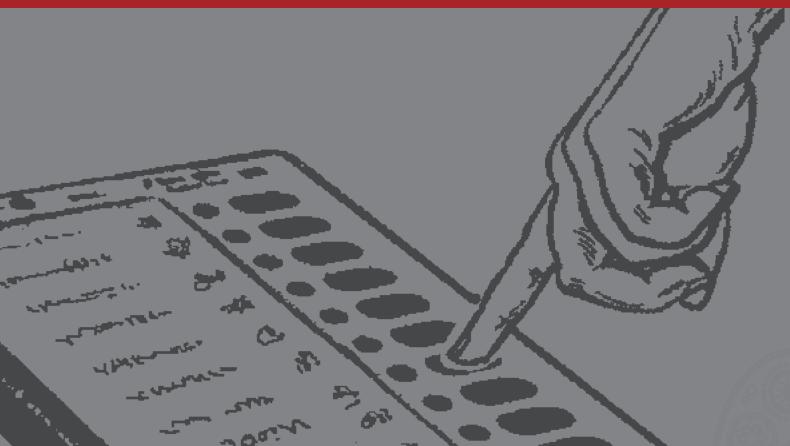An Inquiry into India's Election System

REPORT OF THE
CITIZENS' COMMISSION ON ELECTIONS

VOLUME II

Are Elections in India Free and Fair?

CITIZENS' COMMISSION ON ELECTIONS

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March 2021

Inside

Acknowledgements

We would like to acknowledge the roles of many persons who helped in various ways in the preparation of this Report and thank them. The Members of the Citizens' Commission on Elections – Justice Madan B. Lokur, Wajahat Habibullah, Justice Hari Paranthaman, Professor Subhashis Banerjee, Ms Pamela Philipose, Professor Arun Kumar and Dr John Dayal - gave unstintingly of their time both to make valuable suggestions and give insights from their respective areas of expertise. They also provided general guidance to the effort.

To all those who deposed before the Commission, too numerous to name – whether from India or abroad, whether by written depositions or participation in Zoom meetings – we must say that we are deeply grateful for it was their specialized knowledge that helped firm up the bedrock of our understanding.

This is the second and the final volume of a series of reports that the CCE is planning to bring out under the title: An Inquiry into India's Election System. Each theme covered under this series had a mentor(s). It was they who sifted through the numerous depositions made, conducted their own research and finalized Thematic Reports. We must place on record our appreciation for their contributions to Professor Sanjiva Prasad, Mr Paranjoy Guha Thakurta,Mr Harsh Mander, Mr V. Ramani, Professor Sanjay Kumar, Professor Jagdeep Chhokar and Ms Anjali Bhardwaj.

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Many have helped in this journey. If inadvertently, we have left out any names, our apologies.

M. G. Devasahayam

Sundar Burra

Abbreviations

AAP	:	Aam Aadmi Party
ADR	:	Association for Democratic Reforms
AIR	:	All India Radio
BJP	:	Bharatiya Janata Party
BLO	:	Block Level Officer
BSP	:	Bahujan Samaj Party
CCG	:	Constitutional Conduct Group
CEC	:	Chief Election Commissioner
CEO	:	Chief Electoral Officer
CIC	:	Chief Information Commissioner
CPI(M)	:	Communist Party of India (Marxist)
DD	:	Doordarshan
ECI	:	Election Commission of India
ERO	:	Electoral Registration Officer
EVM	:	Electronic Voting Machine
IIT	:	Indian Institute of Technology
IAMAI	:	Internet and Mobile Association of India
KYC	:	Know Your Customer
MCC	:	Model Code of Conduct
MCMC	:	Media Certification and Monitoring Committee
MLA	:	Member of the Legislative Assembly
MP	:	Member of Parliament
NPCI	:	National Payments Corporation of India
NVSP	:	National Voters' Service Portal
PCI	:	Press Council of India
PIL	:	Public Interest Litigation
RPA	:	Representation of People's Act
RSS	:	Rashtriya Swayamsevak Sangh
RTI	:	Right to Information
SC	:	Supreme Court
TRAI	:	Telecom Regulatory Authority of India
UIDAI	:	Unique Identification Authority of India
UPI	:	Universal Payment Interface
VVPAT	:	Voter Verifiable Paper Audit Trail
WP	:	Writ Petition

Foreword

Modern India's greatest pride is that it is not only the world's largest, but because of the grassroots institutional mechanisms that we have built for the panchayat raj, is also the most vibrant democracy. It gives to every Indian the world's largest number of elected representatives to ensure peoples' participation in governance at the local, state and national levels. At the national level the institution of the Election Commission of India (ECI) is mandated to ensure that this participation is not only truly representative, but also one of the world's most free.

In such a democracy, accountability and transparency are the guarantors of good health. ECI, set up under Article 324 of the Constitution of India, is expected to work with civil society to ensure this within the framework of India's Right to Information Act (RTI), 2005. In our democracy the RTI, which encourages accountability through transparency, is an expression of a profound national commitment to ensuring an open government. Not surprisingly, this commitment is shared by all political parties, forming part of the manifesto also of India's ruling party today. Citizens have consistently worked with the Commission to flag issues of concern to government or to the public.

Our group of citizens have in our careers been associated in big ways and small in the building of the governance of India as it stands today. For them, India's Constitution has been the only scripture, and hence they are concerned that the ECI's conduct of the parliamentary elections of 2019 had led to grave doubts about its fairness, which has always been its greatest strength. The Association for Democratic Reforms, the Constitutional Conduct Group of former civil servants and the Forum for Electoral Integrity were among the civil society groups that were constrained to invite public attention to what appeared to be the ECI's shortcomings in living up to its mandate of neutrality. Many political parties, mainstream and digital media houses also joined in voicing serious apprehensions as to the manner in which the 'model code of conduct' was violated with impunity.

ECI neither responded to criticism or sought to defend itself when patent infirmities were specifically pointed out by responsible citizens with no effort to satisfy the critics, several of whom were retired officials themselves, expe-

rienced in conducting elections. The Citizens' Commission on Elections (CCE) came into being to go into critical aspects of the conduct of elections, call for expert advice where necessary and come up with appropriate suggestions. These are to be placed in the public domain for the consideration of Indian citizens who, at final call, should have the last word in India's governance to ensure that elections are conducted as merit the proud Republic of India.

The first sectoral report (Volume I) that dealt with the merits of Electronic Voting Machines (EVMs) and Voter Verifiable Paper Audit Trail (VVPAT) in light of the requirement of verifiability and transparency was published in January 2021. In this report the functioning of EVMs has been dissected by CCE's experts, specifically in light of their adherence to principles of democracy. This Report has kick-started debates and discussions among the public, universities and political parties. This is a good sign.

The second Report (Volume II) deals with the other dimensions of free and fair elections which are vital to the very survival of India's democracy. These include Integrity and inclusiveness of the Electoral Rolls; Criminalization, money power and Electoral bonds ; Scheduling and processes of elections and compliance of Model Code of Conduct; Role of media including social media, fake news, etc. and the Autonomy of ECI and its functioning before, during and after Elections. All these are analysed in detail by the experts and the report contains their findings and recommendations.

These are now before the citizens not only of India but before those of democracies across the world-as a gauge for assessing safeguards to democratic functioning and their conservation in these days of grave threat to freedom and liberty.

Madan B. Lokur
Wajahat Habibullah

Introduction

Are Elections in India Free and Fair ?

M. G. Devasahayam*

The US based Freedom House's 2021 report that appeared across the media on March 8, 2021 should put all Indians to shame. "India loses its status as 'free'… Political rights and civil liberties have worsened since 2014, and the decline has accelerated since 2019." India's status on Freedom House's report on political rights and civil liberties was lowered to "partly free." In 2020, the organisation's report had ranked India as "free."

The decline is due to the increased pressure on human rights organizations, rising intimidation of academics and journalists, and a spate of bigoted attacks, including lynchings, aimed at Muslims. The coronavirus-induced draconian lockdown that "resulted in the dangerous and unplanned displacement of millions of internal migrant workers" also resulted in the degeneration. The report expressed concern that the fall in India's status from the "upper ranks of free nations" may have a damaging impact on international democratic standards.

The just released 'Democracy Report' by the Varieties of Democracy (V-Dem) Institute based at the University of Gothenburg, Sweden, puts India in the league of countries who have seen significant slides into authoritarianism. According to the Report India's democratic process is 'on a Path of Steep Decline' turning the country into an 'electoral autocracy'. The unkindest cut in the Report is the comparison with Pakistan: "India is, in this aspect (censorship), now as autocratic as is

Pakistan, and worse than both its neighbours Bangladesh and Nepal. In general, the government in India has used laws on sedition, defamation, and counter-terrorism to silence critics."

This is speaking 'truth to power'. Since Parliament Election-2019 India has witnessed several draconian laws and predatory policies being rushed through in an arbitrary and autocratic manner, not complying with even elementary principles of democracy. Prominent among these are Citizen's Amendment Act, RTI Amendment Act, National Education Policy, Privatising Public Sector Policy, OTT Rules and the three anti-Farmer laws only to favour a select corporate-oligarchy. Added to these is a near 75% jump in sedition and UAPA cases against academics, lawyers, journalists, students and activists just for questioning the government!

Parliament Election-2019 is being flagged as the flash-point that has led to India losing the status as 'free' and becoming an 'electoral autocracy'. This is a very serious matter and it is therefore imperative to analyse as to how this election was conducted, and how it answered to the requirements of 'free and fair elections.' As it is, India has a deeply flawed first-past-the-post election system wherein a political party winning just about 25% of the electorate's mandate can capture power by having majority number of MPs and impose its will on the entire population as is happening now.

This itself is a cruel assault on representative democracy. And if an unfair election is added to it that could spell the death knell of democracy itself. Sadly enough, ECI's conduct of the Parliamentary Election-2019 invited serious controversy and criticism and its very fairness was questioned, with adequate reasons, by several organisations. The Association for Democratic Reforms, the Constitutional Conduct Group (CCG) of former civil servants and the Forum for Electoral Integrity were among the several groups that were compelled to draw public attention to the lack of fairness in the conduct of the election. Many political parties, mainstream and digital media houses and civil society groups also voiced serious apprehensions at the manner in which the 'model code of conduct' was being violated by the ruling party.

The response of ECI to all these serious public concerns was indifferent bordering on hostility. So, civil society groups got together and held seminars and public discussions in 2019 and 2020. Of the suggestions that emanated, a unanimous one was to constitute a body of eminent and experienced persons with domain knowledge on issues relating to elections. Thus, the Citizens' Commission on Elections (CCE) was constituted to delve deeper into critical aspects concerning elections, call for expert advice where necessary and come up with appropriate findings and suggestions to ensure that elections are conducted with fairness and integrity.

After due deliberations CCE was set up on March 5, 2020 and went into specific areas/themes that have direct bearing on the integrity and fairness of Parliament election-2019. Each theme had a mentor/mentors:

Theme	Mentor
i. Integrity and inclusiveness of the Electoral Rolls	**Harsh Mander** IAS (Retd) and **Venkatesan Ramani** IAS (Retd)
ii. Electronic Voting [EVM/VVPATs] and its compliance with Democracy Principles	**Prof. Sanjiva Prasad,** Dept of Computer Science, IIT Delhi
iii. Criminalization, money power and Electoral bonds.	**Ms Anjali Bhardwaj,** Co-convenor, National Campaign for People's Right to Information
iv. Scheduling and processes of elections and compliance of Model Code of Conduct.	**Prof Jagdeep Chhokar,** Co-Founder, ADR and Former Dean, IIM, Ahmedabad.
v. Role of media including social media, fake news, etc.	**Paranjoy Guha Thakurta,** Distinguished Journalist.
vi. Autonomy of ECI and its functioning before, during and after Elections.	**Prof. Sanjay Kumar,** Centre for the Study of Developing Societies, Delhi

Mentors prepared the Report based on depositions, RTI replies, published papers, articles and other relevant documents. Based on the depositions and analysis CCE came across severe flaws in all these areas before, during and after Parliamentary Elections-2019. Reports have been prepared on all these areas/themes.

Volume I

Since the theme "Electronic Voting [EVM/VVPATs] and its compliance with Democracy Principles" is largely technical in nature it was dealt with separately and the Report under the title "Is the Indian EVM-VVPAT system fit for democratic elections" was released as Volume I on 30 January, 2021. Key findings in this Report are:

i. EVM voting does not comply with the essential requirements of 'Democracy Principles' i.e. each voter having the direct knowledge and capacity to verify that his/her vote is cast-as-intended; recorded-as-cast and counted-as-recorded.

ii. It also does not provide provable guarantees against hacking, tampering and spurious vote injections. That an EVM has not yet been detected to have been hacked provides no guarantee that it cannot be hacked. Thus, elections must be conducted assuming that the EVMs may possibly be tampered with.

iii. Though VVPAT is installed in every EVM not even one paper slip is counted and matched to verify/audit the votes polled and votes counted

before making the results public. This has exposed elections to serious fraud.

iv. Design and implementation of ECI-EVMs as well as the results of both software and hardware verification are not public and open to full independent review. VVPAT system does not allow the voter to verify the slip before the vote is cast.

v. Due to absence of End-to-end (E2E) verifiability, the present EVM system is not verifiable and therefore is unfit for democratic elections.

vi. In practice, it may be necessary to test more EVMs than even what the civil society and the political parties demand (30% and 50% respectively) to ensure verification and reliable ascertainment of results.

vii. There must be stringent pre-audit of the electronic vote count before the results are declared. The audit may in some cases - depending on the margin of victory - require a full manual counting of VVPAT slips.

viii. The electronic voting system should be re-designed to be software and hardware independent in order to be verifiable or auditable.

ix. The decision-making processes within the ECI was not logical, rigorous and principled during the 2019 parliamentary elections. It is essential for elections using electronic means to adhere to standard democratic principles. Only then can elections be free and fair, engendering confidence in election outcomes and democratic process. This is not so now.

This Report has gained considerable traction among the media, public and political parties. Link: https://www.reclaimtherepublic.co/report

Volume II

Compiling the Reports of all other themes Volume II is released now under the title "Are elections in India free and fair?" Herewith is the summary of each theme.

(a) Electoral Rolls.

■ Significant exclusion has been noticed of vulnerable and disadvantaged groups: Circular migrants; Urban homeless persons; Trans-people; Women (especially single women, widowed, divorced women); Sex workers; Highly stigmatised caste groups (Manual scavengers); Adivasis (Including PVTG's (particularly vulnerable tribal groups) and DNT's (De-notified Tribes); Muslims (even Christians in some Constituencies); Persons with disabilities; Persons with mental illnesses; Old people without care.

■ There is no doubt that many names do not figure in the electoral rolls, whether through mischief or oversight: minority communities, the homeless

and the disadvantaged, the aged, etc. The modalities for ensuring that these names are included need to be clearly spelt out. It is obvious that the electoral rolls registration machinery has been found wanting in carrying out a door- to-door enrolment campaign.

- There is still the issue of whether the voter's name actually figures in the electoral rolls. The National Voters' Service Portal (NVSP) allows for downloading the electoral roll part, but this is hardly a feasible task for the average voter without internet facilities. There is still a need to go through hundreds of names to locate one's name in the rolls. Some easier method of verifying in advance of the date of polling whether one's name is in the rolls would make the task easier, especially for the aged, sick, etc.

- Two categories of voters would still have a problem of casting their votes at the polling station: (a) migrant labour located at other places away from their place of residence; and (b) those who, because of age, disability, illness, etc. are not able to travel to the polling station. What provisions need to be made for such voters will need to be decided.

- Effective mitigation of the electoral roll problems that have been pointed out requires maintaining records in a manner that enables 1. complete transparency; 2. public verifiability of all decisions regarding enrolment, updates and deletions. The above are necessary conditions for ensuring the integrity of the electoral rolls. Sufficiency will also require defining fool-proof processes beyond data organisation, especially for identification of all eligible voters and avoiding exclusion, which are beyond the scope of this document.

- ECI's proposal to link voter ID with Aadhar is a 'very dangerous proposition'. It could lead to massive data leak, fraud and theft that can severely endanger India's democracy.

(b) Criminal, Money, Electoral Bonds

- The problem is enormous. Government told SC that for the period between 2014-2017, 3,045 criminal cases, including heinous ones, involving 1,765 MPs and MLAs were pending. This continues to rise assuming alarming proportions.

- Money-power in election is the fountainhead of all corruption in the country. It compromises the integrity of democracy in multiple ways: it raises the entry barriers to politics; excludes honest candidates and parties; leads to corruption and big money controlling the state; distortion of policy making in wasteful, inefficient, and anti-democratic directions and exacerbation of polarization.

- Despite opposition from ECI and RBI, government, using Money Bill route to bypass Rajya Sabha, introduced electoral bonds. Finance Act, 2017,

increased opaqueness and consolidated the role of big money in electoral politics, giving huge advantage to the ruling party and destroying level playing field.

