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# **TRACING THE JOURNEY OF ELECTRONIC VOTING MACHINES IN INDIA THROUGH JUDICIAL PRONOUNCEMENTS**

AUTHORED BY – ATUL RAJ

## **INTRODUCTION**

The Electronic Voting Machines (“EVMs”) have become the mainstay of the electoral process in India for more than two decades. The idea of replacing ballot papers with EVMs was conceived first in the year 1977 which led to the development of the first proto-type by the Electronics Corporation of India Ltd (“ECIL”), a Central Public Sector Undertaking. After the proto-type was demonstrated by the Commission before the representatives of various political parties, another Central Public Sector Undertaking, Bharat Electronic Ltd. (“BEL”), was co-opted along with ECIL to manufacture EVMs after a broad consensus emerged regarding its introduction.

Eventually, the Commission deployed the EVMs for the first time at 50 polling booths during the Kerala Legislative Assembly Elections, 1982, however, the Hon’ble Supreme Court ordered a repolling for these booths after the deployment of these machines was challenged by the defeated candidate on grounds of lack of statutory backing.

Subsequently, the governing law for conduct of elections i.e., the Representation of the People Act, 1951 (“RP Act 1951”) was amended by the Parliament in 1989<sup>1</sup> which paved the way for use of EVMs in Indian elections. A broad consensus for its introduction was later reached in the year 1998 and subsequently, the EVMs began to replace ballot papers across the country as the preferred system of voting.

## **LITERATURE REVIEW**

During the course of writing this paper, I had the privilege of reading and analysing the literature produced by Election Commission of India regarding EVMs. Shri S.K. Mendiratta’s *How India Votes: Election Laws, Practice and Procedure* has served as a bible for officials working in the

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<sup>1</sup> The Representation of the People (Amendment) Act, 1988 [Act No. 1 of 1989]

Commission. This book serves as a treasure of legal cases pertaining to Election Commission and how the functioning of the Commission was shaped by these case laws. With respect to the EVMs, this book traces the history of these machines and how the Commission went through the legal challenges that arose regarding its deployment.

Lastly, the judicial pronouncements on EVMs, including landmark judgments of the Hon'ble Supreme Court as well as Hon'ble High Courts, throw light on how the Commission was able to demonstrate the infallibility of the EVMs through its wide ranging technical and administrative safeguards and how the Hon'ble Courts affirmed the voting system through EVMs.

## **RESEARCH METHODOLOGY**

I have adopted doctrinal research methodology. This will include analysis of existing literature as well as relevant case laws on the subject matter. An attempt will be made to understand the lacunae that exist in the statutory framework and the possible solutions which may help in filling the legal loopholes. The nature of data used during this paper is qualitative in nature which includes examining statutes, ECI's literature as well as case laws on the subject matter.

## **THE FIRST ELECTION**

While the marking system of voting, adopted since the 1962 elections, had been working remarkably well, there were certain inherent problems in this system such as printing of crores of ballot papers and storage of lakhs of ballot boxes<sup>2</sup>. To address these problems and to take advantage of the scientific and technological developments, ECI made a proposal to ECIL in the year 1977 to design an EVM suitable to Indian conditions. The prototype developed by ECIL was demonstrated to the representatives of political parties on 06.08.1980.

A few EVMs were produced by ECIL and BEL and ECI decided to deploy them for about 50 polling booths for election to 70- Parur AC of Kerala in the 1982 Legislative Assembly Elections. In this election, the winning candidate had secured 30,450 votes, among which 11,268 votes were received manually, i.e., through ballot papers and 19,182 votes were recorded in EVMs. Due to absence of any law which mandated the usage of EVMs, the Commission had to resort to Article 324 of the Constitution to notify the deployment of EVMs for the aforesaid election. The election

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<sup>2</sup> VS Rama Devi and SK Mendiratta, *"How India Votes: Election Laws Practice and Procedure"*

of the returned candidate was thereafter challenged before the Hon'ble Supreme Court in the matter of *A.C. Jose v. Sivan Pillai*<sup>3</sup>.

In the aforesaid case, the Commission contended that under Article 324 of the Constitution, it is empowered to give any direction with respect to the superintendence and conduct of elections. However, the Hon'ble Supreme Court held that the plenary power under has to be read harmoniously with the Articles 325 to 329 and the powers that are given to the Legislatures under entry No. 72 in the Union List and entry No. 37 of the State List of the Seventh Schedule to the Constitution. The Hon'ble Court further held that the Commission in the garb of Article 324 cannot encroach upon the legislative domain of the Parliament.

