

Political finance in India: déjà vu all over again

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AS India gears up for the 2019 general elections, there is a feeling of great uncertainty about the outcome. What once appeared to be a walk in the park for the Narendra Modi-led Bharatiya Janata Party (BJP) has turned into a much more heated contest.¹ While the outcome of the next general election is up in the air, one attribute about it is already well known: it will be the most expensive general election in Indian history and perhaps one of the most expensive ever held in any democratic society. Researchers from the Centre for Media Studies (CMS) estimated that the price tag for the 2009 general election was around \$2 billion while parties and candidates spent on the order of \$5 billion for the 2014 edition.² It is not inconceivable that overall expenditure will double again this year. For comparison's sake, the combined 2015-16 United States presiden-

tial and congressional elections had a price tag of \$11.1 billion, according to U.S. federal regulators.³

The exorbitant cost of Indian elections has become a cardinal fact of the Indian political economy that is widely acknowledged and lamented – including by politicians and their donors. But it is not simply the material outlays that grab one's attention, it is the manner in which the money flows.

In India today, there is virtually zero transparency when it comes to political contributions. It is next to impossible to either identify who has donated money to a politician or party or to figure out from where a politician has obtained his or her campaign funds. Very few donors are willing to disclose their political giving for fear of retribution should their preferred party not come to power.

Although political parties benefit from an exemption on income tax, their accounts are not subject to any genuine scrutiny. The best one can say is that parties deign to submit a perfunctory annual statement of accounts – which is signed off by a handpicked auditor of their choosing – to the Election Commission. And although candidates are required to disclose the minutiae of their campaign spending, their disclosures do not pass the smell test. In the 2014 general election, for instance, winning Members of Parlia-

* Milan Vaishnav's latest book, co-edited with Devesh Kapur, is *Costs of Democracy: Political Finance in India* (Oxford University Press, 2018). This essay draws on his contributions to this volume, which were carried out in collaboration with Devesh Kapur and E. Sridharan. He thanks Jamie Hinton for comments on an earlier draft.

1. For more on the emerging dynamics shaping the 2019 election, see Milan Vaishnav, 'From Cakewalk to Contest: India's 2019 General Election', Carnegie Endowment for International Peace, 16 April 2018, <https://carnegieendowment.org/2018/04/16/from-cakewalk-to-contest-india-s-2019-general-election-pub-76084>.

2. Niraj Sheth, 'Corruption Mars Image of Change in India Elections', *Wall Street Journal*, 9 April 2009; Sruthi Gottipati and Rajesh Kumar Singh, 'India Set to Challenge U.S. for Election-Spending Record', *Reuters*, 9 March 2014.

3. United States Federal Election Commission, 'FEC Summarizes Campaign Activity of the 2011-2012 Cycle', 27 March 2014, <https://www.fec.gov/updates/fec-summarizes-campaign-activity-of-the-2011-2012-election-cycle/>.

ment (MPs) claimed that they spent less than two-thirds of the prescribed ceiling – all the while complaining about how impossibly low the limit had been set.⁴

It is against this backdrop that in 2017 the Narendra Modi government announced with great fanfare a big-bang election finance ‘reform’ that was sold as a bold effort to enhance the transparency of political funding. In the 2018 budget presentation, the Union Finance Minister Arun Jaitley formally rolled out this reform – a new system of ‘electoral bonds’. Electoral bonds are a vehicle through which associations, corporations, and individuals can supposedly ‘transparently’ donate funds to a political party of their choosing via the formal banking system.⁵ If the plan sounds too good to be true, that’s because it is. The advent of electoral bonds, coupled with associated changes to campaign finance law, have done little to clean up the murky morass of campaign finance in India; in fact, there is a good case to be made that they have only further legitimized anonymity, opacity and obfuscation. These new changes will likely set back the fight to cleanse Indian politics by years, if not decades.

