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# Electronic Voting Machine: Constitutional Examination

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## ABSTRACT

*The Indian Constitution was enacted by the Constituent Assembly in the backdrop of the national struggle for independence. The Indian people had gone through a travail and on the attainment of independence, the country had to face unique problems which had not confronted other federations like America, Australia, Canada, or Switzerland. These problems had to be solved pragmatically and not by confining the country's political structure within the straitjacket of a known or established formula.*

*The Constituent Assembly, therefore, pursued the policy of pick and choose to see what suited the genius of the nation best. Democracy postulates that there should be periodic elections where the people should be in a position to re-elect their old representatives or change the representatives or elect in their place a new representative. It was also held that democracy can function only when elections are free and fair and the people are free to vote for the candidates of their choice. To strengthen the transparency and credibility of a free and fair election the Electronic Voting Machine is playing a vital role in the election process.*

## I. INTRODUCTION

The Electronic Voting Machine (EVM), the replacement of the ballot box is backbone in the electoral process. It was first introduced by Chief Election Commissioner S. L. Shakhdar in 1977 the Electronics Corporation of India Ltd. (ECIL), Hyderabad was assigned the task to design and develop it. In 1979 a proto-type was developed, which was demonstrated by the Election Commission before the representatives of political parties on 6th August, 1980. The Bharat Electronic Ltd. (BEL), Bangalore, another public-sector undertaking, was co-opted along with ECIL to manufacture EVMs once a broad consensus was reached on its introduction.

First time use of EVMs occurred in the general election in Kerala in May, 1982; however, the absence of a specific law prescribing its use led to the Supreme Court striking down that election. Subsequently, in 1989, the Parliament amended the Representation of the People Act, 1951 to create a provision for the use of EVMs in the elections (chapter 3). A general consensus

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on its introduction could be reached only in 1998 and these were used in 25 Legislative Assembly constituencies spread across three states of Madhya Pradesh, Rajasthan and Delhi. Its use was further expanded in 1999 to 45 Parliamentary.

Constituencies and later, in February 2000, to 45 Assembly Constituencies of the Haryana Assembly elections. In the State Assembly elections, held in May 2001, in the states of Tamil Nadu, Kerala, Puducherry and West Bengal, the EVMs were used in all the Assembly Constituencies. Since then, for every State Assembly election, the Commission has used the EVMs. In 2004, in the General Election to the Lok Sabha, the EVMs (more than one million) were used in all 543 Parliamentary Constituencies in the country.

An EVM consists of two units, namely, Control Unit (CU) and Balloting Unit (BU) with a cable (5 mt. long) for connecting the both. A Balloting Unit caters upto 16 candidates. There are number of variants available for the EVMs. Time-to-time, it has evolved and has become more robust. In case of pre-2006 (M1) and post-2006 EVMs (M2), 4 (Four) Balloting Units can be cascaded together to accommodate upto a maximum of 64 candidates (including NOTA), which can be used with one Control Unit. In case of upgraded post-2006 EVMs (M3), 24 (Twenty Four) Balloting Units can be cascaded together catering to 384 candidates (including NOTA) which can be used with one Control Unit. It runs on a power pack (Battery) having 7.5 volts.

In case of M3 EVM, power packs are inserted in 5th, 9th, 13th, 17th & 21st Balloting Units, if more than 4 BUs are connected to a Control Unit. On the right side of the BU along the candidates' vote button, digits 1 to 16 are embossed in Braille signage for guidance of visually impaired electors.

The design and application of EVMs in the elections are considered a significant achievement in global democracy. It has brought more transparency, swiftness, and acceptability in the system. It has also helped in creating a vast pool of election officials well versed in its use. In its evolution, the Commission has issued series of instructions, frequently asked questions, and technical guidelines. During this period a number of judicial pronouncements has also helped in making the EVMs an integral component of our electoral system.

## **II. VVPAT (VOTER VERIFIABLE PAPER AUDIT TRAIL)**

In a meeting of all political parties held on 4th October, 2010, the parties expressed satisfaction with the EVM but some parties requested the Commission to consider introducing Voter Verifiable Paper Audit Trail for further transparency and verifiability in poll process. The Commission referred the matter to its Technical Expert Committee 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, BEL & 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, the BEL and ECIL made a prototype and demonstrated before the Committee and the Commission in 2011. On the recommendation of the Expert Committee on EVM & VVPAT system, the Commission 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. All stake holders including senior leaders of political parties and civil society members participated and witnessed enthusiastically in the field trial. After 1st field trial of the VVPAT system, Commission made a detailed 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 2nd field trial in the said five locations in July-August 2012. In the meeting of the Technical Expert Committee held on 19.02.2013, the Committee approved the design of VVPAT and also recommended the Commission to take action on amendment of the rules for using VVPAT. The Government of India notified the amended Conduct of Elections Rules, 1961 on 14th August, 2013, enabling the Commission to use VVPAT with EVMs. The Commission used VVPAT with EVMs first time in bye-election from 51-Noksen (ST) Assembly Constituency of Nagaland. Thereafter, VVPATs have been used in selected constituencies in every election to Legislative Assemblies and 8 Parliamentary Constituencies in General Election to the House of the People-2014.

