ENDS AND MEANS: REFLECTIONS ON THE ELECTORAL BONDS JUDGMENT

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Abstract

The Supreme Court's judgment in Association for Democratic Reforms v. Union of India, in invalidating the Electoral Bonds scheme and directing authorities to disclose details of bonds purchases and encashments, has firmly placed itself in the shelves of constitutional canon. Yet, that is precisely why a critical engagement with it, one that separates the ends from the means employed, is necessary. The authors critique the Court's uncritical acceptance of the conception of informational privacy advanced by the Union of India, and the unfounded use of 'essentiality' to dangerously narrow the voter's right to information. They also highlight the Court's (mis)adventures with the double proportionality framework and misapplication of the conventional proportionality assessment. At the same time, the Court made some salutary attempts to advance the law — notably, through its clarity on the presumption of constitutionality in fundamental rights cases and on the constitutionalisation of political parties — attempts which deserve mention due to the potentially canonical status of the judgment.

Keywords: *Electoral Bonds–Right to Privacy–Double Proportionality–Right to Information*

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I. PREFATORY REMARKS

Great cases, just like hard ones, often make bad law.[1]

Indisputably, *Association for Democratic Reforms v. Union of India*[2] ('Electoral Bonds Judgement') is a 'great' case. The Electoral Bonds scheme ('the Scheme'), by permitting donors (including corporate donors) to channel unlimited funds to political parties without any public disclosure, had flooded the electoral field with big money,[3] allowed corporations undisclosed and unlimited political influence,[4] and grossly disadvantaged Opposition parties during a time of democratic backsliding. The Court's striking down the Scheme as unconstitutional and directing authorities to publicly disclose details of all bond purchases and encashments, months before the 2024 General Elections, has placed the Electoral Bonds Judgement firmly (and justly) in the shelves of constitutional history.

Yet, for that very reason, its missteps too carry the risk of distorting constitutional doctrine for years to come. We aim to highlight the Court's failure to consider threshold questions on the ambit of the right to privacy and the right to information, its misapplication of the conventional proportionality framework, and its doctrinal (mis)adventure with double proportionality, in the hope that these errors do not endure.

II. INTRODUCTION TO THE SCHEME

Electoral bonds were proposed in 2017 with the stated aim of curbing black money in electoral funding, and introduced through the Finance Act, 2017 by amending four key legislations. The Reserve Bank of India Act, 1934 was amended to allow the Central Government to authorise any scheduled bank to issue electoral bonds;[5] the Representation of People Act, 1951 was amended to exempt donations made via electoral bonds from the general requirement to disclose donations of amounts greater than twenty thousand rupees;[6] the Income Tax Act, 1961 was amended to exempt

1 *Northern Securities Co v United States* 193 US 197 (1904).

2 *Association for Democratic Reforms & Anr v Union of India & Ors* 2024 INSC 113.

3 'Electoral Bonds: Rs 1-cr bonds takes lion's share at 96%; Rs 1k bonds just 0.0001%' (Deccan Herald, 15 March 2024) <https://www.deccanherald.com/india/electoral-bonds-rs-1-cr-bonds-take-lions-share-at-96-rs-lk-bonds-just-00001-2938567> accessed 8 August 2024; Ayushi Arora, 'Infographic Unrestrained corporate funding as over 16K electoral bonds of Rs 1 Crore' (Deccan Herald, 16 February 2024) <https://www.deccanherald.com/india/infographic-unrestrained-corporate-funding-as-over-16k-electoral-bonds-of-rs-1-crore-sold-2897845> accessed 8 August 2024.

4 'Electoral Bonds: BJP took home lion's share of Rs. 16,000 crore political funding' (The Economic Times, 17 February 2024) <https://economictimes.indiatimes.com/news/politics-and-nation/electoral-bonds-bjp-took-home-lions-share-of-rs-16000-crore-political-funding/articleshow/> accessed 8 August 2024.

5 Finance Act 2017, s 135.

political parties from maintaining any records of contributions made via electoral bonds;[7] and finally, the Companies Act, 2013 was amended to remove the cap on corporate contributions to political parties as well as the requirement that companies disclose the amount and recipient of each contribution, leaving only a requirement of declaring aggregate amount of contributions.[8] These amendments were finally implemented by the notification of the Electoral Bonds Scheme, 2018, despite the objections raised by both the Reserve Bank of India[9] and the Election Commission of India.[10] Both the amendments and the 2018 Scheme were challenged before the Court.