In the wake of the government’s November 2016 demonetization gambit, Prime Minister Modi addressed the Indian people in a nationwide televised address on New Year’s Eve. At that point it had become clear that *notebandi* had likely failed in achieving its stated objective of rooting out black money and instead had

led to widespread economic disruption for ordinary people and to a massive collusion between public sector bank managers and those who sought to launder their illicit wealth. It took Indians nearly two years to learn what many of them had already suspected back then: most of the purveyors of black money had found various ingenious ways to game the system.⁶

To reassure a frazzled nation, Modi thanked the citizenry for their patience while announcing a raft of schemes meant to assuage the poor and disadvantaged sections of society. In his speech, Modi also took note of politicians – urging them to do their part to address the scourge of corruption. Specifically, Modi called on parties and leaders of all stripes to end their ‘holier than thou’ approach in order to forge a consensus on improving transparency in political funding and curbing the abuse of black money in politics.⁷

The pivot to politicians and the discussion of money in politics stemmed from an emerging charge that while politicians were beseeching citizens to sacrifice by waiting in endless bank queues and to look beyond the immediate cash crunch, very little was being asked of politicians. Indeed, analysts pointed out that it was hypocritical to suggest that demonetization would curb cronyism while, at the same time, the government failed to articulate any new measures specially designed to address political graft – the very wellspring of corruption in India.⁸

The initial outcry was sparked by statements made by senior finance ministry officials that deposits of newly invalid currency notes into the bank accounts of political parties would not attract tax scrutiny.⁹ These statements, legally speaking, broke no new ground. They were a mere reflection of the fact that under Section 13A of the Income Tax Act, political parties have long been exempt from paying tax. But they also revealed a blatant double standard: there was one set of rules for politicians and another for ordinary citizens. The latter were being asked to make sacrifices on a daily basis while the former were allowed to proceed with business as usual.

Modi’s end-of-year speech set the stage for what was to come next: the announcement of a series of measures in the 2017 budget meant to address – or at least *appear* to address – this hypocrisy.¹⁰ First, the finance minister announced that the ceiling on cash donations to political parties would be lowered from Rs 20,000 to Rs 2,000 in an effort to squeeze black money contributions. Curiously, however, the government did not shift the corresponding threshold for mandatory disclosure to the new Rs 2,000 level (that is, contributions below Rs 20,000 level could still be made anonymously). Second, the Finance Bill also introduced the concept of an ‘electoral bond’ by which private entities could purchase time-limited bearer bonds from a scheduled bank and transfer those bonds to the registered bank accounts of political parties.

4. These stylized facts are discussed in Devesh Kapur, E. Sridharan and Milan Vaishnav, ‘The Path to Reforms: Ensure Enforcement, Bring Clarity’, *Hindustan Times*, 27 July 2018.

5. Speech of Union Finance Minister Arun Jaitley announcing the 2017-2018 Union Budget, 1 February 2017, <https://www.india-budget.gov.in/budget2017-2018/ub2017-18/bs/bs.pdf>.

6. ‘99.40% of demonetised notes returned: RBI’, *Hindu Business Line*, 29 August 2018.

7. Full text of PM Narendra Modi’s Speech on New Year’s Eve, 31 December 2016, <https://www.ndtv.com/india-news/read-full-text-of-pm-narendra-modis-speech-on-new-years-eve-1643833>.

8. Shankkar Aiyar, ‘To Curb Black Money, Strike at the Business Model of Politics’, *New Indian Express*, 13 November 2016.

9. Indivjal Dhasmana, ‘Political Parties Depositing Old Notes Exempt from Tax’, *Business Standard*, 17 December 2016.

10. Milan Vaishnav and Rebecca Brown, ‘Crafty Indian Politicians Can Game the New Political Funding Rules Even in Their Sleep’, *Quartz*, 1 February 2017, <https://qz.com/900922/budget-2017-why-arun-jaitleys-new-rules-to-clean-up-indias-political-funding-simply-wont-work/>.

The government claimed the scheme would facilitate ‘white money’ donations to political parties because funds would be required to flow through the formal banking system, as opposed to under-the-table in cash. At the eleventh hour, the government attached two further amendments to the Finance Bill. The first eliminated the cap on corporate giving (which previously stood at 7.5 per cent of a corporation’s average net profits over the previous three years), while the second abolished the provision that firms must declare their political contributions on their profit and loss statements.

It is ironic that the government introduced these measures under the heading of enhancing ‘transparency’ given that the moves seem to legitimate the kind of opacity that has long characterized political finance. Indeed, Jaitley said as much in a speech defending the measure on the floor of Parliament: ‘People donating to a political party usually don’t like to disclose their identity as they fear repercussions from rival political parties. By purchasing electoral bonds, they can keep their identity secret.’¹¹ Special interests may desire anonymity, but why the government feels the need to accommodate their demands is not altogether clear.

