

## THE DANGERS OF ALLOWING FOREIGN POLITICAL CONTRIBUTIONS: A THEORETICAL PERSPECTIVE

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VASUDEV DEVADASAN\* AND ASMITA SINGHVI\*\*

*Campaign contributions are often condemned as a necessary evil associated with elections. However, the Indian parliament's decision to allow political contributions from entirely foreign owned companies with retrospective effect calls for scrutiny. This article examines how political contributions (in particular, foreign contributions) impact the legitimacy-generating role of elections in a constitutional democracy. We explore the role of political contributions in promoting the deliberative ideals of democracy, the resulting political inequality, and the potentially corrupting impact on governance, post-elections. Acknowledging that a balance must be struck, we argue that the Supreme Court of India's conception of free speech and political equality requires that in the Indian context, the balance must tilt towards political equality. Assessing the impact of foreign political contributions, we argue that permitting foreign corporations to participate in the electoral process interferes with a nation's ongoing process of self-definition. In an increasingly globalised world, foreign contributions challenge the notion of a perfectly defined political community and careful regulation. However, by providing for a blanket acceptance of foreign contributions, the Indian parliament risks delegitimising the electoral process – which plays a crucial role in the continued legitimate existence of government, and the nature of, and the outcomes within, the nation.*

### INTRODUCTION

The 2016 presidential elections in the United States raised the spectre of a nation's elections being susceptible to foreign influences. While the United States' Congress appointed a special counsel to determine whether Russia had interfered in American elections, the Indian parliament took a step in a different direction. Tucked away in the Union budget for 2016, was an amendment to the Foreign Contributions (Regulation) Act, 2010 ("the FCRA") that allows foreign owned corporations to donate to political parties in India.<sup>1</sup>

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\* Vasudev Devadasan is an Associate at Trilegal. He can be contacted at vasudevdevadasan@gmail.com. The views and opinions expressed in this article are those of the author and do not reflect the views of Trilegal.

The FCRA, prohibits a few select groups from receiving contributions from “foreign sources”.<sup>2</sup> Broadly speaking, nobody engaged in print or broadcast media, a judge, or any member of a state-owned corporation can receive foreign contributions.<sup>3</sup> Crucially, (i) political candidates, (ii) political parties, or (iii) organisations of a political nature are prohibited from receiving contributions from a “foreign source”.<sup>4</sup> Before the 2016 amendment, the FCRA, defined “foreign sources” to include a “foreign company”.<sup>5</sup> Under the FCRA, a “foreign company” included a multi-national corporation, a company that was incorporated outside India, or a company incorporated in India but having more than 50% of its share capital owned by either foreign governments, foreign citizens or other foreign corporations.<sup>6</sup>

The 2016 amendment added a proviso to the definition of “foreign company” which stated that a “foreign company” was not a “foreign source” if it complies with the Foreign Exchange Management Act, 1999 (“FEMA”). Subject to restrictions in certain sectors (e.g. defence and real estate), the FEMA allows investment by companies that are one hundred percent foreign owned.<sup>7</sup> Thus, post the 2016 amendment, even if a company is entirely owned and controlled by foreign citizens, corporations or governments, as long as it complies with the FEMA’s minimal foreign investment restrictions, it can contribute to Indian political parties. In 2018, parliament went one step further, giving this amendment retrospective effect from 1976,<sup>8</sup> the year the FCRA’s precursor, the Foreign Contribution (Regulation) Act, 1976 was enacted.<sup>9</sup>

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\*\* Asmita Singhvi is pursuing the BCL at the University of Oxford. She can be contacted at [asmitasinghvi@gmail.com](mailto:asmitasinghvi@gmail.com).

<sup>1</sup> The Finance Act, No. 28 of 2016, § 236, (2016).

<sup>2</sup> The Foreign Contribution (Regulation) Act, No. 42 of 2010, § 2(j), (2010).

<sup>3</sup> *Id.* §3(1).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* § 2(j)(iii).

<sup>6</sup> *Id.* §2(j).

<sup>7</sup> D/o IPP F. No. 5(1) 2017-FC-1, Consolidated FDI Policy, 2017 (the Department of Industrial Policy and Promotion makes policy pronouncements on the levels of foreign direct investment which are subsequently notified by the Reserve Bank of India as amendments to the Foreign Exchange Management (Transfer or Issue of Security by Persons Resident outside India) Regulations.

<sup>8</sup> The Finance Act, No. 13 of 2018, § 220, (2018).

<sup>9</sup> The Foreign Contribution (Regulation) Act, No. 49 of 1976, (1976).

This legalises any donation that Indian political parties and candidates may have received from foreign owned companies in the four decades that India prohibited foreign political contributions.<sup>10</sup>

While the rules surrounding political donations in India are unfortunately honoured more in the breach than in the observance, 2014 saw a significant development in the realm of foreign political donations. The Delhi High Court declared that political donations made by Sterlite Industries were illegal as fifty-nine percent of Sterlite Industries was owned by a company in the United Kingdom (Vedanta Resources).<sup>11</sup> This breached the fifty percent threshold set out under the FCRA as it stood in 2014. In explaining its decision, the Delhi High Court noted, the FCRA was enacted to “*insulate the sensitive areas of national life like – journalism, judiciary and politics from extraneous influences stemming from beyond our borders.*”<sup>12</sup> In using the phrase, “*national life*” the Delhi High Court identifies elections as an area of national life which is the sole domain of members of the Indian political community, where the participation of foreign individuals and entities may be restricted.

While the 2016 and 2018 amendments to the FCRA are currently under challenge in the Supreme Court (“SC”), this article examines the impact of political donations, and in particular, foreign political donations (“foreign contributions”) in a constitutional democracy from a theoretical perspective. In Part II, we consider the legitimacy generating role of elections in a democracy. Part III examines how contributions interfere with this role. We conclude that the question of contribution brings into conflict two democracy-enhancing values: freedom of speech and political equality. We argue that in the context of the Indian democracy, the line-drawing exercise of regulating contribution should favour political equality. In Part IV, we examine how foreign contributions, as an interference by non-members of a political community, specifically erode the legitimacy of elections. Part V considers the corrupting effects of contributions and unpacks the democracy-related harms that extend beyond episodic elections. We argue that allowing foreign contributions compounds these effects. We conclude by evaluating the 2016 and 2018 amendments in the context of the Indian democracy.

