

SECTION: PIL

IN THE SUPREME COURT OF INDIA
(CIVIL ORIGINAL JURISDICTION)
WRIT PETITION (CIVIL) NO. _____ OF 2021

IN THE MATTER OF:

ASSOCIATION FOR DEMOCRATIC REFORMS

....PETITIONER

VERSUS

UNION OF INDIA & ANR.

....RESPONDENTS

FILING INDEX

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SUPREME COURT OF INDIA
NEW DELHI 110 001
CODE NO.: 515

NEW DEHI:

DATED: 16.05.2021

DOL RAJ BHANDARI , REGD. CLERK, I.D. NO. 3745, MOB. NO. 9868255076

IN THE SUPREME COURT OF INDIA
(CIVIL ORIGINAL JURISDICTION)

WRIT PETITION (CIVIL) NO. _____ OF 2021

IN THE MATTER OF:

ASSOCIATION FOR DEMOCRATIC REFORMS PETITIONERS

VERSUS

UNION OF INDIA & ANR. RESPONDENTS

PAPER BOOK

(FOR INDEX KINDLY SEE INSIDE)

WITH
I.A. NO. _____ OF 2021
(APPLICATION FOR INTERIM DIRECTION)

AND
I.A. NO. _____ OF 2021
(APPLICATION FOR EXEMPTION FROM FILING ATTESTED COPY OF THE AFFIDAVIT)

COUNSEL FOR THE PETITIONER: **PRASHANT BHUSHAN**

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SECTION: PIL**PROFORMA FOR FIRST LISTING**

The case pertains to (Please tick/check the correct box):

<input type="checkbox"/>	Central Act: (Title)	THE CONSTITUTION OF INDIA
<input type="checkbox"/>	Section	UNDER ARTICLE 14
<input type="checkbox"/>	Central Rule : (Title)	-NA-
<input type="checkbox"/>	Rule No(s):	-NA -
<input type="checkbox"/>	State Act: (Title)	-NA -
<input type="checkbox"/>	Section :	-NA -
<input type="checkbox"/>	State Rule : (Title)	-NA -
<input type="checkbox"/>	Rule No(s):	-NA -
<input type="checkbox"/>	Impugned Interim Order: (Date)	-NA -
<input type="checkbox"/>	Impugned Final Order/Decree: (Date)	-NA-
<input type="checkbox"/>	High Court : (Name)	-NA-
<input type="checkbox"/>	Names of Judges:	-NA-
<input type="checkbox"/>	Tribunal/Authority ; (Name)	-NA -
1.	Nature of matter : <input type="checkbox"/> Civil <input type="checkbox"/> Criminal	
2.	(a) Petitioner/appellant No.1 :	ASSOCIATION FOR DEMOCRATIC REFORMS
	(b) e-mail ID:	<u>JCHHOKAR@GMAIL.COM</u>
	(c) Mobile Phone Number:	09999620944
3.	(a) Respondent No.1:	UNION OF INDIA
	(b) e-mail ID:	- NA -
	(c) Mobile Phone Number:	- NA -
4.	(a) Main category classification:	08(0812)
	(b) Sub classification:	OTHER PIL MATTER
5.	Not to be listed before:	- NA -

6. (a) Similar disposed of matter with citation, if any & case details: - NA -
(b) Similar Pending matter with case details: **W. P. (Civil) no. 104 of 2015**

7. **Criminal Matters:**

- (a) Whether accused/convict has surrendered: Yes ☐ No ☐
(b) FIR No. - NA - Date: - NA -
(c) Police Station: - NA -
(d) Sentence Awarded: - NA -
(e) Period of sentence undergone including period of Detention/ Custody Undergone: - NA -

8. Land Acquisition Matters: - NA -

- (a) Date of Section 4 notification: - NA -
(b) Date of Section 6 notification: - NA -
© Date of Section 17 notification: - NA -

9. Tax Matters: State the tax effect: - NA -

10. Special Category (first Petitioner/ appellant only): - NA -

- ☐ Senior citizen > 65 years ☐ SC/ST ☐ Woman/child
☐ Disabled ☐ Legal Aid case ☐ In custody - NA -

11. Vehicle Number (in case of Motor Accident Claim matters): - NA -

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New Delhi

Dated: 16.05.2021

SYNOPSIS

The instant Writ Petition has been filed in public interest under Article 32 of the Constitution of India challenging the constitutional validity of the practice of the Respondent in appointing the members to the Election Commission as being violative of Articles 14, 324 (2) and basic features of the Constitution.

Article 324(2) of the Constitution of India states:

"324(2): The Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix and the appointment of the Chief Election Commissioner and other Election Commissioners shall, subject to the provisions of any law made in that behalf by Parliament, be made by the President."

Presently, the appointment of Chief Election Commissioner and Election Commissioner is done solely by the executive. The impugned practice is incompatible with Article 324(2) and is manifestly arbitrary because:

A. Article 324(2) mandates Parliament to make a just, fair, and reasonable law. It is pertinent to mention that Dr. B.R. Ambedkar introduced an amendment that the appointment of the Chief Election Commissioner and the Election Commissioner shall be made by the President "subject to any law made in that behalf by Parliament." with the hope that in due course of time the Government will take an initiative to make just, fair, just and reasonable law for the appointment of the members of Election Commission so as to ensure its independence and integrity.