A year later, in early 2018, the government formally notified the new electoral bond scheme.¹² According to newly issued regulations, on certain days throughout the year, donors can buy bonds – essentially non-interest bearing promissory notes – issued by the State Bank of India (SBI) in specified amounts (Rs 1,000, Rs 10,000,

Rs 1 lakh, Rs 10 lakh and Rs 1 crore). According to the government notification, corporations – in addition to individuals, Hindu undivided families, and associations – are all eligible to take part in the scheme as donors. The bonds, which will be valid for only 15 days, can then be deposited in official bank accounts of those registered political parties which have earned at least one per cent of votes polled in the previous general (or state) election. Once deposited, the bonds essentially are converted into donations.

The upside to the new scheme is that donors will now have a legitimate channel through which they can make political contributions, as opposed to indulging in under-the-table transactions, while protecting their anonymity.¹³ Because all transactions related to the purchase and deposit of electoral bonds will happen through the banking system, the government has argued that there will be a digital paper trail that will encourage the use of white money in contrast to the cash transactions that prevail under the status quo. Furthermore, donors will be subject to standard Know Your Customer (KYC) norms that will mitigate concerns about money laundering.

But the upside is also the downside: transparency, as far as the public is concerned, is completely absent.¹⁴ Taking into account the elimination of the cap on corporate giving, the dropping of the requirement that firms disclose political giving on their financial statements, and the introduction of electoral

13. For more, see E. Sridharan and Milan Vaishnav, ‘Political Finance in a Developing Democracy: The Case of India’, in Devesh Kapur and Milan Vaishnav (eds.), *Costs of Democracy: Political Finance in India*. Oxford University Press, New Delhi, 2018, pp. 15-35.

14. Milan Vaishnav, ‘Finance Bill Makes Funding for Political Parties More Opaque Than Ever’, *Hindustan Times*, 29 March 2017.

bonds, moneyed interests can now legally give unlimited sums to political parties who, in turn, can accept unlimited sums of money – all without having to disclose a single rupee. Advocates of the new changes rightly point out that there will be a digital paper trail (as there is with all banking transactions), but this trail will not be on public display, which means that electoral bonds will not undermine the opaque status quo in the foreseeable future.

So if an iron ore magnate in the resource-rich state of Karnataka decided to pump hundreds of crores into the campaign of the Indian National Congress, and the Congress, once it was brought to power, decides to reward that company with sweetheart deals and regulatory forbearance, there would be absolutely no way to connect the dots. Voters, the media, civil society – the citizenry at large – would remain completely in the dark. One could argue that this has always been the case – and he or she would not necessarily be wrong in saying so. But now this *quid pro quo* can proceed with the government’s Good Housekeeping seal of approval.

What are the implications of these changes for India’s political economy? First, the government’s decision to implement the electoral bonds scheme is in keeping with its general attack on cash; demonetization was merely the opening salvo. But in its assault on cash, the government has conflated cash with black money. While black money is often transacted in cash, the two are not the same. There have been enough incidents of money laundering through the official banking system to acknowledge that formal financial channels are not immune to dodgy money. Indeed, while corporations face obligations to place their annual accounts in the public domain, individuals and societies face no such requirement – and the lat-

11. Smriti Kak, ‘Electoral Bonds will Protect Donors’ Identity: FM Jaitley in Lok Sabha’, *Hindustan Times*, 9 February 2017.

12. This section draws on Milan Vaishnav, ‘Electoral Bonds Prize Anonymity, You Won’t Know Who’s Bought Them’, *Indian Express*, 8 January 2018.

ter are enabled to make political donations via the electoral bond route.¹⁵

Furthermore, if the government was really serious about tackling the scourge of cash, why did it not prohibit cash donations altogether? By limiting cash giving to an arbitrary threshold (Rs 2,000), the government has just tinkered with a loophole that can be easily manipulated. A genuine solution would have been to insist that every single political contribution – irrespective of the amount – be processed digitally, complete with a donor's Permanent Account Number (PAN) or Aadhaar details.