**(A) Facts on VVPAT:**

Voter Verifiable Paper Audit Trail is an independent system attached with the Electronic Voting Machines that allows the voters to verify that their votes are cast as intended. When a vote is cast, a slip is printed on the VVPAT printer containing the serial number, name and symbol of the candidate and remains exposed through a transparent window for 7 seconds. Thereafter, this printed slip automatically gets cut and falls in sealed drop box of the VVPAT. VVPAT consists of a Printer and a VVPAT Status Display Unit (VSDU). However, in M3 VVPAT, there is no VSDU and status of VVPAT display on Control Unit of M3 EVM. VVPAT runs on a power pack (Battery) of 22.5 volts. Control Unit and VSDU are kept with the Presiding Officer/Polling Officer and Balloting Unit and Printer are kept in the voting compartment<sup>2</sup>.

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<sup>2</sup><https://eci.gov.in/search/?q=EVM&quick=1>

### III. CONSTITUTIONAL INTERPRETATION

Use of electronic voting machines in elections was declared "illegal" by the Supreme Court of India in 1984.

Electronic voting machines were first introduced in the country in 1982 in assembly elections on a limited basis. One such constituency where they were used was the Parur Assembly constituency in the state of Kerala. In 50 of the 84 polling stations, electronic voting machines were used. The defeated candidate A.C. Jose who polled 30,327 votes and lost the election to Sivan Pillai a small margin of 123 votes appealed in the Supreme Court alleging that the use of electronic voting machines in elections was illegal and prayed that the election be set aside<sup>2</sup>.

On March 5, 1984, in the **A.C. Jose vs. Sivan Pillai 1984 (2)**<sup>3</sup> case, the Supreme Court of India had ruled that Democracy at Risk the use of EVMs was illegal and that the Election Commission had no power to use electronic voting machines as the Representation of People Act (RPA), 1951 and Conduct of Election Rules, 1961 only provided for use of ballot papers and ballot boxes in elections.

Thus, the Election Commission's initial attempts in 'imposing' electronic voting machines on the country without relevant provisions in the statute met with a sarcastic prosecution by the highest court of the country. Justice Murtaza Fazl observed:

"If we were to accept the contention of the respondents (Election Commission), it would convert the Commission into an absolute despot in the field of election. If the Commission is armed with such unlimited and arbitrary powers bring about a constitutional crisis, setting at nil the integrity and independence of the electoral process, so important and indispensable to the democratic system ." (AIR 1984, SC 921, Para 21)

In 1989, the Representation of People (RP) Act, 1951 was amended by Parliament incorporating Section 61A which allowed use of electronic voting machines<sup>4</sup>.

With this change of statute, the Election Commission re introduced EVMs in Indian elections. But, the question arises: did the amendment empower the Election Commission to introduce them on a nationwide scale as it did in 2004 and 2009.

### IV. LEGALITY OF LOK SABHA ELECTION HELD ON 2004 & 2009

The amendment made to the RP Act in the form of 61A in 1989 allowed use of EVMs

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<sup>3</sup> (A.C. Jose vs. Sivan Pillai-1984 (2) SCC 656.)

<sup>4</sup> Sec. 61A- Voting Machines at election. The Representation of People Act, 1951 (Inserted by Act 1 of 1989 w.e.f. 15.3.1989)

selectively and did not envisage blanket use of EVMs on a universal basis.

The amendment to the act states that voting machines "may be adopted in such constituency or constituencies as the Election Commission may, having regard to the circumstances of each case, specify."

The amendment reads as follows:

Sec. 61A Voting machines at elections: Notwithstanding anything contained in this Act or the rules made there under, 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". (The Representation of the People Act, 1951)

Further Explanation provided Section under 61 A in the RP Act reads as follows:

Explanation- For the purpose of this section, " voting machine" means any machine or apparatus whether operated electronically or otherwise used for 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<sup>5</sup>.

The explanation makes it further clear that the amendment made in the RP Act envisaged that both the voting systems-ballot papers and voting machines-would continue to co-exist and that voting machines will be used with regard to the circumstances of each case. A similar system works in some countries in Europe (for instance in France) where electronic voting machines are used in a limited manner in select constituencies. Similarly, Indian law makers visualized use of EVMs only in select constituencies or on a limited basis.

It was not in the powers of the Election Commission to conduct nationwide elections through electronic voting machines violating this provision under the R.P. Act. This becomes clear from the Supreme Court's ruling in the A.C. Jose vs. Sivan Pillai case, 1984. In its judgment, the Court stipulated the limitation to the powers of the Election Commission under the constitution.