- B. Democracy is a facet of the basic structure of the Constitution and in order to ensure free and fair elections and to maintain healthy democracy in our country, the Election Commission should be insulated from political and/or executive interference. There is no doubt that in order to ensure the purity of the election process it was thought by our Constitution-makers that the responsibility to hold free and fair elections in the country should be entrusted to an independent body which would be insulated from political and/or executive interference. However, the appointment of members of the Election Commission on the whims and fancies of the executive violates the very foundation on which it was created, thus, making the Commission a branch of the executive.
- C. Further, the Election Commission is not only responsible for conducting free and fair elections but it also renders a quasi judicial function between the various political parties including the ruling government and other parties. In such circumstances the executive cannot be the sole participant in the appointment of members of the Election Commission as it gives unfettered discretion to the ruling party to choose someone whose loyalty to it is ensured and thereby renders the selection process vulnerable to manipulation. Thus, the aforesaid practice violates Article 14 of the Constitution of India and is incompatible with free and fair elections.

By way of the present Writ Petition, the Petitioner also seeks writ of mandamus or an appropriate writ, order or direction for constituting a

neutral and independent collegium/selection committee to recommend the names for appointment on the vacant post of the members of the Election Commission on the lines of the recommendations of Law Commission in its 255th Report of March 2015; Second Administrative Reform Commission in its fourth Report of January 2007; Dr. Dinesh Goswami Committee in its Report of May 1990; and Justice Tarkunde Committee in its Report of 1975. Pertinently, all the Committees and Commissions have recommended in similar lines for independent/neutral committees in order to strengthen the autonomy of Election Commission and to ensure their impartiality. However, the recommendations of the Committees and Commissions have not been implemented yet.

Pertinently, in ***Prakash Singh v. Union of India, (2006) 8 SCC 1***, in absence of legislation and failure of state to implement the recommendations of various committees and commissions for the purpose of insulating the Police from executive/ political interference, among others, this Hon'ble Court was pleased to hold, *inter alia*, as follows:

"26. Having regard to (i) the gravity of the problem; (ii) the urgent need for preservation and strengthening of the rule of law; (iii) pendency of even this petition for the last over ten years; (iv) the fact that various commissions and committees have made recommendations on similar lines for introducing reforms in the police set-up in the country; and (v) total uncertainty as to when police reforms would be introduced, we think that there cannot be any further wait, and the

stage has come for issuing of appropriate directions for immediate compliance so as to be operative till such time a new model Police Act is prepared by the Central Government and/or the State Governments pass the requisite legislations. It may further be noted that the quality of the criminal justice system in the country, to a large extent, depends upon the working of the police force. Thus, having regard to the larger public interest, it is absolutely necessary to issue the requisite directions...

29. The preparation of a model Police Act by the Central Government and enactment of new Police Acts by the State Governments providing therein for the composition of the State Security Commission are things we can only hope for the present. Similarly, we can only express our hope that all State Governments would rise to the occasion and enact a new Police Act wholly insulating the police from any pressure whatsoever thereby placing in position an important measure for securing the rights of the citizens under the Constitution for the rule of law, treating everyone equal and being partisan to none, which will also help in securing an efficient and better criminal justice delivery system. It is not possible or proper to leave this matter only with an expression of this hope and to await developments further. It is essential to lay down guidelines to be operative till the new legislation is enacted by the State Government”

30. Article 32 read with Article 142 of the Constitution empowers this Court to issue such directions, as may be necessary for doing complete justice in any cause or matter. All authorities are mandated by Article

144 to act in aid of the orders passed by this Court. The decision in VineetNarain case [(1998) 1 SCC 226 : 1998 SCC (Cri) 307] notes various decisions of this Court where guidelines and directions to be observed were issued in the absence of legislation and implemented till the legislatures pass appropriate legislations.” [emphasis supplied]

The inaction of the Respondent in not making appropriate law for ensuring just, fair and reasonable selection process for the appointment of members of Election Commission since 1950 is unwarranted and thus, to ensure proper implementation of the rule of law, it is in the interest of justice to issue necessary directions/ guidelines to fill the vacuum occurred on account of the aforesaid inaction till such time the legislature steps in to cover the gap or the executive discharges its role.

Hence, the Writ Petition.

List of dates

15.06.1949	<p>Article 324 was introduced as article 289 by Dr. B. R. Ambedkar before the Constituent assembly. Originally Article 324(2) read as follows:</p> <p><i>"(2) The Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may, from time to time appoint, and when any other Election Commissioner is so appointed, the Chief Election Commissioner shall act as the Chairman of the Commission."</i></p> <p>However, there were various reservations about the</p>
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proposed Article as it gave unfettered power to the executive to appoint anyone to be a member of the Election Commission. The most prominent reservation was proposed by the eminent Constitution maker namely Prof. Shibban Lal Saksena, in the Constituent Assembly Debate, who, while proposing an amendment that the appointment of the Chief Election Commissioner should be "*subject to confirmation by a two-thirds majority in a joint session of both Houses of Parliament*", argued that appointment by the President would really mean appointment by the Government under the decision of the Prime Minister.

Agreeing with Prof. Saksena, Dr. B.R. Ambedkar, the Chairman of Drafting Committee, in his reply stated:

"With regard to the question of appointment, I must confess that there is a great deal of force in what my friend, Prof. Saksena, has stated that there is no use of making the tenure of the Election Commissioner a fixed and secure one if there is no provision in the Constitution to prevent either a fool or knave or a person who is likely to be under the thumb of the Executive. My provision - I must admit - does not contain anything to provide against nomination of an unfit person to the post of Chief Election Commissioner or the other Election Commissioners."