- Total expenditure on Parliament election-2019 is estimated at a staggering Rs 60,000 crores making it the costliest in the world, more than double of 2014 polls, according to Centre for Media Studies (CMS). As per the Report, out of this amount the ruling party (BJP) spent close to Rs 27,000 crore i.e. 45%. This works out to Rs 89 crores per seat (303) won by this party.

- The fast-rising economic Oligarchy in the country, threatening India as a welfare state is the direct fallout of this extreme money power in elections.

(c) Electoral Process and MCC

- For Parliament Election-2019, ECI deliberately delayed the announcement to enable PM to complete the inauguration blitz of a slew of projects (157 of them) that he had scheduled between February 8 and March 9.

- It was the longest election in the country's history, and its scheduling gave room for suspicion that it had openly and unabashedly favoured the ruling party.

- Some of the major controversies of MCC pertain to (a) Lack of consistency by the ECI in enforcing the MCC, (b) ECI treating the ruling party with kid gloves, (c) ECI not using its powers under Article 324 of the Constitution.

- The Election Commissioner who dissented and stood his ground was eased out from the ECI.

- This is a very critical issue because the major raison d'être of the MCC was to provide a level-playing field to all contesting political parties. Dealing with the ruling party with kid gloves negates the very reason for the existence of MCC.

- One of the most disturbing phenomena in this election was the abuse/ misuse of Armed Forces for election purposes by the party in power. Propaganda went the extent of calling Indian Army 'Modi's Sena' causing anger among Veterans. This forced a large number of veterans to write to the President of India that received no response.

Media, fake news, etc.

- India's mediascape has undergone a major transformation with the exponential growth in the use of the internet across the world and also in India.

- A very substantial section of the mainstream and mass media in the country has become excessively supportive of the ruling BJP.

- Despite guidelines and codes ECI did not take note of the many media violations – particularly by the ruling party.

- The most blatant violation was the opening of a new channel called Namo TV which continuously telecast speeches and events about the PM. Namo TV did not have permission from the I & B Ministry to go on air and did not comply with the regulations necessary to start a new channel.
- ECI failed to curb fake news online before and during the 2019 elections.
- Procrastination, silence and inaction characterized ECI's responses even to serious violations of MCC, media code and guidelines by the ruling party!

(e) ECI-Functioning and Autonomy

- ECI has plenipotentiary powers drawn from Article 324 of the Constitution of India to conduct free and fair election.

- In addition, Supreme Court has ruled: "When Parliament or any State Legislature made valid law relating to, or in connection with elections, the Commission, shall act in conformity with, not in violation of, such provisions, but where such law is silent, Article 324 is a reservoir of power to act for the avowed purpose of pushing forward a free and fair election with expedition..."

- But ECI is just not using these powers, because ECs are the appointees of the Government of the day and not through an independent process of collegium. The case of one dissenting EC, who was side-lined and then eased out has caused irretrievable damage to ECI's independence and integrity!

- This compromises the autonomy of the ECI and creates doubts about the neutrality of the CEC and the ECs, and consequently, the neutrality of the Commission itself. This poses serious danger to the fairness and integrity of not only the elections, but democracy itself…

End-Note

In his well-researched Book "An Undocumented Wonder-Making of the Great Indian Election" former Chief Election Commissioner SY Quraishi (Rain Light; First edition- 21 April 2014) writes thus: "The Indian election is a gigantic exercise that is often called the 'greatest show on earth', not merely because of the scale, size and diversity of the exercise but because of the vibrant volatility of our democracy."

Writing the Foreword to the Book Gopalkrishna Gandhi, former civil servant, diplomat and Governor of West Bengal noted: "India is valued the world over for great many things, but for three over others: The Taj Mahal, Mahatma Gandhi and India's electoral democracy. The credit for the last of the three fames goes to the people of India … The people are the propulsive force, the driving energy of India's Electoral democracy. … But the vehicle's engine, where ignition and

combustion take place and the fuel and engine combine to move the vehicle is the Election Commission of India ".

Sadly, since then, ECI, the 'engine that drives India's elections' seem to have corroded fast and has morphed into an 'unelected autocracy'. It is maintaining the fig leaf of 'free and fair elections' only by deploying vast array of para-military forces, variety of observers and flying squads while losing its essence of level playing field, "democracy principles" and public faith. In the event, ECI has drifted away from its constitutional (Article 324) mandate of holding genuinely free and fair election. No wonder then that India is being branded as 'electoral autocracy'!!

In his seminal work "The Oak and the Calf" the Russian recluse Alexander Solzhenitsyn famously wrote: *It is infinitely difficult to begin when mere words must move a great block of inert matter. But there is no other way if none of the material strength is on your side. And a shout in the mountains has been known to cause an avalanche.*

We have only words and no material strength. There may not be an avalanche. But, if these words can facilitate a rapid return to 'democracy principles' and 'free-and-fair' elections, thereby reversing the drift towards 'electoral autocracy', that would be reward enough.

*** **M.G. Devasahayam** is former Army and IAS Officer and is presently Coordinator, Citizen's Commission on Election; Convener, Forum for Electoral Integrity; Member, Constitutional Conduct Group and Chairman, People-First.

Electoral Roll and Exclusion of Vulnerable Sections from Voting

| **Harsh Mander** | **Venkatesan Ramani**

At some time or the other, the election process is on either in some state(s) in India or, once in five years, for the Lok Sabha when about 900 million voters are eligible to choose who will run the country for the next five years. The right of citizens to participate in elections, according to the principle of adult franchise, is central to their citizenship status. But it is an unfortunate that a significant proportion of Indian citizens are unable to exercise their franchise for one of two reasons: (a) their names are missing from the electoral rolls; or (b) even though listed on the electoral rolls, their geographical location or other infirmities prevent them from participating in the electoral process.

It is, therefore, essential to list out the specific categories or communities of persons who may run the greatest risk of exclusion from the electoral process.

Categories of Voters Vulnerable to Exclusion

Circular migrants:

The quantum of internal movement in India is large. While the official estimates provided by the Ministry of Statistics and Programme Implementation (MOSPI) suggest a number of 30 million per year

(NSS 64th round), sector wise employment estimates show that more than 100 million people move every year from rural areas in search of livelihood. Quite often, these migrant workers are away from home at the time of elections. The current voting regulations do not allow them to send their votes through postal ballots. A majority of such migrants work in the informal/unorganised sector; a large number are daily wagers and very few have any form of a valid identity card, given their transient existence. Working in the informal unorganized sector of the Indian economy and earning meagre wages, migrants find it difficult to make a trip home only to cast their votes. In cities where they go to work, they lack voting rights. Stuck in between, migrants miss out on participating in the only institutional mechanism in the country, the elections, to raise their political views/concerns.

Urban homeless persons:

It is generally considered that 1% of a city's population (in large cities) are homeless. The urban homeless already live on the margins of society, neglected, without much by way of state support. Exclusion from electoral rolls further heightens their vulnerabilities by not having a platform to express their concerns. Documents are extremely important to the urban homeless, since they serve as their only identification and open up access to other services and entitlements. In order to acquire a voter ID and be registered in the electoral rolls, the following three documents are required:

1. **Proof of Name**: For this one might need a birth certificate. Alternatively, self-attested declarations have worked in some districts, but these are reliant on sympathetic or sensitive officers who handle the case in order to be accepted

2. **Proof of address**: Homeless people either live on the streets, in homeless shelters or at their place of work if they are employed and, therefore, do not have permanent addresses. In this case, the Block Level Officer (BLO) must find the same person at the same address for three consecutive nights which can serve as proof of address. However, this is often unachievable. Furthermore, this is dependent on whether the BLO performs this task at all.

3. **Proof of age**: Generally a birth certificate would work for this but most homeless people do not possess birth certificates. The discretion of the BLO is crucial in deciding whether the person is over 18 years of age.

It becomes clear that even though there is a process in place that accounts for the lives of homeless people, in that it allows the BLO to make judgements on age and proof of residence, in reality this is rarely practiced. While organisations working with the homeless run voter ID and electoral education drives to register people, many people still remain excluded from the electoral rolls.

Transpeople:

Transpeople have faced many levels of discrimination, stigmatisation and marginalisation for centuries. They have been victims of extreme physical and structural violence. Inclusion in the electoral roll hinges on acquiring a voter ID, which is extremely challenging and traumatic for the trans community. Much of the fight for trans-people has been their gender identification and the structural violence that is embedded in filling official forms. When registering for voter IDs, there are only three gender options: male, female and 'other'. Transpeople who refuse to identify within the 'other' category would therefore not be included in this process. Furthermore, most Transpeople are forced to leave their families due to social stigmatization and live together in communities under the guidance of a guru, a spiritual teacher, in *gharanas,* which are their support system. However, *gharanas* cannot be used as permanent addresses for proof of address for voter IDs, unless formal rental documents are produced, which is unlikely. Neither can other members in the *gharanas* be designated as legal guardians for the purposes of acquiring voter IDs.

Women (especially single women, widowed, divorced women):

While universal suffrage has been in existence in India since the 1952 elections, the practical reality is different. The 2011 census data reveals that 97.2% women were 18 years and above as of 2019, entitling them to vote. In actual fact, only 92.7% women were registered voters. This 4.5% gap translates into a staggering 21 million women who were not entitled to vote in 2019. The reasons for these exclusions lie in conditions of patriarchy, in which women are often not treated as equal members of a household, and their agency, including political agency embodied in voting, may be wilfully denied. If unlettered and married before 18 years, she may lack any documentation, like a school certificate. But the greatest danger of exclusion is of single-women headed households. Widows, divorced/abandoned women, women who are not married beyond a certain age, cover a large spectrum of single women, approximately 7.5% of the population. If abandoned or divorced, they are often stripped of any kind of documentation.

Sex workers:

Sex workers have been treated with apathy and stigma by society and state systems for many years. They often migrate from smaller towns or villages to cities in search of work, are trafficked into this work at a very young age or are children of sex workers and have grown up in red light districts. In all these situations, access to documents needed to register for a voter ID such as birth certificates, proof of address or age is unlikely. The stigma attached to their work makes accessing these documents even more difficult. Although some sex workers might have voter IDs and be registered in their place of origin, the stigma attached to their work and excommunication from the family or community make going back there to vote impossible. Often, brothels do not

serve as permanent residences for sex workers when registering for documents, and the apathy, sometimes disgust and abuse, with which state officials treat sex workers hinders them from approaching the state to acquire documents. Even where they are included in the electoral rolls, they are made to feel unwelcome and uncomfortable when they go to vote, limiting their participation in the electoral process.

Highly stigmatised caste groups (Manual scavengers):

Manual scavengers and septic tank cleaners, both in rural and urban areas, have long been invisible to the state and society at large. Even though manual scavenging has been outlawed, thousands of people continue to engage in this work without dignity or any option to leave. Having faced centuries of discrimination and marginalisation, without access to education, it is no surprise that manual scavengers are excluded from electoral rolls as well. Manual scavengers are entirely dependent on state officials for access to documents. But they often face discrimination, corruption, abuse and indifference when they visit government offices to secure documents to establish their residential status.

Adivasis (including PVTGs (particularly vulnerable tribal groups) and DNTs (De-notified Tribes)):

At 8.6 percent of the Indian population, Adivasis (or Scheduled Tribes) comprise about 140 million people. They have often faced threats to their rights to land, self-determination and autonomy and have suffered from the development process, with displacement and migration constituting a harsh reality for tribal groups in the country. The situation is even worse for PVTGs, who are virtually invisible to the state or are so heavily discriminated against that accessing any documents is a major challenge.

DNTs are pejoratively considered to be "criminals by birth". These nomadic and semi-nomadic communities continued to face harassment at the hands of law enforcement agencies, given the colonial mind-set of many government officials and better-off members of society. Given their centuries-old tradition of constant movement, they often do not possess any residential proof, which leaves them out of the majority of the government's developmental schemes as well as with no proof of address to exercise their right of electoral franchise.

Differently abled persons:

Regardless of their age or sex, differently abled persons are not only excluded from many social activities but are also invisible in political agendas and development strategies. It is not, therefore, surprising that their vulnerabilities extend to the electoral process as well. Ensuring inclusion in the electoral rolls is itself often a major challenge. Even where they are included in the electoral rolls and provided physical access to the voting process, they sometimes suffer from the attitudes of election staff.

Persons with mental illnesses:

Section 16 of the Representation of People's Act, 1950 provides for disqualification of a person as a voter if the person is of unsound mind and has been so declared by a competent court. While an Electoral Registration Officer (ERO) cannot refuse to enter a person's name in the electoral register solely on the grounds that they have a mental illness, with the onus of proving that a person is of unsound mind being on the ERO, in practice, implementation of this provision is extremely flawed. The main argument made for disallowing persons with mental health from voting is the need to maintain the integrity of the electoral process which requires a certain level of informed choice by individuals who have the capacity to make such choices. It is presumed that persons with mental health problems lack the capacity and, hence, should not be allowed to participate in the electoral process. This clearly demonstrates a lack of understanding of the spectrum of mental illnesses people suffer from and of the fact that such persons may well be capable of making informed decisions, such as voting in elections.

Old people without care:

Senior citizens, especially those who are poor, are vulnerable to being excluded from the universal franchise process, more so where they lack familial or institutional support. Digitisation of processes poses major challenges for them, as evidenced in the Aadhaar/UID rollout.

Minority/disadvantaged communities:

While estimates of those from these communities who are without voting rights remains a matter of disputation, there is a perception among these communities that they are victims of systemic bias. A study by Dr. Abusaleh Shariff and Khalid Saifullah indicates that about 15% of eligible voters in India are either left out or excluded from voting lists, with the Muslim population accounting for a higher proportion of such exclusions as compared to the rest of the population. The lack of consistent efforts by the electoral registration machinery to include all eligible voters in the electoral rolls not only deprives many persons of their right to vote but also enables political parties to achieve undemocratic and unethical goals.

Two specific issues need to be highlighted in the context of exclusion of eligible voters from the voting process:

**The failure of the electoral registration machinery
to register all eligible voters**

The integrity and completeness of the electoral rolls hinges a great deal on the role of electoral registration officers. This excessive reliance on relatively junior executives without adequate checks and balances is what makes members of powerless and stigmatised groups susceptible to exclusion. There is scope for arbitrary decision making, and even possibly corruption; and these officials may

themselves imbibe many of the stereotypes and systems of discrimination that impact many minority and disadvantaged groups. It has been observed that those entrusted with preparing the voters list frequently merely go to a *chauraha* [crossroads], point at homes and ask who their owners are. Normally, the name of the person heading the household is noted and the other members are left out. They do not always and reliably conduct a house-by-house survey. Guiding the "enrolment officer" is often a person from a dominant social group, probably belonging to an advantaged caste, who might carry prejudice and stigma towards Dalits, religious minorities, single women, sex workers or trans-people, etc. This reliance on electoral officers and their implicit biases forms the context within which further interrogation into electoral exclusion must take place.

Absence/duplication of names in voters' lists of different constituencies

It has been observed repeatedly in the last few Lok Sabha and State Assembly elections that voters turn up at the polling booths on Election Day only to find that their names are missing from the electoral rolls.

The Electoral Roll published as per rule 22 is required to be made as per rule 5 of the Registration of Electors Rules, 1960 framed under the Representation of People's Act, 1950, where the roll should be divided into convenient parts which should be numbered consecutively. Under rule 6, the names of electors in each part of the roll should be arranged according to house number. If rolls were organized in this manner, they would reduce the ghosts and duplicates significantly. As per section 22 of the Representation of People's Act, 1950 and rule 21 of the Registration of Electors Rules, 1960, the registration officer can include names inadvertently left out. Similarly, as per rule 22, the registration officer can delete the names of persons who are included when not entitled or deceased. Rules 14 to 22 provide for objections to be made before the registration officer about the inclusion or deletion of names published publicly in accordance to rule 10 and 11.

In the five Lok Sabha elections of 1998, 1999, 2004, 2009 and 2014, on an average, 32 seats were won with a margin of less than 1 per cent, 69 with less than 2 per cent and 101 with less than 3 per cent. A winning margin of 1 per cent translates to 10,182 votes. This translates into 5 parts (0.2 percent) of an Electoral Roll in every parliamentary constituency.

It is pertinent to note that, in every election, more than 1 percent of voters have experienced deletion or transposition of their names without any notice as required under rule 19 or hearing as required under rule 20 of the Registration of Electors Rules, 1960. A random inspection of several parts of rolls from different parliamentary constituencies reveals that the lists are not organized as required by rule 6. This makes it difficult to audit the parts as containing only those who

are genuine voters from the constituency or identify those whose names have been deleted and to raise objections as per rule 12. Despite raising the issue with the Election Commission of India from 2009 onwards, the lists continue to be prepared ignoring the Registration of Electors Rules, 1960. There are even cases where the voter's name is there in the National Voters' Service Portal but is not traceable on the electoral rolls.

