



Volume 21, December 2024

Where Privacy Ends and Politics Begin: Case Comment on Association for Democratic Reforms v. Union of India

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DOI: 10.2218/scrip.210024.86

Abstract

In February 2024, the Supreme Court of India unanimously struck down the Electoral Bond Scheme, which created a mechanism for unlimited funding to political parties by individuals or corporations, details of which were barred from being revealed to the public and excluded from the scope of right to information legislation. While striking down the Scheme as unconstitutional, the Court considers the right to privacy of political affiliation and assesses whether the Scheme balances the right to information of the voter with the right to privacy of the donors. This case comment places specific focus on this issue. I argue that while protecting the privacy of political affiliation is desirable in the age of algorithmic political surveillance, the majority opinion should have created stronger safeguards when extending such privacy to political contributions, to protect only genuine contributions by individuals and exclude corporations. With respect to the comparison of the rights to information and to privacy, I argue that the majority opinion rests on reasoning which may not be effective to protect the right to information in cases of public interest since it is focused on the *degree* of the bar on disclosure of information on political funding and whether the measure is the least

restrictive method of balancing these rights. Restricted to the issue of this comparison, I argue that the concurring opinion of the Court provides the more effective precedent for the protection of the right to information in cases of public interest.

Keywords

Privacy law; surveillance; politics; political funding; right to information; free expression

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1 Introduction

1.1 Brief on the Electoral Bond Scheme and history of the case

In India, the Electoral Bond Scheme (EBS) has been a subject of controversy since its inception. Introduced by the ruling government in 2018,¹ the EBS created a separate category of financial instrument known as the Electoral Bond which functions like a Promissory Note. Individuals or corporations could, subject to fulfilling certain criteria, purchase these bonds through the State Bank of India as the authorised bank, which would then be transferred to registered political parties. The political party in question was required to encash these bonds within fifteen days.² Importantly, the EBS by design did not permit any information of the donor, or the political parties they had contributed to, to be disclosed to the public,³ falling outside the scope of the Right to Information Act, 2005.

To give effect to the operation of the EBS, correspondent amendments were also made to the Finance Act, 2017, Representation of Peoples Act, 1951, the Reserve Bank of India Act, 1934, the Income Tax Act, 1961 and the Companies Act, 2013.⁴ The cumulative effect of all these amendments was that political parties were exempted from maintaining records on the receipt of electoral bonds beyond the threshold of Indian Rupees Twenty Thousand (below which is considered a small ticket donation), and from publishing contribution reports on the funds received via electoral bonds.⁵

¹ Electoral Bond Scheme 2018. Official Gazette Notification available at <<https://www.scobserver.in/wp-content/uploads/2021/10/Electoral-Bonds-Scheme-2018.pdf>> accessed 12 December 2024.

² Ibid s. 12.

³ Ibid s. 7(4).

⁴ Supreme Court Observer, 'Constitutionality of the Electoral Bond Scheme' (*Supreme Court Observer*) <<https://www.scobserver.in/cases/association-for-democratic-reforms-electoral-bonds-case-background/>> accessed 12 December 2024.

⁵ Ibid.

The EBS and corresponding amendments were all collectively challenged before the Supreme Court of India (referred to as 'SC' or 'Court') through multiple petitions from the years 2019 to 2022 on the grounds that the EBS was unconstitutional due to the lack of transparency provided on political funding.⁶ On 16 October 2023, the petitioners approached the SC for urgent hearing prior to the 2024 General Election.⁷

1.2 The Court's ruling

Considering the importance of the issue, the Chief Justice of India (CJI) referred the matter to a Constitution Bench comprising of five judges, which on 15 February 2024, unanimously struck down the EBS for violating the right to information of voters which forms a part of Article 19(1) of the Constitution of India and ordered that the State Bank of India submit all information of donors and political parties which received bonds, to be then published by the Election Commission of India.⁸

1.3 Scope of this case comment

While the SC has in this landmark judgment, discussed several areas of law to arrive at its decision, it has specifically delved into the issue of whether the right to information of the voter in a democracy to know about political funding, can be justifiably restricted on the ground of protecting the privacy of the donors. Within this issue, there has been a consideration of the right to informational privacy conceptualised as a fundamental right under Article 21 of the Indian

⁶ Supreme Court Observer (n4).

⁷ Ibid.

⁸ *Association for Democratic Reforms & Anr. vs. Union of India & Ors.* (2024) INSC 113 (hereinafter ADR), Section H, 149-152.