The Court, striking these down, held that the amendments exempting donations from disclosure requirements violated the right to information under Art. 19(1)(a),[11] and the removal of the cap on corporate contributions was manifestly arbitrary in violation of Art. 14.[12] We agree with this outcome — there are, however, significant concerns with the path the Court took to get there.

III. DON'T ASK, DON'T TELL: INFORMATIONAL PRIVACY INTERESTS IN FUNDING 'PUBLIC AUTHORITIES'?[13]

The Union of India pressed into service donors' fundamental right to privacy, arguing that the Scheme's legitimate purpose was to realise this right for those donors who chose to donate through banking channels.[14] In its consideration of whether the right to privacy was engaged, the SC correctly recognised the privacy of one's political affiliation as salient even beyond the secret ballot.[15] In doing so, it implicitly affirmed that democratic participation begins, not ends, with the franchise, and consequently safeguards for civic engagement should similarly extend beyond voting day. This is seminal.

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7 ibid, s 11.

8 ibid, s 154.

9 The Wire Staff, 'Modi Govt Ignored All of RBI's Warnings Against Electoral Bonds: Report' (TheWire, 19 November 2019) <https://thewire.in/government/electoral-bonds-rbi-finance-ministry> last accessed on 8 August 2024; Association for Democratic Reforms (n 2), [17]-[21] (Dr. DY Chandrachud, CJ).

10 See generally, the Counter Affidavit on behalf of the ECI filed in the Electoral Bonds Case, available at <https://www.livelaw.in/pdf_upload/pdf_upload-359432.pdf> accessed 8 August 2024; see also, the letter from the ECI to Ministry of Law & Justice (26 May 2017) <https://www.livelaw.in/pdf_upload/pdf_upload-359433.pdf> accessed 8 August 2024.

11 *Association for Democratic Reforms* (n 2) [169] (Dr DY Chandrachud, CJ)

12 ibid [215].

13 *Subhash Chandra Aggarwal & Anr v. Indian National Congress & Ors* [2013] CIC 8047 (Chief Information Commission).

14 *Association for Democratic Reforms* (n 2) [38] (Dr DY Chandrachud, CJ).

15 *Association for Democratic Reforms* (n 2) [134]-[142] (Dr DY Chandrachud, CJ).

However, there is a leap from recognising the right to privacy of political affiliation to first, recognising donations to political parties as expressions of political affiliation where there may be a reasonable expectation of privacy, and second, holding that the facet of privacy they engage is informational privacy, as opposed to only decisional autonomy from external pressures (both being aspects of the right recognised in Puttaswamy).

The SC made this leap, going on to conduct a 'competing rights' analysis between the rights to privacy and information without adequately considering threshold questions of the existence and nature of the conflict between the two rights. Is all information about a person's political affiliation or associations of such a nature that it may be kept anonymous at will, and if not, is information about financial contribution for political campaigns/party-

building of such a nature? Is there a reasonable expectation of informational privacy while donating to parties recognised as public authorities under the Right to Information Act 2005?[16] Specifically, is the nature of the right to privacy of political affiliation context-dependent, potentially taking on forms other than informational privacy (such as decisional autonomy) for political acts that reshape the political sphere outside one's own person, especially when using unequally available resources (such as money)?[17] In any case, are donations by corporations expressions of political affiliation at all, and if not, can the right to privacy be extended to those donations in any form?[18]

These threshold questions, if adequately considered at that stage, would have significantly altered the shape of, if not made redundant, the Court's 'competing rights' analysis under the double proportionality framework.[19] Instead, these questions were neglected or insufficiently answered.

The majority opinion makes a case for informational privacy of political affiliation using instances of purely private actions (like purchasing books or clothes and reading the news),[20] and then seems to, without much further ado, simply extend that logic to financial contributions to political parties (after flagging that extension as requiring

16 *Subhash Chandra Aggarwal* (n 13).

17 See for example, William Mcgeveran, 'Mrs. McIntyre's Persona: Brining Privacy Theory to Election Law' (2011) 19 William and Mary Bill of Rights Journal 859, 862, 869, 880 for a discussion on the relevance of the scale of political activity on privacy interests in it; see also, Elizabeth Garrett & Daniel A Smith, 'Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy' (2005) 4(4) Election Law Journal 295; see further, Lloyd Hitoshi Mayer, 'Disclosures about Disclosure' (2010) 44 Ind L Rev (2010) 255, 283.