Thereafter he introduced an amendment which was subsequently approved by the assembly. The said

	<p>amendment was introduced with the hope that in due course of time the Government will take an initiative to make fair, just and reasonable law for the appointment of the members of Election Commission to ensure its independence and integrity. The law as it stands today is:</p> <p><i>324(2): The Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix and the appointment of the Chief Election Commissioner and other Election Commissioners shall, <u>subject to the provisions of any law made in that behalf by Parliament, be made by the President.</u></i></p>
1975	<p>Justice Tarkunde Committee (appointed by 'Citizens for Democracy' on the suggestion of Sri Jayaprakash Narayan) recommended that the members of Election Commission should be appointed by the President on the advice of a Committee consisting of the Prime Minister, the Leader of the Opposition in the Lok Sabha and the Chief Justice of India.</p>
May, 1990	<p>The Committee on Electoral Reforms under the chairmanship of the then Law Minister namely, Mr. Dinesh Goswami, appointed by the Central Government, made several recommendations on the issue of electoral reforms. In para no. 1.2 of its report, Mr. The Dinesh</p>

	Goswami Committee recommended for the effective consultation with neutral authorities like Chief Justice of India and the Leader of the Opposition for the appointment in Election Commission.
January, 2007	The Second Administrative Reforms Commission, in its fourth report made in January, 2007, also recommended for the constitution of a neutral and independent collegium headed by the Prime Minister with the Speaker of the Lok Sabha, the Leader of Opposition in the Lok Sabha, the Law Minister and the Deputy Chairman of the Rajya Sabha as its members for making recommendations for consideration of the President for appointment of the Chief Election Commissioner and the Election Commissioners.
January 13.01.2015	A Writ Petition titled as <i>Anoop Baranwal v. Union of India (Writ Petition (C) No. 104 of 2015)</i> was filed before this Hon'ble Court praying for a writ of mandamus or an appropriate writ, order or direction, commanding the Respondent to make a law for ensuring a fair, just and transparent process of selection by constituting a neutral and independent collegium/ selection committee to recommend the name for the appointment of the member of the Election Commission under Article 324(2) of the Constitution of India, etc.

12.03.2015	The Law Commission of India made in its Report no. 255 made recommendation that the appointment of all the Election Commissioner should be made by the President in consultation with a three-member collegium or selection committee, consisting of the Prime Minister, the Leader of the Opposition of the Lok Sabha and the Chief Justice of India.
13.07.2015	This Hon'ble Court was pleased to issue notice in the aforesaid Petition.
23.10.2018	<p>This Hon'ble Court was pleased to refer the matter to the constitution bench. The relevant extract of the order is as follows:</p> <p><i>"The matter relates to what the petitioner perceives to be a requirement of having a full-proof and better system of appointment of members of the Election Commission. Having heard the learned counsel for the petitioner and the learned Attorney General for India we are of the view that the matter may require a close look and interpretation of the provisions of Article 324 of the Constitution of India. The issue has not been debated and answered by this Court earlier. Article 145 (3) of the Constitution of India would, therefore, require the Court to refer the matter to a Constitution Bench. We, accordingly, refer the question arising in the present proceedings to a Constitution Bench</i></p>

	<i>for an authoritative pronouncement."</i>
27.02.2020-17.03.2020	The Writ Petition was listed before the Constitution bench on 27.02.2020, 03.03.2020, 04.03.2020, 05.03.2020 and 17.03.2020. However, the same did not reach for hearing.
March, 2021	<p>The Citizens' Commission on Elections (CCE) chaired by the retired Supreme Court Judge, Justice Madan B. Lokur, in its second Report titled "<i>An Inquiry into India's Election System</i>" of March, 2021, examined the critical aspects of Parliamentary elections of 2019. The Commission highlighted several instances of inaction or omission on the part of the Election Commission which has raised doubts regarding its fairness and neutrality. The Report with respect to Electoral Process and Model Code of Conduct has said:</p> <ul style="list-style-type: none"> ● <i>"For Parliament Election-2019, ECI deliberately delayed the announcement to enable the PM to complete the inauguration blitz of a slew of projects (157 of them) that he had scheduled between February 8 and March 9.</i> ● <i>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.</i> ● <i>Some of the major controversies of MCC pertain to (a) Lack of consistency by the ECI in enforcing the MCC, (b)</i>

	<p><i>ECI treating the ruling party with kid gloves, (c) ECI not using its powers under Article 324 of the Constitution.</i></p> <ul style="list-style-type: none"> ● <i>The Election Commissioner who dissented and stood his ground was eased out from the ECI.</i> ● <i>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.</i> ● <i>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 to 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."</i>
27 March- 29 April 2021	<p>That a similar pattern of inaction and abdication of the functions and duties of the Election Commission was seen in the recent round of assembly elections in various states(State of Tamil Naidu, Assam, Kerala and Union Territory of Pondicherry), especially in the State of West Bengal. The Caravan in its article titled as "<i>The Biased Referee</i>" has highlighted several instances from announcing eight-phase polling schedule for West Bengal's</p>