Constitution, the circumstances under which the right to information can restrict the right to privacy, and the right to privacy as it relates to political affiliation and thought.

The focus of this case comment will be on this specific issue. While in agreement with the conclusion of striking down the EBS, I critique the majority opinion on the following grounds - first, that the privacy of political affiliation cannot be categorically granted in all cases, second, that the extension of this right to political contributions requires creating adequate safeguards and clarity on its scope, third, that the reasoning of the Court in arriving at its conclusion to strike down the EBS, leads to ambiguity as a precedent for future cases where the rights to privacy and to information might need to be compared, and fourth, that the Court's determination of when the right to privacy can be restricted in the public interest does not go far enough to protect the right to information. With respect to the fourth argument, I also argue that the concurring opinion by Justice Sanjiv Khanna provides more definitive reasoning in the public interest, where the majority opinion lacks.

2 The Court's examination of the privacy of political affiliation and contributions

To determine whether the right to information of the public could be restricted, the Court first delves into the issue of whether the fundamental right to privacy as held in *Justice KS Puttaswamy (9J) v. Union of India*⁹ (referred to as *Puttaswamy*) includes the privacy of one's political affiliation. Answering this issue in the affirmative, the Court reasons that the right to privacy must necessarily include the privacy over thought, for an individual to exercise their democratic rights

⁹ *Justice KS Puttaswamy (9J) v. Union of India* (2017) 10 SCC 1.

without coercion.¹⁰ Therefore, political expression cannot be exercised effectively without the privacy of one's political affiliation, without which the individual can be subjected to voter surveillance by the state to influence opinions or to suppress dissent, or discriminate in other ways, such as via employment¹¹ - given the number of examples available of such political surveillance across the world,¹² this observation in the Indian context is important.

The Court also acknowledges the possibilities of voter targeting via algorithmic surveillance, for example through gleaning data on purchasing patterns, which could indicate economic class, ideology and leanings.¹³ This is also a crucial observation in the Indian context given the technological advancements which have led to practices such as microtargeting for political advertising, involving the mass collection and tracking of personal information to inform these algorithms.¹⁴ It could even be argued that the Court's ruling in this respect would automatically call into question the legality of targeted advertising which makes use of behavioural data and tracking an individual's activity which indicates their ideology.¹⁵

With jurisdictions such as the European Union attempting to introduce regulation to prevent the misuse of targeted political advertising using sensitive personal information,¹⁶ the express recognition of the privacy of political

¹⁰ ADR (n8) Majority Opinion, [132].

¹¹ Ibid [134].

¹² See, for e.g., Privacy International, 'Privacy as a Political Right' (March 2012) <<https://privacyinternational.org/sites/default/files/2017-12/Privacy%20as%20a%20Political%20Right.pdf>> accessed 12 December 2024.

¹³ ADR (n8) Majority Opinion [136].

¹⁴ See, e.g., Marie-Theres Sekwenz, 'Targeted Advertising – How it Works and Where it is Failing' (*Heinrich Boll Stiftung*, 4 March 2022) <<https://il.boell.org/en/2022/03/04/targeted-advertising-how-it-works-and-where-it-failing>> accessed 12 December 2024.

¹⁵ Ibid.

¹⁶ Regulation (EU) 2024/900 of the European Parliament and of the Council of 13 March 2024 on the transparency and targeting of political advertising [2024] OJ L, 20.3.2024.

affiliation through this judgment is a good step forward. However, I question whether the privacy of political affiliation can be granted in such a blanket manner.

The Court has itself, earlier in the judgment, discussed how unlike an average voter, an economically affluent person would be able to buy more influence through their contributions to political parties, thereby undermining the principle of an equal vote for all.¹⁷ Justice Khanna, in his concurring opinion, has also discussed the findings of the Law Commission of India in its 255th report in relation to the correlation between financial superiority and electoral advantage, leading to influence on policy.¹⁸ As an individual's capacity to influence policy and the electoral process increases progressively, so should their right to privacy in relation to their political affiliation decrease correspondingly – while the Supreme Court seems to recognise these two aspects separately, it does not (either in the majority or concurring opinion) explicitly state this conclusion. The need for this gradation was also emphasised by the petitioners during the course of the arguments.¹⁹

2.1 Extending privacy to political contributions

Even assuming that the right to privacy of one's political affiliation should be granted in all cases, the majority opinion extends this right to political contributions without concrete safeguards to balance the right to information and to privacy. The petitioners argued that once one's political affiliation translates into a monetary contribution with the capability to influence public policy, it is a public act by its very nature and must fall outside the ambit of any right to

¹⁷ ADR (n8) Majority Opinion, [100].