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<sup>10</sup> *Id.* § 4.

<sup>11</sup> Association of Democratic Reforms v. Union of India, (2014) 209 DLT 609 (India).

<sup>12</sup> *Id.* ¶20.

## I. THE ROLE OF ELECTIONS IN A DEMOCRACY

What makes democracy distinct from other types of government is that members of a political community covenant to collectively select a representative. In a democracy, only a government which the people have chosen, and thus consented to, can be legitimate.<sup>13</sup> Free and fair elections are a *sine qua non* of any democracy for several reasons. While they act as a check on the government and allow members to *speak*, their most important function is to legitimise the government of the day.<sup>14</sup> Thus, as James Gardner notes, “*the laws and procedures [that govern elections] influence the legitimacy of the elected government in proportion to their ability to identify accurately the particular individuals chosen by the people as their agents and to whose rule the people have in fact consented.*”<sup>15</sup> The laws and rules that govern elections are relevant because these laws ensure the legitimacy and neutrality of the electoral process, which in turn ensures the legitimacy of the government. Electoral laws can also play a determinative role in the outcome of elections. In the words of James Madison, “*the result will be somewhat influenced by the mode.*”<sup>16</sup>

If an individual is compelled to abide by the obligations of a political community yet has not consented through their vote to be governed by the elected government, the rule by this government *vis-à-vis* this individual cannot be legitimate under this framework. Of course, there are exceptions to this understanding, most notably children. However, as we argue in Part IV, foreigners can legitimately be denied a vote and even participation in the electoral process. Before that however, we first consider how contributions interfere with the legitimacy of the electoral process, which in turn creates legitimacy concerns for the elected government.

## II. THE EFFECT OF CONTRIBUTIONS ON ELECTIONS

Monetary resources in the form of contributions facilitate more effective campaigns and lead to a wider political discourse. These speech-enhancing effects provide a principled basis for allowing contributions.

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<sup>13</sup> James Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty under the Lockean Constitution*, 52 U. PITT. L. REV. 189, 205 (1990).

<sup>14</sup> *Id.* at 215.

<sup>15</sup> *Id.* at 267.

<sup>16</sup> JAMES MADISON, THE FEDERALIST, NO. 51 423 (C. Rossiter ed. 1961).

At the same time, the translation of economic inequality into political inequality is a reason for resisting the influence of money on politics. This section examines these opposing claims to conclude that regulations governing contributions are modelled on a compromise between these values. Finally, we attempt to analyse the nature of this compromise in the Indian context.

*a. The argument from Free Speech*

Recall that elections allow voters to signal consent and legitimize a government.<sup>17</sup> However, for elections to achieve this end, information about political candidates must be freely available. Even if the status of the right to vote is unclear, the SC has recognised that the voter's right to be informed about political candidates is concomitant to the voter's freedom of expression under Article 19(1)(a) of the Indian Constitution.<sup>18</sup> In *Union of India v Association for Democratic Reform*, the Court noted that, '...voter speaks out or expresses by casting vote. For this purpose, information about the candidate to be selected is [a] must'.<sup>19</sup> In other words, the exercise of voting loses value<sup>20</sup> if the freedom of voting is not protected by allied free speech rights of the audience such as the ability to know, to reject and to do so secretly.<sup>21</sup>

It is a practical necessity of modern democracies, that this constitutional role of informing the electorate is carried out through campaigns – often financed by private contributions to political parties. Money makes it possible to reach out to the masses, conduct rallies, use social media and advertise. In this sense, campaigns occupy an important role in democratic theory by providing a platform for political deliberation by the general population.<sup>22</sup> Thus, this deliberative ideal compels structuring political contribution models to promote discourse and persuasion.

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<sup>17</sup> See *infra* Part II.

<sup>18</sup> *Union of India v. Association for Democratic Reforms*, (2002) 5 SCC 294.

<sup>19</sup> *Id.* ¶29.

<sup>20</sup> GAUTAM BHATIA, OFFEND, SHOCK, OR DISTURB: FREE SPEECH UNDER THE INDIAN CONSTITUTION, 270 (2016).

<sup>21</sup> *Peoples' Union for Civil Liberties v. Union of India*, AIR 2003 SC 2363.

<sup>22</sup> James Gardner, *Deliberation or Tabulation?: The Self-Undermining Constitutional Architecture of Election Campaigns*, BUFFALO L. STUDIES Research Paper No. 2016-013.

It is for precisely this role of money, that the U.S. Supreme Court in *Citizens United v FEC* struck down contribution limits by independent corporations towards ‘electioneering communications’ as inconsistent with the First Amendment.<sup>23</sup> The Court considered the role of contributions in facilitating deliberation equivalent to speech in two ways. First, the candidate or party converts the donors’ contribution into speech and therefore, the contribution amounts to speech as proxy.<sup>24</sup> Second, the contribution constitutes symbolic speech because the donors’ contribution register both the content and the intensity of her political views, as a larger contribution is assumed to express a stronger opinion.<sup>25</sup> Notably, in order to prevent *quid-pro-quo* corruption, there is a federal ban on direct contributions to campaigns and candidates from corporations.<sup>26</sup> However, the First Amendment rights of corporations remain protected through other mechanisms such as political action committees (PACs) and freedom to engage in ‘issue advocacy’.

Such an issue has not arisen before the Indian SC and the claim here is not that political contributions be deemed constitutionally protected under Article 19(1)(a). The freedom of speech carries corresponding rights for the speaker as well as the audience.<sup>27</sup> The discussion here is intended to highlight that the constitutionally recognised *right of the audience to be informed* makes contributions a pragmatic necessity to protect the audiences’ right to speech, if not the speakers’. While we may refrain from giving contributions the stature of a right, we would certainly allow them and contain its ill-effects through responsible regulation. The next section considers some of these ill-effects.

