1961. Similarly, political parties are required under Section 29C of the RPA 1951 to disclose donations above Rs. 20,000 received by them from any person or company in a financial year in a report as prescribed in Part VIIA of the Conduct of Election Rules, 1961. It is important to note that despite the change in the permissibility of cash donations from Rs. 20,000 to Rs. 2000, the requirement of disclosure in a party's donations report is still at Rs. 20,000. In relation with transparency related to the contributions received by a candidate, the limited extent to which this has been required is in the obligation to declare assets under Form 26 in the Conduct of Elections Rules, 1961. A 2017 amendment has further mandated that this would include information regarding the source of these assets.⁵¹

⁵⁰ *Common Cause v. Union of India* (1996) 2 SCC 752.

⁵¹ Conduct of Election (Amendment) Rules, 2017, Gazette Notification S.O. 1133(E) dated 7.4.2017, available at <<http://ceodelhi.nic.in/PDFFolder/Amendment%20.pdf>> last accessed 20/1/2018.

V. INTERNATIONAL PRACTICE ON ELECTORAL FINANCE

Though there are many peculiarities to running elections in India, it is not the only country to have a functioning democracy. A number of jurisdictions have encountered issues surrounding the funding of campaigns and concerns regarding how a level electoral playing field can be achieved. No jurisdiction has been entirely spared of these concerns, as democratic values have been open to subversion even in the most mature democracies. Faced with these problems, various countries have responded on three fronts: by regulating funding, by regulating expenditure, and by mandating disclosures. Below, we attempt to explain the different approaches taken in the United Kingdom, Germany, the United States, and South Africa.

This selection has been made to provide as broad a variety in approaches as appeared feasible from a limited sample. Apart from the difference in their systems of government, the UK and the US have diverged in their approaches through their area of focus: the UK rigorously regulates expenses to lower the role of money generally while the US attempts to limit contributions to check illicit influences. The US attempted a system of public funding that has not taken root well as evidenced by the continued necessity of large war chests to stand for office. Germany does not limit either funding or spending but tempers its politics with constitutionalised public disclosure of party finances as well as partial public funding. South Africa has been picked as a developing nation with a diverse population and a democracy transitioning towards greater transparency as well as more equitable campaign finance.

1. United Kingdom

(a) *Funding*

The United Kingdom has developed a set of general rules regulating elections through the Representation of the People Act, 1983 and the Political Parties, Elections and Referendums Act, 2000. The regime is heavy on expense regulations and has limited restrictions on political contributions.

Along with a system for the registration of political parties and their office-holders, the 2000 Act only permits donations from a list of “permissible donors”.⁵² This list allows for donations from a broad range of individuals and corporates without any limitations/ceilings. While corporations with government ownership or government contracts appear to be permitted under the list, foreign donors are not. To ensure the enforceability of the list, the parties are required not to accept donations from any source that they are not able to identify.⁵³ However, the above restrictions are not

⁵² Section 54, Political Parties, Elections and Referendums Act 2000. The term “donation” is defined in Section 50 to eliminate transactions made on commercial terms.

⁵³ Section 54(1)(b), Political Parties, Elections and Referendums Act 2000.

applicable when it comes to donations of less than £500.⁵⁴ It must be noted that prior to the 2000 Act, blind trusts (where the beneficiaries of the trust fund supposedly have no knowledge or control over the handling of the trust) were employed for political funding. Following a 1998 report, this came to be disallowed.⁵⁵ In 2011, recommendations were also made to put into place contribution limits as the main parties depended on a relatively small number of sources for their funding.⁵⁶

A limited scheme of public funding is also envisaged. These are authorized under resolutions and are largely to opposition parties that have secured certain numbers of seats and votes at the previous General Elections.⁵⁷ Parties that have secured at least two seats in the House of Commons are also provided Policy Development Grants which are meant to assist the party with the development of policies for inclusion in election manifestos.⁵⁸ Provision is also made for free airtime for political parties on broadcasting networks.⁵⁹

(b) Spending

Limits are placed on expenditure that can be incurred by political parties, candidates and third parties. Limits on “campaign expenditure” by political parties⁶⁰ are placed under Schedule 9 of the 2000 Act. The expenditure that can be incurred by the party in any one constituency and also caps the total expenditure that can be incurred by the party for all the constituencies it contests.⁶¹ The cap on the total expenditure is different for England, Scotland and Wales. Similar to this, “election expenses” incurred by or on behalf of a candidate are also capped to the sum of a base amount and an additional pro-rata amount depending on the number of electors for that constituency. The base

⁵⁴ Section 52(2)(b), Political Parties, Elections and Referendums Act 2000. When it comes to contributions to candidates, the sum must be above £50 to be regulated as a “donation” (Para. 4(2), Schedule 2A, Representation of the People Act 1983).

⁵⁵ See, Lord Neill of Bladen, QC, *Fifth Report of the Committee on Standards in Public Life: The Funding of Political Parties in the United Kingdom* (October 1998) 61-62 (rejecting blind trusts as contrary to principles of openness and accountability and doubting whether they could ensure anonymity). The subsequent prohibition was put into place in Section 57, Political Parties, Elections and Referendums Act 2000. Loans and certain other transactions are also addressed under Section 71Y and Schedule 7A of the 2000 Act.

⁵⁶ See, Sir Christopher Kelly, KCB, *Thirteenth Report of the Committee on Standards in Public Life: Political party finance - Ending the big donor culture* (November 2011) (discussing the nature of the problem in Chapters 1 & 2, highlighting the cross-jurisdictional practice of limiting donations in Chapter 6, and prescribing curbs on spending, public funding, and a donation cap at £10,000 in Chapters 7-11).

⁵⁷ This is referred to as ‘Short Money’ for the scheme in the House of Commons and ‘Cranborne Money’ for a similar scheme in the House of Lords (which is unelected).

⁵⁸ Section 12, Political Parties, Elections and Referendums Act 2000 (the provision envisages the formulation of a scheme for the distribution of the funds amongst the qualified parties and, under sub-section (8), the total funds to be disbursed are capped at £2 million per financial year).

⁵⁹ Section 333, Communications Act 2003 (authorising the Office of Communications to identify broadcasters and formulate rules determining allocation, length and frequency of party election broadcasts).