	294 assembly seats to amending the rule regarding booth's agent in order to show Election Commission's blatant biasness in favour of the ruling government at Centre.
16.5.2021	<p>The recent incidents and examples have shown the partisan behavior of the Election Commission in favor of the appointing authority or ruling party. It is to further substantiate that it is in the interest of justice to issue the necessary directions/ guidelines to constitute independent neutral and independent collegium/ selection committee for appointment of members of Election Commission on the lines of the recommendation of Law Commission in its 255th report of March 2015; Second Administrative Reform Commission in its fourth Report of January 2007; by the Dr. Dinesh Goswami Committee in its Report of May 1990; and by the Justice Tarkunde Committee in its Report of 1975.</p> <p>Therefore, the Writ Petition.</p>

IN THE SUPREME COURT OF INDIA
(CIVIL ORIGINAL WRIT JURISDICTION)
WRIT PETITION (CIVIL) NO. ____/2021

(PUBLIC INTEREST PETITION)

(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)

IN THE MATTER OF:

ASSOCIATION FOR DEMOCRATIC REFORMS
THRU SH. JAGDEEP CHHOKAR
ADDRESS: T-95, CL HOUSE, 2ND FLOOR,
GULMOHAR COMMERCIAL COMPLEX
NEAR GREEN PARK METRO STATION
NEW DELHI- 110049

....PETITIONER

VERSUS

1. UNION OF INDIA

THROUGH ITS SECRETARY,
MINISTRY OF LAW AND JUSTICE,
SHASTRI BHAWAN, NEW DELHI-11000

2. ELECTION COMMISSION OF INDIA

THROUGH, THE CHIEF ELECTION COMMISSIONER
NIRVACHAN SADAN, SANSAD MARG AREA,
NEW DELHI- 110001

.....RESPONDENTS

WRIT PETITION IN PUBLIC INTEREST UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA FOR ISSUANCE OF WRIT, ORDER, DIRECTION OR ANY OTHER APPROPRIATE DIRECTION DECLARING THE PRACTICE OF APPOINTMENT OF CHIEF ELECTION COMMISSIONER AND ELECTION COMMISSIONER SOLELY BY THE EXECUTIVE AS BEING VIOLATIVE OF ARTICLES 324(2) AND 14 OF THE CONSTITUTION OF INDIA AND A FURTHER DIRECTION TO THE RESPONDENTS TO APPOINT THE ELECTION

COMMISSIONER ON THE VACANT POST THROUGH COLLEGIUM/SELECTION COMMITTEE AS RECOMMENDED BY THE LAW COMMISSION IN ITS 255TH REPORT OF MARCH 2015; SECOND ADMINISTRATIVE REFORM COMMISSION IN ITS FOURTH REPORT OF JANUARY 2007; BY THE DR. DINESH GOSWAMI COMMITTEE IN ITS REPORT OF MAY 1990; AND BY THE JUSTICE TARKUNDE COMMITTEE IN ITS REPORT OF 1975.

TO,

THE HON'BLE CHIEF JUSTICE OF INDIA AND HIS COMPANION JUDGES OF THE HON'BLE SUPREME COURT OF INDIA

THE HUMBLE PETITION OF THE
PETITIONER ABOVE-NAMED

MOST RESPECTFULLY SHOWETH:

1. The instant Writ Petition has been filed in public interest under Article 32 of the Constitution of India challenging the constitutional validity of the practice of the Respondent in appointing the members of the Election Commission as being violative of Articles 14, 324(2) and basic features of the Constitution. The Petitioner by way of present Petition is also seeking a direction for constituting a neutral and independent collegium/ selection committee for appointment of members of Election Commission on the lines of the recommendations of Law Commission in its 255th Report of March 2015; Second Administrative Reform Commission in its fourth Report of January 2007; Dr. Dinesh Goswami Committee in its Report of May 1990; and Justice Tarkunde Committee in its Report of 1975.

1A. ABOUT THE PETITIONER:

Petitioner Association for Democratic Reforms (ADR), a registered Society under the Societies Registration Act XXI of 1860, has been in the vanguard of electoral and political reforms in the country. Its activities comprise advocacy for transparent functioning of political parties, conducting a detailed analysis of candidates in every election, and researching the financial records of political parties. In 1999, ADR filed a PIL in the Delhi High Court seeking disclosure of criminal, financial and educational background of candidates contesting elections. Based on this, the Supreme Court in 2002 and subsequently in 2003 made it mandatory for the candidates to disclose their criminal, financial and educational background prior to the polls by filing an affidavit with the Election Commission. ADR, along with National Election Watch, has conducted election watches for the 2009 Lok Sabha Elections, Rajya Sabha Elections and almost all the State Assembly elections since 2002. ADR is striving to bring about transparency and accountability in the functioning of political parties. In April, 2008, ADR obtained a landmark order from the Central Information Commission holding that the Income Tax Returns of political parties and the assessment orders passed on them will be available to the citizens. ADR is now working to extend this dispensation to members of Parliament and to bring political parties under the ambit of the RTI Act. Under the practice followed by ADR, the Founder-Trustee Prof. Jagdeep S Chhokar is authorised to institute proceedings on behalf of Petitioner. The Registration Certificate of Petitioner and authority letter are being filed along with

the vakalatnama. The petitioner organization's annual income is Rs. 75'27,929 (FY/13-14) (PAN No.AAAAAA2503P). Petitioner not being an natural person does not have a National UID number.