### ***b. The argument from Political Equality***

Political contributions are opposed on the ground that they undermine the political equality enjoyed by citizens. Robert Dahl, in his theory of procedural democracy identifies the essential requirements for a truly democratic functioning of a state. In *On Democracy*, he notes,

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<sup>23</sup> *Citizens United v FEC*, 558 U.S. 310 (2010).

<sup>24</sup> *Buckley v. Valeo*, 424 U.S. 1,21 (1976).

<sup>25</sup> *Id.*

<sup>26</sup> *FEC v Beaumont*, 539 U.S. 146 (2003). *See gen* Bipartisan Campaign Reform Act, 2002.

<sup>27</sup> *State of UP v. Raj Narain*, AIR 1975 SC 865, ¶74.

*“And your constitution must be in conformity with one elementary principle: that all the members are to be treated (under the constitution) as if they were equally qualified to participate in the process of making decisions about the policies the association will pursue.”<sup>28</sup>*

Similarly, in *National Capital Territory of Delhi v Union of India* J. Dipak Misra notes,

*“the cogent factors for constituting the representative form of government are that all citizens are regarded as equal and the vote of all citizens... is assigned equal weight. In this sense, the views of all citizens carry the same strength and no one can impose his/her views on others.”<sup>29</sup>*

This requirement stems from the claim that all citizens inherently possess equal moral worth that entitles them to the same basic rights. At its core, political equality entails equal opportunity of participation in the political process so that the resultant distributive choices remain free of existing inequality.<sup>30</sup> A thicker conception of ‘opportunity’ would give more force to political equality and entail a state where each citizen has equal effective control over the government so that no citizen’s preferences are weighted more heavily than another.<sup>31</sup>

It is important to understand that this is a moral claim that guides the design of democratic processes. Under this thicker conception of ‘opportunity’, formal equality enshrined in the principle of one person one vote is not enough to achieve this ideal.<sup>32</sup> Contributions can offend political equality by translating economic inequality into political inequality.<sup>33</sup> They play a central role in shaping the agenda and deciding

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<sup>28</sup> ROBERT DAHL, *ON DEMOCRACY* 37 (New Haven, Conn: Yale University Press) (1<sup>st</sup> ed., 1998).

<sup>29</sup> *National Capital Territory of Delhi v Union of India*, (2018) 8 SCC 501, ¶ 52.

<sup>30</sup> Maria Paula Saffon, Nadia Urbinati, *Procedural Democracy, The Bulwark of Equal Liberty* accessible at <http://ptx.sagepub.com/content/early/2013/02/19/0090591713476872>.

<sup>31</sup> Eric Freedman, *Campaign Finance and the First Amendment: A Rawlsian Analysis*, 85 IOWA L. REV. 1065, 1067 (2000). See gen ROBERT A. DAHL & CHARLES E. LINDBLOM, *POLITICS, ECONOMICS AND WELFARE* 41 (1953).

<sup>32</sup> *R. C. Poudyal v. Union of India*, AIR 1993 SC 1804, ¶ 21.

<sup>33</sup> Edward Fowley, *Equal-Dollars-per-Voter: A Constitutional Principle of Campaign Finance*, 94 COL. L. REV. 1204.

which issues become key in the campaign. Unequal economic resources make it possible for some constituencies to disproportionately highlight certain issues and ‘drown’ out the needs of other constituencies that cannot afford to compete with the economic influence.<sup>34</sup> Thus, while every person may have an equal formal vote, the needs of some may end up better represented than others.<sup>35</sup> In this manner, private contributions can defeat political equality.

This is a complex claim and not without its weaknesses. The argument assumes that campaigning is sufficiently similar to voting to require the conditions of equality to be applied with the same vigour.<sup>36</sup> This proves too much as citizens are unequal in terms of other resources like time, talent and skill as well.<sup>37</sup> This argument, as Kathleen Sullivan claims, is a constitutional choice. It is equally possible to equate contributions to speech and prohibit any regulation based on economic standing of the contributor – the position in the United States.<sup>38</sup> For example, in *Buckley v Valeo*, the U.S. Supreme Court noted, “*the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment*”.<sup>39</sup> This is true despite the fact that the requirement of equipopulous districts in the United States implicitly recognises that all votes must be equally weighted.<sup>40</sup> The decision in *Buckley* can be understood as a compromise when the thick conception of political equality clashed with individual rights under the First Amendment.

Others disagree with this choice and argue that the analogy between contributions and voting stems from the role that citizens are entitled to in the deliberative process of elections. Dworkin claims that in an election citizens are not simply decision-makers but also participants.<sup>41</sup> He notes, “*They are candidates, supporters and political activists ... and participate in the*

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<sup>34</sup> CASS SUNSTEIN, *THE PARTIAL CONSTITUTION* 223-224 (1993).

<sup>35</sup> *Id.*

<sup>36</sup> Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 672 (1997).

<sup>37</sup> *Id.* 674.

<sup>38</sup> See *supra* note 36.

<sup>39</sup> See *supra* note 24.

<sup>40</sup> *Reynolds v Sims*, 377 U.S. 533, 563 (1964).

<sup>41</sup> RONALD DWORKIN, *THE CURSE OF AMERICAN POLITICS*, N. Y. REV. Book, (1996) 19, 23.



*contests that they collectively judge*.<sup>42</sup> If their role as the constituent power entails participation, then the formal equality of voting power implies a corollary right to equality in the opportunity to speak out on political matters.<sup>43</sup> Citizens are entitled to persuade others of a certain viewpoint in ways other than quietly going to the booth on voting day. Reducing the role of a citizen to only a voter during an election casts their identity as participants into a blind spot.<sup>44</sup> This protects only a diluted conception of citizenship and in turn offends the legitimacy and deliberative function of elections.