Various reasons can be ascribed for this occurrence:

Difficulties in verification by voters of inclusion of their names in the electoral rolls

Chief Electoral Officers publish new versions of electoral rolls on their websites at least twice a year and more often in election years. ECI expects the voters to check every new version of electoral rolls to raise claims and objections. EROs delete or change voter data without due diligence and without notifications to the affected party. Every time a new version of the electoral rolls is published, it is important for a voter to check if (s)he is a bonafide voter and if her/his data in the rolls are correct. S(he) can do so by reading the electoral rolls on the state CEO website or by querying by EPIC number or by name at NVSP. Both the approaches have some difficulties:

a. The electoral rolls are published as image PDF files with CAPTCHA protection. One electoral roll maps to one part in an assembly constituency, which has one booth in almost all cases. To look up the names in the electoral rolls, the voter should know his constituency and the part number. Very few voters know this data. The part number of voters change with delimitations. Voter serial number in the part could change with delimitation and with the draft version published in September/October. Adding to the confusion, often some names are in parts other than where they should be due to wrong addresses in the electoral rolls.

b. The electoral rolls were being published as text PDF files until changed by ECI letter No.485/Comp/ERO-Net/2017 dated 04 Jan 2018 directing that "Electoral Roll should be published on Website in image PDF only... No other format of Electoral Rolls be made available in open domain... The access to view this image of Electoral Roll be strictly provided through CAPTCHA..."

c. The electoral rolls are public documents but not open data. Being image documents, we cannot search text except by scrolling the records one by one. Searching voter records in the electoral rolls is impractical for a common man. EROs and their teams also face the same problem.

d. Extracting voter records from the image files for analysis is a non-trivial task. It demands better resources than the ubiquitous professional/home

PCs. Also, the results have large number of typos because the process involves optical character recognition (OCR).

e. If one knows the EPIC number, searching the NVSP website is easy. Search by name is not effective because it does not have fuzzy search feature. Unless one enters the name exactly as it is entered in the rolls, the record would not be found. With many typos and no standard for entering the names, often the search results in false negative cases. The same is the case with voter helpline app which creates chaos close to the elections.

f. We regularly find a few unreadable voter records in the scanned PDF file as well as on query at NVSP.

g. In the case of Karnataka, it appears that a significant percentage of applications for registration were rejected for the reason that the applicants were not citizens of India. The data was extracted from the status of claims and objections published on CEO-KA website. This prompted the CEO to investigate the matter and discover a software bug that reported wrong reasons for rejection of applications.

h. It has been observed over the past five years that the NVSP data is often not corresponding to the electoral rolls. There are cases where voters' names do not figure in the electoral rolls. In such cases, the voter is expected to register afresh. What then happens, because of poor quality checks in the system, is that duplicate records are created, providing scope for bogus voting.

Issues relating to claims and objections

The ERO is required to intimate the progress in the processing of various applications from the citizens for inclusion, deletion, and corrections to voter records. In practice, neither is the mandated acknowledgement given to the citizens when they apply nor are they intimated of the progress. In the case of Karnataka, the CEO used to publish the status of applications on his website periodically. The data now being published is not complete and does not adhere to one standard format, being different for different constituencies and making access to data difficult.

Wrongful Deletion of Voters

a. Citizens of several states have complained in the past about lakhs of valid voters being deleted from the electoral rolls. For example, CEO, Karnataka had, in 2012, deleted about 13.5 lakh out of 65 lakh voters of Bangalore because the records did not have voter photographs though the EPICs had. The reason given for the deletions was 'Shifted Residence.' The voters were not intimated of the deletions.

b. Many voter addresses are wrong in the electoral rolls. When the BLO does not find the voter in the recorded address during inspections, he is expected to recommend deletion of such voters after due diligence. Though wrong house addresses were to be corrected during the EVP/ SSR between August and December 2019, these corrections were to be made in the electoral rolls published subsequently.

c. During correction of data in response to requests from the citizens, at times wrong records are updated. This results in deletion of some valid voters and duplicate records for the other. Though such occurrences have significantly reduced, the deleted records have not been restored. Changes have not been made to the data entry software to stop such occurrences.

d. In several states, voter records (even more than a lakh records) are lost during delimitation.

e. Though ECI rules allow restoration of wrongly deleted voters, it is seldom done. The citizen is not informed of the deletion. He is expected to find out that his name is missing from the electoral rolls by inspecting the electoral rolls and then apply for registration.

Duplicate entries

The electoral rolls are replete with duplicate entries. With every new version of the electoral rolls, more duplicate entries are added. The ERO-Net is not effective in detecting duplicate records, since it reports Demographically Similar Entry (DSE) only where the voter and the relative's name match exactly and not when there is some slight variation. There is reason to surmise that there are a larger number of duplicate records, when matching is done phonetically using the voter-name + relative-name. Duplicate records can arise in the following scenarios:

i. **Rank 1:** Same EPIC numbers. These are indisputable errors.

ii. **Rank 2:** Same house (part, section, and house number). Photo comparison by EROs showing that more than 90% of these suspects have matching photographs and ground checks prove them to be duplicated records.

iii. **Rank 3:** Same part but in different houses. EROs find about 80% of these suspects to be duplicated records.

iv. **Rank 4:** Across parts. About 20% of them are duplicated records.

Using metaphones and fuzzy-matching approaches, similar voter-name + relative-name sets can be identified. Then, photographs of the voters within the sets can be compared using image comparison software. If the photographs match, then those voters can be physically verified and records deleted if found to be duplicated. We can add additional filters and refine the application based on experience of using this first solution. Voter photographs are not available to the public and

hence comparison of photographs is not possible. Cdr. P.G. Bhat reports that his organisation implemented image comparison feature using a set of about 1,000 voter records with photographs provided by ECI in 2013. In a majority of the cases where the names matched, the photographs also matched. The software was installed at ECI, having proved its utility. In 2014, the CEO of Tamil Nadu took a copy of the software from Mr. Bhat and found it to be useful.

For some unknown reasons, this proven approach to identify duplicate records is not being adopted by the ECI. Lists of suspected duplicate entries have been sent by Mr. Bhat to the CEO, Karnataka for the past eight years and to EROs in Karnataka since 2019. No response has been forthcoming so far.

There is a need to improve the Data Entry Software. Software can easily suspect and warn the operator when a duplicate entry is being made. If the operator overrides the warning and enters the record, it can be flagged for verification by the ERO.

People who have shifted/dead people in the Electoral Rolls

a. People who have shifted residence continue to be in the electoral rolls of the old addresses. ECI rules allow a person to remain an elector in his 'permanent address.' The rules also require deletion of voters not found in the registered address. This has created contradictions and confusion. Citizens tend to register in more than one place though this would require a false declaration. Data entry software does not detect duplicate entries.

b. Large number of dead people are still in the electoral rolls. In addition to expecting the relatives to request deletion of such entries, the CEOs can gather data from the Birth and Death Registrations. Part of such data is available digitally and would make updating the electoral rolls easier.

c. The following table shows the % people at various old-age ranges in Bangalore as per Census-2011 data and voters in those age-ranges. Though these numbers are not conclusive evidence of the presence of names of dead voters in the electoral rolls, this is an indicator that the ECI and CEOs should check if the voter records of the older people are all genuine.

Age Range – Years	Census	Voters
80 to 90	0.71%	2.13%
91 to 99	0.18%	0.22%
100 and above	0.05%	0.06%

d. Only a voter or a family member can request for deletion of a voter record. When a family shifts residence, the members often do not request to delete their names from the electoral rolls. Also, the grieving members of a family do not take initiative to get the name of a deceased off the rolls. RWAs, offices of building societies, and citizens could be encouraged to recommend deletion of names of non-bonafide voters in their area/ building. Deletion can be done after following due diligence procedures in accordance with the law.

Inadequate Data

a. **Sections.** A part (one electoral roll) is divided into several sections. A section is defined as an area with geographical boundaries and is like a street address. Most of the parts are not organised into sections. E.g., of the 8,514 parts in Bangalore, 2,340 parts have only one section each and 1,273 have 2 sections each. We have average 1080 voters per part in Bangalore. One street address for as many voters is not logical.

b. **Section addresses.** Section addresses are mostly inadequate to find the location as also pointed out by the Assistant Post Master General of Karnataka in a meeting with CEO-KA.

c. **House addresses.** Though ECI has prescribed house numbering standards, it is not yet implemented. ECI has directed that notional house numbers be given where a dwelling place does not have a door number. However, a large number of house numbers are entered as 0 or left blank. House address is formed by joining house numbers with section addresses. With inadequate/wrong house numbers and section addresses, many voters cannot be easily located. Wrong addresses also result in illegal deletion of voter records.

d. **Wrong Houses.** In many cases, house addresses are wrong. Voters of a family living under one roof are shown in different houses, often in different parts. In some cases, houses are shown in a different address and in different parts. This type of wrong data creates confusion and also to disenfranchisement. Though this was to be corrected during the EVP in 2019, all the errors are still in the electoral rolls.

Wrong Data/unaccounted EPIC

a. Wrong names, sex, age and relationship are common in the electoral rolls. There are several cases where a husband is shown as father and father-in-law as husband. Some voter records show males having husbands. Whereas it is the responsibility of the citizens to get wrong entries corrected, ECI software can include features to detect logical errors and initiate steps to correct.

a. Whereas the EPIC serves as an identity card in many places and is also a proof of citizenship, they are not accounted for when changes take place.

For example, when a voter changes his constituency, (s)he is expected to register again rather than only change his address. S(he) is issued with a new EPIC without having to return the old one.

b. If a voter record is deleted illegally, the voter has to apply for registration even when the illegal deletion is proven. S(he) is asked to state that s(he) was never registered. The person gets new EPIC without returning the old one.

Issues which need attention

Roles and Responsibilities: It has been observed that EROs/AEROs/BLOs often cannot handle the responsibilities entrusted to them. They could be given better support with good software tools. Much of the work expected from them can be done at higher levels with better computing facilities and access to data. For instance, a BLO is expected to submit various statistical reports. He may not be even a matriculate and works as BLO in addition to his regular government job, for a compensation of Rs. 6,000 per year. Most of the BLOs exist only on paper. Those who do exist do not know what they are expected to do. Having tasked them with what they cannot do, those tasks are not taken up by the higher authorities. The system is designed for inefficiency.

No Response to Citizens' Feedback and Offers of Help: The ECI and CEOs seldom respond or acknowledge feedback from the citizens. This has been the unfortunate experience of citizens' organisations which have interacted with them. The ECI launched an ambitious-on-paper program named EVP/SSR, conducted between August and December 2019 with the objective of improving the quality of electoral rolls. It ended with no effort to meet any of the goals notified in the policy letters. Orders that could not be implemented were passed. Lower level officials were expected to achieve the goals without support and without necessary tools.

Use of Aadhaar databases for electoral registration purposes: some issues

Aadhaar has been used to issue primary IDs like passports, driving licences and PAN cards. This means that the continued use of Aadhaar easily continues to generate documents that serve as proof of address for Form 6 to apply for inclusion in Electoral Roll or Form 8A for shifting from one constituency to another. Section 4(3) of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 specifies that an Aadhaar number may be accepted as *proof of identity* of the Aadhaar number holder for any purpose. Section 9 of the Aadhaar Act declares "The Aadhaar number or the authentication thereof shall not, by itself, confer any right of, or be proof of, citizenship or domicile in respect of an Aadhaar number holder". It is clear that the Aadhaar may *not* be used as a proof of address,

age, gender, citizenship, or relationship. Almost all Aadhaar numbers are supposed to have been issued on the basis of other primary documents of Proof of Identity and Proof of Address. The UIDAI however has no information about the primary ID used for the Aadhaar card, making it impossible to allow the verification of the uniqueness and validity of the Aadhaar number by anyone who uses it. Furthermore, unlike the Voter ID that is certified by the Registration Officer in accordance with rule 28(3)(d) of the Registration of Electors Rules, the Aadhaar "card" or the biometric or demographic data associated with any Aadhaar number is not certified by the UIDAI. Unlike the process of revising the Electoral Rolls, there is no process for revising the Aadhaar database.

Those whose Aadhaar fails on authentication due to biometric change, technology failure, or any other reason too, are excluded wherever authentication is used as required under section 8 of the Aadhaar Act. Even more serious has been UIDAI's ability to deactivate Aadhaar numbers under section 23(g) of the Aadhaar Act. Deactivated Aadhaar numbers or the absence of Aadhaar number results in automatic deletion of voters from beneficiary databases including Electoral Rolls, where Voter IDs are meshed with Aadhaar numbers. The use of Aadhaar, under the claim of discovering and deleting duplicate or ghost entries, allowed the exclusion of legitimate voters by treating those without an Aadhaar or those whose Aadhaar information did not match, as ghosts or duplicates. In Telangana alone, it was reported in September 2018 by the CEO, Telangana that 2.2 million people were excluded from the electoral rolls after Aadhaar based "verification" was done in 2015. The voter deletions in Telangana have been a contentious issue with much debate and complaints to Election Commission of India by political parties. People even approached the High Court in Hyderabad for justice, which has not been delivered yet for all the voters who could not vote on the day of Telangana Assembly Elections in 2018.

Furthermore, the use of Aadhaar cannot be harmonized with the requirements of the Registration of Electors Rules or rules 35, 42A and 49H, 49J, 49K, 49P of The Conduct of Elections Rules, 1961. The failure to follow the Registration of Electors Rules and the use of Aadhaar to prepare rolls, therefore, results in a significant number of parts of the electoral rolls in each constituency having been altered such that the number of excluded persons is in excess of the winning margins of candidates.

The offices of the CEOs, Andhra Pradesh & Telangana supplied voter data to a government application called State Resident Data Hub (SRDH). Typically, SRDH has data on residents of the state which is supplied by UIDAI or collected further by the state governments. In Telangana and Andhra Pradesh, the state governments conducted state census where voter data, Aadhaar data, a 360 degree profiling with details such as caste, religion and other sensitive personal information was also collected. The SRDH application was used to find duplicate voters and shared by the government with the CEO. By allowing the SRDH software to find out duplicate voters the ECI has abdicated its responsibility to a software algorithm commissioned

by the government for purposes unknown to the public and maintained by a private IT company. This is a clear violation of electoral laws in allowing government or a technology application to intervene in electoral rolls preparation.

In 2018, there was outrage across the world as *Cambridge Analytica*, a private company providing services to political clients, helped influence votes by targeting messages to voters based on their psychometric profiles. There is every possibility that the linkage of Aadhaar numbers to Voter IDs would allow the targeted manipulation of the beneficiaries of subsidies, benefits and services. In March 2018 the then Chief Election Commissioner, O.P. Rawat, declared that 32 crore Aadhaar numbers had already been linked to voter ID cards. This linkage of Aadhaar to voter IDs allowed the selective inclusion or exclusion of *voters* from beneficiary lists by seeding or deseeding their Aadhaar numbers to the list of beneficiaries. The use of Aadhaar in place of NEFT to transfer to bank accounts the benefits or subsidies did nothing other than allow the *selective targeting of voters* across government programs. Aadhaar targeting allows the manipulation right down to every voter, effectively giving complete control on the votes that may be counted or excluded in a specific booth of a constituency.

Towards a solution

Prof. Subhashis Banerjee of the Indian Institute of Technology Delhi, has made the following suggestions for maintaining voters' lists and other electoral roll records in an immutable and transparent way.

The suggestions are presented in Prof Banerjee's words below:

Effective mitigation of the electoral roll problems that have been pointed out in the preceding parts of this paper requires

1. ***Processes for inclusion****: Proactively identifying all eligible voters and making sure that they are able to vote, irrespective of whether they apply or not.*

2. ***Avoiding exclusion****: Ensuring that (a) all applications for inclusion in electoral rolls - whether by voters themselves, or by their representatives on their behalf - are correctly processed (b) there are no spurious deletions from the electoral rolls.*

3. ***Avoiding spurious entries:*** *Ensuring that there are no duplicate or false entries.*

The first requires careful process design at local community levels, and being particularly mindful of marginalised communities. The second and third require carefully defining standards of data processing, and data organisation that can enable local communities to publicly audit and verify all additions and deletions. Following are some recommendations for data organisation that can make the electoral rolls publicly verifiable.

1. Maintaining electoral records on Public Bulletin Boards

Ensuring the integrity of the electoral rolls requires maintaining records in a manner that enables

1. complete transparency
2. public verifiability of all decisions regarding enrolment, updates and deletions

*For transparency and verifiability of the records the construct of an **append-only, immutable (untamperable) public (web) bulletin board** [Heather and Lundin, 2009] can be used. Data can only be added but never deleted in the board.*

A public bulletin board (a publicly readable sequence of bulletins or messages $(B_1, B_2, ..., B_n)$ can be defined in terms of the following properties:

■ ***Certified Publishing***: *A public (web) bulletin board has certified publishing if whenever readers retrieve the contents of the board, for each message on the board they can determine with certainty (obtain a proof of) (i) the identity of the (sub) authority that published the message and (ii) the exact time of publication.*

Failure to determine either of the above with certainty will indicate malfeasance or corruption of the bulletin board.