The Petitioner has no personal interest, or private/oblique motive in filing the instant Petition. There is no civil, criminal, revenue or any litigation involving the Petitioner, which has or could have a legal nexus with the issues involved in the PIL.

The Petitioner has not made any representation to the Respondent in this regard because of the urgency in the matter in issue.

That the instant Writ Petition is based on the information/documents which are in public domain.

Facts of the case

2. Article 324 was introduced as Article 289 by Dr. B. R. Ambedkar before the Constituent assembly. Originally Article 324(2) read as follows:

"(2) The Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may, from time to time appoint, and when any other Election Commissioner is so appointed, the Chief Election Commissioner shall act as the Chairman of the Commission."

However, there were various reservations about the proposed Article as it gave unfettered power to the executive to appoint anyone to be a member of the Election Commission. The most prominent reservation was proposed by the eminent Constitution maker namely Prof. Shibban Lal Saksena, in the Constituent Assembly Debate, who, while proposing an amendment that the appointment of the Chief Election Commissioner should be "*subject to confirmation by a two-thirds majority in a joint session of both Houses of Parliament*", argued that appointment by the President would really mean appointment by the Government under the decision of the Prime Minister.

Agreeing with Prof. Saksena, Dr. B.R. Ambedkar, the Chairman of Drafting Committee, in his reply stated:

"With regard to the question of appointment, I must confess that there is a great deal of force in what my friend, Prof. Saksena, has stated that there is no use of making the tenure of the Election Commissioner a fixed and secure one if there is no provision in the Constitution to prevent either a fool or knave or a person who is likely to be under the thumb of the Executive. My provision - I must admit - does not contain anything to provide against nomination of an unfit person to the post of Chief Election Commissioner or the other Election Commissioners."

Thereafter, he introduced an amendment which was subsequently approved by the Assembly. The said amendment was introduced with the hope that in due course of time the Government will take an initiative to make a fair, just and reasonable law for the appointment of the members of Election Commission to ensure its independence and integrity. The law as it stands today is:

"324(2): The Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix and the appointment of the Chief Election Commissioner and other Election Commissioners shall, subject to the provisions of any law made in that behalf by Parliament, be made by the President."

3. That in the year 1975 Justice Tarkunde Committee (appointed by 'Citizens for Democracy' on the suggestion of Sri Jayaprakash Narayan) recommended that the members of Election Commission should be appointed by the President on the advice of a Committee consisting of the Prime Minister, the Leader of the Opposition in the Lok Sabha and the Chief Justice of India.
4. That the Committee on Electoral Reforms under the chairmanship of then Law Minister, Mr. Dinesh Goswami, appointed by the Central Government, made several recommendations on the issue of electoral reforms. In Para no. 1.2 of its Report, Mr. Dinesh Goswami Committee recommended for the effective consultation with neutral

authorities like Chief Justice of India and the Leader of the Opposition for the appointment in Election Commission. The relevant recommendations in para no. 1.2 of the Report are as follows:

(i)The appointment of the Chief Election Commissioner should be made by the President in consultation with the Chief Justice of India and the Leader of the Opposition (and in case no Leader of the opposition is available, the consultation should be with the leader of the largest opposition group in the Lok Sabha).

(ii)The consultation process should have a statutory backing.

(iii)The appointment of the other two Election Commissioners should be made in consultation with the Chief Justice of India, Leader of the Opposition (in case the Leader of the opposition is not available, the consultation should be with the leader of the largest opposition group in the Lok Sabha) and the Chief Election Commissioner.

A true copy of the Chapter I and Chapter II of the report of May, 1990 of the Committee on Electoral Reforms is annexed herewith and marked as **ANNEXURE P-1 (Page No. 29 to 43)**.

5. That the Second Administrative Reforms Commission, in its fourth report made in January, 2007, also recommended the constitution of a neutral and independent body to recommend the name for Election Commission. The recommendation of the Commission is as follows:

"2.1.5.4 Recommendation:

a.A collegium headed by the Prime Minister with the Speaker of the Lok Sabha, the Leader of Opposition in the Lok Sabha, the Law Minister and the Deputy Chairman of the Rajya Sabha as members should make recommendations for the consideration of the President for appointment of the Chief Election Commissioner and the Election Commissioners."

A true copy of the relevant Para no. 2.1.5 of the 4th Report of January, 2007 of the Second Administrative Reforms Commission is annexed herewith and marked as **ANNEXURE P-2 (Page No. 44 to 46).**

6. That 12.03.2015, the Law Commission of India in its report no. 255 on the Electoral Reform recommended that the appointment of all the Election Commissioner should be made by the President in consultation with a three-member collegium or selection committee, consisting of the Prime Minister, the Leader of the Opposition of the Lok Sabha and the Chief Justice of India. A true copy of the relevant part of report no. 255 dated 12 March, 2015 of the Law Commission of India is annexed herewith and marked as **Annexure P- 3 (Page No. 47 to 57).**

7. That on 13.07.2015, this Hon'ble Court was pleased to issue notice in a Writ Petition tiled as *AnoopBaranwal v. Union of India (Writ*

Petition (C) No. 104 of 2015), wherein the Petitioner had challenged the appointment of members of Election Commission as being violative of Article 324(2) and also sought direction of this Hon'ble Court to issue a writ of mandamus or an appropriate writ, order or direction, commanding the Respondent to make law for ensuring a fair, just and transparent process of selection by constituting a neutral and independent collegium/ selection committee to recommend the name for the appointment of the member of the Election Commission under Article 324(2) of the Constitution of India, etc.