This political inequality in providing input at the election stage can lead to further entrenchment of inequality. Governments of the day routinely make distributive choices. Political contributions are a vital input into these political processes, as they can determine which issues are at the forefront of the distributive agenda of government. For example, an industrialist can make a better claim for relaxing environmental regulations while underrepresented tribal constituencies are unable to make a rival claim for increased control over their own resources. Therefore, private money not only hinders equal participation but also threatens to affect the substantive outcomes on questions of justice.

As a result, most states regulate political contributions to contain the resulting political inequality. In India, Section 77 of the Representative of People's Act, 1951 ("the RPA") achieves this by imposing expenditure ceilings on political parties.<sup>45</sup> While theoretically a step in the right direction, as the National Commission for the Working of the Constitution put it, '*The limits of expenditure prescribed are meaningless and almost never adhered to*'.<sup>46</sup> The inefficacy of this check requires us to take a hard look at the threats of private contribution notwithstanding expenditure limits under Section 77.

This conflict between political equality and free speech can be resolved if campaigns are publicly funded i.e. through taxpayer money. This is a

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<sup>42</sup> *Id.*

<sup>43</sup> See *supra* note 36, 674.

<sup>44</sup> See *supra* note 41.

<sup>45</sup> P Nalla Thamby Thera v. UOI, 1985 SCR Supl. (1) 622.

<sup>46</sup> Report of the National Commission for the Working of the Constitution, Electoral Processes and Political Parties (2002) ¶ 4.14.1.

popular campaign reform proposal and, without getting into the details, has the advantage of equalising the financial means of all citizens while meeting the monetary demands of campaigning.<sup>47</sup>

Suggestions of such a reform are not unheard in the context of India but remain academic and aspirational.<sup>48</sup> While public financing of campaigns may theoretically resolve the conflict between political equality and free speech, until meaningful political will for such a proposal exists, cognisance must be taken of the challenges raised by private – and foreign – contributions. Thus, for the present purposes, we set aside the idea of public financing and attempt to strike a balance between free speech and political equality through the effective regulation of private contributions.

As free speech and political equality are both democracy-enhancing values, it should remain open and coherent for any constitutional order to prioritise one at the cost of the other. This provides a spectrum of choice – from the *liberal* unregulated use of private money to the *egalitarian* public funding of elections.<sup>49</sup> The real question, therefore, is a political question – ‘which vision would better serve the aims of democracy?’<sup>50</sup> Campaign finance models should be so designed as to better protect the democratic ideal closer to our conception of democracy. In the following section, we mount a case that the principle of political equality is more central to the Indian democracy and consequently it is this ideal which must be protected at the cost of minimising potential speech effects of contributions.

### *c. Locating Political Contributions in India*

Political equality has not only been construed central to Indian democracy but has played an important factor in shaping electoral laws as well. In *R.*

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<sup>47</sup> Edward Fowley, *Equal-Dollars-per-Voter: A Constitutional Principle of Campaign Finance*, 94 COL. L. REV. 1204; *See also* BRUCE ACKERMAN, IAN AYRES, VOTING WITH DOLLARS – A NEW PARADIGM FOR CAMPAIGN FINANCE (2004).

<sup>48</sup> Report of the High-Powered Expert Committee on the Companies and MRTP Acts (1978) ¶13.12; *See also* P Nalla Thamby Thera v Union of India, 1985 SCR Supl. (1) 622, 639.

<sup>49</sup> Edward B. Foley, *Philosophy, the Constitution, and Campaign Finance*, 10 STAN. L. & POL'Y REV. 23 (1998).

<sup>50</sup> *Id.* at 27.

C. Poduval, observing the varying conceptions of the term democracy, the Court noted, “*In our Constitution, it refers to denote what it literally means that is ‘people’s powers’... It conveys the state of affairs in which each citizen is assured of the right equal participation in the polity*”.<sup>51</sup> Similarly, in *Kanwar Lal Gupta v Amar Nath Chawla*, where the SC interpreted expenditure limits under Section 77 of the RPA, it noted, “*that democratic process can function efficiently and effectively... only if it brings about a participatory democracy in which each and every man... should be able to participate on a footing of equality with others.*”<sup>52</sup> The Court justified this as one of the reasons behind parliament enacting an expenditure ceiling.

More importantly, unlike the First Amendment, free speech jurisprudence under Article 19(1)(a) does not favour the idea of privatising free speech. Gautam Bhatia has argued that “*regulating market conditions to guarantee access is entirely in line with the requirements of Article 19(1)(a).*”<sup>53</sup> J. Mathew in his dissent in *Bennet Coleman* noted, “*the restraining the hand of the government is quite useless in assuring free speech, if a restraint on access is effectively secured by private groups. A Constitutional prohibition against governmental restriction on the expression is effective only if the Constitution ensures an adequate opportunity for discussion.*”<sup>54</sup> In other words, the requirement of equality is internal to the free speech jurisprudence under the Indian Constitution. The same is not true for the First Amendment. Indeed, Kathleen Sullivan claims that, “*... short of major revision of general First Amendment understandings, campaign finance reform may not be predicated on equality of citizen participation*”.<sup>55</sup> These alternate orientations help explain why the line may be drawn differently under different constitutional orders while remaining true to the democratic agenda of enhancing the electoral process. The disagreement lies in the differing means through which the consent of the electorate may be better actualized. Therefore, given the primacy of political equality to the conception of democracy in India and free speech rights, we conclude that the balance between the two should be resolved in favour of protecting political equality.

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<sup>51</sup> *Supra* note 32, ¶ 46.

<sup>52</sup> *Kanwar Lal Gupta v Amar Nath Chawla*, AIR 1975 SC 308, ¶ 9.

<sup>53</sup> *Supra* note 20, 295.

<sup>54</sup> *Bennett Coleman v. Union of India*, AIR 1973 SC 106, ¶¶ 126-7.

<sup>55</sup> *Supra* note 36, 675.