18 See generally, Elizabeth Pollman, 'A Corporate Right to Privacy' (2014) 99 Minnesota Law Review 27.

19 *Campbell v MGN Limited* [2004] UKHL 22, [137], [147].

20 *Association for Democratic Reforms* (n 2) [136] (Dr DY Chandrachud, CJ).

distinct analysis).[21] The limited reasoning for this extension seems to broadly be thus: all expressions of political affiliation are based on thoughts and beliefs, and the right to privacy protects the privacy of all thoughts and beliefs (and, as explicitly stated, does not protect the resulting act of speech or expression).[22]

The Court's reasoning seems to indicate that while political actions are not generally protected by the right to privacy, being communicative in their nature, any actions (such as political donations) that reflect political beliefs are protected. The problem with this is fairly straightforward. Since most political actions would reflect political beliefs, and the Court gives no further hints about which of those kinds of actions it seeks to include within the ambit of informational privacy, the Court's reasoning threatens to collapse the difference between political action and political belief, and treats them both as confidential information disclosure of which is an 'intrusion of the mind'.[23]

In doing so, the Court flattens all expressions of political affiliation — ranging from purchasing certain kinds of newspapers, to voting, to handing out leaflets promoting a cause, to organising political protests, to making substantial donations to a political party — without regard to the inherent nature of the action and the expectations of privacy (and the facets of it) that may reasonably fit it. Of course, the right to decisional autonomy may be said to inhere in most matters of political affiliation, but surely whether the right to informational privacy is engaged cannot be a function merely of whether an action betrays a political belief (many things do, such as a pro-life group heckling women entering an abortion clinic). Rather, whether a reasonable expectation of informational privacy inheres in that action is a distinct inquiry involving, inter alia, considerations of the public/private space occupied by the action, its inherent nature, and its effect on the social/political field outside one's own person. Regrettably, the Court undertook no such inquiry when it came to financial contributions as a form of expressing political affiliation.

Nor did the majority opinion consider whether corporate entities, which were also permitted to purchase bonds under the Scheme, could be said to have a right to privacy of political affiliation (or, for that matter, even a political affiliation) at all, even if the right was otherwise engaged.[24] If not, the Scheme, insofar as it applies to corporations, should have been expressly invalidated after a conventional proportionality analysis had shown that it violated voters' right to information, without any further 'competing rights' analyses.

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21 ibid [139].

22 ibid [141].

23 ibid [141].

24 In contrast, see ibid [73] (Sanjiv Khanna, J), which did consider the question and qualify the right to privacy that corporations may claim, albeit on account of different reasons.

Of course, the outcome would have remained the same — the Court declared, after assessing the competing rights, that the right to privacy would not prevail over the right to information and the Scheme would not be upheld. However, addressing these threshold questions would have brought doctrinal clarity to the future of informational privacy and avoided the distortions that arise from implicitly treating corporations as holders of political rights.

IV. THE RIGHT TO (ESSENTIAL) INFORMATION: THE (SOMEWHAT) INFORMED VOTER

The Court's threshold analysis on the right to information was as if a mirror image of its threshold analysis of the right to privacy: where, as we noted above, it failed to consider the case for circumscribing the latter, it seems to have over-circumscribed the former without sound basis in constitutional text or doctrine.

Interpreting (inaccurately, we argue) its prior decisions on mandatory disclosures of information by candidates before elections, the Court held that it is only that information which is 'essential' for the effective exercise of the freedom to vote that falls within the ambit of the fundamental right to information under Art. 19(1)(a).[25] This is a severe standard; while information on the funding of political parties may easily meet it (and indeed, the Court held it does),[26] it remains to be seen what information this newly innovated standard may deprive voters of. To make matters worse, a conjoint reading of ADR[27] and PUCL[28] does not support the Court's claim that it arrived at this litmus test of 'essentiality' on their basis.