8. The aforesaid Writ Petition was last listed before this Hon'ble Court on 23.10.2018, wherein this Hon'ble Court while referring the issue to a constitution bench passed the following order:

"The matter relates to what the petitioner perceives to be a requirement of having a full-proof and better system of appointment of members of the Election Commission. Having heard the learned counsel for the petitioner and the learned Attorney General for India we are of the view that the matter may require a close look and interpretation of the provisions of Article 324 of the Constitution of India. The issue has not been debated and answered by this Court earlier. Article 145 (3) of the Constitution of India would, therefore, require the Court to refer the matter to a Constitution Bench. We, accordingly, refer the question arising in the present proceedings to a Constitution Bench for an authoritative pronouncement."

A copy of the order dated 23.10.2018 passed in Writ Petition(Civil) No. 104 of 2015 is marked and annexed as **ANNEXURE P-4 (Page No. 58 to 59).**

9. The Writ Petition was listed before the Constitution bench on 27.02.2020, 03.03.2020, 04.03.2020, 05.03.2020 and 17.03.2020. However, the same did not reach for hearing.

10. That in recent years questions have been raised about the conduct of the Election Commission in its supervision and management of the election process. It is the responsibility of the Election Commission to conduct the elections in a free, fair, impartial, and efficient manner because the sanctity of elections is the most important requirement in the Indian Democracy. Unfortunately, there has been a growing impression that the Election Commission is indulgent towards the ruling government at the centre, and the commission has a different standard to determine the actions of the members of the ruling government and the complaints that arise during the campaign/elections.

11. That in March, 2021, The Citizens' Commission on Elections (CCE) chaired by the retired Supreme Court Judge, Justice Madan B. Lokur, in its second Report titled "*An Inquiry into India's Election System*" of March, 2021, examined the critical aspects of Parliamentary elections of 2019. The Commission highlighted several instances of inaction or omission on the part of the Election

Commission which has raised doubts regarding its fairness and neutrality. The report with respect to Electoral Process and Model Code of Conduct has said:

- ❖ *"For Parliament Election-2019, ECI deliberately delayed the announcement to enable the 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 to 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."*

A true copy of the relevant pages of Report of the Citizen's Commission on Elections of March, 2021 is annexed and marked as **ANNEXURE P-5 (Page No. 60 to 90).**

12. That a similar pattern of inaction and abdication of the functions and duties of the Election Commission was seen in the recent round of assembly elections in various states(State of Tamil Naidu, Assam, Kerala and Union Territory of Pondicherry), especially in the State of West Bengal. The Caravan, in its article titled as "*The Biased Referee*" has highlighted several instances in order to show Election Commission's blatant biasness in favor of the ruling government. A true copy of The Caravan article dated 31.03.2021 titled "The Biased Referee" is annexed and marked as **ANNEXURE P-6 (Page No. 91 to 105).**

13. That it is relevant to state that the appointment on the post of the head and members of many other Authorities are being made on the recommendation of an independent and neutral statutory

collegium/ selection committee. Illustration of such Authorities may be quoted herewith as follows:

i. Chief Information Commissioner/ Information Commissioner - are appointed on the recommendation of the Committee consisting of Prime Minister, Leader of the Opposition in the Lok Sabha and one Union Cabinet Minister to be nominated by the Prime Minister u/s 12(3) of the Right to Information Act, 2005.

ii. Chairperson and member of the National Human Right Commission - are appointed on the recommendation of the Committee consisting of Prime Minister, Speaker, Home Minister, Leader of the Opposition in the Lok Sabha, Leader of the Opposition in the Rajya Sabha and Deputy Chairman of Rajya Sabha u/s 4 of the Protection of Human Right Act, 1993.

iii. Chief Vigilance Commissioner & Vigilance Commissioners - are appointed on the recommendation of the Committee consisting of Prime Minister, the Minister of Home Affairs and Leader of the Opposition in the Lok Sabha u/s 4(1) of the Central Vigilance Commission, Act, 2003.

iv. Director of Central Bureau of Investigation - is appointed on the recommendation of the Selection Committee consisting of Prime Minister, Leader of the Opposition in the Lok Sabha and Chief Justice of India under the Delhi Special Police Establishment Act, 1946.

v. Lokpal and Members - is appointed on the recommendation of the Selection Committee consisting of (a) Prime Minister (Chairperson); (b) the Speaker of the House of the People—Member; (c) the Leader of Opposition in the House of the People—Member; (d) the Chief Justice of India or a Judge of the Supreme Court nominated by him—Member; (e) one eminent jurist u/s 4(1) of the Lokpal and Lokayuktas Act, 2013.

vi. Chairman: Press Council of India- is appointed on the recommendation of the Committee consisting of Chairman of the Council of States (Rajya Sabha), the Speaker of the House of the People (Lok Sabha) and a person elected by the members of the Council u/s section 5 of the Press Council Act, 1978.

14. That democracy is a facet of the basic structure of the constitution and in order to ensure free and fair election and to maintain healthy democracy in our country, the Election Commission should be insulated from political and/or executive interference. The practice of appointment of members of Election Commission by the government creates apprehensions regarding the neutrality of the Commission. Further, in recent years the Election Commission has acted as an organ of the Central Government rather than an independent agency.