⁶⁰ These expenses (as incurred “for election purposes”) are listed under Part I, Schedule 8.

⁶¹ See Paragraph 3, Schedule 9, Political Parties, Elections and Referendums Act 2000.

amount and/or the rate for the additional amount are different for county, borough, parliamentary, and local government elections.⁶²

Expenditures by third parties are also limited in various ways. “Notional campaign expenditure” is defined so as to cover free transfers and substantially discounted transfers to political parties as well as usage of property, services or facilities by political parties that would have been campaign expenditure had they spent on it. These expenditures are treated appropriately to prevent such transactions from being used as loopholes for expenditure limits.⁶³ “Controlled expenditure”, incurred by third parties directly to promote a party in elections, is also restricted.⁶⁴ Similar restrictions may be seen in the 1983 Act in relation with expenses towards the election of a candidate which are not authorised by the candidate’s election agent.⁶⁵

The law distinguishes limits imposed before and after a person officially becomes a candidate (on the date that Parliament dissolves). These have come to be known as regulated periods for the ‘short campaign’ (described above) and ‘long campaign’ (a period that starts 55 months after the previous general elections and ending when the short campaign starts). The sum that may be spent prior to official candidacy is a much higher one.⁶⁶

(c) Disclosures

Accounting and auditing provisions are in place for political parties. Treasurers of registered parties are required to prepare a statement of accounts for each financial year and get it approved by party management.⁶⁷ Where a party’s gross income or total expenditure exceeds £250,000 in any financial year or if the Electoral Commission directs it, they are required to carry out an audit by a qualified auditor.⁶⁸ The auditor’s report and other relevant documents (or, as the case may be, the statement of accounts) is then submitted to the Electoral Commission.⁶⁹ Where the Commission receives statements of accounts, these are made available for public inspection.⁷⁰

⁶² Section 76, Representation of the People Act, 1983.

⁶³ Section 73, Political Parties, Elections and Referendums Act 2000.

⁶⁴ Part VI, Political Parties, Elections and Referendums Act 2000.

⁶⁵ Section 75, Representation of the People Act, 1983.

⁶⁶ Section 76ZA, Representation of the People Act, 1983.

⁶⁷ Section 42, Political Parties, Elections and Referendums Act 2000.

⁶⁸ Section 43, Political Parties, Elections and Referendums Act 2000.

⁶⁹ Section 45, Political Parties, Elections and Referendums Act 2000. Timelines are laid out for the submission of these documents.

⁷⁰ Section 46, Political Parties, Elections and Referendums Act 2000.

Additionally, parties are required to prepare quarterly donation reports in which they must record benefits (donations or transactions) above a particular value that they receive or enter into.⁷¹ During general election periods, the party must prepare weekly donation reports, again for donations above a particular sum.⁷² These reports are submitted to the Electoral Commission which maintains a register of the same.⁷³ Election agents of every candidate to an election are also required to submit returns as to election expenses and payments to the appropriate officer along with relevant bills and receipts.⁷⁴

The Electoral Commission maintains public registers regarding a number of the above reports.⁷⁵

2. Germany

(a) Funding

There are no restrictions on the quantum of donations that may be received by political parties in Germany.⁷⁶ However, donations in cash may be made only up to the sum of €1,000. There is a ban on donations that may be received by parties from particular sources. These include public corporations, parliamentary parties and groups, parliamentary groups of municipal councils, non-profit, charitable or church-related organisations, foreign donations (with certain exceptions including an exception for donations under €1,000 made by a foreigner), enterprises with substantial state participation, anonymous donations above €500, donations evidently made in the expectation of, or in return for, some specific financial or political advantage etc.

⁷¹ Section 62, Political Parties, Elections and Referendums Act 2000. Interestingly in relation with the Indian context, Section 68 of the 2000 Act earlier placed an obligation on donors who made multiple small donations to a party totalling £5,000 in a year to report their donations. However, this was repealed through the Electoral Administration Act, 2006 because “[i]n practice this provision [had] been of little use.” (Explanatory Notes to the Electoral Administration Act, 2006, available at <<https://publications.parliament.uk/pa/cm200506/cmbills/050/en/06050x-c.htm>> last accessed 18/1/2018)

⁷² Section 63, Political Parties, Elections and Referendums Act 2000.

⁷³ Sections 65 & 69, Political Parties, Elections and Referendums Act 2000.

⁷⁴ Section 81, Representation of the People Act, 1983.

⁷⁵ The Electoral Commission, United Kingdom, “Upcoming elections & referendums”, available at <<http://www.electoralcommission.org.uk/home/home-page-boxes/party-finance3>> last accessed 18/1/2018 (“We maintain several public registers of political parties and details of their donations, borrowings, campaign expenditures and annual accounts. You can also see information on regulated donees (such as MPs, members of a party and certain organisations), third parties and permitted participants in a referendum.”)

⁷⁶ Provisions regarding donations to political parties are made in Section 25 of the German Political Parties Act (Parteiengesetz), available at <<https://www.bundestag.de/blob/189734/2f4532b00e4071444a62f360416cac77/politicalparties-data.pdf>>. In Germany’s mixed member party list system, the parties nominate candidates and campaign for them with Section 25 requiring that party members pass on any donations received by them on behalf of the party to the relevant executive committee member of the party. This purportedly covers donations received by candidates.

Apart from the right of political parties to receive donations, they also receive public funding.⁷⁷ An absolute upper limit of €133 million is placed on the funds that can be disbursed in this manner. The criteria for allocation of this fund are the proportion of votes won by a political party in previous elections, the total amount of its membership dues and contributions from holders of elected public office, and the amount of donations received. The rate at which votes polled and donations received translates into public funding is also detailed in law.

(b) Spending

The funds collected by and publically provided to parties are to be used for their general activities.⁷⁸ These activities are required of political parties and guaranteed to them under German Basic Law.⁷⁹ This is as a result of a scheme in Germany involving constitutional recognition and regulation of political parties as an integral part of public life in that country.