■ ***Unalterable history:*** *A web bulletin board has unalterable history if, whenever a reader retrieves the contents of the board at any time T_0 and again at any later time T_1, she is able to check that the board read at T_1 has exactly the same content as previously at T_0 (it is untampered), except for possibly having some additional new messages appended at the end (that is, the board at T_0 is a prefix of the board at T_1). If this is not the case, it indicates malfeasance or that the board has become corrupted.*

The Election Commission of India (ECI) should maintain two public bulletin boards for each constituency - at a block/ward level granularity - which should be updated as and when changes occur.

1. ***Bulletin board of electoral rolls:*** *This should be a self-contained bulletin board of the entire electoral roll - updated with all additions, deletions and changes till date - where each entry is dated and digitally signed by a competent authority in the ECI. This should be the official master electoral roll correct up to the time of the last update, and the list of valid voters on any date can be publicly determined from this bulletin board.*

2. ***Bulletin board of transaction records:*** *This should contain*

   (a) *the sequence of all enrolment applications and enrolment records generated by the Electoral Registration Officers (ERO), and the processing information including reasons for acceptance or rejection*

   (b) *the sequence of all change or deletion requests generated, and the processing information clearly citing the reasons for the change or deletion*

For every application of enrolment, update or deletion, the concerned authority in ECI should issue a digitally signed receipt, using which a voter (or her representative)

should be able to search for her application processing status on the bulletin boards. Every entry in the append-only bulletin boards should be time stamped and digitally signed by a concerned competent authority. Any member of the public should be able to verify the authenticity and the integrity of the bulletin boards. Authorised entities (may even be everybody) should be able to carry out search, deduplication and audit operations on the bulletin boards.

2. Privacy of Electoral Records

There is always an inherent conflict between privacy and public transparency. The public web bulletin boards may be made privacy preserving by replacing the clear text messages on the bulletin boards with their hashes(See below)computed using a suitable publicly committed hash function. Publishing the hashes will ensure that the original messages cannot be altered, and access to the unalterable messages may only be given to a restricted set of authorised entities- including representatives of political parties - after authentication.

It is to be noted that there is no theory to substantiate that publishing only image records - as is the current practice of the ECI - protects privacy, and it only serves to make searching the database difficult for an honest operator.

Appendix:

Some basic technical background for secure and searchable append-only public bulletin boards

In what follows we briefly describe the broad technical specifications of such immutable and transparent bulletin boards.

The construction of a public bulletin board is based on two technical concepts from computer science:

1   *Digital signature:* The digital signature s = **sign**(msg,sk) of a message msg is signed using a publicly known function **sign** and a secret key sk, and it can be verified using a publicly known function **verify**(msg,s,pk) which returns either true or false, using the public key pk of the signing authority. A digital signature is non-repudiable and the signature and the integrity of the message can be publicly verified by anybody using the pre-published public key of the signer.

2   *Hash function:* A hash h = H(msg) of a message msg is computed using a hash function H. The hash function is one-way if given a hash value h it is computationally difficult to find a msg such that h = H(msg); and is collision resistant if finding msg_1 and msg_2 such that $H(msg_1) = H(msg_2)$ is computationally difficult. The above two properties guarantee that once the hash of a message is published, it becomes practically impossible to alter the message.

Using the above, a public bulletin board may be realised by requiring that for each bulletin B_i

$$B_i = (m_i, T_i, W_i, h_i, WSign_i, BSign_i)$$

where m_i is the message of the bulletin and must contain a searchable reference to an issued receipt or a certificate, T_i is the writer's timestamp, W_i is the identity of the writer (the sub-authority of ECI that is posting the message), h_i is a hash computed by any suitable publicly committed cryptographically secure one-way and collision resistant hash function H, $WSign_i$ and $BSign_i$ are signed terms as described below. The bulletins must satisfy the following invariant:

1. $h_i = H (m_i \cdot T_i \cdot W_i \cdot h_{i-1})$; where $h_0 = 0$ and $\cdot$ is the string concatenation operator.

2. $WSign_i = SW_i(h_i)$; where $SW_i()$ indicates signing with the private key of the writer.

3. $BSign_i = SB_i (WSign_i \cdot T_i')$; where $SB_i ()$ indicates signing with the private key of the bulletin board, and T_i' is the bulletin board's timestamp at the time of signing, which must be within a bounded small delay after the writer's timestamp.

The above will have protection against insertion, deletion and alteration of messages even if the writers and the bulletin board collude [Heather and Lundin, 2009]. If the writer and the bulletin board maintainer are the same authority (not recommended; the bulletin board may be maintained by an independent agency, or even multiple independent agencies) then it will be necessary for some readers to read whenever there is an update (or at least once in a while), or for the bulletin board to push out (upload) the differential bulletin board content to some neutral place. Concurrency control for multiple writers may be realised by serializing using standard distributed computing protocols.

The requirements outlined above constitute a special case where

1. All writing authorities are sub-jurisdictions of the ECI and there is no possibility of any conflict in the time order of writing records.

2. The requirements of precise timing of reading and writing are relaxed.

3. ECI is the sole authority to decide on the information to be displayed on the bulletin boards, hence there is no need for any distributed consensus for committing content on the bulletin board, as, for example, in a blockchain. In fact, a blockchain based solution where there is only one authority is actually highly insecure because blockchain derives its security from distributed control through multiple mutually adversarial entities.

4. The ECI is obligated to post status reports and decisions on every application it has received, receipt it has issued and registration it has accepted. For every entry that needs to be published on the bulletin board, the ECI has already made a prior commitment by issuing a signed receipt or a certificate, so there is no possibility of omission of records.

The hash chain based public bulletin board protocol should be straightforward to implement. Similar public bulletin boards may also be considered for maintaining applications and processing records of out-of-station voters if and when a remote voting scheme for migrant voters is implemented.

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Criminalisation, Money Power and Elections in India

| Anjali Bhardwaj

Introduction

Credible elections, though not sufficient, remain a necessary condition for any polity to be considered democratic. Maintaining the purity of the electoral process requires a multi-pronged approach, which includes removing the influence of money and criminal elements in politics and ensuring transparency in the functioning of political parties. The first part of this paper addresses the problem of criminalisation of electoral politics, which is manifest in an increasing number of candidates with criminal background contesting and getting elected to Parliament and State Legislative Assemblies. The second part focuses on the influence of money on the sanctity of elections, including concerns regarding the Electoral Bonds Scheme introduced in 2018.

I

Criminalization of Electoral Politics

Criminalisation of politics is one of prominent infirmities of the Indian election system. In his book titled, *When Crime Pays: Money and Muscle in Indian Politics,* Milan Vaishnav notes that the Indian political scenario drastically changed when offenders, who earlier provided backdoor support to politicians, started entering the electoral fray in a process he terms 'vertical integration'.

Enormity of the Malaise :

The extent of criminalisation of electoral politics in India is illustrated by the number of legislators with criminal cases pending against them.

Based on data collected for the period 2014 to 2017, the central government informed the Supreme Court in 2018 that 3,045 criminal cases involving 1,765 MPs and MLAs were pending in various states across the country.

An analysis by the Association for Democratic Reforms (ADR), of the profile of candidates who have contested and won elections since 2009, shows that those with criminal cases pending against them constituted 15 per cent of the total candidates in 2009. This increased to 17% in 2014 and to 19% in 2019. During the same period, candidates with serious criminal cases increased from 8% of the total candidates in 2009 to 11% in 2014 and to 13% in 2019. The proportion of candidates with criminal background who won elections presents an even grimmer picture. While 30% of the winning candidates in 2009 were those who had declared criminal cases against them, such candidates accounted for 34% of the winning candidates in 2014 and 43% in 2019. Of these, MPs with serious criminal cases against them constituted 14% in 2009, 21% in 2014 and 29% in 2019.

The proportion of candidates with criminal background among the winning candidates presents a grimmer picture. While 30 per cent of the winning candidates in 2009 were those who had declared criminal cases against them, such candidates accounted for 34 per cent of the winning candidates in 2014 and 43 per cent in 2019. Of these, MPs with serious criminal cases against them constituted 14 per cent in 2009, 21 per cent in 2014 and 29 per cent in 2019.

In 2019, 30 MPs had cases of attempt to murder against them and 19 had cases of crime against women. MPs with criminal records also make it to the Union Council of Ministers. The ADR report noted that in 2019, 22 MPs facing criminal charges, including 16 with serious cases, were inducted in the Council of Ministers.

The proclivity of voters to choose candidates with criminal backgrounds is often attributed to the lack of information about candidates. In India, however, providing information to voters about the criminal background of candidates does not seem to have resulted in reducing the number of candidates with criminal past in the fray or reducing the number of such candidates getting elected. In a landmark judgment in 2002, the Supreme Court of India made it mandatory for candidates contesting elections to Parliament and State Assemblies to file self-sworn affidavits declaring full information regarding their criminal, financial and educational background. The publishing of affidavits have helped voters know the background of the candidates they are going to vote for.

Several studies show that such candidates are elected because it is perceived that they can offer more protection than the state apparatus. Often even well-informed voters opt for a candidate with a criminal background and provide rational reasons for doing so. This voting behavior needs to perhaps be seen in the context of the economic, social and political changes that have taken place in recent times. Voting for people with criminal antecedents could be an indication of citizens looking for alternate options in strongmen with a criminal reputation.[1]

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1. According to analysts like Milan Vaishnav, the Indian state has not been able to keep pace with growing aspirations of citizens brought about by the changes in political economy in the country

Do Voters Have a Choice?

'Although the response to the question "Where does the government come from?" is almost unfailingly, "We elect the government.", the fact remains that people vote for a candidate out of a slate of candidates chosen by a set of political parties. Very often voters do not have an option of selecting a candidate with a clean background, since political parties give ticket to people with criminal background based on their winnability and ability to spend. The choice of a voter is pre-constrained by the choices made by political parties.

"Red Alert", a study conducted by ADR, defines a constituency as a 'Red Alert constituency' if it has three or more candidates who have declared pending criminal cases against themselves in their self-sworn affidavits. Data for the last several elections shows that on average at least half the constituencies in every election qualify as Red Alert constituencies. More often than not, the three candidates with chances of getting elected are representatives of the major political parties that are strong in the constituency. This effectively leaves voters with no real choice but to vote for a candidate with criminal antecedents. As pointed out by Prof. Lawrence Lessig of Harvard Law School, peoples' choice of representatives is hijacked by those, like political parties and their anonymous donors, who choose and restrict the candidates they can vote for.

Section 8 of the Representation of People's Act, 1951, bans convicted politicians. But those facing trial, no matter how serious the charges, are free to contest elections. The fielding of candidates is a function of their "winnability", and far from denying ticket to criminals, all parties seem to compete in the number of criminals they field. Political parties have been united in their opposition to any law which debars those accused of being perpetrators of heinous offences during the pendency of cases from contesting elections. One way to get around this issue is to speed up the judicial process in the country so that convictions can happen which would in turn prevent candidates with criminal background from contesting. But getting there needs significant institutional reforms.

Several studies show that these candidates are elected because they can offer more protection that what the state apparatus can do. Scholars have pointed out that even well-informed voters opt for a candidate with criminal reputation and provide rational reasons for doing so. This voting behavior needs to be seen in the context of the democratic, social and political changes that have taken place in India in recent times. Scholars like Milan Vaishnav indicate that Indian state has not been able to keep pace with growing aspirations of citizens brought about by the changes in political economy in the country. He indicates that this could be a case of citizens looking for alternate options in strongmen with criminal reputation.

Tackling Criminalization of Electoral Politics

The issue of ushering in electoral reforms – including barring candidates with criminal antecedents from contesting in elections – was referred to the Law Commission of India in 2013. The commission headed by Justice A P Shah observed that disqualification upon conviction in a criminal case has "proved to be incapable of curbing the growing

criminalization of politics". Although the committee did not recommend electoral disqualification at the stage of police filing a report under Section 173 of the Code of Criminal Procedure, it did recommend disqualification to be triggered at the stage of framing of charges by a court. Owing to the potential misuse of this provision, the commission also recommended several safeguards:

- Disqualification only for offences which have a maximum punishment of five years or above

- Charges filed up to one year before the date of scrutiny of nominations for an election to not lead to disqualification

- The disqualification should operate till an acquittal by the trial court, or for a period of six years, whichever is earlier.

- For charges framed against sitting MPs/ MLAs, the trials to be expedited so that they are conducted on a day-to-day basis and concluded within a one-year period. If trial isn't concluded within one year then either the MP/ MLA to be disqualified at the expiry of the one-year period or the MP/ MLA's right to vote in the House as a member, remuneration and other perquisites attaching to their office be suspended at the expiry of the one-year period.

II

Money Power in Elections

One of the fountainheads of corruption in India is political party financing. The problems emanating from the influence of money power in elections are widely recognized and are often at the very heart of complaints about politics.

During elections, candidates of large parties routinely spend several times more than the official stipulated ceiling. Of relevance here is the reported statement of Member Parliament Late Gopinath Munde, who admitted spending 20 times more than the allowed limit on his elections. This phenomenon of making wrong declarations in election expenditure affidavits is not isolated or new. In a Supreme Court judgment in 1994, Justice J. S. Verma wrote:

> The prescription of ceiling on expenditure by the candidate is a mere eyewash and no practical check on election expenses for which it was enacted to attain a meaningful democracy. This lacuna in the law is, of course, for the Parliament to fill lest the impression is reinforced that its retention is deliberate for the convenience of everyone. If this be not feasible, it will be advisable to omit the provision to prevent the resort to indirect methods for its circumvention and subversion of the law, accepting without any qualm the role of money power in the elections. This provision has ceased to be even a fig leaf to hide the reality.

Though there is a limit on expenditure by candidates in India, there are no limits for party expenses. Big parties usually spend more money per constituency than the limits of individual candidates.

The existing pattern of electoral funding in the country compromises the integrity of democracy in multiple ways: it raises the entry barriers to politics; excludes honest candidates and parties; leads to corruption and big money controlling the state; distorts policy making in wasteful, inefficient and anti-democratic directions and; exacerbates polarization. These are not trivial costs for any democracy.

Political financing in India has evolved over the years – from political parties mobilizing funds primarily through memberships and small contributions to corporate funding of parties becoming the norm over time, bringing with it the malaise of black money. In the 1957 Jayantilal Ranchhoddas Koticha vs Tata Iron and Steel Co Ltd judgment, where a proposal by the Tata Iron and Steel Company to make contributions to political parties was being adjudicated, Justice M.C. Chagla had noted:

> …democracy is a political system which ensures decisions by discussion and debate, but the discussion and debate must be conducted honestly and objectively, and decisions must be arrived at on merits without being influenced or actuated by any extraneous considerations. On first impression it would appear that any attempt on the part of anyone to finance a political party is likely to contaminate the very springs of democracy. Democracy would be vitiated if results are to be arrived at not on their merits but because money played a part in the bringing about of those decisions. The form and trappings of democracy may continue, but the spirit underlying democratic institutions will disappear. History of democracy has proved that in other countries democracy has been smothered by big business and money bags playing an important part in the working of democratic institutions and it is the duty not only of politicians, not only of citizens, but even of a Court of law, to the extent that it has got the power, to prevent any influence being exercised upon the voter which is an improper influence or which may be looked at from any point of view as a corrupt influence. The very basis of democracy is the voter and when in India we are dealing with adult suffrage it is even more important than elsewhere that not only the integrity of the representative who is ultimately elected to Parliament is safeguarded, but that the integrity of the voter is also safeguarded, and it may be said that it is difficult to accept the position that the integrity of the voter and of the representative is safeguarded if large industrial concerns are permitted to contribute to political funds to bring about a particular result."

Justice Chagla warned that, "it is a danger which may grow apace, and which may ultimately overwhelm and even throttle democracy in the country." In 1999, more than four decades later, the 170th report of the Law Commission of India, titled Reform of the Electoral Laws noted (paragraph 4.1.6.1) the phenomenon of rampant funding of political parties by big businesses and powerful corporations as follows:

> In the very scheme of things and as pointed out by the Supreme Court in its various decisions, the bulk of the funds contributed to political parties would come only from business houses, corporate groups and companies.

Such a situation sends a clear message from the political parties to big business houses and to powerful corporations that their future financial wellbeing will depend upon the extent to which they extend financial support to the political party. Indeed, most business houses already know where their interest lies and they make their contributions accordingly to that political party which is likely to advance their interest more. Indeed, not sure of knowing which party will come to power, they very often contribute to all the major political parties. Very often these payments are made in black money" (Emphasis added).

A factor that abetted large cash donations and use of black money in political party funding was the provision in the Income Tax Act exempting political parties from disclosing sources of donations of less than Rs. 20,000. In 2010-11, just six national parties had a combined declared income of Rs 700 crore and a whopping 90 per cent were reported as having been received in denominations smaller than Rs 20,000 thus doing away with the requirement to disclose the source of donation. Most of these 'anonymous' donations were large cash donations made by industrialists, corporates and rich individuals, which were 'broken down' and shown as multiple small donations. In 2017, amendments were made to the IT Act reducing the limit from Rs 20,000 to Rs 2,000, which did little to address the problem.