The Hon'ble Court ultimately held that the order of the Commission regarding using of EVM machines for recording votes in some of the polling stations was without jurisdiction and therefore, the election of the returned candidate with respect to the 50 polling stations where the voting machines were used was set aside. It is pertinent to mention that despite setting aside the aforesaid election, the Hon'ble Court refrained from making observation on either the defects or advantages of EVMs.

## **AMENDMENT IN LAW AND INTRODUCTION OF SECTION 61A IN THE RP ACT 1951**

In light of the aforesaid judgment of *A.C. Jose* (supra), the Commission sent a recommendation to the Union Government for bringing an amendment and consequently, granting a legal sanction for the deployment of EVMs. This led to insertion of Section 61A in the RP Act 1951 in the year 1989. This provision reads as follows:

*“Section 61A. Voting machines at elections — Notwithstanding anything contained in this Act or the rules made thereunder, the giving and recording of votes by voting machines in such manner as may be prescribed, may be adopted in such constituency or constituencies as the Election Commission may, having regard to the circumstances of each case, specify.*

*Explanation — For the purposes of this section, “voting machine” means any machine or apparatus whether operated electronically or otherwise used for*

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<sup>3</sup> 1984 SCR (3) 74

*giving or recording of votes and any reference to a ballot box or ballot paper in this Act or the rules made thereunder shall, save as otherwise provided, be construed as including a reference to such voting machine wherever such voting machine is used at any election.”*

However, the constitutional validity of the aforesaid provision was challenged before the Hon’ble Supreme Court in *All India Anna Dravida Munnetra Kazhagam v. Chief Election Commissioner*<sup>4</sup>. Herein, the Appellant challenged Section 61A of RP Act 1951 *inter alia* on the grounds that in *A.C. Jose* (supra), the Hon’ble Supreme Court itself had set aside the election conducted through EVMs. The Hon’ble Supreme Court, however, dismissed the petition by distinguishing the decision in *A.C. Jose* (supra). The Hon’ble Court observed that in the said judgment, EVMs were sought to be deployed through an executive order which was ultra vires the Rules, but in the present case, the introduction of Section 61A in the Act, has made the ruling in *A.C. Jose* (supra) as inadmissible for the case in hand.

## INTRODUCTION OF NOTA IN EVM

In *People’s Union for Civil Liberties v. Union of India*<sup>5</sup>, a Writ Petition had been filed under Article 32 of the Constitution of India seeking inclusion of necessary provision in the ballot papers as well as in EVMs for secrecy/ protection of right of not to vote. The Commission supported the prayer of the Petitioner and submitted before the Hon’ble Court that in the larger interest of promoting democracy, a provision for “None of the Above” or “NOTA” button should be made in the EVMs/ballot papers. It was further contended that such an action, apart from promoting free and fair elections in a democracy, will provide an opportunity to the elector to express his dissent/disapproval against the contesting candidates and will have the benefit of reducing bogus voting.

The Hon’ble Supreme Court took note of the submissions put forth by the Commission and observed that the implementation of the “None of the Above” (NOTA) button will not require much effort except for allotting the last panel in the EVM for the same. Further, the Commission was directed to provide NOTA button in EVMs so that the voters, who come to the polling booth and decide not to vote for any of the candidates in the fray, are able to exercise their right not to

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<sup>4</sup> Special Leave Petition (Civil) 2824 – 25 of 2001 before the Hon’ble Supreme Court of India

<sup>5</sup> (2013) 10 SCC 1

vote while maintaining their right of secrecy. It was observed that the Commission can implement the same either in a phased manner or at a time with the assistance of the Government of India. The Commission was further directed to undertake awareness programmes to educate the masses.

## INTRODUCTION OF VVPAT IN EVM

In 2010, all political parties in a meeting convened by the Election Commission of India, expressed satisfaction about the functioning of EVMs. At this stage, the idea of Voter Verified Paper Audit Trail (VVPAT) was moved for further exploration. The Election Commission of India, in consultation with the political parties, considered to explore the use of VVPAT with a view to enhance transparency during the election process. Introduction of VVPAT implied that a paper slip is generated bearing serial number, name and symbol of the candidate along with recording of vote in the Control Unit, so that in case of any dispute, paper slip could be counted to verify the result being shown on the EVM. Under VVPAT, a printer is attached to the Balloting Unit and kept in the voting compartment. The voter after pressing the button on Balloting Unit can view the printed slip on VVPAT through the viewing window and, thus, can verify that the vote is recorded for the Candidate of his/her choice. The paper slip remains visible on VVPAT for about seven (7) seconds through a transparent window.