(c) Disclosures

Public accounting of the use of funds by political parties is required under Article 21(1) of German Basic Law. Disclosure is also further mandated under the Political Parties Act.⁸⁰ The statement of accounts of the party is to be audited and submitted to the President of the German *Bundestag* who shall circulate it as a “*Bundestag* printed paper”.⁸¹ Inaccuracies are vetted for against evidence

⁷⁷ The scheme for this public funding is outlined under Section 18 of the German Political Parties Act (Parteiengesetz), available at <<https://www.bundestag.de/blob/189734/2f4532b00e4071444a62f360416cac77/politicalparties-data.pdf>>.

⁷⁸ Sections 1(4) and 18(1) of the German Political Parties Act (Parteiengesetz), available at <<https://www.bundestag.de/blob/189734/2f4532b00e4071444a62f360416cac77/politicalparties-data.pdf>>.

⁷⁹ Article 21 (1) of the German Basic Law thus states “Political parties shall participate in the formation of the political will of the people. They may be freely established. Their internal organisation must conform to democratic principles. They must publicly account for their assets and for the sources and use of their funds.” Further elaboration may be seen in Section 1 (2) of the German Political Parties Act (Parteiengesetz) (“Political parties shall participate in forming the people’s political will in all fields of public life, in particular by exerting an influence on the shaping of public opinion; encouraging and enhancing civic education; promoting citizens’ active participation in political life; educating citizens capable of assuming public responsibilities; participating in elections at the federal, *Land* and local levels by nominating candidates; influencing political developments in parliaments and governments; contributing the political aims they have developed to the public decision-making and policy formation process; and ensuring a continuing active interrelationship between the people and the state institutions.”)

⁸⁰ Section 23 of the German Political Parties Act (Parteiengesetz) requires that the party “truthfully and to the best of its knowledge and belief, publicly account for the origin and use of funds and the party’s assets in a statement of accounts.” Section 24 further outlines the details that the statement of accounts is to include.

⁸¹ The President is required to present brief annual overviews (on income, expenditure and assets) and biennial reports (on trends and statements of account) on the parties to the *Bundestag*.

provided to the President.⁸² Compliance of disbursement of public funds with the provisions regarding the same are verified by the *Bundesrechnungshof* (BRH - Germany's Supreme Audit Institution).⁸³

Only individual donations exceeding €10,000 per year are required to be itemized.⁸⁴ Individual donations exceeding €50,000 are to be reported immediately to the President of the *Bundestag*.⁸⁵

3. United States of America

(a) Funding

The amount that various individuals and entities can contribute in connection with an election is subject to limitations.⁸⁶

Contributions and donations by foreign nationals in connection with elections, whether made directly or indirectly, are prohibited.⁸⁷ Apart from this, entities like corporations and labour organisations are also prohibited from making contributions or expenditures in connection with federal elections.⁸⁸ They are permitted, however, to contribute to political committees established solely to finance independent expenditures (e.g. Super PACs), contribute to the non-contribution accounts of Hybrid PACs, and establish separate segregated funds (SSFs).⁸⁹ Corporate and labour PACs raise only voluntary contributions from a restricted class of individuals and use those funds to support federal candidates and political committees.⁹⁰

⁸² Section 23a of the German Political Parties Act (Parteiengesetz).

⁸³ Section 21(2) of the German Political Parties Act (Parteiengesetz).

⁸⁴ Section 27(2) of the German Political Parties Act (Parteiengesetz).

⁸⁵ Section 25(3) of the German Political Parties Act (Parteiengesetz).

⁸⁶ A systematic presentation of these limitations may be seen at Federal Election Commission, United States of America, "Contribution limits," available at <<https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/contribution-limits-candidates/>> last accessed 19/1/2018.

⁸⁷ 52 USC § 30121 ("Contributions and donations by foreign nationals").

⁸⁸ 52 USC § 30118(a) ("Contributions or expenditures by national banks, corporations, or labor organizations").

⁸⁹ See, *Citizens United v. FEC*, 558 U.S. 310 (2010); *SpeechNow.org v. FEC* 599 F.3d 686 (D.C. Cir. 2010) (en banc), and *Carey v. FEC*, 791 F.Supp.2d 121 (D.D.C. 2011); Federal Election Commission, United States of America, "Campaign Guide: Corporations and Labor Organizations" (October 2017) 1, available at <<https://transition.fec.gov/pdf/colagui.pdf>> last accessed 18/1/2018

⁹⁰ "The term "political action committee" (PAC) refers to two distinct types of political committees registered with the FEC: separate segregated funds (SSFs) and nonconnected committees. Basically, SSFs are political committees established and administered by corporations, labor unions, membership organizations or trade associations. These committees can only solicit contributions from individuals associated with connected or sponsoring organization. By contrast, nonconnected committees--as their name suggests--are not sponsored by or connected to any of the aforementioned entities and are free to solicit contributions from the general public." (See, Federal Election Commission, United States of America, "Quick Answers to PAC Questions," available at <http://classic.fec.gov/ans/answers_pac.shtml> last accessed 18/1/2018).

Generally, the prevention of corruption (or prevention of the perception of corruption) is seen as a legitimate constitutional objective for the regulation of campaign finance but not the equalisation of the electoral playing field (which is seen as an unconstitutional restriction of free speech protections).⁹¹ This distinguished contributions from expenditures, with the regulation of the former being permissible for anti-corruption objectives. The distinction was diluted in a 2014 Supreme Court ruling⁹² that struck down general limits on how much money can be spent on political campaigns over a two-year period. It did this on the ground that it restricted participation in the democratic process and did not target *quid pro quo* corruption. However, the verdict permitted specific limits on how much a donor can spend on each candidate, with the only overall financial limit being the number of possible campaigns and candidates that can receive funds.⁹³

Public funding can be provided to a limited extent in a few ways. First, those seeking to become their party's Presidential nominee in the US system of primaries can be funded partially. This is in the form of the federal government matching every contribution made to that candidate up to a limited sum. To be eligible, the candidate must be able to show that he or she has adequate support in the form of minimum contributions received and must limit campaign spending to a prescribed amount. Second, Presidential nominees of major parties are eligible for a public grant to finance their campaigns if they limit their expenditure to the amount of the grant and do not accept private contributions (with an exception regarding expenditure from personal funds). Minor parties may similarly receive funding according to a ratio of the share of popular votes received by them to the average share of popular votes of the two major parties in the preceding election. A new party candidate may similarly receive partial funding after an election if they have received 5% or more of the popular vote. A third means of funding, towards the national nominating conventions of major parties, was ended in 2014.