## **V. POWERS OF THE ELECTION COMMISSION AND CONSTITUTIONAL INTERPRETATION**

To sum up, therefore, the legal and constitutional position is as follows:

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<sup>5</sup> Supra Page No.3

a) When there is no parliamentary legislation or rule made under the said legislation, the Commission is free to pass any orders in respect of the conduct of elections<sup>6</sup>.

b) Where there is Act and express Rules made thereunder, it is not open to the Commission to override the Act or the Rules and pass orders in direct disobedience to the mandate contained in the Acts and Rules<sup>7</sup>.

c) Where the Acts and Rules are silent, the Commission has no doubt plenary powers under Article 324 to give any direction in respect of the conduct of elections and

d) Where a particular direction by the Commission is submitted to the government for approval, as required by the Rules, it is not open to the Commission to go ahead with implementation of it at its own sweet will even if the approval of the government is not given<sup>8</sup>."

Clearly overriding the provisions under the R.P Act and deviating from the stated legal and constitutional position enunciated by the Supreme Court of India, as above, the Election Commission had conducted 2004 and 2009 parliamentary elections using EVMs in all constituencies of the country.

Election Commission officials claimed in discussions that all political parties agreed to the use of EVMs throughout the country in the All Party Meeting held on February 3, 2009 before the April-May, 2009 general elections. This, the Election Commission believes has granted them the legal sanction to use EVMs all over the country. This reasoning is unacceptable. When have all party meetings acquired legislative powers? Where is the need for any legislation if the Election Commission and political parties can mutually agree on electoral laws and reforms in All Party Meetings?

The Election Commission seems to be in violation of legal provisions once again, as earlier in 1982. The Supreme Court then held that the election to the Parur Assembly constituency in Kerala was illegal and set aside the election on the grounds that that it was conducted violating the provisions of the R.P. Act.

## **VI. CONSTITUTIONAL ISSUES**

Besides the technical and legal considerations, there are larger constitutional issues involved in the use of electronic voting machines in elections. They may be held unconstitutional because they - EVMs store voting data only on electronic memory devices-infringe the fundamental

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6 Mohinder Singh Gill v. Chief Election Commr.,AIR 1978 SC 851.

7 Maharashtra Wine Marchants Association v. State of Maharashtra, AIR 1992 Bom.

8 Sadiq Ali v.Election Commission of India AIR 1972 SC 187

rights of the voters. Here go the arguments.

True, the right to vote is a legal right, given under the Representation of People Act and it is not a fundamental right. But how that vote should be exercised by a voter is his/her individual expression and that is covered by Article 19(1)(a) of the Constitution, which guarantees fundamental rights to the citizens of the country. It is this fundamental right, the human right of a voter which is required to be preserved & expanded, if we want to make democracy vibrant and live.

Relevant in this regard is the 2002 judgment of the Supreme Court of India in the case pertaining to disclosure of assets and the criminal background of candidates. The Supreme Court emphasized that the voter has the right to know the antecedents of the candidates before making his choice so that the choice is not mechanical but an informed choice. The Supreme Court reasoned:

**"Under our Constitution, Article 19(1)(a) provides for freedom of speech and expression. Voter's speech or expression in case of election would include casting of votes, that is to say, voter speaks out or expresses by casting vote. For this purpose, information about the candidate to be selected is a must. Voter's right to know antecedents including criminal past of his candidate contesting election for MP or MLA is much more fundamental and basic for survival of democracy<sup>9</sup>."**

Legal experts say that the emphasis should be on making this right absolutely free and transparent from all hurdles created by law and procedure. "A voter has the right to know that his vote which he exercised as a part of freedom of expression to sub-serve the democracy has really gone in favour of the candidate whom he/she has chosen. This right which is fundamental in nature and not merely a legal right is completely absent in the electronic voting system," says Sanjay Parikh, Senior Lawyer, Supreme Court.

In the traditional paper ballot system, that fundamental right was preserved because a voter knew exactly how his/her vote was recorded and counted. Seen in this light, the use of EVMs in Indian elections is liable to be held unconstitutional. There is a clear international precedent for this in the decision of the Federal Constitutional Court of Germany in March 2009<sup>10</sup>,

## VII. CONCLUSION

A question is bound to arise in our mind. If this is indeed so, why have the Indian courts not

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9 Union of India v. Association for Democratic Reforms, AIR 2002 SC 2112

10 Judgement of 3 March 2009 -2 BvC 3/07 and 2BvC 4/07

ruled on this matter yet?

Though a number of public interest litigations and election petitions have been filed in the Supreme Court of India and several High Courts, the focus of these litigations has largely been on the vulnerability and tamprability of electronic voting machines and less so on the larger constitutional issues concerning fundamental rights of voters. As most of the questions raised were of technical nature, the Courts have routinely referred the matter to the Election Commission to hear the "complaints".

If a proper legal challenge is mounted questioning the constitutionality of the electronic voting machines, it is sure that the Indian Courts will examine the constitutionality otherwise democracy will be at risk.

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