### III. POLITICAL MEMBERSHIP AND FOREIGN CONTRIBUTIONS

While the section above provides a framework to conceptualise the democratic values underlying political contributions, this section argues that political contributions by foreigners, as a distinct sub-set of contributors specifically reduces the legitimacy-generating function of elections. To understand the impact of foreign campaign contributions (as opposed to domestic campaign contributions) we begin by demonstrating why States, as political communities, make a distinction between members (citizens) and non-members (foreigners). Based on this distinction, we argue that States may impose restraints on non-members, particularly in critical areas of ‘*national life*’, and finally that limiting the participation of non-members in the electoral process by prohibiting foreign political contributions is one such legitimate restraint.

#### *a. Political Communities and Membership*

Under contractarian theories of statehood, a central claim is that an individual is autonomous and capable of self-rule. But such autonomy and self-rule are likely to be short-lived in the face of hunger, the forces of nature, and the hostility from other individuals. From the dawn of time, individuals chose to live together in communities, acknowledging that their survival and well-being depended on the common effort of other members of their community.<sup>56</sup> To protect the mutual obligations of security and well-being members owe each other, members separate themselves from “mankind as a whole” and set up their own distinct community.<sup>57</sup> Take the example of the smallest community, a family living within the four walls of a house. The reason the family chooses to live within these four walls and permits only family-members to reap the benefits of the goings on in the house is in part because the members of the family have mutually covenanted to live in a particular manner, to eat a kind of food and to spend money on particular items. Even if family members disagree, disagreements are expressed in a manner that is acceptable to all. As the community gets larger, members find it beneficial to create a system of governance to handle public functions associated with living together.

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<sup>56</sup> MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENCE OF PLURALISM AND EQUALITY 65 (Basic Books 1983); *Supra* 13, 202.

<sup>57</sup> *Id.*

The idea that some individuals should benefit from the membership of a community to the exclusion of others is often challenged on two grounds. First, the claim that certain benefits are owed to *all* individuals even if they belong to another community. Alternatively, it is argued that all individuals are in fact members of an overarching global community.<sup>58</sup> In response to the first claim, it is true that members of a community owe certain obligations to all individuals irrespective of whether they are members or not. For example, a State owes certain obligations to refugees that arrive at their borders. However, these are broadly limited to “non-coercion, good faith, and good samaritanism”.<sup>59</sup> As Michael Walzer notes, if our obligations to other individuals were limited to these “*external principles*”, every individual would effectively be a stranger.<sup>60</sup> If all we owed our co-citizens was food and shelter, matters that require complex coordination such as nationalised healthcare or state infrastructure (even driving on the same side of the road) would be beyond our reach. It is precisely because we owe some individuals, our family-members, or co-citizens greater obligations than merely food and shelter, which the distinction between members and non-members arises.

The problem with the second claim, concerning the global community, is that individuals experience communities at different levels. The further removed from an individual, the thinner the notion of community becomes. One may have a vivid experience of one’s family as community, a thinner experience of the State as the community, and an almost non-existent sense of community at the level of supra-national frameworks such as international human rights. There are also inherent dangers to strengthening such efforts at global membership. The larger the community, the higher the risk of an individual’s agency being drowned out and the lower the community’s reflexivity to the individual’s interest. This can easily lead to increasingly authoritarian decisions. While a meaningful notion of democracy beyond the state is yet being imagined,<sup>61</sup> supra-national organisations that set increasingly more detailed and intrusive regulations are largely impervious (or non-reflexive) to

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<sup>58</sup> *Id.* at 34.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> G de Burca, *Developing Democracy Beyond the State*, 46 COLUMBIA J. OF TRANSNATIONAL L. 101, 105 (2008).

individuals within a state.<sup>62</sup> For example, the extent to which a citizen or group of citizens can make themselves heard, or challenge the actions of an international norm-setting body (e.g. in international trade law) is drastically reduced when compared to the accountability expected of elected local or national government. Thus, authority should ideally be imposed at a level commensurate to the problem being tackled. If a neighbourhood seeks to build a road, it is the members of that neighbourhood who form the community, and the authority will be of the local council. For elections that result in national governments, the community is the citizens of that nation. In any case, to argue that the State has been subsumed by a global community is simply at odds with reality.

A consequence of maintaining a defined set of members is that there will exist certain restraints on becoming a member of a political community.<sup>63</sup> This is not to say that the content of such restraints will always be justified. (E.g. restricting membership on the grounds that non-members don't look or talk the same as members cannot be justified as such difference does not impact the non-members ability to live by the community's agreed obligations.) However, the point sought to be made is that restrictions *per se* will exist. Common examples of such restrictions are a minimum number of years before one can apply for citizenship or an examination to acquire citizenship. Further, non-citizens are often not allowed to hold high governmental offices, be members of the judiciary and, as we argue, make political contributions. Extending our example of a family, while a stranger may eventually be permitted to sleep in the house, they are unlikely to be given access to the family's bank account until they become a part of the family itself.

However, foreigners within a country *do* have certain obligations and are owed certain rights. But because citizenship influences the content of other crucial distributive choices,<sup>64</sup> citizenship determines who is entitled to certain rights. Citizens vote for a government on issues such as taxation, state welfare and immigration. Allowing foreigners to participate in elections would allow them to participate in the *process which determines*

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<sup>62</sup> Marco Dani, *The Rise of the Supra-National Executive and the Post-Political Drift of European Public Law*, 24(2) INDIAN J. OF GLOBAL LEGAL STUDIES 399-428 (2017).

<sup>63</sup> *Supra* note 56.