Right off the bat, it may be noted that the issue framed by the Court in ADR[29] itself asked whether voters have the right to know all 'relevant' particulars of candidates, not essential particulars. In fact, the word essential was not used anywhere at all in the reasoning; instead, the Court observed that the electorate has the right to know "full particulars"[30] of a candidate and that every voter's decision will be based on his own relevant criteria.[31] Clearly, then, the Court in ADR was leaning towards a significantly more expansive conception of the voter's right to know than one limited to merely 'essential' information. The Court in PUCL, operating against the backdrop laid down by

25 ibid [77], [78], [95] (Dr DY Chandrachud, CJ).

26 ibid [104].

27 *Union of India v Association for Democratic Reforms* (2002) 5 SCC 294.

28 *PUCL v Union of India* (2003) 4 SCC 399.

29 *PUCL* (n 28) [1], [18].

30 ibid [46.4].

31 ibid [22].

the prior decision in ADR, confirms this expansive construction. the majority opinion in PUCL was concerned with the right to information in its widest terms, speaking of "relevant antecedents" of a candidate,[32] emphasising the need to "attenuate the area of secrecy as much as possible,"[33] and holding voters' knowledge of the "biodata" of a candidate to be "the foundation of democracy."[34]

Thus, the Electoral Bonds Bench's misguided standard of 'essentiality' for determining whether a right to information exists finds no place in the precedents it cites. Nor should that be surprising. The 'essentiality' of a specific instance of a right is an inquiry better fitted to the subsequent stage of assessing whether a restriction on it is justified by competing interests/rights, not to the threshold inquiry of whether the right claimed exists at all in the first place.

After all, to recognise voters' right to all relevant information is not to perforce make it absolute — it only establishes that any secrecy when it comes to such information will have to be suitably justified as a proportionate restriction. The Electoral Bonds Judgement, unfortunately, takes that safeguard away for a large extent of the right to information.

V. MATTERS OF PROOF IN STRUCTURED PROPORTIONALITY: A LOST OPPORTUNITY

While applying the doctrine of proportionality to assess whether the Scheme's violation of the right to information is justified, the Court evaluated the constitutionality of the Scheme against two different proffered objectives — curbing black money and protecting donor privacy. In both cases, the Court's analysis in the 'suitability' prong, i.e. whether the Scheme is a suitable means for furthering its aim, was undercut by its deference to the State's evidentiary claims and consequent unwillingness to demand justifications based in the actual working of the law and not merely its stated intent.[35]

The more egregious omission was made by the majority opinion while considering the Scheme's suitability for the purpose of curbing black money in electoral finance. Having noted the Union Government's submission that the Scheme's guarantee of anonymity incentivises contributors to donate through the banking channel and thereby curbs the inflow of black money, the Court simply assumed it to be true, without further

32 *PUCL* (n 29) [16].

33 ibid [26].

34 ibid [70].

35 See generally Aparna Chandra, 'Proportionality in India: A Bridge to Nowhere?' (2020) 3(2) Oxford Human Rights Hub Journal 55.

analysis of the Scheme's design or evidence of its workability.[36] This is not a quibble merely with the Court's refusal to show its work before arriving at a conclusion of suitability, but instead with its complete abdication of its responsibility to assess, and arrive at a conclusion as to, the Scheme's suitability at all. In doing this, the Court ignored serious evidence that indicated the Scheme's unsuitability for curbing black money. Indeed, as acknowledged by the majority opinion itself, two different regulators - the RBI and the ECI - had warned the Union Government that the Scheme might facilitate money laundering and the circulation of black money, not stem it.[37] Puzzlingly, however, this finds no mention in the Court's suitability analysis.[38]

The RBI, in particular, objected to the Scheme three different times. First, on 2nd January, 2017, the RBI wrote to the Ministry of Finance highlighting, inter alia, that the identities of any persons who buy the electoral bonds from the original purchaser will remain anonymous, effectively creating a secondary market that would militate against the objectives of the Prevention of Money Laundering Act.[39] Then for the second time, on 14th September, 2017, the RBI objected again, saying that the Scheme gave rise to the possibility of shell companies misusing electoral bonds for money laundering transactions.[40] When even this was not given heed to, the RBI finally wrote directly to the Finance Minister on 27th September, 2017, saying in clear terms that the Scheme may be perceived as enabling money laundering since the consideration for transfer of bonds from the original subscriber to a transferee will likely be paid in cash.[41] The ECI, echoing RBI's concerns, wrote to the Ministry of Law and Justice on 26th May, 2017 asking it to reconsider the Scheme since the removal of the cap on corporate funding would increase the use of black money in political funding through shell companies.[42] In addition, the counsel for one of the Petitioners had also collated data showing that the actual impact of the Scheme has also been to shift donors from conventional banking channels to anonymous bonds while leaving the cash channel (which the Union Government sought to attack as the avenue for black money) unaffected.[43]

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36 Association for Democratic Reforms (n 2) [117]-[118] (Dr DY Chandrachud, CJ).