(b) Spending

As mentioned above, a 1976 Supreme Court verdict struck down campaign expense limitations on the grounds that it restricted constitutional free speech guarantees.⁹⁴ Political parties are not restricted from making any independent expenditures for campaigns but limits are placed on the amount of expenditure that can be made in coordination with their candidates.⁹⁵ Independent third party

⁹¹ *Buckley v. Valeo*, 424 U.S. 1 (1976).

⁹² *McCutcheon v. FEC*, 134 S.Ct. 1434 (2014).

⁹³ Scott Bomboy, "Supreme Court ends overall campaign finance limits" (April 2, 2014), *National Constitution Center*, available at <<https://constitutioncenter.org/blog/supreme-court-ends-overall-campaign-finance-limits>> last accessed 19/1/2018.

⁹⁴ *Buckley v. Valeo*, 424 U.S. 1 (1976).

⁹⁵ Federal Election Commission, United States of America, "Coordinated party expenditure", available at <<https://www.fec.gov/help-candidates-and-committees/making-disbursements-political-party/coordinated-party-expenditures/>> last accessed 18/1/2018.

expenditures are not limited and have become increasingly indistinguishable from contributions/donations as noted above.

(c) Disclosures

Candidate committees, party committees and PACs are required to file periodic reports disclosing the money they raise and spend. Such committees are obligated to appoint a treasurer as the nodal officer for all contributions and expenditures. Contributions received towards a committee are to be forwarded to the treasurer within a specified time frame with details regarding the relevant names, addresses and dates of receipt if the donation is higher than \$50.⁹⁶ The treasurer is required to keep records of such contributions and other required details forwarded, the identity of any person who has in total contributed more than \$200, the identity of any contributing political committee, and the identity of any person to whom a disbursement is made along with relevant receipts, invoices etc. for disbursements higher than \$200.⁹⁷ Stringent reporting requirements to the FEC are placed on the treasurer regarding recorded details and these are to be placed in the public domain by the Commission.⁹⁸

4. South Africa

(a) Funding

In South Africa, elections are carried out under a party-list proportional representation system, with candidates running for elections primarily through the lists released by their party. The funding of political parties is thus of primary concern in campaign finance laws. Parties are funded both through public funding and through private donations, with the latter being a considerably contentious issue. A party is permitted to obtain funds from its members as well as from other sources including local and foreign businesses.⁹⁹

Public funding is carried out under the Public Funding of Represented Political Parties Act, 1997. This governs the eligibility of a party for such funding as well as the allocation to be made to it. The Electoral Commission of South Africa manages the fund and as per the 1997 Act allocates it to parties that are represented in the National Assembly, in any provincial legislature, or in both.¹⁰⁰ This means that there is no disbursement made to any political party that is represented only in a municipal council or that is not represented at all. The use of the funds by a party is restricted to only those

⁹⁶ 52 USC § 30102(b) (“Account of contributions; segregated funds”).

⁹⁷ 52 USC § 30102(c) (“Recordkeeping”).

⁹⁸ 52 USC § 30104 (“Reporting requirements”).

⁹⁹ Electoral Commission of South Africa, “Party Funding,” available at <<http://www.elections.org.za/content/Parties/Party-funding/>> last accessed 23/1/2018.

¹⁰⁰ Section 5(1)(a), Public Funding of Represented Political Parties Act, 1997.

purposes that are compatible with its “functioning as a political party in a modern democracy”.¹⁰¹ A nuanced formula is also crafted in the legislation for the allocation of funds on the basis of both proportionality (based on a party’s seat share in the various legislatures) and equity (based on a minimum allocation for a party’s representation in a legislature).¹⁰² However, of the funds earmarked, 90% is disbursed proportionally and 10% equitably, meaning that parties with greater representation have substantially higher funding.¹⁰³

While private funding is availed of by political parties, the Prevention and Combating of Corrupt Activities Act, 2004 criminalises the giving and taking of gratification to influence decisions by members of legislative authorities.¹⁰⁴

(b) Spending

There are no legal limits on how much a political party can spend on electioneering. However, if public funds have been allocated to a party, unspent funds are to be repaid as per Section 6A of the 1997 Act.

(c) Disclosures

Political parties are required to account for the money allocated to them through public funding. They are to maintain the funds in separate bank accounts, appoint accounting officers, keep separate books and records of account, prepare and statements of accounts to auditors etc. The auditor’s report and other financial statements are submitted to the Electoral Commission.¹⁰⁵ The Commission annually reports on the usage of public funding to Parliament.¹⁰⁶

In 2015, a Constitutional Court case seeking disclosure of private funding of parties was unsuccessful as it did not make a frontal challenge to the constitutionality of the Promotion of Access to Information Act, 2000.¹⁰⁷ In 2017, this frontal challenge was made before the Western Cape High Court which found that the prevention of disclosure of private funding of political parties under the 2000 Act unconstitutionally restricted the right of access to information and the right to vote.¹⁰⁸ Such

¹⁰¹ Section 5(1)(b), Public Funding of Represented Political Parties Act, 1997 (providing an inclusive list of such purposes: “the development of the political will of people”, “bringing the political party’s influence to bear on the shaping of public opinion”, “inspiring and furthering political education”, “promoting active participation by individual citizens in political life”, “exercising an influence on political trends”, and “ensuring continuous, vital links between the people and organs of state”).

¹⁰² Section 5(2)(a), Public Funding of Represented Political Parties Act, 1997.

¹⁰³ Regulation 2(2), Public Funding of Represented Political Parties Regulations, 1998.

¹⁰⁴ Section 7(1) & (2), Prevention and Combating of Corrupt Activities Act, 2004.

¹⁰⁵ Section 6 & 6A, Public Funding of Represented Political Parties Act, 1997.

¹⁰⁶ Section 8, Public Funding of Represented Political Parties Act, 1997.

¹⁰⁷ *My Vote Counts NPC v. Speaker of the National Assembly*, [2015] ZACC 31 ¶193.