<sup>64</sup> *Id.*

*how the resources of a community are shared.* Further, because it is the elected government that decides on matters of immigration and citizenship, allowing foreigners to participate in the elections allows foreigners to have a say on the contours of membership itself. Therefore, while foreigners may be owed certain rights, they are not provided the right to participate in elections because elections are crucial to how a democratic community defines *itself*. Because of this central role that elections play, a high premium is placed on restricting the influence of non-members in elections. As the U.S. Supreme Court notes, “*although we extend to aliens the right of education and public welfare, along with the ability to earn a livelihood and engage in licensed professions, the right to govern is reserved to citizens.*”<sup>65</sup>

In the case of corporations, the case is often made out that just an individual’s legal rights are protected, so too should the interests of corporate persons. However, it is crucial to recognise that any rights a corporate person has stems from the right of association that its members possess. The extent of this right of association is democratically determined by citizens taking into consideration the good of those associating as well as the good of the citizens. Thus, as Philip Pettit argues, the rights of a corporate person in a political community should be determined by the members of that community by considering the “*interests of the individuals associating and the individuals affected, they ought not to be determined by reference to the good or the status of the corporate entity.*”<sup>66</sup> Thus, just as restrictions may be placed on foreign individuals, citizens may limit the rights of foreign owned corporate persons taking into account the interests of the citizens to define their own political community. Corporations are, in the words of Gallanter, “*economically well-resourced, they are also legally privileged, politically powerful and [potentially] democratically uncontrolled.*”<sup>67</sup> Given the case against contributions by foreign individuals in elections, these harms are only exacerbated in the case of foreign corporations.

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<sup>65</sup> *Foley v. Connelie*, 435 U.S. 292, 297 (1978).

<sup>66</sup> Philip Pettit, *Two Fallacies about Corporations*, in *PERFORMANCE AND PROGRESS: ESSAYS ON CAPITALISM, BUSINESS, AND SOCIETY* 379-395 (Oxford University Press. 2015).

<sup>67</sup> Marc Galanter, *Planet of the APs: Reflections on the Scale of Law and its Users*, 53 *BUFFALO L. REV.* 1369-1417 (2006).

### ***b. Campaign Finance***

Recall that while a campaign contribution is not akin to voting, it is an integral part of the electoral process. A good articulation of the problems campaign finance can raise in the context of non-members was put forth by American legislators when defending a measure to prohibit members from outside the state from contributing to local political races. It was contended that:

*“The people of Oregon’s specific sovereignty interests in banning non-resident money contributions in elections parallel their sovereignty interests in banning non-resident voting and candidacy [...] Non-citizen campaign contributors’ intervention in state legislative races changes the definition of the political community and distorts the character of the campaign process.”<sup>68</sup>*

Allowing foreigners to make contributions towards political parties or candidates broadens the political community with respect to electoral *inputs*, without subjecting them to the restraints on membership that are crucial to defining a community, *in the very process which defines a political community*. In the words of the U.S. Supreme Court in *Cabell v Chavez-Solido*, the “*exclusion of aliens from basic governmental process is not a deficiency in the democratic system, but a necessary consequence of the community’s process of political self-definition.*”<sup>69</sup> This is not to say that States should seek to reject divergent views during elections. Rather, that those divergent views in an election should stem from the members of the political community themselves because elections constitute moments of democratic self-definition of a community. As noted above, the existence of political communities necessitates a defined set of members and consequent restrictions on non-members. Further, as argued below, allowing these new ‘members’ to influence the outcomes of elections also dilutes the influence that existing citizens have over their own elections, reducing the ability of the electoral process to accurately reflect the consent of the citizens, and consequently reducing the legitimacy of any government

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<sup>68</sup> Bruce Brown, *Alien Donors: The Participation of Non-Citizens in the U.S. Campaign Finance System*, 15 YALE L. & POL. REV. 503, 548 (1997).

<sup>69</sup> *Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1982).



elected in such a process. This is exacerbated when a few foreign companies can drown out the demands of domestic citizens.

In *Bluman v FEC*, the Federal District Court of Columbia expressly upheld the U.S. prohibition on foreign campaign contributions.<sup>70</sup> (This decision was summarily affirmed by the U.S. Supreme Court.)<sup>71</sup> The Court began by noting that foreigners are prohibited from participating on par with citizens in several areas of American life. For example, foreigners in America are barred from serving as jurors, working as police officers, or public-school teachers.<sup>72</sup> The Court notes that permitting non-members to make political contributions can lead to far greater consequences than allowing a non-member to be a police officer, concluding that,

*“A state’s historical power to exclude aliens from participation in its democratic political institutions [is] part of the sovereign’s obligations to preserve the basic conception of a political community. [...] In other words, the government may reserve ‘participation in its democratic political institutions’ for citizens of its own country.”*<sup>73</sup>

In declaring Sterlite Industries’ contributions, a violation of the FCRA (on the ground that fifty-five percent of Sterlite’s shares were owned by a foreign company), the Delhi High Court noted that the FCRA was intended to exclude foreign participation in certain areas of ‘*Indian life*’, such as government, journalism and politics.<sup>74</sup> It is important to understand that the court did not strike down foreign contributions because they interfered with any particular conception of “*Indian life*”, but rather because foreign contributions interfered with the *ongoing process of political self-definition*, which, through the FCRA, is restricted to citizens. Exploring the legislative intent of the FCRA, the Court noted;

*“The Foreign Contributions (Regulation) Act, 1976 was enacted by the parliament to serve as a shield in our legislative*

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<sup>70</sup> Benjamin Bluman v. Federal Election Commission, 800 F.2d 281.

<sup>71</sup> On 9 January 2012 the U.S. Supreme Court summarily affirmed the decision of the federal district court (Docket No: 11-275) by a vote of 9-0.

<sup>72</sup> *Supra* note 70.

<sup>73</sup> *Id.*

<sup>74</sup> *Supra* note 11, ¶ 20.

*armoury, in conjunction with other laws, and insulate the sensitive areas of national life – journalism, judiciary and politics from extraneous influence stemming from beyond our borders.*<sup>75</sup>

The use of the phrase, “*national life*” highlights the court’s implicit claim that non-members, despite being owed certain minimum obligations, are not entitled to participate in the core aspects of the political self-definition of a community. Elections are fundamental to the definition of the political community because citizens vote for the distributive choices and substantive outcomes to questions of justice they wish to see in their community.