37 ibid [17]-[23].

38 ibid [117]-[118].

39 ibid [17].

40 ibid [20].

41 ibid [21].

42 ibid [23].

43 See pages 61-64 of the Supreme Court's Transcript <https://www.scobserver.in/wp-content/uploads/2021/10/Day-1-Transcript-Electoral-Bonds.pdf> accessed 8 August 2024.

The Electoral Bonds case was therefore a rare opportunity; seldom is there available such rich and cogent official material questioning the suitability of a measure for its own stated purpose. Much more frequently, the question of evidence in proportionality assessments involves either an absence of evidence-based thinking within the Government or a state of 'factual uncertainty'[44] from the production of conflicting evidence by the Government and private petitioners in support of their respective positions. The Court, unencumbered by these complications, had the opportunity to set a strong precedent for foregrounding evidentiary questions in the proportionality framework. Regrettably, however, the majority opinion paid all this evidence about as much heed as the Union Government had. Instead, it went on to consider (and strike the Scheme down on) the necessity prong, i.e. whether there were less restrictive options that fulfilled the Scheme's purpose to a 'real and substantial degree', without ever concluding that the Scheme itself had any rational connection to that purpose.

This is especially surprising because the minority opinion not only accepts the Petitioners' argument that the Scheme lacks a rational connection to the purpose of curtailing black money[45] but also lays down important law on the crucial role of evidence in proportionality assessments. It clarifies that the proportionality doctrine does not admit of 'preconceived notions'[46] and notes that the State would be typically required to produce empirical evidence justifying the impugned measure and establishing a causal relationship between the measure and its purposes, without which proportionality stricto sensu may fail for want of lack of standards.[47] The minority opinion further held that, if such evidence is inconclusive, or does not exist and cannot be developed — basically, as an exception — courts may instead rely on reason and logic to assess the State's justifications,[48] an inquiry where the State would still have to prove its case to a 'balance of probabilities'.[49] More notably still, the minority opinion specifically flagged that a lack of parliamentary deliberation and a failure to make relevant enquiries, i.e. a failure of the State to conduct an evidence-based inquiry, will itself be factors in the Court's decision,[50] thus proposing a form of indirect judicial review of legislative processes.[51] Regrettably, the Court's majority opinion failed to even engage with this rich exposition of the role of proof in the proportionality framework.

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44 See generally, BS Barroso, 'Beyond the Principle of Proportionality: Controlling the Restriction of Rights under Factual Uncertainty' (2023) Oslo Law Review 74.

45 *Association for Democratic Reforms* (n 2) [44]-[46] (Sanjiv Khanna, J).

46 ibid [18].

47 ibid [33], [35].

48 ibid [33].

49 ibid [18].

50 ibid [33].

51 See generally, Vikram A Narayan, Jahnavi Sindhu, 'A Case for Judicial Review of Legislative Processes in India?' (2021) VRU / World Comparative Law 358.

The Court commits a similar error in evaluating whether the Scheme is a suitable measure for protecting donor privacy as part of its double proportionality analysis. Again, the Court proceeds from the unquestioned premise that the Scheme enhances donor privacy by guaranteeing anonymity, and therefore all that remains for it to do is to consider less restrictive options and balance the Scheme's effect on the right to information.[52] This premise, on a deeper scrutiny of the actual design and working of the Scheme, breaks down.

Undoubtedly, the Scheme ensures donors' informational privacy vis-a-vis the electorate. However, it guarantees in no way donors' informational privacy vis-a-vis political parties.[53] Prima facie, this may seem like only an academic concern — one might assume that people donating to a political party will anyway want that political party to be aware of the donation. A more considered view, however, is that political parties knowing exactly who has (and, worse, who hasn't) contributed to them is likely to catalyse the exact kind of political vindictiveness the Scheme is supposedly trying to avoid.[54] If a party has perfect knowledge of all who are donating to it, it is able to strong-arm prospective donors into donating, a problem greatly exacerbated by the fact that this transaction is otherwise happening behind closed doors and away from public scrutiny.