Lack of transparency

The political system in India has traditionally been hostile to the idea of transparency in electoral financing. Political parties zealously guard their internal workings and information about funding from public scrutiny. Although some regulatory mechanisms have been introduced to bring transparency into political funding, including tax exemptions for political parties if they file annual tax returns and tax exemptions for those contributing to political parties under Section 80GGC of the Income Tax Act, the measures have been far from adequate.

There is a clear and urgent need for grea¬ter transparency in the functioning and funding of political parties. In a landmark decision in 2013, the Central Information Commission held six national political parties to be public authorities under the Right to Information (RTI) Act. While the order has not been set aside by any court, political parties have refused to comply with it. In fact, greater secrecy in the funding of political parties has been infused, and peoples' fundamental right to know who funds them has been totally emasculated through the introduction of electoral bonds.

Electoral Bonds

Political parties have opposed any examination of the linkages between their governments' policies and decisions, and the interests of their major donors. When the government announced the launch of a new instrument of political party funding in 2017 to ostensibly ensure greater transparency and eliminate black money from the system, it was hoped that the issue of anonymous financing would be squarely dealt with. However, using the money bill route to bypass the Rajya Sabha, the government introduced regressive amendments to laws, including the Income Tax of 1961, the

Companies Act of 2013, and the Representation of People's Act of 1951 to introduce electoral bonds which allow donors to anonymously donate unlimited amounts of funds to political parties.

Under the Electoral Bonds Scheme, a bond, issued in the nature of a promissory note, can be bought by any Indian citizen or company incorporated in India. The scheme allows parties to receive these bonds without the public, the Election Commission or even the Income Tax Department knowing the identity of the donors. It has legitimised opacity and opened the floodgates for anonymous donations to parties, dealing a severe blow to voters' right to know. People's ability to track donations by big businesses and expose quid pro quo has been completely undermined.

In 2016 and 2017, amendments were made to the Foreign Contribution (Regulation) Act (FCRA), 2010, with retrospective effect to bail out the BJP and Congress, which were found guilty by the Delhi High Court of having received contributions from foreign sources in violation of the FCRA. In conjunction with these amendments, which enabled Indian subsidiaries of foreign companies to make donations to political parties, electoral bonds allow anonymous financing by foreign entities opening Indian elections to the influence of foreign interests.

One of the stated objectives of introducing electoral bonds was to address the problem of black money and large cash donations. Proponents of electoral bonds have argued that since bonds can only be purchased via cheques, demand drafts, direct debit or electronic clearing, they will stem the flow of black money. The problem with this assertion, however, is that it completely overlooks the crux of the problem: the provision of the Income Tax Act under which political parties were exempted from disclosing sources of donations of less than Rs 20,000. Most parties claimed that a majority of their income was received in denominations smaller than Rs 20,000 thus doing away with the requirement to disclose the source of donation. It is an open secret that most of the anonymous donations received by parties were large cash contributions, which were shown as multiple small donations. If the government was serious about addressing the malaise of black money, it should have done away with the provision of non-disclosure of sources. Instead, amendments to the Income Tax Act in 2017 only lowered the stipulated ceiling of anonymous contributions from Rs 20,000 to Rs 2,000. Creative accountants can easily neutralise the impact of a lowered ceiling by multiplying the number of unattributed cash donations by a factor of 10, enabling donors to continue to anonymously pump cash into the system.

In fact, electoral bonds are likely to abet money laundering since the amendments to the Companies Act in 2017 removed the cap of 7.5% on political contributions by a company as a percentage of its average net profits of the preceding three years. This allows for black money to be easily routed through shell companies to purchase electoral bonds, an apprehension also expressed by the Election Commission. Even the Reserve Bank of India flagged this concerns when the Electoral Bonds Scheme was being formulated.

The rationale given by the government for providing anonymity to donors of electoral bonds is to allow donors to use legitimate funds to support political parties by

protecting them against the wrath of rival parties, especially the party in power. In reality, however, bonds create an asymmetry of information in favour of the ruling party. An investigation by a media house revealed hidden alphanumeric numbers printed on electoral bonds, raising the spectre of covert surveillance by the state. In any case, as bonds are issued only through the State Bank of India, it would not be difficult for the party in power to access information about the identity of purchasers and details of bonds sold to them, and match those to deposits in political party accounts. It is no surprise, therefore, that the lion's share of donations through bonds have been cornered by the BJP – it bagged 95% of bonds issued in the first tranche in March 2018 and approximately 60% of bonds sold till March 2019.

Bonds worth nearly Rs 6,500 crore have been sold so far. They have consolidated the role of big money in electoral politics. Information obtained under the Right to Information (RTI) Act shows that bonds with the highest denomination value of Rs 1 crore are the most preferred by donors and constitute 92% of the total value of bonds sold till October 2020.

Electoral bonds militate against every known principle of transparency and lend themselves to use by special interest groups, corporate lobbyists and foreign entities to acquire a stranglehold on the electoral process and governance at the expense of citizens. Petitions challenging the Electoral Bonds Scheme continue to languish in the Supreme Court. The delay by the SC in adjudicating on the matter is inexplicable given the observation by the apex court that the matter gives rise to "weighty issues which have a tremendous bearing on the sanctity of the electoral process in the country."

Expressing its opposition to electoral bonds in the Supreme Court, the Election Commission has contended that they will have an adverse impact on transparency in political party financing and would make it impossible for the constitutional body to ascertain whether donations received are in compliance with the statutory framework governing political parties.

Money 'laundering' by digital means[1]

Innovative mechanisms that could potentially be used to launder money for elections have emerged in the last decade. These include Aadhaar Pay, Universal Payment Interface (UPI) and payment wallets like Paytm. Aadhaar payments require the mapping of Aadhaar numbers to bank accounts, which is maintained by a non-government entity that manages Aadhaar payments, the National Payments Corporation of India (NPCI). Unlike bank accounts, this mapping is volatile and available for manipulation by seeding or deseeding Aadhaar numbers to bank accounts every time before, or after, making money transfers . The payment instructions are not verified by the payer's bankers, nor are the payment receipts verified and confirmed by the payee's bankers. Aadhaar payments, therefore, makes the transacting parties untraceable. Similarly, UPI provides the payer and payee the ability to transact with a virtual private address (VPA) to hide the real name or account number.

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1 . Based on deposition by Dr Anupam Saraph

Paytm allows the loading of "currency" to its app associated with a mobile SIM. Telecom companies have been using Aadhaar numbers to do KYC for issuing a SIM card, which means anyone in possession of Aadhaar numbers (or cards) can generate SIM cards and payment wallets. If a ghost, fake, duplicate or third person's Aadhaar number is used to obtain a SIM card, it would make it impossible to trace the donor. The problem of duplicate and fake Aadhar numbers has been highlighted repeatedly, including by the former Supreme Court Judge P.B.Sawant . The issue came to the fore when the Airtel Payments Bank opened 37 lakh bank accounts that received Rs 167 crore LPG subsidy without any authentication.

The use of these digital mechanisms raises the spectre of them being used as a Trojan horse to launder money and manipulate elections.

Tackling money power in elections

Some of the measures that are required to address the increasing influence of money power in elections are listed below:

Enactment of comprehensive laws for election financing reforms

- The current laws on election expenses must be made more effective. A ceiling should be imposed on expenses incurred by political parties during elections.

- Political parties should be mandated to submit a statement of election expenditure beginning one year before an election is due for the State Assembly or the Parliament.

- Candidates who fail to file their election expenses within the stipulated time should face penalty and barred from taking oath until they fulfil this obligation.

- Political parties and candidates should be allowed to take and spend funds only through bank channels.

Reversal of regressive amendments to laws related to electoral funding

- The retrograde amendments to the FCRA made in 2016 and 2017, enabling Indian subsidiaries of foreign companies to make donations to political parties, must be reversed. A registered political party must not be allowed to accept any financial contribution from any foreign source or company with a view to ensuring that parliamentary institutions and political associations function in a manner consistent with the values of a sovereign democratic republic.

- Amendment to the Companies Act, removing the cap of 7.5% contribution of the company's average net profits in the last three financial years to political parties, must be repealed. The amendment opens the doors for shell companies and cronies to pass on unlimited amount of money to political parties.

Public funding of elections

- The 255th Law Commission Report recommended partial state funding of elections. This should be done through creation of a National Election Fund that draws its resources from the Consolidated Funds of India. It must be managed by an independent authority appointed by the Election Commission of India. At the same time, the offer of public funds must be preceded by reforms such as decriminalization of politics, the introduction of inner party democracy, electoral finance reform, transparency in party funding, putting in place proper audit mechanisms and stricter implementation of anti-corruption laws.

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Whither Enforcement of Model Code of Conduct?

| **Jagdeep S. Chhokar**

The Model Code of Conduct (MCC) was first adopted by the Election Commission of India (ECI) with the agreement of *all* political parties in 1968, to provide a level-playing field to all contesting political parties and to ensure that the ruling party does not get undue advantage because it happens to be in office at the time of the election. The MCC was consolidated and re-issued in its present form in 1991.

The new section VIII, titled *Guidelines on Election Manifestos* describes the process that was gone through before making the changes. The guidelines given by the Supreme Court in its judgment are reproduced in the MCC, then it says that a meeting was held with political parties where there was difference of opinion, then it cites Article 324 and "directs" political parties and candidates that they "shall adhere to" the guidelines.

A plain reading of the MCC shows that most of the provisions, especially the first six, ask the political parties and candidates contesting elections to do nothing more than observe the law of the land during their election campaigns. The key elements are those which refer to the conduct of the ruling party and its members.

Implementation of MCC

The implementation has been a contentious issue. Some of the major controversies pertain to (a) Lack of consistency by the ECI in enforcing the MCC, (b) ECI treating the ruling party with kid gloves, (c) ECI not using its powers under Article 324 of the Constitution.

- **Lack of consistency:** It often appears that the ECI responds differently to what look like similar, if not identical, violations of MCC. Cases of Navjot Singh Sidhu, Mayawati, and Azam Khan, for similar violations, misuse of religion, were treated differently during the 2019 Lok Sabha elections. Same was the case for Amit Shah and the Prime Minister 1[1] . It is such disparities that show the inconsistency in the decisions and actions of the ECI in enforcing the MCC.

- **Special, lax treatment of the ruling party:** This is a very a critical issue because the major raison d'être of the MCC was to provide a level-playing field to all contesting political parties. Dealing with the ruling party with kid gloves negates the very reason for the existence of MCC.

  A glaring instance is the "NaMo TV" during the 17th Lok Sabha election. Neither the ECI nor the Ministry of Information and Broadcasting (I&B), nor the Chief Electoral Officer of Delhi seemed to know where it came from on March 26, 2019, and where it disappeared on May 20, 2019, precisely the day after voting ended in all States on May 19, 2020.

  Another instance involves another party in power. The last elections to the Delhi State Assembly were held on February 08, 2020. The then Chief Minister of Delhi who was also a candidate in the election, visited a temple in central Delhi, on February 07, along with his wife, ostensibly to seek the blessings of the temple deity. It became a major media event and was telecast the whole day on February 07. With polling was to be held the next day, the 48-hours silence period was in force and was violated with impunity.

  That very day, February 07, the Prime Minister had decided to "celebrate" the "successful" signing of the Bodo Agreement which, was signed on January 27, 2020. The celebration was held in the form of a public meeting to be addressed by the Prime Minister at Kokrajhar, a district headquarters but a small town in Assam. And since the Prime Minister was addressing a rally, it also "deserved" to be telecast. This also was a violation of the 48-hour silence period.

- **(Mis) use of the Armed Forces for election campaigning[2] :** One of the most disturbing phenomena in the 2019 Lok Sabha election was the (mis)use of armed forces for election campaigning by the party in power. This started rather early in the election. The Chief Minister of UP, Union Ministers V.K. Singh and Mukhtar Abbas Naqvi made objectionable references to the Armed Forces while campaigning.

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2. Deposition of Major General (Rtd) S.G.Vombatkere

Such actions led to an angry response from the veterans of armed forces. Over 400 veterans of all services--Army, Navy, Air Force—and all ranks, led by the Former Chief of Naval Staff, Admiral L. Ramdas wrote letters to the CEC and to President of India, who is the Supreme Commander of the Armed Forces, expressing their apprehension to the President that "such misuse of the Armed Forces ... would impinge adversely on the morale and fighting efficiency of the serving man or woman in uniform," which, in turn, "could therefore directly affect national security and national integrity."

This dragging of the armed forces into election campaign rhetoric was unprecedented and may set an unfortunate precedent unless it is stopped completely and quickly.

■ **ECI not using its powers:** It is said often that the MCC is ineffective because it has not been passed in Parliament and therefore has no legal standing, and that "The MCC is not really a *model* code but is actually a *moral* code". There have been calls to formally legalise the MCC through legislation passed in Parliament. *What power does ECI actually have*?

To say that the ECI does not have any power under the MCC is not correct. The ECI has *plenary or plenipotentiary* powers drawn from Article 324 of the Constitution of India.

In one Supreme Court judgment, *Mohinder Singh Gill vs. CEC* (1978. 2 SCR-272), the SC declared, "When Parliament or any State Legislature made valid law relating to, or in connection with elections, the Commission, shall act in conformity with, not in violation of, such provisions, but *where such law is silent, Article 324 is a reservoir of power to act for the avowed purpose of not divorced from, pushing forward a free and fair election with expedition...*" (Italics added).

Various decisions of the SC have also declared fair and free elections to be one of the components of the Basic Structure of the Constitution. laid down by the Supreme Court in the 1973 (*Kesavananda Bharati Sripadagalvaru and Others vs State of Kerala and Another*). According to this, while Article 368 of the Constitution does give Parliament the power to amend the Constitution, Parliament does *not* have the power to amend the basic structure of the Constitution. This means that the provision for conduct of free and fair election cannot be changed even by the Parliament.

In addition to Article 324, ECI has power under Clause 16A of *The Election Symbols (Reservation and Allotment) Order, 1968* to either suspend or withdraw the recognition of the political party violating the MCC after giving the party reasonable opportunity of showing cause in relation to the action proposed.

Why does the ECI not use its power?

There are quite a few reasons. As mentioned above, the maximum that the ECI can do to a political party is, according to the Symbols Order, is to "*either suspend… or withdraw the recognition of such party as the National party or…, the State party.*" In

reality, and in practical terms, it is not easy for the ECI to "suspend or withdraw" the recognition of a major political party.

Another reason is a Supreme Court decision of 2002, in the *Indian National Congress (I) Vs. Institute of Social Welfare & Ors* case, which says that while the ECI does have the power to register political parties under Section 29A of the RP Act, the ECI does NOT have the power to de-register political parties.

This has created a very strange, almost bizarre, situation. India is *the only* country in the world where once a political party is registered, it will remain registered till eternity! Political parties know that ECI may do whatever else it likes, it cannot de-register them. The ECI is also acutely aware of this and therefore, shies away from taking really effective steps against political parties and politicians.

These are only *some* of the reasons why ECI shies away from taking action against political parties and politicians. The most fundamental reason for this lies in the Election Commissioners.

Election Commissioners: The Election Commission was a single-member commission till October 15, 1989, when two new Election Commissioners were appointed by the President in addition to the Chief Election Commissioner. Surprisingly, two newly created posts of Election Commissioners were abolished on January 01, 1990. Again, in 1993 two Election Commissioner were appointed. The CEC challenged the appointment in the Supreme Court (*T.N. Seshan Chief Election Commissioner of India etc.vs Union of India & ors*). The court upheld the appointments. government's action in a judgment delivered on July 14, 1995. The Court made significant observations on the working of the Election Commission, and of the ECs:

> *It is a pity they did not try to work as a team. The efforts of (one the ECs) to persuade the other two to forget the past and to get going with the job fell on deaf ears. Unfortunately, suspicion and distrust got the better of them. We hope they will forget and forgive, start on a clean state of mutual respect and confidence and get going with the task entrusted to them in a sporting spirit always bearing in mind the fact that the people of this great country are watching them with expectation. For the sake of the people and the country we do hope they will eschew their egos and work in a spirit of camaraderie.*

Sadly, this was not the last instance of such dysfunctionality. The next episode was at the end of January 2009, when the then CEC recommended the removal of an EC on the ground of alleged partisanship. This matter also went to the Supreme Court but was later withdrawn.

The latest episode: Something not too dissimilar happened last year, in the Lok Sabha elections of 2019. There seemed to be a difference of opinion amongst the three CEC/ECs on complaints for violations of MCC by the Prime Minister and the Home Minister. The dissentions were not recorded in the minutes of the meetings, and that led to further disagreements.