¹⁸ ADR (n8) Concurring Opinion, [66].

¹⁹ The petitioners' arguments were viewed by the author during the live stream of the hearings through the Supreme Court's official website.

privacy.²⁰ Disagreeing with this, the Court reasoned that in *Puttaswamy*, it was held that the “privacy (including informational privacy) is extendable to thoughts, beliefs, and opinions formed for the exercise of speech and action.”²¹ Therefore, it concludes that the privacy of political affiliation in this case should also extend to political contributions.

Further, the SC also considers that not all contributions are made for the purpose influencing policy, with some contributions being made by the average citizen looking to offer support to the party of their choice.²² It concludes that the possibility of misuse cannot be a reason to deny the “umbrella of protection” of privacy to political contributions, if revealing such information would also reveal the political affiliation of the donor.²³ Since the law as it stands in India permits contributions by corporations, they are not explicitly excluded, although it bears noting that the Court does not go into an in-depth exploration of privacy claims by corporations. Therefore, this case comment does not delve into the jurisprudence on this subject to avoid going beyond the scope of the Court’s ruling.

Leaving aside the aspect that the vast majority of electoral bonds have been purchased by corporate houses²⁴ as opposed to individuals, the reasoning does not appreciate the Court’s own recognition of the differential impact of economically affluent individuals or corporations, nor the petitioners’ argument on the need to recognise the gradation of one’s participation in the democratic process (with voting being the lowest level of participation).²⁵ Adopting a graded

²⁰ ADR (n8) Majority Opinion, [139].

²¹ Ibid [141].

²² Ibid [142].

²³ Ibid.

²⁴ ADR (n8) Concurring Opinion, [67]-[71].

²⁵ The petitioners’ arguments were viewed by the author during the live stream of the hearings through the Supreme Court’s official website.

approach to this application of privacy rights may have been a method of creating a check and balance, protecting the interests of small ticket donors (which is the Court's stated intention in granting privacy to political contributions).

While the majority opinion is clear that privacy does not extend to contributions which are made to influence policy and only as a genuine form of political support,²⁶ this is a vague standard and it is unclear how this could be proved. Therefore, the majority opinion should have made the following clear – (i) that corporate contributions can never be considered private even if permitted along with individual contributions, (ii) that individual donations can be considered 'private', subject to reasonable restrictions, and (iii) that such restrictions should be designed in such a way that the right to information is never compromised, and subject to measurable monetary limits. The majority opinion also acknowledges that the EBS is not fool-proof in terms of political parties being unable to know the details of a contributor, using this to reject the Union of India's argument that there should be privacy vis-à-vis the political party to which the contribution is made²⁷ – this is a crucial safeguard to include, and safeguards on a similar level should have been included with respect to the privacy of donors as well.

The concurring opinion by Justice Khanna does not create this blanket application of privacy rights which is then caveated by a broad standard of proof, instead recognising that "as the person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks contextually."²⁸ While this is a clearer standard in some respects, Justice

²⁶ ADR (n8) Majority Opinion, [167].

²⁷ Ibid [143]-[144].

²⁸ ADR (n8) Concurring Opinion, [59].

Khanna dismisses the claim of privacy outright, since the donor is making the contribution via formal banking channels, hence willingly submitting their information at the very least to the officials of the authorised bank.²⁹ This also does not create a balance between protecting the privacy of individual donors (below a certain monetary threshold) and the right to information, since it does not appreciate the nuances of the privacy of political affiliation and possibilities of surveillance.

3 The right to information vs. the right to privacy: does the ruling go far enough?

Having discussed the issue of privacy, the Court looks to assess the two competing rights (i.e, to information and to privacy), through the standard of double proportionality. This standard is employed where the Constitution does not create a hierarchy between two competing rights, and therefore, it must be assessed as to whether the measure in question (i) is suitable for furthering both rights, (ii) is the least restrictive measure required for realising both rights, and (iii) has the disproportionate effect on either right.³⁰

Here, the majority opinion does not consider there to be a clear hierarchy between the right to information and the right to privacy. While noting that the EBS could be said to have a rational nexus between the measure and objective of protecting the donor's informational privacy, the Court finds that the EBS is restrictive insofar as it creates an absolute bar on disclosure of information on contributions, without any recourse,³¹ noting "the purpose of securing information about political funding can never be fulfilled by absolute non-

²⁹ Ibid [40].