Second, given that a public sector bank is issuing the electoral bond instrument, there is at least one entity which will have full view of the transactions taking place: the government itself (and, presumably, the bank regulator). But when something is transparent to government, but kept off-limits to ordinary citizens, it is hardly a meaningful sort of transparency. Whether potential donors will take advantage of the electoral bond route knowing that the ruling party might be able to access transaction details remains an open question. Prior to the fifth sale of bonds in October 2018, barely more than 1,000 bonds had been sold, totalling less than Rs 500 crore. Nearly all bonds (99.9 per cent, to be exact) were purchased in denominations of 10 lakh or 1 crore, suggesting that the initial purchases have been dominated by big business or wealthy interests as opposed to ordinary citizens.¹⁶

Third, if the government were truly committed to scrutinizing the

15. Nitin Sethi, 'The Fine Print: Groups of Individuals, NGOs Can Buy Electoral Bonds Without Public Disclosure', *Scroll.in*, 4 January 2018, <https://scroll.in/article/863782/the-fine-print-groups-of-individuals-ngos-can-buy-electoral-bonds-without-public-disclosure>.

16. Rakesh Dubbudu, 'Electoral Bonds: Not a Single Bond of Rs 1000 and Rs 10000 Sold

sources of campaign finance, it would not have opened the floodgates to foreign funds, which it has done through the backdoor.¹⁷ In 2014, the Delhi High Court issued an order that found both the BJP and the Congress party guilty of accepting donations from foreign corporations. Under the terms of Foreign Contribution (Regulation) Act 2010 (FCRA), a 'foreign source' is defined as a company that has 'more than one-half of the nominal value of its share capital held' by 'corporations incorporated in a foreign country or territory'. By that definition, the Delhi High Court ruled that multiple donations from the London based natural resources concern Vedanta – among others – provided to both parties ran afoul of the FCRA statute.

In 2016, with little advance notice or little public scrutiny, the Union finance minister inserted a seemingly routine clause into that year's Finance Bill which retroactively amended the 2010 FCRA law to state that a company will no longer be deemed a foreign source as long as the 'nominal value of share capital is within the limits specified for foreign investment.' In other words, majority foreign ownership would no longer be the standard by which a company would be deemed to be 'foreign' or not. The government, in cahoots with the principal opposition, was being too clever by half: several of the foreign donations the BJP and Congress received pre-dated 2010, the date of the amended FCRA legislation. Thus, in the 2018 Finance Act, the

Even in July', *Factly*, 28 August 2018, <https://factly.in/electoral-bonds-not-a-single-bond-of-rs-1000-rs-10000-sold-even-in-july/>.

17. This section draws on Milan Vaishnav, 'Don't Believe the BJP and Congress Claims That They're Cleaning Up Poll Funding', *ThePrint*, 6 February 2018, <https://theprint.in/opinion/dont-believe-the-bjp-and-congress-claims-that-theyre-cleaning-up-poll-funding/33671/>.

government had to again amend the law so that the retrospective amendment covers the period beginning 5 August 1976 – the date the original FCRA law came into being.

Unfortunately for the parties involved, this sordid saga will not end there; a public interest suit is pending before the Supreme Court challenging the latest fix because the most recent amendment alters a 1976 law that is no longer on the books.¹⁸ So the question arises how Parliament can amend a law that was repealed several years ago and is no longer operative.

The real damage that has been done is not found in the legal tinkering around the margins, instead it concerns the fight for real political finance reform in the long term. With the spate of recent 'reforms', the government has passed on the impression that sweeping changes have been signed, sealed and delivered. Few, apart from a select group of ardent campaign finance reformers, lawyers, and chartered accountants, have been bothered to actually read the fine print. This group understands that the recent alterations only double-down on the infirmities of the status quo. Individuals and corporations that previously disclosed their giving, however limited in number, now have no incentive to do so.

As the global democratic reform movement is agitating for more transparency, disclosure and openness in political funding, India is rapidly hurtling in the opposite direction. India has earned a reputation for often bucking global trends. But here is one domain where India's innovation is hardly cause for celebration.

18. The Association for Democratic Reforms (ADR), a good governance watchdog, has filed a writ petition with the Supreme Court of India, challenging the retroactive amendment on these grounds. See: https://adrindia.org/sites/default/files/PIL_against_amendment_to_FCRA_1976_and_2010_April2018.pdf