Attempts to get the copies by filing appeals to the Central Information Commission (CIC) were stone-walled. The matter did not end there. A few months after the elections were over, what appeared to be something like a witch-hunt started against the dissenting EC and his family. At the time of writing, this dissenting EC, who would have become the CEC next year, had been offered a very senior position in an international multilateral organisation outside the country. This was referred to by some commentators as being "kicked upstairs" and as an "honourable exit" by some.

What can, and should, be done

The *single most important reform* that is required to be done to improve the electoral processes is to change the process of appointment of the Chief Election Commissioner (CEC) and the Election Commissioners (ECs), and their service conditions.

This is because it is widely accepted that in any institution, it is the people who matter. This has been said by two of the leading makers of modern India, B.R. Ambedkar and Rajendra Prasad. The former, in his final speech in the Constituent Assembly on November 25, 1949, said, "*I feel, however good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However bad a Constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot*"

Similarly, Rajendra Prasad, in his last speech in the Constituent Assembly on November 26, 1949, said, "*the welfare of the country will depend upon the way in which the country is administered. That will depend upon the men who administer it…. If the people who are elected are capable and men of character and integrity, they would be able to make the best even of a defective Constitution. If they are lacking in these, the Constitution cannot help the country. After all, a Constitution like a machine is a lifeless thing. It acquires life because of the men who control it and operate it, and India needs today nothing more than a set of honest men who will have the interest of the country before them.*"

Technically, the CEC and the ECs are *appointed* by the President but, *de facto*, the appointments are made by the 'government'.

The most critical element in *service conditions* is the process of removal of the incumbent from the position. While the CEC can be removed only through a process of impeachment like a Supreme Court judge, ECs can be removed by the President at the recommendation of the CEC. This obviously makes the ECs feel insecure in their tenure.

The appointment of CEC and the ECs being one *exclusively by the government of the day*, can, and often does, create doubts in the minds of people at large about the neutrality of the CEC and the ECs, and consequently, the neutrality of the Election Commission itself. The confidence of people about elections being free and fair also gets shaken.

Insecurity of tenure for the ECs can prevent the ECs from being objective in dealing with sensitive issues, particularly those involving high functionaries of the government and major political parties. They may not be able to take decisions on such issues without fear or favour.

Instead of being appointed exclusively by the government, the recommendations for *appointment should be made by a collegium* in which the opposition parties are also involved. Such a change is long overdue and should be done as soon as possible.

For security of tenure, removal of ECs should be possible only after impeachment like that for a Judge of the Supreme Court.

Both the above actions have been recommended by the Law Commission of India in their 255th report on Electoral Reforms, submitted in March 2015.

Why have these changes not happened?

No government, irrespective of the party in power, has been in favour of making these changes. The government submitted an affidavit in the Supreme Court in April 2018, opposing a PIL which had demanded that the process for dismissal of an EC should be the same as that of the CEC. A similar situation exists about the appointment process. Governments are not willing to make these changes because the current procedures given the government power over the ECs and no government wants to give up that power.

Conclusions

This note is about the MCC and not about the CEC and the ECs. The conclusions regarding the MCC can be summarised as under.

Innumerable recommendations have been made about electoral reforms in general, and the MCC in particular. The Law Commission of India did this in their reports in 1999, 2014, and 2015. The ECI itself sent 22 proposals in July 2004, followed by 47 proposals in December 2016.

In conclusion, there are only two recommendations for the MCC, only one out of which requires amending the Constitution.

First, DO NOT make any changes in the MCC.

Second the Constitution needs to be amended (i) to change the process of appointment of the CEC and the ECs, so that the appointments are recommended by a collegium which involves the opposition and the judiciary, instead of being recommended exclusively by the government and (ii) Provide the same constitutional protection to the ECs as is enjoyed by the CEC.

Media Helps Rulers While Election Commission Looks the Other Way

| **Paranjoy Guha Thakurta**[1]

Introduction

India's mediascape has changed drastically in less than a decade. These changes have become even more dramatic after the onset of the Covid-19 pandemic and the accompanying economic recession. Printed newspapers and periodicals are shutting down faster than ever before. Advertising flows from private corporate entities to the media have come down drastically. Journalists are being thrown out of their jobs or asked to accept deep salary cuts and expenditure on reportage, research and investigations have shrunk significantly.

A very substantial section of the mass media in the country has become excessively supportive of the ruling Bharatiya Janata Party (BJP). After Narendra Modi became Prime Minister of India in May 2014 and especially since he was re-elected five years later for a second term, much of the so-called mainstream media has become uncritical of the ruling dispensation. It can even be argued that Modi's political success has been aided considerably by a favourable "fourth estate."

The environment for dissemination of information has undergone a major transformation with the exponential growth in the use of the internet across the world, and also in India. Two sets of figures will illustrate

1. with inputs from M G Devasahayam

this point as far as this country is concerned. Almost everywhere in India, there are more SIMs (subscriber identity modules) in mobile cellular phones than human beings––according to the Telecom Regulatory Authority of India (TRAI), at the end of January 2020, the number of "subscribers" had reached 1.18 billion, of which the number of wireless subscribers stood at over 1.17 billion. The current population of India is estimated at around 1.35 billion.

The second set of numbers is about the social media. The Facebook-owned application, WhatsApp, claimed it had at least 400 million users in the country in July 2019. The number of persons eligible to vote in India stood at around 900 million during the Lok Sabha elections that concluded in May 2019. These numbers highlight the importance of mobile internet and social media in India at present. Not surprisingly, the social media has become as important (if not, more important) than the traditional "mainstream" media (daily newspapers, periodicals, radio and television) in propagating and disseminating facts, information, opinions, half-truths and untruths that seek to influence political preferences and electoral outcomes.

Whereas a small section of the mass media in India continues to play an antagonistic or adversarial role by questioning those in power and authority and highlighting instances of corruption in high places, a much larger section of the media appears keener on attacking the political opponents of the ruling regime. Why? With advertising and sponsorships from privately-owned organisations not increasing (and after the Covid-19 pandemic shrinking rapidly), the dependence of the media on advertising support from the Union government and state governments has grown commensurately. This phenomenon has ensured that politicians in power ensure that media organisations are pliant and toe the "official line" by not putting out information and views that go against the interests of those in power.

As for the social media, it can be said without fear of contradiction that supporters of the Hindu nationalist, right-wing BJP have been far more adept than supporters of other political parties in using WhatsApp, Facebook and other digital platforms–– that are part of bigger international conglomerates dominating information flows––to spread disinformation and hate speech that demonises Muslims and those belonging to other minority communities. Critics of the government and the ruling party are attacked by well-coordinated "armies" of trolls.

The rise of Islamophobia, for which the media has been responsible to an extent, has helped further the agenda of the ruling party and its ideological parent, the Rashtriya Swayamsevak Sangh (RSS). Perhaps never before in the history of India after the partition of the subcontinent in 1947 has such a large section of the media so aggressively whipped up communal sentiments and even mob frenzy that has undoubtedly benefited the BJP and its alliance partners before, during and after elections.

Political Propaganda by Media

It is not as if the use of falsehoods in political propaganda before and during elections is a new phenomenon. Far from it. What is new, however, is the sheer scale and speed with which such partisan information has been (and still is being) spread thanks to the growth in the use of modern information technology, including the use of mobile internet services that have become cheaper than ever before. The "new media" emphasises "opinions" over "facts" and this has been taken advantage of by the BJP and its supporters, even as they know that untruths and lies travel faster than factually correct information.

The government of India, through the Secretary, Ministry of Home Affairs, Ajay K. Bhalla and the Solicitor General of India Tushar Mehta told the Supreme Court on March 31, 2020. that the media should stop "creating panic" by disseminating fake news about the ongoing crisis before first ascertaining from the government "true" and "factual" information. That evening, a bench of the Supreme Court of India headed by the Chief Justice of India S.A. Bobde and including Justice L. Nageswara Rao observed that "the migration of large number of labourers working in the cities was triggered by panic created by fake news that the lockdown would continue for more than three months." The court urged the media not to disseminate "unverified news" capable of causing panic, adding: "We do not intend to interfere with the free discussion about the pandemic, but direct the media (to) refer to and publish the official version about the developments."

But what happens when the government itself puts out falsehoods? The same day (March 31, 2020), the government claimed to the Supreme Court that there was "not a single" migrant worker on the country's highways––a brazen lie if ever there was one. This untruth was called out by the media at a time when India witnessed the biggest internal migration in recent memory.

Many believe that the media in India is currently in a situation that is comparable to the Emergency period in the mid-1970s when Indira Gandhi's government muzzled the press. While the critics of the government were at that time summarily detained, what is happening at present is a slow and steady squeeze on the finances and the autonomy of much of the media––thereby diminishing its independence and ability to hold accountable those in positions of power and authority, check abuse of discretionary power and contribute to greater transparency in public life.

Failure of Election Commission

There is clear evidence that the Election Commission of India (ECI) failed to curb fake news online before the 2019 elections. Caught in the midst of a high-stakes battle on the future of regulating the internet, the Commission made feeble attempts to regulate online propaganda, political campaigning, and fake news prior to the Lok Sabha elections, a report has revealed. The Commission, it can be argued, failed miserably in its endeavour in this regard.

According to a report prepared by a committee that was set up by the Election Commission itself, the BJP was the only political party, among many the committee consulted, whose representatives categorically opposed a ban on electoral advertising on all media during the 48-hour "silence period" prior to polling that is mandated in the Model Code of Conduct.

The committee had examined the critical gaps in the regulation of political advertising and propaganda. It looked at the provisions in Section 126 of the Representation of People's Act (RP) Act, 1951 – which defines a "silence period" starting 48 hours prior to the conclusion of polling in any particular area, during which all political campaigning is supposed to cease. The committee was supposed to identify lacunae and suggest amendments to the law to improve its effectiveness. In particular, the committee was tasked to examine the issues raised by the proliferation of political propaganda on social media platforms, and to work towards developing a regulatory framework.

The committee, set up by the ECI in January 2018, comprised several officials of the Commission itself, together with representatives of the Ministries of Information & Broadcasting, Law & Justice, and Electronics & Information Technology. In the panel were representatives of the quasi-judicial Press Council of India (PCI) and the self-regulatory organisation of private television news channels, the News Broadcasters Association (NBA). During the consultation process over a series of meetings that took place through 2018, the committee invited the views of the country's national and state political parties, the Internet and Mobile Association of India (IAMAI) and social media companies, Facebook, WhatsApp, Twitter, and Google. Its report was submitted to the ECI in January 2019. But the contents of this report were not known till 12 July (more than six weeks after the election results were declared on 23 May) weeks after it was obtained through a right to information (RTI) application by Srinivas Kodali, an independent researcher and analyst based in Hyderabad, who then made it public.

Guidelines and Codes

On 5 March 2019, the election dates were announced and the Model Code of Conduct (MCC) came into effect. A fortnight later on 19 March, the ECI called a meeting of representatives of social media and other online "intermediary" companies, following which, the commission issued a set of guidelines for social networks and updated an application for citizens to report violations of the MCC. The ECI committee's report made it clear that the IAMAI's code of ethics was derived entirely from the recommendations made by the committee and was essentially a list of measures suggested by the IAMAI itself to the committee. The committee was functioning during a period that witnessed high-profile battles among different stakeholders in the internet space over proposed changes to the Indian law on online intermediaries.

ECI's set of guidelines consisted of the following suggestions:

1. Intermediaries should voluntarily undertake information, education and communication campaigns to build awareness for their users about unlawful conduct during election and in particular, during prohibited period of 48 hours.

2. Intermediaries should work with the ECI to evolve a notification mechanism by which the ECI may notify the relevant platform of potential violations of Section 126 of the RP Act. The ECI shall appoint an officer as the designated officer to liaise with the intermediaries.

3. Intermediaries should open a special grievance redressal channel for the ECI and appoint dedicated persons/teams during the election period to interface with and take expeditious action upon receipt of an order from the ECI.

4. Intermediaries should send a report to the ECI on the measures taken by them to prevent abuse of their platforms. Publicly available transparency reports that detail the actions taken by intermediaries on content blocking, could be one form of such regular reporting as they are updated frequently to improve transparency and ensure accountability.

5. No intermediary shall host any political advertisements without the prior approval of an ECI appointed Media Certification and Monitoring Committee (MCMC) and should endeavour to deploy their political advertisement transparency tools in India. They must facilitate transparency in regard to political advertisements by maintaining a repository of political advertisements with information such as the sponsor, expenditure, and targeted reach of such content in an aggregated manner.

6. Intermediaries must commit to facilitating transparency in political advertisements by clearly distinguishing/labelling political advertisements, including utilising their pre-existing labels/disclosure technology for advertisements in general.

7. The IAMAI should coordinate with intermediaries and should periodically monitor the cases of violation and promptness of the action taken by the intermediaries.

8. The IAMAI may be asked to setup a monitoring committee to periodically study the actions of intermediaries with regard to their conduct regarding election matters.

On 20 March, the IAMAI put out a "voluntary code of ethics" that was intended to "safeguard (social media platforms) against misuse to vitiate the free and fair character of the 2019 general elections." This Code was broadly in line with the ECI's set of guidelines issued the previous day.

Violation of Guidelines and Codes

Despite these guidelines and codes ECI did not take note of the many media violations – particularly by the ruling party. This caused a great deal of concern to the public. The most blatant violation of this was the opening of a new channel called Namo TV which continuously telecast speeches and events about the Prime Minister Narendra Modi. Namo TV had, strangely, neither obtained permission from the Information and Broadcasting Ministry to go on air nor had it complied with the many regulations necessary to start a new channel. Even though the ECI ordered the channel to be closed, Namo TV continued to telecast almost until the end of the elections.

There were other violations as well: a programme anchored by actor Akshay Kumar centred on the PM's unofficial persona, which was telecast by several TV channels while the elections were underway, giving the PM's campaign an undue edge over those of others; the media attention given to the PM's meditation in a cave in Kedarnath, even while the last phase of the polling was going on was another such instance. None of these expenses have been added to the PM's electoral expenses as laid down in the election rules. If only ECI had acted as per the letter and spirit of Article 324 of the Constitution, and its codes and rules to conduct free and fair election it could have determined the total expenses incurred in all these media extravaganza and added this amount to the election expenses of the beneficiary of this hyper-propaganda rendering him liable for disqualification!

New revelation on ECI's media management

On 23 July, 2020 Saket Gokhale, a Right to Information activist made a revelation that one Devang Dave, the national convener of the Bharatiya Janata Party's (BJP) IT cell, was given the contract to conduct voter awareness campaigns for the 2019 Assembly elections in Maharashtra despite an obvious conflict of interest. He said that the Chief Electoral Officer employed a company called Signpost India Pvt Ltd for its publicity work. This and another company called Social Central had a common registered office address. Social Central runs Facebook pages such as "I Support Narendra Modi" and "Fearless Indian". Managing director of Social Central is Devang Dave.

Dave's social media firm shows the Chief Electoral Officer, Maharashtra, as a "client" on its website, http://www.socialcentral.in. The agency also lists the BJP as a client and a few other government agencies as well. The ECI has taken cognition of Gokhale's revelation and has asked the State's Chief Electoral Officer for a report.

Chief Electoral Officer of Maharashtra has not denied the appointment of Signpost, but has hinted that it was probably done by the Directorate General of Public Information and Relations to whom a reference was made in this respect. Devang Dave confirms the appointment and says that the work assigned by Election

Commission to Signpost was after following due process and there was no illegality whatsoever.

There may not be illegality per se, but the question is whether ECI has functioned in a partisan manner in Maharashtra and there could be similar cases in other states. This has huge bearing on the fairness and integrity of Parliament Election-2019.

Summing-up

On 5 April 2019, a statement was issued as an outcome of collective reflection and a consultative process involving a number of civil society organisations and retired civil servants including two former Chief Election Commissioners of India, which found fault with the ECI's efforts to combat the dangers of misinformation and unaccounted mass campaigning via social and other media. The statement pointed out that the entire process had been conducted without any transparency, public inputs or civil society engagement.

The statement issued an appeal to political parties to "recognise the threat of money power in the elections and evolve a consensus to enact a legislation to cap the expenditure of political parties in elections." To the ECI, the statement appealed that it monitor compliance of spending by political parties, ensure disclosure by political parties on their Information Technology cells, contractors and advertisements to the ECI, ensure disclosure of all digital spending during the election campaign by political parties and candidates to the ECI.

The statement also called for the ECI to conduct an independent audit of the declaration process for political advertisements, suggesting specific steps towards such an audit. It also called for the creation of a nodal department within the ECI to address the "growing threat of fake news" and for the ECI to ensure that online platforms are not used to target communities on the lines of caste, religion, ethnicity, and linguistic identity, or in any other way that violates the MCC.

Procrastination, silence and inaction characterized ECI's responses even to serious violations of media code and guidelines, particularly by the ruling party! An irretrievable damage to electoral integrity has been done!