¹⁰⁸ *My Vote Counts NPC v. President of the Republic of South Africa*, [2017] ZAWCHC 105 ¶69. Significantly, the Court dismissed arguments that such disclosures could be prevented to secure the right to privacy of donors and

information was thus required by the Court to be disclosed for the exercise of the said rights. While a procedure for disclosure under the 2000 Act appears to be imminent, a new Political Party Funding Bill has been tabled in the National Assembly that (amongst a number of reforms) envisages disclosures of private donations that fall above a certain threshold.¹⁰⁹

VI. RECOMMENDATIONS AND SUGGESTIONS

A. Towards Transparency

It is important that all electoral reforms must tend towards transparency and accountability. Political parties play a vital role in our democracy. They bring the discipline and resources that are necessary to manage modern democracies. In order for them to succeed, it is absolutely imperative the ECI be empowered to ensure a level playing field inter se the various political parties.

1. Disclosure of Assets and Liabilities of Candidates

The Election Commission has mandated that each candidate has to file an affidavit containing information on assets and liabilities, apart from criminal antecedents and education qualifications.¹¹⁰ For the first time, the Supreme Court set aside a candidate's election on the basis of a false declaration relating to education qualification on the affidavit submitted in accordance with Form 26 of the Conduct of Election Rules, 1961.¹¹¹ The 2017 amendment to the Rules has now mandated that disclosure of the source of the Candidates and his spouse's income.¹¹² Accordingly a new entry 9A has been inserted into Form 26 affidavit.¹¹³ From the judgments of the Supreme Court, it would

political parties or to secure the right to freedom of association from "the severe effect of funders withdrawing donations to opposition parties for fear of reprisals from the ruling party" (at ¶165-68).

¹⁰⁹ See, Mike Law, "What the historic party funding Bill means for SA politics," *Mail & Guardian* (December 14, 2017), available at <<https://mg.co.za/article/2017-12-14-what-the-historic-party-funding-bill-means-for-sa-politics>> last accessed 23/1/2018 (the Bill additionally sets up a Multiparty Democracy Fund, amends public funding rules to increase equitable disbursement to 1/3rds of the total disbursement, bans funding from state bodies, limits foreign funding, sets limits on maximum amounts that can be donated by a single donor, and puts in place penalties and offences for violations).

¹¹⁰ ECI Order No. 3/ER/2003/JS-II (27 March 2003), available at <http://eci.nic.in/eci_main/ElectoralLaws/OrdersNotifications/Order_Assests_Affidavits.pdf> last accessed 8/1/2018.

¹¹¹ *Mairembam Prithviraj v. Pukhrem Sharatchandra Singh*, (2017) 2 SCC 487, at page 499.

¹¹² Conduct of Election (Amendment) Rules, 2017, Gazette Notification S.O. 1133(E) dated 7.4.2017, available at <<http://ceodelhi.nic.in/PDFFolder/Amendment%20.pdf>> last accessed on 20/1/2018.

¹¹³ Election Commission of India, Letter No. 3/4/ECi/LET/FUNC/JUD/SDR/Vol. 1/2016, available at <http://eci.nic.in/eci_main1/current/Implns_12072017.pdf> last accessed on 20/1/2018.

follow that a false declaration relating to source of the candidates income may be a ground for setting aside his or her election.

To strengthen this movement towards accountability which has been largely done without legislative backing but by the ECI with judicial support, it is recommended that necessary amendments to the RPA 1951 be made at the earliest so that it does not have to await for confirmation by the Courts.

2. Regulating Political Parties

Political parties have largely enjoyed and taken advantage of a legal vacuum. Even the Representation of People Act, 1950 and 1951 did not have any provisions for regulating parties till the 1989 amendments. It is recommended that a comprehensive law for registering and regulating political parties would be a must for enforcing some of the financial disclosure and accountability norms that are being proposed.¹¹⁴

Political parties should be required to maintain and submit annual accounts to the ECI. These accounts will fully and clearly disclose all the amounts received and expenditures incurred by the political party.¹¹⁵ The ECI should be required to upload these accounts online. At present, financial regulation is being done by the ECI through guidelines issued under their plenary powers under Article 324. The lack of legislative backing for these guidelines is always an issue of contention and subject of litigation in the superior courts and subject to their approval. Pursuant to these guidelines, the Institute for Chartered Accountants of India has also issued a Guidance Note on Accounting and Auditing of Political Parties.¹¹⁶

It is our recommendation that the RPA 1951 should be amended so that political parties are mandated to submit annual statement of accounts to the ECI. These accounts should be certified by a chartered accountant and the ECI specifically empowered to issue 'Accounting Standards' and rules in this regard. The ECI should also be empowered to initiate action against parties who fail to comply with these standards or guidelines. This recommendation has been made keeping in mind that the ECI institutional capacity will need to be increased and strengthened.

¹¹⁴ ECI Outcome Paper of National Consultation (16 April 2015), National Consultation on "Political Finance and Law Commission Recommendations, available at <http://eci.nic.in/eci_main1/current/draft_outcome_paper16042015.pdf> last accessed 8/1/2018; ADR had drafted a proposed bill under the guidance of former Chief Justice of India MN Venkatachaliah. We believe this could be a good starting point for a draft law to regulate political parties. The ADR draft Political Parties (Registration and Regulation of Affairs Etc.) Bill is available at <<https://www.adrindia.org/sites/default/files/Bill%20on%20pol%20parties.pdf>> last accessed 8/1/2018.

¹¹⁵ Law Commission of India, 255th Report on Electoral Reforms (March 2015) Para 2.31(b)6

¹¹⁶ Guidance Note on Accounting and Auditing of Political Parties, ICAI, available at <https://www.adrindia.org/sites/default/files/Guidance_Note_on_Accounting_Auditing_of_Political_Parties.pdf>

3. Make RTI Applicable to Political Parties

The Right to Information Act, 2005 ('RTI Act') should be made applicable to political parties. A full bench of the Central Information Commission had directed that 6 national parties, including the BJP and the INC, come within the ambit of the RTI Act.¹¹⁷ A larger bench had been constituted to re-examine the issue but was dissolved by the Chief Information Commissioner. This dissolution is now the matter of a challenge before the Supreme Court.¹¹⁸ A legislative attempt to expressly exclude them from the RTI Act had been aborted and the bill has lapsed.¹¹⁹

It is recommended that keeping in mind the influence and central role that political parties play in our democracy they should be brought within the ambit of the RTI Act. This is the only way to ensure compliance with the disclosure requirements that are necessary in a modern democracy.