In this way, the asymmetry of information that the Scheme facilitates does not only lack a nexus with informational privacy vis-a-vis the party, but also outright enables coercion in political funding and seriously compromises donors' decisional privacy. Of course, evidence supporting this proposition could only have come to light later (as it did)[55] when bond purchases were directed to be disclosed publicly. However, if the Court had critically engaged at all with the likely working of the Scheme, even using merely

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52 *Association for Democratic Reforms* (n 2), [162] (Dr DY Chandrachud, CJ).

53 ibid, [103].

54 *Association for Democratic Reforms* (n 2) [39] (Sanjiv Khanna, J) adopts a somewhat similar stance.

55 Yashraj Sharma, 'India's electoral bonds laundry: 'Corrupt' firms paid parties, got cleansed' (Al Jazeera, 04 April 2024) <https://www.aljazeera.com/news/2024/4/4/indias-electoral-bonds-laundry-corrupt-firms-paid-parties-got-cleansed> accessed 8 August 2024; Vignesh Radhakrishnan and Srinivasan Ramani, 'Electoral bonds data | Many top donors were under ED and Income Tax Department scanner' (The Hindu, 15 March 2024) <https://www.thehindu.com/data/ed-and-it-had-conducted-searches-on-many-firms-which-purchased-electoral-bonds/article67954005.ece> accessed 8 August 2024; Himanshi Dahiya and Naman Shah, 'Electoral Bonds: Of Donations From Top Firms Raided by Agencies, BJP Got 30%' (The Quint, 15 March 2024) <https://www.thequint.com/news/politics/electoral- bonds-bjp-donations-ed-cbi-income-tax-departments-election-commission> accessed 8 August 2024; see also Reporters' Collective, 'Electoral Bonds Tracker' <https://www.reporters-collective.in/electoral-bonds-tracker#tracker> accessed 8 August 2024.

reason or logic as the minority opinion suggests,[56] its so-called double proportionality analysis need not have gone further than holding that the Scheme is an unsuitable means for realising either the right to information or the right to privacy.

This, unfortunately, is only the tip of the iceberg as far as the Court's competing rights analysis was concerned.

VI. DOCTRINAL (MIS)ADVENTURES WITH DOUBLE PROPORTIONALITY

To resolve the conflict between the right to information and the right to privacy that was held to arise from the Electoral Bonds Scheme, the Court offered a framework of analysis it called the 'double proportionality' approach. Offering a roadmap for navigating hard constitutional cases — those involving competing fundamental rights — the Court's holding had the potential to achieve a significant shift in the very decision-making matrix that informs constitutional litigation. Regrettably, however, the Court's particular version of 'double proportionality' seems to lack logical coherence or a sound understanding of the origins of the test it relies on, leaving it all but unworkable.

Proportionality simpliciter evolved in the context of contests between an individual and the State where the individual seeks to challenge a State-imposed restriction on their fundamental right.[57] However, there may be situations when the fundamental rights of other non-litigants are implicated in the litigation between an individual and the State, particularly where the measure infringing the litigant's right was intended to protect another competing fundamental right. In such cases, the simple application of the proportionality test in protection of the fundamental right asserted by the individual suing may be unfair, in that such an exercise is designed to maximise the right allegedly infringed by the measure (say, Right A) and minimise all restriction on it. Consequently, in situations such as the one described above, the right that the restriction seeks to maximise (say, Right B) gets decentred, or even minimised, in favour of the infringed right claimed by the petitioner.[58] This has been called 'preferential framing',[59] where the entirely circumstantial questions of who the petitioner is and what right they assert ends up materially affecting the manner in which the conflict between two fundamental rights is resolved.[60]

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56 *Association for Democratic Reforms* (n 2), [33] (Sanjiv Khanna, J).

57 HMJ Andrew Cheung PJ, 'Conflict of fundamental rights and the double proportionality test' (University of Hong Kong Common Law Lecture Series, 17 September 2019) <https://www.hkcfa.hk/filemanager/speech/en/upload/2236/Common%20Law%20Lecture%20(Final%20Version).pdf> accessed 8 August 2024.