The Election Commission of India referred the matter to its Technical Expert Committee (TEC) on EVMs for examining and making a recommendation in this regard. The Expert Committee had several rounds of meetings with the manufacturers of EVM, namely, Bharat Electronics Limited (BEL) and Electronics Corporation of India Limited (ECIL), on this issue and then had met the political parties and other civil society members to explore the design requirement of the VVPAT system with the EVM. On the direction of the Expert Committee, BEL and ECIL made a prototype and demonstrated before the Committee and the Election Commission of India in 2011. On the recommendation of the Expert Committee on EVM & VVPAT system, the Election Commission of India conducted simulated election for the field trial of VVPAT system in Ladakh (Jammu & Kashmir), Thiruvananthapuram (Kerala), Cherrapunjee (Meghalaya), East Delhi District (NCT of Delhi) and Jaisalmer (Rajasthan) in July 2011<sup>6</sup>. All stake holders including senior leaders of political parties and civil society members participated and witnessed the field trial. After 1<sup>st</sup> field trial of the VVPAT system, Election Commission of India made a detailed

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<sup>6</sup> ECI Press Note No. ECI/PN/44/2011 dated 20.07.2011

reassessment of the VVPAT system to further fine tune the VVPAT system. Accordingly, the manufacturers developed 2nd version of VVPAT prototype. The same was again subjected to 2<sup>nd</sup> field trial in the said five locations in July-August 2012<sup>7</sup>. Thereafter, in the meeting of the Technical Expert Committee held on 19th February, 2013, the Committee approved the design of VVPAT and also recommended the Election Commission of India to take action on amendment of the rules for using VVPAT. The model was demonstrated to all the political parties in an all-party meeting on 10th May, 2013.

Accordingly, introduction of VVPAT was facilitated by amending the Conduct of Elections Rules, 1961 vide the Conduct of Elections (Amendment) Rules, 2013, which was notified in the Official Gazette of India by the Ministry of Law and Justice on 14.08.2013<sup>8</sup>, whereby a proviso was inserted after Rule 49A, inter alia, to provide for a printer with a drop box to be attached to a voting machine. Furthermore, Rule 49MA and Rule 56D (contained in Rule 66A) were also inserted in the Conduct of Elections Rules, 1961 vide the said notification.

In *Subramanian Swamy v. Election Commission of India*, reported in (2013) 10 SCC 500, the Petitioner had prayed for directing the Commission to incorporate a system of “paper trail/ paper receipt” in EVMs as a convincing proof that the machine has rightly registered the vote cast by a voter in favour of a particular candidate. The Commission submitted before the Hon’ble Court that it is exploring possibility of incorporating voter verifiable paper audit trail (VVPAT) system as part of EVMs to make election system more transparent, however, its introduction can be done only in a phased manner and after legislative amendments.

The Hon’ble Supreme Court held that “paper trail” is an indispensable requirement of free and fair elections and that the confidence of the voters in EVMs can be achieved only with the introduction of the “paper trail”. EVMs with VVPAT system ensure the accuracy of the voting system. It was held that with an intent to have fullest transparency in the system and to restore the confidence of the voters, it is necessary to set up EVMs with VVPATs system because vote is nothing but an act of expression which has immense importance in a democratic system. The Hon’ble Court took note of the pragmatic and reasonable approach of the Election Commission and considering the fact that in general elections all over India, the Election Commission has to

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<sup>7</sup> ECI Press Note No. ECI/PN/ 59 /2012 dated 25.07.2012

<sup>8</sup> S.O. 2470(E) dated 14.08.2023 published by Ministry of Law and Justice

handle one million (ten lakh) polling booths, the Commission was permitted to introduce VVPAT in gradual stages or geographical-wise in the ensuing general elections. It was held that the area, State or actual booth(s) are to be decided by Commission and that it is free to implement the same in a phased manner.

Later, a contempt petition titled *Backward & Minority Community Employees Federation (BAMCEF) vs. Syed Nasim Ahmad Zaidi*<sup>9</sup>, was filed in relation to the alleged non-implementation of the Judgment of the Hon'ble Supreme Court in *Dr. Subramanian Swami Vs. Election Commission of India (Supra)*. It was noted by the Hon'ble Court in the above matter that the Election Commission of India had not yet received the grant of sanction and release of funds for implementation of VVPAT, and thus the Hon'ble Court had directed "*the Election Commission of India to bring on record the approximate time within which the entire system of VVPAT can be introduced subject to grant of sanction and release of funds as and when required*". Furthermore, the Hon'ble Court also asked the learned Solicitor General of India to assist it in so far as sanction and release of funds are concerned. By Order dated 24.04.2017, the Hon'ble Court disposed of the aforementioned contempt petition in the following terms:

*"2. From the materials laid before the Court it appears that on 19th April, 2017 the sanction of the President of India for purchase of 16,15,000 Voter Verifiable Paper Audit Trail (VVPAT) at an estimated cost of Rs.3,173.47 crore (excluding taxes and freight as applicable) from M/s Bharat Electronics Ltd., Bangalore and M/s Electronics Corporation of India Ltd., Hyderabad has been conveyed to the Election Commission of India.*

*3. Pursuant to the above, on 21st April, 2017, the Election Commission of India has placed orders with M/s Bharat Electronics Ltd., Bangalore and M/s Electronics Corporation of India Ltd., Hyderabad for purchase of 8,07,500 VVPAT units from each of the aforesaid firms indicating September, 2018 as the outer limit for procurement of the said units.*

*4. Shri Ashok Desai, learned Senior Counsel for the Election Commission of India has also placed a set of written instructions received by him from the Election Commission of India which indicates that all the VVPAT machines should be available by September 2018 and such machines should be available for deployment in the next General Elections to constitute 17th Lok Sabha.*

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<sup>9</sup> Contempt Petition (C) No. 303 of 2016 in Civil Appeal No. 9093 of 2016 before the Hon'ble Supreme Court

By virtue of the Hon'ble Court's aforesaid orders, the concrete steps of the Election Commission of India came to fruition with the 100% deployment VVPAT along with EVMs in the ensuing elections.

In *N. Chandrababu Naidu v. Union of India*<sup>10</sup>, the Petitioner had prayed for directing that minimum of 50% randomized VVPAT paper slip verification of EVM shall be conducted in every General and Bye-Elections. The Election Commission submitted that Indian Statistical Institute [ISI], an expert body, has stated that verification of VVPAT paper trail of 479 (randomly selected) EVMs would generate over 99% accuracy in the election results. And, as per Guideline No. 16.6, verification of VVPAT paper trails would involve verification of VVPAT paper trail of 4125 EVMs instead of 479 EVMs which is eight times more than what has been reported by the ISI. Additionally, the Election Commission pointed out infrastructure difficulties, including manpower availability, at that point of time, in increasing the number of EVMs for verification.

The Hon'ble Court observed that neither the satisfaction of ECI nor the system in vogue today, is being doubted by the Court in so far as fairness and integrity is concerned. However, having regard to the need to generate the greatest degree of satisfaction in all with regard to the full accuracy of the election results, it was held that the number of EVMs that would now be subjected to verification so far as VVPAT paper trail is concerned would be 5 per Assembly Constituency or Assembly Segments in a Parliamentary Constituency instead of what is provided by Guideline No. 16.6<sup>11</sup>, namely, one machine per Assembly Constituency or Assembly Segment in a Parliamentary Constituency.

## **OTHER JUDGMENTS UPHOLDING THE EVM/ VVPAT SYSTEM**

Over the last two decades, various Courts including the Hon'ble Supreme Court has held voting EVMs/VVPATs in high esteem, as early as in the early introductory years when the VVPAT system was not even in place. Reference is drawn to the observation made by the Hon'ble Karnataka High Court in the Judgment and Order dated 05.02.2004 in *Michael B. Fernandes vs. C.K. Jaffer Sharief*<sup>12</sup> wherein it was observed that “*this invention is undoubtedly a great*

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<sup>10</sup> (2019) 15 SCC 377

<sup>11</sup> Manual on Electronic Voting Machine and VVPAT

<sup>12</sup> AIR 2004 Kar 289

*achievement in the electronic and computer technology and a national pride.”*

It may also be noted that the Hon’ble Courts have dismissed petitions seeking the ECI to refrain the use of EVMs and use ballot paper instead. In one such petition, of ***Madhya Pradesh Jan Vikas Party vs. Election Commission of India***<sup>13</sup>, the SLP was dismissed by the Hon’ble Supreme Court with costs of Rs. 50,000. Relevant extract of the order is reproduced here below:

*“The election process under the representation of the People Act, 1951 is monitored by a Constitutional Authority like Election Commission. Electronic Voting Machines (EVM) process has been utilized in our Country for decades now but periodically issues are sought to be raised. This is one such endeavor in the abstract. It appears that party which may not have got much recognition from the electorate now seeks recognition by filing petitions!*

It is also apposite to mention the observation of the Hon’ble Gujarat High Court in the matter of ***Khemchand Rajaram Koshti vs. Election Commission of India*** [WP(PIL) No. 36 of 2019] wherein the Hon’ble Court vide judgment dated 19.03.2019 held that the allegations of tampering of EVMs were unfounded and observed as follows:

*“The apprehension of the petitioner seems to be based on the unjustified apprehension of a malfunction and tamperability of the EVMs, which claims have been rendered completely unfounded and unjustified.”*

Recently, even the Hon’ble Supreme Court in ***Sunil Ahya vs. Election Commission of India***<sup>14</sup>, wherein the petitioner sought for a direction to conduct an independent audit of the source code governing the EVMs, dismissed the petition stating that such exercise bears on sensitive issues pertaining to the integrity of elections in a democracy which are conducted in the supervision of ECI. The Hon’ble Court further observed that such petitions touched upon policy issue on which the Court would not be inclined to issue directions. Relevant extract of the order dated 22.09.2023 passed in the aforesaid case is reproduced here below:

*“5. The Election Commission is a constitutional entity entrusted under Article 324 of the Constitution with superintendence and control over the conduct of the elections. The petitioner has placed no actionable material on the record of the Court to indicate that the Election Commission has acted in breach of its*

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<sup>13</sup> SLP (Civil) No.16870/2022

<sup>14</sup> Writ Petition (Civil) No. 826/2023

*constitutional mandate. Ultimately, the manner in which the source code should be audited and the way the audit should be dealt with bears on sensitive issues pertaining to the integrity of the elections which are conducted under the superintendence of the Election Commission. On such a policy issue, we are not inclined to issue a direction as sought by the petitioner. There is no material before this Court, at this stage, to indicate that the Election Commission is not taking suitable steps to fulfill its mandate.\_*

## POSSIBLE ISSUES & SOLUTION

Though the aforesaid statutes and judicial pronouncements have established faith and trust in EVMs adopted by the Commission, there are certain grey areas which are required to be addressed for making the EVM VVPAT system of voting full proof. **Firstly**, in the Representation of the People Act, 1951, it is seen that the offences which may relate to EVMs such as its destruction and forcible removal only pertains to an 'election'. It is pertinent to mention that an election is notified when the Commission announces it and the Model Code of Conduct comes into force. Moreover, the Hon'ble Courts in a catena of judgments including *Mohinder Singh Gill vs. The Chief Election Commissioner*<sup>15</sup> and *Durga Shankar Mehta vs. Thakur Raghuraj Singh*<sup>16</sup> has held that the election period commences from the date of issue of notification and ends at completion of election. This means that if any damage or illegal transport of EVMs is done during a non- election period, then there is no violation of law as per the Representation of the People Act, 1951. This assumes significance since the EVMs/ VVPATs are often in the custody of district administration and are stored in their respective storehouses. Therefore, there is a need for bringing amendments which makes the offences relating of EVMs applicable irrespective of the election period.

**Secondly**, there is also a need for bringing a strict law which prevents motivated persons and political parties from raising unsubstantial and baseless allegations against the technical aspects of these machines. As mentioned above, these machines have adequate administrative and technical safeguards which have been recognized by the constitutional courts of the country, yet, on the eve of elections or after the announcement of results, various political parties and their leaders question the veracity of these machines. This not only demoralized the whole election machinery but also affects the voters' trust in the EVM VVPAT system.

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<sup>15</sup> (1978) 1 SCC 405

<sup>16</sup> AIR 1954 SC 520

*Thirdly*, while the introduction of EVMs has addressed the erstwhile election issues of booth capturing and bogus voting, a long-standing issue of providing a voting mechanism for migrant citizens also needs to be addressed through technology. Just like Electronic Voting Machines, there is now a need for introducing “Remote Voting Machines” (RVMs) to enable a migrant voter, who is not residing in his constituency at the time of election, to remotely cast his vote from his or her location. In this regard, the Commission has already held a meeting with leaders of political parties<sup>17</sup>. However, the problems faced during the introduction of EVMs such as its credibility and legal backing is bound to arise again if RVMs are planned to be introduced. The Commission will have to carefully steer through the legal hurdles and demonstrate its proto-type effectively before the political parties so as to ensure that the machines are trusted and supported.

## CONCLUSION

The Election Commission of India has always been open to bringing about any technological improvements that would further the cause of free & fair elections and increase the trust of voters in the EVM VVPAT system of voting. Further, the Commission has continuously demonstrated the administrative and technical safeguards of these machines before the constitutional courts of the country. However, nothing stays still and static. Further improvements and legal safeguards will have to be provided to keep up with the changing times so that the trust of the people in the EVM VVPAT system of voting remains intact and the Election Commission of India continues to fulfill its constitutional duty of conducting elections across the country with full vigour and robustness.

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<sup>17</sup> ECI/PN/100 /2022 dated 29.12.2022