B. Political Funding and Expenditure

1. Anonymous Donations

Anonymous donations are synonymous with political corruption and the potential for a *quid pro quo*. There can be no justification for the facilitation of anonymous donations. Although the cap on anonymous donations has been reduced from Rs. 20,000 to Rs. 2000, the introduction of the scheme of electoral bonds and the lack of a cap on the total amount of anonymous donations received in the same breadth has largely negated the effect of transparency objectives of this measure. Anonymity of donations vide Electoral trusts were largely negated by the guidelines issued by the ECI.¹²⁰ The LCI's 255th Report recommendation of a cap of Rs. 20 crores or 20% of the party's entire collections, whichever is lower, has been reiterated by the ECI in its proposed electoral reforms.¹²¹ It is our recommendation that this proposal should be accepted at the earliest.

¹¹⁷ *Subhash Chandra Agarwal and anr. v. INC and others*, Order dated 3.6.2013, available at <http://ciconline.nic.in/rti/docs/cic_decisions/CIC_SM_C_2011_001386_M_111222.pdf> last accessed 28/12/2017.

¹¹⁸ PTI, "Larger CIC bench on RTI cases relating to political parties not formed legally," *The Indian Express* (August 13, 2017) available at <<http://indianexpress.com/article/india/larger-cic-bench-on-rti-cases-relating-to-political-parties-not-formed-legally-4795217/>> last accessed 23/1/2018.

¹¹⁹ Right to Information (Amendment) Bill, 2013, available at <<http://www.prsindia.org/uploads/media/RTI%20%28A%29/RTI%20%28A%29%20Bill,%202013.pdf>>.

¹²⁰ Guidelines for submission of contribution reports of the Electoral Trusts - regarding, bearing reference No.56/Electoral Trust/2014/PPEMS, available at <http://eci.nic.in/eci_main1/PolPar/ElectoralTrust_06062014.pdf> last accessed on 8/1/2018.

¹²¹ Law Commission of India, 255th Report on Electoral Reforms (March 2015) 43; and Election Commission of India, Proposed Electoral Reforms, (December 2016) 48.

2. Ban on Corporate Donations

There needs to be a complete ban on corporate donations on the basis that entities, like companies and trusts, who cannot vote should not be permitted to cause an asymmetry and exercise disproportionate influence on the electoral processes. The LCI 170th report has observed the removal of the ban, introduced in 1969, was an unfortunate step.¹²² This also goes beyond the LCI 255th recommendation which was in effect to return to the pre-1969 position of requiring shareholder approval through an Annual General Meeting.¹²³ We are conscious that there is evidence to suggest the banning of corporate donations tends to increase the use of ‘black money’ in election financing, but we still consider that direct corporate funding of political parties is not a desirable end.¹²⁴ In the alternative, corporates may be permitted to donate to an ECI controlled Electoral Trust or Corpus at the National or State Level availing the consequent income tax benefits. The ECI can then distribute the amounts to regional and national parties on the basis of votes secured at the last election.¹²⁵ This is in line with the recommendations arising out of the ECI’s National Consultation on “Political Finance and Law Commission Recommendations.”¹²⁶

Under the proposed recommendation, individuals as shareholders would still be permitted to donate directly to political parties. At present, the board of directors could effectively donate large amounts even without the approval of the shareholders and continue to do so anonymously through the recently introduced electoral bonds scheme mentioned above.

3. Political Advertising

A large amount of electoral expenses of political parties has been on advertisement in print and electronic media.¹²⁷ The Supreme Court passed an order stating that all political advertisements proposed to be issued on TV Channels and Cable Networks by any registered political party/any group or organization/association/individual candidate shall be pre-certified by the designated certification committee at various levels to be constituted by the ECI. Pursuant to this, the ECI has issued various instructions from time to time on the requirement and procedure for pre-certification

¹²² Law Commission of India, 170th Report on Reform of Electoral Laws (May 1999) Para 4.1.6.1

¹²³ Law Commission of India, 255th Report on Electoral Reforms (March 2015) 45

¹²⁴ Rajeev Gowda & E. Sridharan, “Reforming India’s Party Financing and Election Expenditure Laws,” 11(2) *Election Law Journal* 226, 232-235 (2012).

¹²⁵ ECI Outcome Paper of National Consultation (16 April 2015), National Consultation on “Political Finance and Law Commission Recommendations, available at <http://eci.nic.in/eci_main1/current/draft_outcome_paper16042015.pdf> last accessed 8/1/2018.

¹²⁶ ECI Outcome paper of National Consultation (16 April 2015), National Consultation on “Political Finance and Law Commission Recommendations, available at <http://eci.nic.in/eci_main1/current/draft_outcome_paper16042015.pdf> last accessed 8/1/2018.

¹²⁷ Association for Democratic Reforms, “Analysis of Funds Collected and Expenditure Incurred by National Political Parties - Lok Sabha 2004, 2009 & 2014,” available at <<https://adrindia.org/content/analysis-funds-collected-and-expenditure-incurred-national-political-parties-lok-sabha-2004>> last accessed 23/1/2018.

of political advertisements by a Committee before being telecast on television channels.¹²⁸ A similar set of instructions have also been issued for dealing with Paid News.¹²⁹

All political advertisements must clearly mention the sponsor. Paid news i.e. “any news or analysis appearing in any media (Print & Electronic) for a price in cash or kind as consideration” should be not be within the list of permissible election expenditures by candidates or political parties. The lack of legal backing for ECI’s instructions was illustrated by the curious case of Ashok Chavan was that even though there was proof that a payment had been made action could only be taken for his failure to lodge the expenditure in his account of expenditure. Further, even though the ECI order and power was confirmed by the Delhi High Court and Supreme Court, subsequently a single judge of the High Court set aside the ECI’s Order regarding Ashok Chavan’s failure to lodge his accounts, on the ground that the Rules had not been complied with, as well as the fact that the Commission did not frame an issue regarding the knowledge and consent of the candidate.¹³⁰ This is illustrative of the difficulty in taking effective action against defaulting candidates or political parties without specific legislative empowerment.