58 See generally, ibid; John T Cheung, 'Balancing Fundamental Rights in Private Law Through the Double Proportionality Test' (2020) 28 Nottingham LJ 52.

59 See Stijn Smet, *Resolving Conflicts between Human Rights: The Judge's Dilemma* (Routledge 2017) 35.

60 John T Cheung (n 58) 58.

The double proportionality test was innovated to solve this problem, to provide a framework for resolving a conflict of rights where the proportionality of interfering with one had to be assessed against the proportionality of restricting the other. As such, its use in Indian jurisprudence is undoubtedly a net positive — it provides a structured way of ensuring that "no considerations that are relevant are omitted… and no questions that should be asked are not asked"[61] while weighing competing rights, and represents a significant improvement over the kind of ad hoc analysis that has been pervasive till this point.[62]

A correct application of the double proportionality framework would thus entail conducting a conventional proportionality analysis for each possible infraction of rights, and if each measure passes muster in the first three stages, then balancing them against each other in an attempt to restrict each to the extent necessary to protect the others. If one of the alleged infractions fails at one of the first three stages — if it does not have a legitimate goal, is not a suitable means of furthering that goal, or is not the least restrictive method of furthering that goal — then that alleged infraction gets invalidated without ever having to resort to balancing. In case the alleged infractions pass the first three stages of their respective proportionality assessments, the Court would then be required to assess the strength and clarity of the two assessments and ultimately balance them against each other.[63]

Crucially, in a constitutional case, the incidence of infraction for the competing rights would each be distinct. As for the right claimed by the petitioner, the infraction is in the Impugned Measure itself; but for the competing right, the infraction is a hypothetical one, that is it will arise in the event that the Court strikes down the Impugned Measure and reverts the law to status quo ante. Thus, to clarify, the correct 'double proportionality' inquiry in a constitutional challenge is as follows: first, whether Measure No. 1 is a proportionate infringement of Right A, and second, whether striking down Measure No. 1 will be a proportionate infringement of Right B.

In the Electoral Bonds case too, there were two possible infractions of fundamental rights in play — the infraction of the electorate's right to information on account of the Scheme, and the hypothetical infraction of the donor's right to privacy in the event of the Court striking down the Scheme. The Court's task, then, was to first assess whether the Scheme was a proportionate restriction of the electorate's right to information and

61 HMJ Andrew Cheung (n 57) 20.

62 See for example the Supreme Court's analysis of the right of privacy as a competing right to the right to information in *Union of India v Association for Democratic Reforms* (2002) 5 SCC 294, [41]; Andrew Cheung (n 57), 20.

63 John T Cheung (n 58) 55.

second whether striking down the Scheme and reverting to status quo ante would be a proportionate interference with the donors' right to privacy.

Instead, the majority opinion inexplicably scrutinises the Scheme itself against the touchstone of both rights, and assesses whether the Scheme (i.e. the Impugned Measure) itself is a suitable means for furthering both the right to privacy and the right to information, whether the Scheme itself is the least restrictive measure for realising both the right to privacy and the right to information, and whether the Scheme has a disproportionate impact on the right to privacy and the right to information.[64]

This version of 'double proportionality' creates a logical impossibility — if a 'conflict' between the two rights is assumed, how can a test that requires the Impugned Measure to be a suitable means for furthering both the rights ever succeed and validate a law? If this is what 'double proportionality' is, any and every action actually involving a conflict between two fundamental rights should be struck down as invalid. Imagine if, in the facts of In Re: S, when faced with the conflict between a 5 year-old boy's right to privacy and a newspaper's freedom of expression to publish details about that boy's mother's trial for murder,[65] the House of Lords had framed the question as whether a gag order furthered both the boy's and the newspaper's right; a gag order can never further the freedom of expression, just as a scheme designed to facilitate informational privacy for donors can never further the freedom of information. To test it against that benchmark reveals an entirely misguided understanding of the double proportionality framework, one that we are optimistic will be rectified in the Court's future doctrine.

VII. CONCLUDING REMARKS

Each one of these errors takes on outsize importance because SC judgements, unlike those of apex courts through most of the world, are binding in toto, even parts not strictly in issue before the court.[66] Every error, thus, affects future jurisprudence; equally, so does every salutary piece of analysis. Consequently, before concluding this case comment, it is only apt to flag three positive strands in the Court's reasoning in the hope that the Court will pick up and expand on them moving forward.