5

Election Commission's Partisan and Controversial Functioning

| Sanjay Kumar

Introduction

For much of India's post-independence history, the Election Commission of India (ECI/EC), entrusted with the main task of administering and regulating the electoral space and for carrying out a constitutional mandate of free and fair elections, has largely enjoyed high credibility and trust among people and evoked admiration in the rest of the world for successfully managing to conduct the biggest electoral exercise on earth. Since 1950, the Commission, operating under the authority of the Constitution as per Article 324 and the Representation of People's Act, has overseen the conduct of 17 national elections and over 360 state elections along with administering elections to the Rajya Sabha, the State legislative councils and the offices of the President and Vice President. The Election Commission of India website in fact proudly mentions the fact that during her visit to India in 2011, then US Secretary of State Hillary Clinton had described the Commission as the **"global gold standard"** in election management. However, of late, this respect enjoyed by the Election Commission has come under a cloud due to numerous allegations made against India's apex electoral body of bias and partisanship before, during and after the conduct of elections. Ever since the Narendra Modi-led BJP government assumed office in 2014, there have been repeated accusations made by concerned citizens and Opposition parties against the Election Commission for

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favoring the ruling party through its actions and for not acting against or ignoring electoral violations done by it. Long seen as a 'referee institution' and praised for its strict handling of elections especially since the time of T.N. Seshan's tenure in the 1990s, the Election Commission of India has been in recent times charged with bending to the diktats of the political executive and functioning at the behest of the BJP-led government, be it in the announcement of election schedule or for selectively overlooking violations of election codes and laws that involve senior BJP leaders and politicians.

In this paper, in order to highlight the gravity of the situation (that is, the alleged partisanship of the Election Commission), we would be first citing extensively many of the allegations that pertain to the Commission not being able to ensure a level playing field or acting in a biased and subservient manner, prior to the elections, during the elections as well as after the elections. Even though there have been numerous allegations/instances, we will be restricting ourselves to what appear to have been the major ones. This will however exclude the controversies surrounding the alleged manipulation of electronic voting machines and campaign financing and expenditure as those are themes/matters that deserve entire papers in themselves. Thereafter we shall offer a few suggestions about what could possibly be done to fix the eroding credibility of the Election Commission.

ECI's Pre-Election Functioning

Controversies surrounding the announcement of dates

One of the repeated allegations about the ECI's pre-election functioning has been with respect to the announcement of dates for elections. There have been at least five instances of the Election Commission being either accused of delaying the announcement of election dates to suit the BJP or of having shared the dates with individuals close to the ruling party prior to their announcement or having withdrawn its announced dates to suit the ruling party.

i) Election schedule related accusations were first made against the EC during the **Gujarat assembly elections of 2017**. On October 12, 2017, while the EC announced the voting and counting dates for the Himachal Pradesh Assembly elections (a state ruled by the Congress party back then), it did not announce the voting dates for the Gujarat Assembly elections (a state ruled by the BJP) even though the two elections were to be held in the same period and were to have the same Counting day. While it was announced that Himachal Pradesh would vote on November 9 (owing to winter setting in early in the State) and its votes will be counted on December 18, for Gujarat the only announcement that was made was that its voting schedule will be announced separately but that its assembly elections will be held before December 18 thus suggesting that the counting day for Gujarat would be the same as that of Himachal Pradesh. Eventually, the EC

declared the election schedule for Gujarat on October 25, announcing that the State would vote in two phases on December 9 and 14. This delay allowed the BJP governments at the State and the Centre a full two weeks to announce a slew of schemes and development projects as the Model Code of Conduct or MCC (set of guidelines for parties and candidates on what is/isn't permissible behaviour during the election period in order to ensure a fair election) had not kicked in the State. What made the decision to announce the election schedule for the two States separately even more curious is the fact that announcements of dates for the 2012 elections in both the States had been done on the same day (October 3, 2012). Moreover, even back then the voting dates of both the States had been a month apart (November 4, 2012 in Himachal Pradesh and December 13 and 17 in Gujarat), and yet the MCC in both the States had come into force on the same day.

The delay in 2017 and the separate declaration of election dates for the two States led opposition parties to allege that the ECI was pressured by the ruling party to grant it extra time to announce schemes for Gujarat, the State to which the Prime Minister belongs. Some of the announcements made in this two-week period between October 12 and 25 by the State and Central governments were - interest-free agriculture loan of up to Rs 3 lakh to farmers, a minimum support price of Rs 900 for groundnut, Rs 100 bonus on 20kg of cotton, formation of 16 new Gujarat Industrial Development Corporation (GIDC) units, inauguration of passenger service from Ghogha to Dahej by Prime Minister Narendra Modi himself, pay revision for fixed salaried workers, GST waiver on micro irrigation equipments, 50% hike in incentives given to ASHA workers, appointments to vacant posts of various boards and corporations in a bid to woo communities, Rs 4,337-crore Barrage project to solve the issue of drinking water for Bharuch, and an Antyodaya Express train connecting Surat and Bihar's Jaynagar. Eventually, when the votes were counted on December 18, the BJP ended up winning the election by a narrower margin in Gujarat than before and the role played by each of these announcements in helping it achieve this victory cannot be overlooked. It is also important to point out here that Chief Election Commissioner (CEC) AK Joti who announced the schedule for the Gujarat elections was the Gujarat's chief secretary when Prime Minister Modi was the state's chief minister and as an IAS officer he held important positions in the Gujarat government.

ii) The second instance, although perhaps not as grave, of the EC being accused of collusion with the government about election scheduling came during the **Karnataka assembly elections of 2018**, the dates for which were announced on March 27. Fifteen minutes before the scheduled announcement of the dates by the ECI in a press conference,

the 'dates' were shared in a tweet by the BJP's IT cell head Amit Malviya, setting off a big controversy and allegations of a leak. It later also emerged that the Congress's social media in-charge in Karnataka had also put out a similar tweet at around the same time. While both tweets had the date of voting (May 12) right, they got the date of counting wrong (May 18, instead of May 15). When called out by a journalist, Malviya said that his source of information had been a TV channel. CEC O.P. Rawat described the whole incident as a "very serious issue". He said that while people can conjecture, since information had been "leaked", the EC would probe the matter and take "stringent action" both "legally and administratively". The EC asked a group of senior officials to investigate the leak and report back to it within a week. In its report on April 12, the committee noted that the private TV channel that was attributed as the source of the tweets had stated that it had accessed the details of the poll schedule from informed sources and, given that the information was not entirely accurate as it got the date of counting wrong, "the alleged leak was not a leak and was merely speculation."

iii) The third instance of the EC facing an accusation of announcing election dates as per the government's liking came in **October 2018**. On October 6, the EC had called a press conference at 12.30 pm to announce election dates for five states -- **Rajasthan, Madhya Pradesh, Chhattisgarh, Mizoram and Telangana.** The presser however was postponed later and rescheduled to 3.00 pm. The Congress and other Opposition parties such as AAP alleged that the conference was delayed due to the pressure put by Prime Minister Narendra Modi who was scheduled to address an election rally at 1 pm that day in Ajmer in Rajasthan. The opposition accused the EC of facilitating the rally of the Prime Minister before the MCC kicked in. Eventually, the rally which was also attended by then State Chief Minister Vasundhara Raje witnessed the announcement of free electricity for farmers.

iv) The fourth instance of a controversy around the announcement of the election dates came during the **Lok Sabha election of 2019** when the EC was once again accused by Opposition parties, particularly the Congress, of delaying the announcement of the dates. On March 7, 2019, the opposition questioned the delay arguing that in 2014 the dates for the election had been declared on March 5. It thus insinuated that the EC was working in tandem with the Centre by allowing the Modi government an extended time to announce pre-election sops and schemes. The EC in response stated that in 2014, the last date of delivering results for General Elections was May 31 and the poll schedule was announced on March 5, and that this time since the last date to deliver results for General Elections was June 3 hence they had enough time to declare and thus there was no delay on their

part. The EC eventually announced the dates on March 10. In these first ten days of March prior to the announcement of the election dates, the Union Cabinet took as many as 30 decisions that ranged from allocating Rs 31,000 crore to power-sector projects located in the electorally crucial states of UP and Bihar to sanctioning 50 new Kendriya Vidyalalayas. During this period Prime Minister Modi also inaugurated and in many cases re-inaugurated development projects in many States. He launched projects in Tamil Nadu, Uttar Pradesh, Gujarat, Maharashtra, Karnataka, Sikkim, Arunachal Pradesh and Tripura. At many of these events, he even used the government platform to make a political appeal, asking voters to bring his party back to power and in some cases directly attacking the Congress. Also, remarkable during this pre-election schedule announcement period was the government's last minute use of ordinances, six of which were promulgated in the two weeks before the announcement of the dates. One of these ordinances involved the amendment of the Aadhaar Act to allow for private companies to use the biometric identity for verification, even though the government had failed to get the legislation passed in Parliament just weeks earlier during the Budget Session. Another ordinance restored the 200-point roster for reservation in faculty jobs in higher education thus treating the college or university as the unit for reservation in teaching posts. This ordinance nullified a Supreme Court verdict and the 13-point roster introduced by the UGC in March 2018 that treated each department as a unit for reservation. The ordinance was seen as an attempt to placate the teaching community, many among whom had opposed the 13-point roster on the grounds that it would lead to a fall in the number of Scheduled Caste and Scheduled Tribe teachers in university faculties.

v) The fifth major controversy related to the ECI announcing dates was with respect to the announcement and then deferment of the dates of the **Karnataka by-elections**. On September 21, 2019, the Election Commission announced the schedule for bypolls in 15 assembly constituencies of Karnataka along with 49 other assembly by elections across 17 States and Union Territories. The date of polling and counting for all the by-elections were to be the same as those for assembly polls in Maharashtra and Haryana, that is 21 October and 24 October, respectively. However, just about a week later, the EC went back on its own decision and deferred the Karnataka bypolls to December 5 arguing that the plea of the 17 disqualified rebel Congress and JDS MLAs in the Supreme Court challenging the Speaker's decision of disqualifying them (which had necessitated the bypolls) was being heard and a final order was pending. The EC's decision came after the apex court said it would be better if the pleas filed by the disqualified MLAs were decided first since virtually two-third arguments in the

matter were already over. The EC's about turn was criticised strongly by the Opposition. The Congress accused it of functioning like an "agent of BJP" and termed its move to defer bypolls to as "arbitrary." The party's Karnataka unit also claimed that this was the first time in the country's history, that the EC had cancelled elections after issuing notification without giving any reason. Eventually, the Supreme Court upheld the disqualification of the rebel MLAs but allowed them to contest the bypolls. The BJP won 12 of the 15 seats.

Defiance on voter list irregularity allegations

Another aspect of the EC's pre-election functioning that has been contentious is with respect to alleged discrepancies in the voter list. In **August 2018**, months before the **Madhya Pradesh and Rajasthan elections**, Congress leaders Kamal Nath and Sachin Pilot had separately petitioned the Supreme Court alleging the presence of duplicate voters in the voter lists of Madhya Pradesh and Rajasthan, respectively. This petition came just two months after the Congress had submitted a complaint to the EC alleging that there were 60 lakh duplicate voters in the Madhya Pradesh electoral roll. Mr. Nath's petition sought from the SC a direction to the ECI to be transparent and provide the draft voter lists of Madhya Pradesh in the editable Word format instead of the non-editable PDF format claiming that voter lists in the Word format made it possible to search/verify names through the Ctrl-F option and that they had been earlier made available in the Word format in Rajasthan, and during the 2018 Karnataka assembly elections and even at the time of the 2013 Madhya Pradesh assembly elections. The ECI in response said that they had received complaints of voter profiling and therefore a conscious decision was taken to provide the draft list in PDF format without any pictures. It also said that the publication of the draft electoral rolls of Rajasthan in Word format on the CEO's website was an "inadvertent error" and in contravention of rules and that the Rajasthan CEO had been consequently replaced on September 3 for this serious lapse. In early October, the EC mounted an even more aggressive posture in the case accusing Mr. Nath of using fabricated documents sourced from a private company to make his case and malign its image. The Supreme Court eventually dismissed both the petitions. Nath's petition had also sought the apex court's intervention demanding a direction to the ECI regarding compulsory cross-verification of Electronic Voting Machine (EVM) vote count with the Voter Verifiable Paper Audit Trail (VVPAT) in the Madhya Pradesh polls.

ECI's Election-Time Functioning

Not only has the ECI been accused of acting in a suspect manner before elections as evidenced above with respect to the scheduling/timing of elections and non-transparency in dealing with voter list irregularity allegations, but it has also been charged with not maintaining a level playing field during the campaigning period,

especially with respect to ensuring compliance with the **Model Code of Conduct**. This allegation is particularly significant as the period when the Model Code of Conduct is in force is considered to be a special time or an exceptional period when the Election Commission can wield considerable power over the political executive.

The Model Code of Conduct was framed in 1968 in consultation with political parties in order to ensure a minimum standard of conduct by all competing parties during elections. The code, known as 'minimum code of conduct during election propaganda and campaign', was a buttressed version of the norms of behaviour during election time that was drawn up by the Kerala government before the elections of 1960. It was further strengthened in 1974 and then thoroughly revised in 1979 after further consultation with various political parties on the eve of the 1980 national elections with one full part on the role of the party in power at the Centre and in States. In the 1980s although the Election Commission made a proposal to the Union Government that the provisions of Model Code, particularly the ones dealing with ruling parties, should be provided statutory sanction, however, no law was passed in the Parliament. During the 1991 national election, the Election Commission took the stand that the Model Code came into operation right from the day the election schedule was announced by it. This led to disagreements between the Commission and the Central Government and some of the State Governments. The Governments contended that the Model Code became operational only when the formal notification of election was issued. The matter even went to court on two occasions and an agreement was finally reached in 2001 that the Model Code would come into force from the date the EC announces the schedule for any election, however such announcement shall not ordinarily be made more than 3 weeks in advance of the date of notification of that election. It was also agreed that the inauguration of any completed projects or the laying of foundation stone of new projects may be done by the civil servants instead of ministers/political functionaries so that public interest may not suffer because of the Model Code being in force.

The MCC contains eight parts - Part I lays stress on certain minimum standards of good behaviour and conduct of political parties, candidates and their workers and supporters during the election campaigns; Parts II and III deal with the holding of public meetings and taking out processions by political parties and candidates; Parts IV and V describe as to how political parties and candidates should conduct themselves on the polling day; Part VI urges political parties and candidates to bring their complaints to the notice of the observers appointed by the Election Commission; Part VII deals with the parties in power. This part is, in fact, the heart of the Model Code, which deals with several issues relating to Government and its Ministers, such as visits of Ministers, use of Government transport and Government accommodation, announcements of various schemes and projects etc. Part VIII regulates the issue of election manifestos. It states that election manifestoes shall not contain anything repugnant to the ideals and principles enshrined in the Constitution and further that it shall be consistent with the letter and spirit of other provisions of Model Code.

Even though the MCC does not have any legal sanctity and the EC itself is now averse to giving it any statutory backing since any violation of MCC warrants a quick decision which may not be possible if the matters are taken to the courts, the EC did become more proactive and assertive during the first decade of this Century in ensuring its compliance. One of the most famous recent instances of such an assertion was during the 2009 Lok Sabha election when the EC took suo moto cognisance of two highly communally charged speeches delivered by BJP leader Varun Gandhi and directed the CEO of Uttar Pradesh to file a criminal case against Gandhi under the provisions of the Indian Penal code and Section 125 of the Representation of People's Act (RPA) 1951 (promoting enmity between classes in connection with elections). Infact, other than censuring parties and candidates for violating the MCC, the EC also has at its disposal the RPA 1951, which specifies in detail corrupt practices and the electoral offences and punishments prescribed for them. Under RPA, 1951, the power to decide election disputes vests in the high courts with the right to appeal to the Supreme Court. While election petitions under the RPA can only be made after the election process is over, certain provisions of the MCC can be enforced by invoking the Indian penal and criminal codes and other laws to book offenders during the electoral process. Moreover, the Supreme Court has held that where the enacted laws are silent or make insufficient provisions to deal with a situation in the conduct of elections, the ECI has the powers under Article 324 of the Constitution to act in an appropriate manner.

However despite these plenary powers vested in the EC, recent years have been replete with instances/examples of the ECI failing to keep a check on political parties, particularly the BJP that rules at the Centre and in many states from violating the MCC and this has seriously harmed its reputation and standing.

Here are a few instances from the last few years where violations of the MCC were alleged by the Opposition and the civil society and yet the EC either did not act or even if it did its response was found wanting/too mild.

The run-up to the **2019 general elections** had seen several 'dubious' incidents that potentially violated the MCC. In fact so bad was the situation in fact that it had forced as many as 66 former bureaucrats to write to the President of India on April 9, 2019 to express concern over the working of the Election Commission.