Another issue that needs to be highlighted is that of government sponsored advertisements which causes some asymmetry in election campaigns. The Supreme Court had banned the use of the images of Political leaders apart from the President, Prime Minister and Chief Justice of India.¹³¹ However, on application by the Union and State government this was modified to include Ministers in charge of the concerned departments.¹³² The bench, in its original order, had also directed the creation of an ombudsman panel to review advertisements issued. This direction needs to be considered seriously, and it is suggested that the ombudsman panel be constituted by and under the ECI.

It is also recommended that the ECI be given a clear legislative mandate to pre-certify media and print advertisements before publication in accordance with guidelines to be issued by the ECI and powers to take action if any discrepancies are found. The ECI should be permitted to issue show-cause notices and penalise organisations or media houses for carrying political advertisements without the precertification to prevent third parties from carrying political advertisements. The cost

¹²⁸ Election Commission of India, Compendium of Instructions on Media Related Matters (January 2017), available at <http://eci.nic.in/eci_main/Electorallaws/HandBooks/Media_compendium_2017.pdf> last accessed 8/1/2018.

¹²⁹ Election Commission of India, Compendium of Instructions Related to Paid News and related matters (September 2015), available at <http://eci.nic.in/eci_main/Electorallaws/compendium/compendium_on_paid_news_11092015.pdf> last accessed 8/1/2018.

¹³⁰ *Ashok Chavan v. Election Commission of India*, W.P. (C) No. 459/2014.

¹³¹ *Common Cause v. Union of India*, WP(C) 13 of 2003 with WP(C) 197 of 2004 and W.P. (C) 302 of 2012, available at <<http://supremecourtindia.nic.in/jonew/judis/42686.pdf>> last accessed 28/12/2017.

¹³² *State of Karnataka v. Common Cause*, Review Petition Nos. 1879-1881/2015, available at <<http://supremecourtindia.nic.in/jonew/judis/43493.pdf>> last accessed 28/12/2017.

and expenses should be lodged in the statement of account of the political party and candidate. If sponsored by the latter, it should count to the candidates ceiling limits. We recognise the impracticality in imposing ceilings on advertisement spends by political parties.

4. Permissible Sources and Expenditure

The ECI should be empowered to lay down permissible sources of funding for political parties and candidates. The amendments to the Foreign Contributions (Regulation) Act, 2010 by the Finance Act 2016 is particularly worrying since this would permit indirect foreign funding which is not desirable. Similarly, permissible head of expenditure should be expressly laid down so that expenditure towards paid news and other corrupt practices can be monitored and excluded from tainting the electoral process. This is in line with the practice in the UK discussed above.

5. Third Party Spending and Maintenance of Accounts

Political parties and candidates should be asked to maintain and inform the ECI of specific bank accounts to be utilised for all donations and expenditures. Any transfer from the political party to the account of the candidate should only be through electronic means. The candidate may withdraw and use the money and file expenditure statement as mandated by Section 78 of the RPA 1951.

The 2003 Amendment to Section 77 has specifically stated that expenditure incurred by supporters and workers of a candidate is deemed to be expenditure incurred by the candidate and subject to the overall ceiling limits. It is recommended that the problematic and largely unworkable Explanations 1 and 2 to Section 77 may be deleted and a simple exemption for the expenses relating to travel of the leaders holding political or electoral office (which would include leaders of the opposition), their government staff and security personnel can be made.¹³³

6. State and Public Funding of Elections

We are largely in agreement with the LCI that the complete public funding of elections is not a practical option.¹³⁴ Instead, expansion of indirect state subsidy in the form tax benefits, public airtime and partial state funding through an electoral corpus or trust controlled by the ECI as suggested above is a better alternative.¹³⁵ The National Commission to Review the Working of the

¹³³ In *Common Cause (A Registered Society) v. Union of India*, (1996) 2 SCC 752, the Court had exempted the expenses incurred by political parties or any other association or body of persons apart from the candidate or his/her election agent. But the court also issued directions to political parties to submit a statement of expenditure of elections to the ECI to be submitted within a specified period.

¹³⁴ Law Commission of India, 255th Report on Electoral Reforms (March 2015) 57

¹³⁵ Law Commission of India, 255th Report on Electoral Reforms (March 2015) 53-59. The first committee to deal with the issue of public funding was the Dinesh Goswami Committee on Electoral Reforms in 1990, which advocated for partial state funding of elections in the form of limited in-kind support for vehicle fuel (which is a primary campaign expense); rental charges for microphones; issuance of voter identity slips; and additional copies of electoral rolls. The 1998 Indrajit Gupta Committee Report on State Funding of Elections endorsed state funding of elections, seeing “full justification constitutional, legal as well as on ground of public interest” in order to establish a fair playing field for parties with less money power. The Committee envisaged a phased

Constitution headed by former Chief Justice MN Venkatachaliah had noted that the question of state funding of elections should not arise without “an effective systemic acceptance of full audit of party funds including a full audit of campaign funds, deletion of explanation 1 to section 77(1) of the Representation of People Act 1951, a fool proof mechanism to deter expenditure violations, and until the government is convinced that these improvements have been institutionalised and are no longer being breached.”

Keeping these previous recommendations in mind, we are of the opinion that the prevailing economic and legal conditions in the country are not conducive to full state funding and the prevailing practice of indirect funding could be continued and, if necessary, expanded to include further tax benefits, designation of electoral meeting grounds in each constituency which can be availed by all political parties on the same conditions, free public meeting rooms, certain printing costs, free postage etc.