It may be argued that, if non-members of the community are not allowed to participate, then members from federal unit in a country should not be able to donate to political races in another federal unit. The court in *Bluman* addressed exactly this argument when it noted that, “*American corporations, and citizens of other states and municipalities are all members of the American political community. By contrast, aliens are by definition those outside of this community.*”<sup>76</sup> Thus, in the context of elections, the political community in question is undoubtedly the country, echoed by the Delhi High Court’s use of the phrase, “*national life.*” Recall also that it is the national government which patrols the border and demands taxes. Without the State as we know it, it is unlikely that individual communities *within* that State would have the necessary level of security to flourish as distinct groups.

Under the original FCRA, companies having more than fifty percent of their share capital owned by foreign governments, companies or citizens were prohibited from making any political donations in India. In *Association of Democratic Reforms v Union of India*, where fifty-five percent of the Sterlite’s shares were owned by Vedanta (a foreign company), it was precisely this restriction that allowed the Delhi High Court to hold that the political contributions were illegal. By removing this restriction and allowing foreign companies to make donations so long as they comply with foreign investment restrictions opens the door for corporations that

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<sup>75</sup> *Supra* note 11, ¶ 34.

<sup>76</sup> *Supra* note 70.

are wholly foreign owned to influence the outcome of elections in India. These foreign corporations may be owned and controlled by foreign governments who seek to leverage favourable outcomes in the sphere of foreign policy. Alternatively, they may be corporations seeking to secure *quid-pro-quo* arrangements with legislators and regulators. In either case, the controlling interests of these entities are not members of the Indian political community, and while they may be regulated by Indian law, an elected Indian government should treat these entities' interests with circumspect for their interests are their own.

## VI. CORRUPTION: THE EFFECT OF POLITICAL CONTRIBUTIONS ON POST-ELECTION GOVERNANCE

The extent to which governmental legitimacy is reduced through the introduction of lax electoral laws also depends on the extent of electoral accuracy a community has agreed upon (e.g. a country that has no history of voter fraud is unlikely to have stringent voting ID requirements). In the case of India, a high degree of electoral accuracy has been sought primarily due to the spectre of political corruption. As the SC noted, “*The likely evasion of the law by using big money through political parties is a source of pollution of the Indian political process.*”<sup>77</sup> In 1968, the government banned corporate donations to political parties outright, to ensure that large businesses could not affect electoral outcomes. However, it is speculated that because no alternative source of funding (e.g. public funding) was provided, corporate donations continued, but were merely unreported.<sup>78</sup> In its 1996 judgement of *Common Cause v Union of India*, the SC directed political parties to file tax returns, observing that until that day, political parties had not submitted audited accounts.<sup>79</sup> In an effort to stop funnelling of ‘black’ (illicitly obtained) money from corporations to political parties, political contributions are exempt from income tax provided political parties maintain accurate financial records of the income earned.<sup>80</sup> Further, as noted above, the Section 77 of the RPA places expenditure limits on candidates.

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<sup>77</sup> *Supra* note 45, 634.

<sup>78</sup> R. Gowda and E. Sridharan, *Reforming India's Party Financing and Election Expenditure Laws*, 11(2) ELECTION L.J. 226, 228 (2012).

<sup>79</sup> *Common Cause v. Union of India* (1996) 4 SCC 33 (India).

<sup>80</sup> The Income Tax Act, No. 43 of 1961, §13A, (1961).

Polemic statements about the intrinsic connection between corruption and contributions have an intuitive appeal. However, provocative tags of ‘pollution’ and ‘corruption’ prevent us from analysing the real interests implicated in this debate.<sup>81</sup> This section is an attempt to unpack the real interests implicated in the process and assess how contributions lead to continuing post-election harms for the democratic functioning of a state. We conclude with analysing how the foreign nature of these contributions compounds these effects.

### **a. Policy-Selling**

The necessity of securing political contributions can influence parties to enact policies which favour their donors. Essentially, contributions open the possibility to a *quid-pro-quo* situation, wherein campaign donors make the funding contingent on some legislative favour in return. In this sense, policy can be ‘sold’.<sup>82</sup> Even in the U.S., where there exists a high threshold to strike down campaign contribution restrictions due to free-speech concerns, the Supreme Court recognised the possibility of this danger, noting, “*To the extent that large contributions are given to secure a political quid pro quo from current and potential officeholders, the integrity of our system of representative democracy is undermined.*”<sup>83</sup> Even if representatives do not engage in intentional policy-selling, in *Kanwar Lal Gupta*, the SC observed, “*office bearers and elected representatives may quite possibly be inclined, though unconsciously and imperceptibly to the policies... that will attract contributions*”.<sup>84</sup>

### **b. Distortion**

Contributions also act as an external influence and distort the agency relationship between the representative and her constituency. In *NCT v Union of India*, Misra CJI, noted, “*The representatives so elected are entrusted by the citizens with the task of framing policies which are reflective of the will of the electorate*”.<sup>85</sup> In doing so, they should not possess an ‘*ulterior motive*’ and

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<sup>81</sup> Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 111, 112.

<sup>82</sup> Jonathan Hopkin, *The Problem with Party Finance: Theoretical Perspectives on the Funding of Party Politics*, 10(6) *Party Politics* 627, 632 (2004).

<sup>83</sup> *Supra* note 24, ¶¶ 26-27.

<sup>84</sup> *Supra* note 52, ¶ 10.

<sup>85</sup> *Supra* note 29, ¶ 49.

misuse the popular mandate to covertly transform it to ‘*own rule*’.<sup>86</sup> As Lawrence Lessig argues, the constitution envisages the representative’s independence by making it dependent on the will of the people *alone*.<sup>87</sup> Political contributions are ‘corrupting’ because they do not correlate with public opinion and therefore distort policymaking.<sup>88</sup> In other words, the dependency on contributions competes with the dependency on the constituency and hurts the independent nature of the representative.<sup>89</sup> Similarly, Lowenstein has argued that contributions create a ‘cash-motivated’ reason for the representative to deflect from their ‘natural position’ – where their decisions are determined only by considerations of constituency, ideology and party.<sup>90</sup> By opening a private channel to the political elite, contributions distort the reflexivity between the politician and the people. In a sense, policy-selling is an extreme example of distortion where the agency with the constituency is wholly outside the consideration of the representative.