1   **NaMo TV**, a TV channel that carried Prime Minister Narendra Modi's rallies live and broadcast other promotional material of the BJP, made its way into several DTH and cable TV platforms on March 26 as a free-to-air service, just before the start of the Lok Sabha elections. Despite complaints against it, it continued to be on air throughout the one and half month period of elections and then mysteriously went off air on May 20, a day after voting had ended in all States. In fact, when the issue of NaMo TV was brought to the notice of the EC soon after it started being broadcast, the EC merely sought clarification from the Information and Broadcast ministry which in its response stated that NaMo TV was an advertisement based platform, the expenses

of which were borne by the BJP. The ministry further clarified that NaMo TV wasn't a registered channel that needed permission to air. To this the EC directed the Delhi Chief Electoral Officer to get the contents of 'Namo TV' pre-verified by the media certification and monitoring committee (MCMC).

2 During the Lok Sabha campaign, Prime Minister Narendra Modi himself **invoked the Balakot strikes**, the **troops killed in the Pulwama attack** (Latur, April 9), the **Indian Army** (Barmer, April 21) and even **IAF fighter pilot Abhinandan Varthaman** who was captured (and released) by Pakistan (Patan, April 21) in his election rallies. In each of these cases, the EC did not find any violation of the MCC and gave a clean chit to the Prime Minister. The only instance of campaigning related to the armed forces in which the EC took some action, albeit a bit late, was the case of a poster shared on March 1 by Delhi BJP MLA OP Sharma on Facebook that carried the pictures of IAF pilot Varthaman, Narendra Modi, Amit Shah and the MLA himself. The EC issued a show cause notice to the MLA and two weeks later on March 13, directed Facebook to remove the content. This action was taken in keeping with the EC's earlier call urging political parties to advise their candidates/ leaders to desist from displaying photographs of Defence personnel as part of their election propaganda/campaigning.

3 On March 27, the Election Commission sought an explanation from **NITI Aayog vice-chairman Rajiv Kumar** for criticizing Congress President Rahul Gandhi's election promise that the families who fall in the poorest 20% of the country will be given Rs 72,000 each annually as a minimum income if the Congress comes to power. The EC contended that Kumar was a bureaucratic executive and this was not a case of a politician attacking another politician. Kumar in his defence stated that he had spoken out as an economist and not as part of a public body. Eventually, even though the EC expressed it displeasure at Kumar's violation of the MCC, it did not act against him and merely pulled him up by asking him to be cautious in future while making statements.

4 On March 27, in a **televised address to the nation**, Prime Minister Narendra Modi announced India's successful test-firing of an anti-satellite missile. Opposition parties accused Modi of trying to gain political benefits through the televised address and CPI (M) leader Sitaram Yechury approached the ECI alleging that the PM's address had violated the MCC. On March 28, the ECI India set up a committee of officers to examine the responses received from Doordarshan (DD) and All India Radio (AIR) on the Prime Minister's address to the nation. On March 29, it concluded that Prime Minister Modi did not

violate the MCC provisions for 'party in power'. Citing meetings with top DD and AIR officials and correspondence received from the two, the committee said that DD had only used the feed provided by a private agency and the AIR had taken audio output as broadcast by Doordarshan News for dissemination over its network.

5 On March 29, the ECI gave a conditional approval for the **government's decision to review the wages under the MGNREGA from April 1** but asked the governments not to publicize the enhancement of wage rates. However, the CPI-M and Congress criticized the central government for increasing the wages under the MGNREGA just on the eve of Lok Sabha elections and telecasting the news through the government owned electronic media – AIR and DD. The ECI let the matter be and did not act.

6 On April 1, the Uttar Pradesh Chief Minister Yogi Adityanath of the BJP gave an election speech in Ghaziabad, Uttar Pradesh, in which he linked the armed forces with Prime Minister Narendra Modi by calling them *Modiji ki Sena* or "Modi's soldiers". This invocation of the armed forces for electoral gains had the Opposition parties up in arms. On April 3, the ECI asked Adityanath for an explanation. However, just days later on April 6, while it rejected his explanation, it merely warned him against making such statements in the future. The ECI's reaction to Adityanath's comments was seen as being particularly mild considering that on the very same day it had transferred the chief secretary of Andhra Pradesh, a favored officer of Chief Minister Chandrababu Naidu, over an issue of compliance with a previous order.

7 On April 1, Prime Minister Modi, while addressing a **rally in Wardha, Maharashtra**, said, the opposition party was "scared" to field its leaders from constituencies where the majority community dominates. He made the remark in reference to Congress chief Rahul Gandhi's decision to contest from a second Lok Sabha seat Wayanad in Kerala which has a sizeable minority population. The Congress approached the ECI and had sought action against Modi's for having violated the MCC through his "divisive" speech. However a month later, on April 30, the ECI gave a clean chit to the Prime Minister stating that "the matter has been examined in detail in accordance to the extant guidelines/provisions of the Model Code of Conduct, the Representation of People's Act and the report of the Chief Electoral Officer, Maharashtra" and accordingly, the commission was of the considered view that in this matter "no such violation has been noticed." Not only was this decision criticised by the opposition but the ECI was also accused of being inconsistent as just a fortnight earlier using its extraordinary election time powers it had imposed campaign

bans ranging from two to three days on BSP chief Mayawati, UP CM and BJP leader Yogi Adityanath and BJP leader Menaka Gandhi for either seeking votes in the name of religion or making communal speeches. On May 4, one of the election commissioners, Ashok Lavasa, recused himself from meetings on election code violations stating that his dissenting views on the EC's decisions to clear Modi and BJP president Amit Shah of charges of violating the model code were not being recorded.

8 On May 15, the EC decided to **cut short the campaign period by 19 hours** for the last phase of polling in West Bengal. The "unprecedented" move followed the eruption of violence during BJP president Amit Shah's road show in Kolkata. However, Prime Minister Narendra Modi's campaigning schedule in the state remained unaffected as he had two rallies planned before the 10 pm deadline on May 16. Chief Minister Mamata Banerjee of Trinamool Congress, along with the Congress and the Communist Party of India (Marxist), alleged that the commission's decision intentionally left the window open for Modi.

Even during the **Gujarat elections of 2017**, there were at least 2 serious allegations of the violation of the Model Code of Conduct made by the Opposition.

On 13 December 2017, just a day after campaigning had ended and a day before voting in the second phase of the Gujarat assembly elections, Prime Minister **Narendra Modi was at a FICCI event (during the EC-mandated silence period)**, where he showcased his government's achievements and accused the previous UPA government of pressuring banks to give loans worth thousands of crores of rupees to industrialists. A day later, on the day of voting in Gujarat in the second phase, **on 14 December, the Prime Minister commissioned the country's first Scorpene-class submarine, INS Kalvari, into the Indian Navy** in Mumbai and showcased it as a success of 'Make in India'. The event was beamed live on TV channels even many parts of Gujarat were voting in the second phase of elections. The Congress party criticized the poll panel for allowing Modi to go ahead with the event on the day of voting. On the same day **Prime Minister Modi also held a road show with BJP flags after casting his vote in the Ranip locality of Ahmedabad.** For this, the Congress accused the CEC of "complete abdication of authority" and for overlooking the "flagrant violation of the Constitution and the Code of Conduct". Interestingly, the Congress's objections came just a day after the EC acting on a complaint of the BJP issued a show cause notice to Congress President Rahul Gandhi for violating election laws and the MCC for having given interviews to Gujarati TV channels on December 13 during the 48-hour silence period.

During the **2020 Delhi assembly elections** too, the EC was in the dock for either not acting fast enough against divisive speeches made by BJP leaders or of not doing enough to rein them in.

On February 1, during a campaign speech in Delhi's Karawal Nagar Uttar Pradesh Chief Minister **Adityanath** had slammed the AAP government, saying it "supplies biryani" to the anti-CAA protesters in Shaheen Bagh. His exact reported words were, "Earlier it was that Congress that used to feed biryani in Kashmir, now it is Kejriwal who is doing the same in Shaheen Bagh, everyone today has a new fetish of feeding biryani. Pakistani ministers are also making appeals for Kejriwal, one can imagine why that is happening." The speech was objected to strongly by the Opposition and resulted in a complaint by AAP to the ECI. However it took the EC five full days to take note of the comment, and it was only on February 6, the last day of campaigning for the election, that it issued a notice to Adityanath for the controversial speech and sought a reply from him in 24 hours. In the interim, however, that is from February 1 to February 6, Adityanath addressed rallies in other parts of Delhi and kept taking the same line as he had done at Karawal Nagar.

Adityanath was the not the only BJP leader to be sent a notice by the Election Commission. On January 29, the Election Commission ordered the removal of Union Minister and BJP MP **Anurag Thakur** from the BJP's list of star campaigners for the Delhi election after he egged the crowd at a rally on January 27 to say "shoot the traitors" in a reference to the anti-CAA protestors. A day later he was banned from campaigning by the ECI for a period of 72 hours. On the same day BJP MP **Parvesh Varma** was barred from campaigning for 96 hours for his controversial comments on the protestors at Shaheen Bagh. Varma had on January 28 alluded to the prospect of the protestors at Shaheen Bagh entering homes of people and raping and murdering them if left unchecked. Like with Thakur, the ECI also ordered his removal from the BJP's list of star campaigners. A few days later on February 5, the EC further banned Varma for campaigning for another 24 hours for likening Chief Minister Arvind Kejriwal to a "terrorist" at a rally on January 29. The poll panel however did not act against Union Minister Prakash Javadekar for a similar remark. Moreover, the ECI's second ban on Varma did not deter him from making further divisive comments. On February 7, a day prior to polling Varma claimed the AAP supplied biryani to protesters at Shaheen Bagh with bribe money collected by a Deputy Chief Minister Manish Sisodia's Officer on Special Duty who was arrested in a bribery case by the CBI, and on February 8, that is, the day of polling, Varma posted a video of himself on social media saying that people in Shaheen Bagh are voting for AAP because they are indebted to them for biryani.

In a stinging indictment of the Election Commission, former CEC S.Y. Quraishi wrote in a newspaper piece that "In its notice to BJP leader Anurag Thakur, ECI cited Section 123 and 125 of the RP Act. What is baffling, however, is that if the commission had found them guilty of offences deserving punishment, why did it stop short of filing FIRs?…Not taking action under the IPC encouraged the worthies like Parvesh Sahib Singh Verma to commit a repeat offence…" Quraishi's point is particularly significant considering that the EC not only banned BJP leader and candidate **Kapil Mishra** from campaigning for 48 hours on January 25 for putting out controversial tweets likening the Delhi election to an India vs Pakistan match but also directed the Delhi Police to register an FIR against him. It is another matter of course that the EC did not further act against Mishra when he blamed AAP for

"ignoring 80 percent of Hindus for a Muslim vote bank" in an interview to a TV channel on January 29.

The Election Commission also overlooked the possible **violation of the 48-hours silence period** before voting. On February 7, Chief Minister Arvind Kejriwal of AAP went to the Hanuman temple in central Delhi along with his wife to offer prayers. This visit saw reporters and camera crew tagging along and was thus shown on television all throughout the day just a day before Delhi voted. At around the same time as Kejriwal was praying, Prime Minister Narendra Modi was at an event in Kokrajhar, Assam, to celebrate the "successful" signing of the Bodo agreement and addressed a public gathering there. Both leaders were thus indirectly carrying on with the campaigning for the Delhi elections, albeit indirectly, even though the stipulated time for campaigning had ended and the silence period was in force.

ECI's Post-Election Functioning

EC's post-election functioning in recent times hasn't been free of controversy either. On January 19, 2018, on his penultimate working day in office, CEC AK Joti, who had been at the centre of controversies during the Gujarat assembly elections which had concluded just a month prior, grabbed the headlines once again when he recommended the disqualification of 20 Aam Aadmi Party (AAP) MLAs from the Delhi Assembly. In its opinion sent to President, the Election Commission said the MLAs were holding offices of profit as they had occupied the post of Parliamentary secretaries between March 13, 2015 and September 8, 2016 and thus were liable to be disqualified as legislators. The AAP and many political analysts termed ECI's recommendation disqualifying 20 AAP MLAs as Joti's "parting gift to the BJP". The MLAs accused the ECI of not hearing them out and challenged the order the Delhi High Court. The disqualifications ended up being quashed by the court three months later. The High Court which termed the ECI's recommendation as "vitiated" and "bad in law" directed it to hear the matter afresh.

Another controversial instance came on September 29, 2019 when the Election Commission using its discretionary powers reduced Sikkim Chief Minister Prem Singh Tamang Golay's period of disqualification (from contesting elections) by almost five years under a provision of the electoral law, thus enabling him to contest an election. Golay who had become chief minister in May 2019 after his party the Sikkim Krantikari Morcha won a majority of seats in the Assembly election had himself been unable to contest the assembly elections because of he was serving a six year disqualification period that began in August 2018 when he had completed a year's jail term in a corruption case. Now that he had become the chief minister, Golay had to get himself elected to the assembly within six months if he had to hold on to his CM-ship but since the disqualification period was going to last for another five years or so it meant that he could not contest any bye-elections. The EC's decision reducing his disqualification period thus paved the way for him to contest an election. What was even more curious about the EC's decision was the fact that it came just two days after the BJP entered into a pre-poll alliance with

Golay's party to contest the by-elections to three assembly seats in the state. This posed a big question mark on the timing of the ECI's decision.

What can be done about the problem?

The many instances cited in this paper indicate that the Election Commission's standing and its reputation as a neutral no-nonsense umpire that has been built over the last many decades is now increasingly under a cloud as it has been accused repeatedly during the last few years of determining election schedules at the behest of the Modi government or of overlooking poll code violations. The ECI has been accused of being too cautious in handling certain cases and reluctant in exercising its constitutional powers, particularly in cases involving divisive and hateful speeches by top leaders including the Prime Minister. While the problem of alleged partisanship is not just restricted to the EC as an institution alone as other institutions such as the judiciary, and the police have also been accused of the same, and perhaps more so, the fact that a constitutional body responsible for conducting elections, arguably one of the most significant tasks in a democracy, is in the dock is a very serious matter.

One of the major reasons for the alleged kowtowing of the ECI before the political Executive in recent times may be located in how the appointments to the Election Commission are made. While the ECI is autonomous institution drawing its powers from the Constitution, the problem lies in the fact that the appointment of Chief Election Commissioner and Election Commissioners is done by the government and that too unilaterally. This problem has been there always but assumes particular significance now because the government at the Centre has repeatedly exhibited authoritarian tendencies. What is therefore urgently needed is a de-politicization of appointments through a process of wide consultation. There is no prescribed procedure for appointment of CEC and the 2 ECs (who were added to the single-member body in 1993) as per the Constitution. At present it is the President who appoints the CEC and ECs based on the recommendations made by the government. The President appoints the CEC and ECs after the Law Ministry initiates the file for their appointments. This means that it is the executive power of the President to appoint CEC and ECs. In its 255th report in 2015, the Law Commission had recommended a three-member collegium consisting of the Prime Minister, the Leader of the Opposition and the Chief Justice of India for the appointments. A Public Interest Litigation was also filed in the Supreme Court in late 2018 calling for a "fair, just and transparent process of selection by constituting a neutral and independent Collegium or selection committee". The matter was however referred to a constitution bench. This reform is much needed for maintaining the autonomy of the ECI.

Also needing reforms is the system of removal of Election Commissioners. At present only the Chief Election Commissioner or the CEC is given protection from being removed by the government except through impeachment like in the case

of a Supreme Court judge. This same protection is not given to the other two commissioners who can be removed by the government at the discretion of CEC. This matter assumes significance in the context of Election Commissioner Ashok Lavasa's case, whose wife and son were recently slapped with Income Tax related cases in what is being seen as government retaliation against Lavasa's stand on alleged model code violations by the Prime Minister and senior BJP leaders during the 2019 Lok Sabha elections. Lavasa was the only dissenting member of the commission in the clean chits given to the Prime Minister and others by the ECI and recused himself from ECI meeting on the grounds that his dissenting views were not recorded. Lavasa is due to be appointed CEC in April 2021, once the current CEC Arora's term comes to an end and just a few months ago the Central Board of Direct Taxes wrote to CEC Arora on the actions it had initiated against Lavasa's family members.

What is also a problem is the uncertainty of elevation of the ECs by seniority which makes them vulnerable to government pressure. Moreover, since the two ECs have equal voting power in the functioning of the ECI and can thus outvote the CEC, the government can control a defiant CEC through the majority voting power of the two commissioners.

The other problem seems to be that the ECI does not have any authority to de-register political parties that violate election laws. Despite being the registering authority under Section 29A of the RPA, 1951, it has no power to cancel their registration even for the most serious of violations. The ECI has been seeking this reform since 1998. The ECI also submitted an affidavit to the Supreme Court in February 2018 saying it wanted powers to de-register a political party, given its constitutional mandate.

That being said, these reforms needed to protect the autonomy of the ECI may take time and in the interim nothing stops the EC from asserting the enough powers it has under the Constitution. The commission after all does have the powers under the Constitution, to act in an appropriate manner when the enacted laws make insufficient provisions to deal with a given situation in the conduct of an election.

CITIZENS' COMMISSION ON ELECTIONS