First, the Court has endorsed a progressive, rights-friendly approach towards the burden of proof in constitutional litigation, requiring the Petitioner to establish a prima facie infringement of a fundamental right, i.e. show that a fundamental right is engaged by the impugned measure, and then shifting the onus to the State to justify the

64 *Association for Democratic Reforms* (n 2), [157] (Dr DY Chandrachud, CJ).

65 *In Re S (FC) (A Child)* (Appellant) [2004] UKHL 47.

66 *Municipal Committee v Hazara Singh* AIR 1975 SC 1087, [4]; *Sarwan Singh Lamba v Union of India* (1995) 4 SCC 546, [17]; *Palitana Sugar Mills v State of Gujarat* (2004) 12 SCC 645, [62].

infringement.[67] The presumption of constitutionality, in effect, ceases to apply once the Petitioner is able to show that a right has been prima facie restricted. Importantly, this puts the "burden of factual uncertainty"[68] on the State, in line with the culture of justification proportionality is meant to represent. However, while this development is critical, the Court leaves it on shaky territory by failing to engage with the conflicting 7-Judge Bench decision in Pathumma v. State of Kerala.[69] Instead, the Court could have differentiated itself from Pathumma by accepting the Petitioners' contention that laws setting the ground rules of the electoral process merit a distinct, higher level of scrutiny; after all, any degree of deference to the legislature since it represents the will of the people is harder to justify when the impugned laws affect whether the legislature as constituted represents an accurate translation of the will of the people.[70] Now, as things stand, a larger Bench will likely need to settle the question of burden of proof in Article 14 challenges — hopefully, it will do so in favour of the position advanced in this case.

Second, the judgement expressly acknowledges that political parties are an important unit of democracy, and accordingly subject to constitutionalisation. The Court has arguably been moving gradually in this direction since Kihoto Hollohon upheld the Xth Schedule of the Constitution,[71] and cases such as Rameshwar Prasad,[72] Kuldip Nayar,[73] and Subhash Desai[74] can be read as having taken incremental steps to enmesh political parties more deeply in our constitutional framework; the Electoral Bonds judgement completes that process. This will likely have significant positive implications for democratic accountability moving forward.[75]

Third, crucially, the Court's framing of the Scheme and the constitutional questions that arise from it centred, not merely the free flow of information as an end in itself, but the spectre of political inequality that money brings to the electoral field and the need for open and informed public discourse to keep it in check. In this manner, the judgement recognises money in elections as, at best, a necessary evil and, at worst, as a

67 *Association for Democratic Reforms* (n 1), [45] (Dr DY Chandrachud, CJ); *Association for Democratic Reforms* (n 2), [17] (Sanjiv Khanna, J).

68 Aparna Chandra (n 35) 85.

69 (1978) 2 SCC 1, [6], [8], [20].

70 *Association for Democratic Reforms* (n 1), [31] (Dr DY Chandrachud, CJ).

71 (1992) Supp (2) SCC 651.

72 (2006) 2 SCC 1, [72]-[73].

73 (2006) 7 SCC 1, [451]-[452].

74 (2024) 2 SCC 719, [118].

75 See generally, Udit Bhatia, 'What's the Party Like? The Status of the Political Party in Anti-Defection Jurisdictions' (2021) 40(3) Law & Philosophy 30(5); see also, Aradhya Sethia, 'Where's the Party?: Towards a Constitutional Biography of Political Parties' (2019) 3(1) Indian Law Review 1, for scholarship on the importance of constitutionalising the political party in India.

constitutional distortion of the ideas of political equality and democracy which needs heightened public scrutiny, even as it clarified that it was not tasked with deciding the constitutionality of corporate funding. The Court's focus on political equality poses a stark and commendable contrast to the jurisprudence in the US which, while emphasising disclosures as essential for informed voting, has still held that donations are political speech and considers the existence of financial influence, an obviously unequally available resource, to be a key sign of responsiveness in government. In proposing a framework that centres equality over 'responsiveness', the Court has unlocked doors for new, different conversations about the role of money in electoral politics.

76 *Association for Democratic Reforms* (n 2) [140] (Dr DY Chandrachud, CJ).

77 *McCutcheon v FEC* 572 US 1, 39.