Legislative restrictions on campaign contributions reflects the desires of citizens to elect a government based on the *issues that the citizens face*, not on the amount of money spent to become elected. As James Gardner argues, the legislative choice in limiting campaign contributions shows that the citizens were dissatisfied with the idea of electoral consent simpliciter, valuing a citizen’s vote more when it was based on a substantive judgement as opposed to the impact of advertising or targeted campaigning.<sup>91</sup>

### *c. Perception*

The requirements of accountability and transparency are not only a matter of substance but equally of perception.<sup>92</sup> In India, increased instances of corruption and questionable dealings between politicians and

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<sup>86</sup> *Id.* ¶ 54.

<sup>87</sup> LAWRENCE LESSIG, *REPUBLIC, LOST*, 127-8 (2011).

<sup>88</sup> Thomas Burke, *The Concept of Corruption in Campaign Finance*, Constitutional Commentary 1089 (1997).

<sup>89</sup> *Supra* note 87.

<sup>90</sup> Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 302 (1989).

<sup>91</sup> *Supra* note 13, 251.

<sup>92</sup> *Supra* note 29, ¶ 277.

businessmen have led to “*the loss of systematic legitimacy*”.<sup>93</sup> This lack of trust can potentially lead to a reduced participation by voters.<sup>94</sup> Voters as rational self-interested beings would prefer to spend less time undertaking the responsibilities of informed citizenry if the perception is that only big money is running politics. This loss of public engagement is compounded because the politically vulnerable financial arrangements of all parties provide a strong incentive for inter-party collusion.<sup>95</sup> Therefore, contributions can lead to a net loss in the level of deliberation and public contestation in a democracy.

The now relaxed regulation of foreign contributions only enhances these threats further. It opens a separate avenue for money-laundering and round-tripping of funds. Domestic companies, in order to escape the restrictions imposed on political contributions by Indian law, can arguably transfer funds abroad and then transfer them back into the country through a foreign company and subsequently donate to a political party. With effective forum shopping, shell companies can be set up in lax jurisdictions with limited regulation so that they can possibly donate 100% of the money sent to them. Therefore, the challenges of countering the ‘polluting’ effect of private money gets compounded by this additional channel of contribution. Making the amendment retrospective with effect from 1976 only further erodes the trust of the electorate.

Add to this, the ever-present threat that a wholly foreign influence can interfere with domestic policies. The scope for policy selling and the subsequent loss of legitimacy from outcomes that are inconsistent with the electorate’s will can damage the democratic functioning of the state. For example, countries in Europe sought to ensure electoral accuracy by excluding foreign contributions when Europe was polarised during the Cold War.<sup>96</sup>

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<sup>93</sup> Report of the National Commission for the Working of the Constitution, Electoral Processes and Political Parties (2002) ¶ 4.5; *See also* Santhanam Committee's Report on Prevention of Corruption in 1962.

<sup>94</sup> *Supra* note 87, 166.

<sup>95</sup> *Supra* 82, 634.

<sup>96</sup> European Commission for Democracy Through Law (Venice Commission), Opinion on the Prohibition of Financial Contributions to Political Parties from Foreign Sources, No. 366 of 2006, CDL-AD (2006)014, ¶21.

### CONCLUSION

This article has endeavoured to evaluate the impact of contributions on the democratic functioning of a state from a perspective of constitutional theory. We sought to evaluate its impact in the episodic election and the continuing life of the polity beyond the election. Designing a model of contribution regulation entails considering the maximizing the deliberative function of campaigns so that citizens can best exercise their vote and signal consent. We argued that in the socio-political context of the Indian democracy, political equality concerns are likely to trump the speech benefits received from more money in campaigns. In addition to the democratic values engaged in the question of contributions, states have to address the accountability and transparency concerns of permitting big money in politics. We analysed the different ways in which money can ‘corrupt’ and identify the democracy-related harms it creates. Unfortunately, the reality of the need for funds to successfully run a campaign makes it a necessity for states to address these factors and balance them to protect the sanctity of the electoral process. The difficulty in striking this balance is both in the *content* of a balanced regulatory regime and in elected legislators mustering the *political will* to regulate a system that resulted in their election. It is perhaps telling that both of India’s largest political parties challenged the verdict of the Delhi High Court in the Sterlite case, but withdrew their appeals after the 2016 amendment to the FCRA.<sup>97</sup>

The 2016 amendment marks a landmark moment where electoral participation through contributions was opened to wholly foreign corporations. In addition to the numerous democracy-related harms highlighted above, foreign political contributions pose the additional question of who constitutes the political community in a country. This is a multifaceted conundrum that involves issues such as the electoral status of non-resident Indians, or, contrastingly, individuals who have not been

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<sup>97</sup> Indian National Congress v Union of India, Petition for Special Leave of Appeal (Civil) No 1819/2014 (Arising out of impugned final judgement and order dated 28 March 2014 in Association of Democratic Reforms v. Union of India, (2014) 209 DLT 609 (India)); see also PTI, *Foreign Funding: BJP, Congress Withdraw Appeals from Supreme Court*, The Economic Times (Nov. 29, 2016, 04:24 PM), <https://economictimes.indiatimes.com/news/politics-and-nation/foreign-funding-bjp-congress-withdraw-appeals-from-supremecourt/articleshow/55685400>.

granted citizenship but have been residing in the country for an extended period. A well thought out legislative agenda on the topic has the potential to *increase* the democratic credentials of the Indian electoral process by making it more accountable to a broader range of concerns without undermining the ongoing process of political self-definition. However, by merely opening the door to political contributions from foreign corporations, the 2016 amendment to the FCRA risks exacerbating the democracy harms raised by political contributions and allows foreign money to paint a few strokes on the canvas that is the Indian political community.