15. The recent incidents and examples have shown the partisan behavior of the Election Commission in favor of the appointing

authority or ruling party. It is to further substantiate that it is in the interest of justice to issue the necessary directions/ guidelines on the lines of the recommendations of Law Commission in its 255th report of March 2015; Second Administrative Reform Commission in its fourth Report of January 2007; Dr. Dinesh Goswami Committee in its Report of May 1990; and Justice Tarkunde Committee in its Report of 1975 to fill the vacuum occurred on account of the aforesaid inaction till such time the legislature steps in to cover the gap or the executive discharges its role.

16. The Petitioner has not filed any other similar petition before this Hon'ble Court or any High Court or any other Court. The Petitioner has no better remedy available.

GROUND

The reliefs claimed and the direction and orders sought in the instant Petition are on the grounds set out herein-below and each of the grounds may be treated as being cumulative as well as being in the alternative and without prejudice to one another.

- A. BECAUSE the appointment of Chief Election Commissioner and Election Commissioner solely by the executive is incompatible with Article 324(2). Article 324(2) mandates Parliament to make a just, fair, and reasonable law. Also, Dr. B.R. Ambedkar amended the original text and introduced "subject to any law made in that behalf by Parliament" with the hope that in due course of time the Government will take an

initiative to make a fair, just and reasonable law for the appointment of the members of the Election Commission to ensure its independence and integrity.

- B. BECAUSE the appointment of the members of the Election Commission solely by executive is incompatible with the preambular values and basic features of the Constitution. Democracy is a facet of the basic structure of the constitution and in order to ensure free and fair elections and to maintain healthy democracy in our country, the Election Commission should be insulated from political and/or executive interference. There is no doubt that in order to ensure the purity of the election process it was thought by our Constitution-makers that the responsibility to hold free and fair elections in the country should be entrusted to an independent body which would be insulated from political and/or executive interference. However, the appointment of members of Election Commission on the pick and choose of the executive violates the very foundation for which it was created, thus, making the Commission a branch of executive.
- C. BECAUSE 'Integrity and Independence of Election Commission' is the basic feature of the Constitution of India in view of the fact that its functioning greatly determines the quality of governance and strength of democracy and adopting the process of appointment of the member to the Election Commission solely on the recommendation of the executive at Centre without evolving fair and reasonable selection process, is undermining the 'Integrity and Independence of Election Commission'.

D. BECAUSE this Hon'ble Court in ***Roger Mathew v. South Indian Bank Ltd., (2020) 6 SCC 1*** while declaring the composition of Search-cum-Selection Committee, which was dominated by the members from central government in Column 4 of the Schedule to the Tribunal, Appellate Tribunal and Other Authorities (Qualification, experience and other conditions of service of members) Rules, 2017, as unconstitutional observed:

"153. *We are of the view that the Search-cum-Selection Committee as formulated under the Rules is an attempt to keep the judiciary away from the process of selection and appointment of Members, Vice-Chairman and Chairman of Tribunals. This Court has been lucid in its ruling in Supreme Court Advocates-on-Record Assn. v. Union of India [Supreme Court Advocates-on-Record Assn. v. Union of India, (2016) 5 SCC 1] (Fourth Judges case), wherein it was held that primacy of judiciary is imperative in selection and appointment of judicial officers including Judges of the High Court and the Supreme Court. Cognizant of the doctrine of separation of powers, it is important that judicial appointments take place without any influence or control of any other limb of the sovereign. Independence of the judiciary is the only means to maintain a system of checks and balances on the working of legislature and the executive. The executive is a litigating party in most of the litigation and hence cannot be allowed to be a dominant participant in judicial appointments."*

Similarly, in the present case the Election Commission is not only responsible for conducting free and fair elections but it also renders a

quasi judicial function between the various political parties including the ruling government and other parties. In such circumstances the executive cannot be a sole participant in the appointment of members of Election Commission as it gives unfettered discretion to the ruling party to choose someone whose loyalty to it is ensured and thereby renders the selection process vulnerable to manipulation.

- E. BECAUSE the process of appointment of the member to the Election Commission also needs to be insulated from the political and executive pressure by evolving a neutral and independent collegium/ committee for fair, just and transparent selection just like other High Constitutional and Legal Authorities like Judge of Supreme Court and High Court; Chief Information Commissioner/ Information Commissioner; Chairperson and members of the National Human Right Commission; Chief Vigilance Commissioner; Director of Central Bureau of Investigation; Lokpal and other members; Chairman: Press Council of India.

- F. BECAUSE the Respondent has failed to implement the recommendations of constituting independent/neutral committee of Law Commission in its 255th Report of March 2015; Second Administrative Reform Commission in its fourth Report of January 2007; by the Dr. Dinesh Goswami Committee in its Report of May 1990; and by the Justice Tarkunde Committee in its Report of 1975.