C. Deregistration of Political Parties as Penalty

While the Representation of Peoples Act, 1951 provides for an express power for registration of political parties with the ECI¹³⁶, at present the ECI can review its order of registration only if the registration was obtained by fraud or forgery, it is declared illegal by the Central Government, or if the party amends its internal constitution and intimates the ECI that it can no longer abide by the Indian Constitution; or any other like matter where no enquiry on the part of the ECI is required.¹³⁷ Even though the ECI guidelines provided for removal from the register if a party does not contest elections for a period of 6 years¹³⁸, the Supreme Court has categorically held that the ECI “has no power to review the order registering a political party for having violated the provisions of the Constitution or for having committed breach of undertaking given to the Election Commission at the time of registration.”¹³⁹

Such a power is necessary to ensure that political parties are not used as a cover for parking funds to claim income tax exemption and surreptitiously used to fund candidates or other political parties.

introduction of public funding, given the economic conditions of the country in 1998, beginning with in-kind state subsidies (and no cash) such as rent-free office space, free telephone facilities, electoral rolls’ copies, loudspeakers, specified quantities of fuel, food packets, and airtime (both on state and private media). Gradually, the Committee envisioned a transition to full state funding, along with monetary provision via the creation of a central-governed Election Fund, whose funding would be provided by the Centre and the states together. The LCI in 1999 endorsed the ideas of the Indrajit Gupta Committee Report on partial state funding., as a first step towards total funding given that the latter was not “feasible” in light of the “prevailing economic conditions”.

¹³⁶ Part IVA of the Representation of Peoples Act, 1951, introduced by s.6 of the Representation of Peoples (Amendment) Act, 1988 (w.e.f. 15-6-1989).

¹³⁷ *Indian National Congress (I) v. Institute of Social Welfare*, (2002) 5 SCC 685, at page 705

¹³⁸ Election Commission of India, Guidelines and Application Format for Registration of Political Parties under Section 29A, <http://eci.nic.in/eci_main/ElectoralLaws/guidelinesandformat.pdf> last accessed 30/12/2017.

¹³⁹ *Indian National Congress (I) v. Institute of Social Welfare*, (2002) 5 SCC 685, at page 702

We are conscious of the observations of the Supreme Court that the legislative intent might have been not to involve the ECI in matters of a political nature and that “deregistration of a political party is serious matter as it involves divesting of the party of the statutory status of a registered political party”¹⁴⁰ Hence, we are also making specific recommendations to ensure the impartiality and independence of the ECI to enable them to carry out these additional powers and functions.

D. Empowering the ECI

Finally, we should mention that many of the above recommendations that we are making would be set to naught if the ECI is not suitably empowered to take enforcement action. But with such empowerment, we would also need to further ensure the impartiality and institutional integrity of the ECI. The following recommendations are being highlighted, as they flow as a necessary consequence of empowering the ECI to take effective action against political parties.

1. Appointment of Election Commissioners

A legislative device that has been innovated in other legislations to ensure the impartiality of the appointment of heads and members of such institutions bodies has been to include the leader of the opposition in the selection Committee. The rationale for this is that it would ensure that purely government nominees are not recommended to these posts and the presence of an opposition party leader could act as a check on government attempt to ‘capture’ such institutions.¹⁴¹ The LCI recommended appointment by a committee consisting of the Prime Minister, Leader of the opposition and Chief Justice of India.¹⁴² While agreeing with the objective of the LCI recommendation, we think it would be improper to involve the Chief Justice of India in such a selection committee since the decisions of the committee are also likely to be challenged before the courts. In the alternative, it is our recommendation that appointment of the Election Commissioners be done by a Committee to be chaired by the President of India and consisting of the Prime Minister, Law Minister, Leader of the opposition or largest party in the Lok Sabha, and Rajya Sabha. The President as Chair of the Committee can have a casting vote to be exercised only in case of a tie.¹⁴³ A similar provision with

¹⁴⁰ *Indian National Congress (I) v. Institute of Social Welfare*, (2002) 5 SCC 685

¹⁴¹ *Centre for PIL v. Union of India*, (2011) 4 SCC 1: (2011) 1 SCC (L&S) 609, at page 21. In the setting aside of the appointment of a CVC designate, the Supreme Court had observed that the ECI is in a similar position to the Comptroller and Auditor General and Central Vigilance Commission and the highlighted the importance of institutional integrity and competence before appointment of persons to such post.

¹⁴² Law Commission of India, 255th Report on Electoral Reforms (March 2015)

¹⁴³ This is a modification of the proposal of the Goswami Committee (1990) which recommended that the CEC should be appointed by the President in consultation with the Chief Justice of India and the Leader of the Opposition in the Lok Sabha. In turn, the CEC should be additionally consulted on the question of appointment of the other Election Commissioners and the entire consultation process should have statutory backing (Government of India, *Report of the Committee on Electoral Reforms* (May 1990), available at

the Governor as Chair can be made for appointment of a panel of Regional or State Election Commissioners keeping in mind the need for decentralisation with the enhanced regulatory powers and functions proposed to be granted to the ECI.

2. Status of Election Commissioners

It is recommended that that the Constitution be amended to ensure parity between the Chief Election Commissioner and other election Commissioners for appointment and removal. This is in accord with the previous recommendations of the LCI and the ECI.¹⁴⁴

3. Independent Secretariat and Budget for ECI

It is imperative that the ECI be allowed to have an independent Secretariat and its budget be charged on the Consolidated Fund of India and be made a non-votable expenditure. This would raise the status of the ECI to that of other independent constitutional bodies like the Comptroller and Auditor General, Union Public Service Commission and Supreme Court.¹⁴⁵

<<http://lawmin.nic.in/ld/erreports/Dinesh%20Goswami%20Report%20on%20Electoral%20Reforms.pdf>> last accessed 20/1/2018).

¹⁴⁴ Law Commission of India, 255th Report on Electoral Reforms (March 2015) 100-101; and Proposed Electoral Reforms, Election Commission of India (December 2016) 1-3.

¹⁴⁵ Proposed Electoral Reforms, Election Commission of India (December 2016) 4-5. The Government had earlier moved The Election Commission (Charging of Expenses on the Consolidated Fund of India) Bill, 1994 in the 10th Lok Sabha with the objective of providing for the salaries, allowances and pension payable to the Chief Election Commissioner and other Election Commissioners and the administrative expenses including salaries, allowances and pension of the staff of the Election Commission to be expenditure charged upon the Consolidated Fund of India. This Bill lapsed without being passed, on the dissolution of that House in 1996.



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