³⁰ ADR (n8) Majority Opinion, [157].

³¹ Ibid [162]-[163].

disclosure.”³² It was also found that the earlier scheme, wherein political parties were required to publish details of contributions in excess of Rupees Twenty Thousand in a financial year, created a balance between the informational privacy of donors expressing genuine support, whilst also providing voters with the information required to effectively participate in the electoral process. Therefore, the Court was not satisfied that the complete anonymity which is intrinsic to the EBS was the least restrictive means to establish the Government of India’s objective.³³

While in agreement with this conclusion, I argue that Justice Khanna’s is clearer in its consideration of which right prevails in the given circumstances. Emphasising the importance of data and evidence for the application of the proportionality standard,³⁴ Justice Khanna examines the data of electoral bonds purchased, concluding that the EBS fails to meet the balancing prong of the proportionality test.³⁵ In addition to this, he also emphasises that the justification of potential retribution or victimisation of donors cannot be treated as a legitimate aim for a piece of legislation, since this is an abuse of law in itself.³⁶ Coupled with his dismissal of a privacy claim for EBS donors (as discussed above), and the observation that political parties themselves may be able to compel revelation of donor details,³⁷ this uncovers the fundamental inconsistency in the objective of the EBS.

When compared with the majority opinion, the concurring opinion does not rest primarily on the assessment of whether the EBS is the least restrictive

³² Ibid.

³³ Ibid [169].

³⁴ ADR (n8) Concurring Opinion, [33].

³⁵ Ibid [72].

³⁶ Ibid [39].

³⁷ Ibid [42].

method of balancing the rights of information and of privacy, nor the *absoluteness* of disclosure. Rather, Justice Khanna is emphatic that the claim of donor privacy (among other justifications) cannot under any circumstances justify the infringement of the voters' right to information, which is "far too important"³⁸ to "deny essential information on the pretext of privacy."³⁹ Reviewing a number of rulings on political funding from other jurisdictions, Justice Khanna is clear that the right to information must take precedence when "the dissemination of information is legitimate and required in the state of public interest."⁴⁰ In conjunction with the observation that privacy shrinks as one moves into the communal space,⁴¹ I argue that this reasoning provides a much greater principle-based safeguard as a precedent for protecting transparency in the public interest, including for other cases such as ones involving the Right to be Forgotten where Indian courts have considered the legality of removal of personal information from public court records.⁴²

4 Conclusion

In this case comment, I have focused on the Court's discussion of whether the right to information of the voter can be restricted for the protection of the privacy of donors to political parties. While agreeing with the Court's ultimate ruling, I have argued as follows: (i) that while political affiliation is rightly protected under the scope of the fundamental right to privacy in the age of algorithmic

³⁸ Ibid [57].

³⁹ Ibid.

⁴⁰ Ibid [58].

⁴¹ Ibid [59].

⁴² See, e.g., Sriya Sridhar, 'Walking the Tightrope of the Right to be Forgotten: Analysing the Delhi HC's Recent Order' (*SpicyIP*, 15 May 2021) <<https://spicyip.com/2021/05/walking-the-tightrope-of-the-right-to-be-forgotten-analyzing-the-delhi-hcs-recent-order.html>> accessed 12 December 2024.

surveillance and targeted advertising, categorically applying this protection in all cases does not appreciate the impact of economically affluent individuals in the political process, (ii) that extension of such privacy to political contributions should have been subject to clear safeguards and the explicit exclusion of corporations from this right, (iii) that the comparison of the right to information and the right to privacy does not go far enough to categorically protect the right to information in cases of democratic and public importance, and (iv) that in respect of this comparison of the two rights, the concurring opinion creates a clearer hierarchy in favour of the right to information in matters of public importance. It is pertinent to acknowledge that as on date, the data about donors who purchased electoral bonds in favour of parties and the potential links such as *quid pro quos* are being uncovered by the media.⁴³ As this issue develops, further insight into the scope and operation of the Supreme Court's ruling is likely to be developed by the legal community in the country.

⁴³ See, e.g., Himanshi Dahiya and Naman Shah, 'Electoral Bonds: Of Donations From Top Firms Raided by Agencies, BJP Got 30%' (*The Quint*, 22 March 2024) <<https://www.thequint.com/news/politics/electoral-bonds-bjp-donations-ed-cbi-income-tax-departments-election-commission>> accessed 12 December 2024.