- G. BECAUSE the inaction of the Respondent in not making appropriate law as contemplated under Article 324 (2) is unwarranted and thus, to

ensure proper implementation of the rule of law, it is in the interest of justice to issue the necessary directions/ guidelines to fill the vacuum occurred on account of the aforesaid inaction till such time the legislature steps in to cover the gap or the executive discharges its role. Such power of issuing directions/ guidelines under Article 32 read with Article 142 of the Constitution of India has also been laid down by this Hon'ble Court in ***VineetNarain v. Union of India, (1998) 1 SCC 226***. The relevant paragraph no. 49 *VineetNarain's* is quoted below:

"49. There are ample powers conferred by Article 32 read with Article 142 to make orders which have the effect of law by virtue of article 141 and there is mandate to all authorities to act in aid of the orders of this Court as provided in Article 144 of the Constitution. In a catena of decisions of this Court, this power has been recognised and exercised, if need be, by issuing necessary directions to fill the vacuum till such time the legislature steps in to cover the gap or the executive discharges its role. It is in the discharge of this duty that the IRC was constituted by the Government of India with a view to obtain its recommendations after an in depth study of the problem in order to implement them by suitable executive directions till proper legislation is enacted. The report of the IRC has been given to the Government of India but because of certain difficulties in the present context, no further action by the executive has been possible. The study having been made by a Committee considered by the Government of India itself as an expert body, it is safe to act on the recommendations of the IRC to formulate the directions of this Court, to the extent they are of assistance. In the

remaining area, on the basis of the study of the IRC and its recommendations, suitable directions can be formulate to fill the entire vacuum. This is the exercise we propose to perform in the present case since this exercise can no longer be delayed. it is essential and indeed the constitutional obligation of this court under the aforesaid provisions to issue the necessary directions in this behalf. We now consider formulation of the needed directions in the performance of this obligation. The directions issued herein for strict compliance are to operate till such time as they are replaced by suitable legislation in this behalf."

H. BECAUSE in ***Prakash Singh v. Union of India, (2006) 8 SCC 1***, in order to insulate the Police from executive/ political interference as recommended by various Committees/ Commissions, this Hon'ble Court was pleased to hold, *inter alia*, as follows:

"26. Having regard to (i) the gravity of the problem; (ii) the urgent need for preservation and strengthening of the rule of law; (iii) pendency of even this petition for the last over ten years; (iv) the fact that various commissions and committees have made recommendations on similar lines for introducing reforms in the police set-up in the country; and (v) total uncertainty as to when police reforms would be introduced, we think that there cannot be any further wait, and the stage has come for issuing of appropriate directions for immediate compliance so as to be operative till such time a new model Police Act is prepared by the Central Government and/or the

State Governments pass the requisite legislations. It may further be noted that the quality of the criminal justice system in the country, to a large extent, depends upon the working of the police force. Thus, having regard to the larger public interest, it is absolutely necessary to issue the requisite directions...

***29.* The preparation of a model Police Act by the Central Government and enactment of new Police Acts by the State Governments providing therein for the composition of the State Security Commission are things we can only hope for the present. Similarly, we can only express our hope that all State Governments would rise to the occasion and enact a new Police Act wholly insulating the police from any pressure whatsoever thereby placing in position an important measure for securing the rights of the citizens under the Constitution for the rule of law, treating everyone equal and being partisan to none, which will also help in securing an efficient and better criminal justice delivery system. It is not possible or proper to leave this matter only with an expression of this hope and to await developments further. It is essential to lay down guidelines to be operative till the new legislation is enacted by the State Government.**

***30.* Article 32 read with Article 142 of the Constitution empowers this Court to issue such directions, as may be necessary for doing complete justice in any cause or matter. All authorities are mandated by Article**

*144 to act in aid of the orders passed by this Court. **The decision in VineetNarain case [(1998) 1 SCC 226 : 1998 SCC (Cri) 307] notes various decisions of this Court where guidelines and directions to be observed were issued in the absence of legislation and implemented till the legislatures pass appropriate legislations.** '[emphasis supplied].*

I. BECAUSE this Hon'ble Court in ***Union of India v. Assn. for Democratic Reforms, (2002) 5 SCC 294*** on the issue of implementation of 170th Law Commission Report and the Vohra Committee Report regarding declaration of, education qualification, assets and pending criminal cases rejected the argument put forth by Union of India and the intervenor- Indian National Congress. The Union of India and Intervener contended that it is for the political parties to decide whether such recommendations should be brought and carried out by way of amendments in the Act and the Rules and that once Parliament has not amended the Act or the Rules despite the recommendation made by the Law Commission or the report submitted by the Vohra Committee, there was no question of giving any direction by the High Court to the Election Commission. This Hon'ble Court while rejecting the argument held that *"it cannot be said that the directions issued by the High Court are unjustified or beyond its jurisdiction"* [Para 47], after observing and holding, inter alia, as follows:

"19. *At the outset, we would say that it is not possible for this Court to give any directions for amending the Act or the statutory Rules. It is for Parliament to amend the Act and the Rules. It is also established law*

that no direction can be given, which would be contrary to the Act and the Rules.

20. However, it is equally settled that in case when the Act or Rules are silent on a particular subject and the authority implementing the same has constitutional or statutory power to implement it, the Court can necessarily issue directions or orders on the said subject to fill the vacuum or void till the suitable law is enacted.

45. Finally, in our view this Court would have ample power to direct the Commission to fill the void, in the absence of suitable legislation covering the field and the voters are required to be well informed and educated about contesting candidates so that they can elect a proper candidate by their own assessment. It is the duty of the executive to fill the vacuum by executive orders because its field is coterminous with that of the legislature, and where there is inaction by the executive, for whatever reason, the judiciary must step in, in exercise of its constitutional obligations to provide a solution till such time the legislature acts to perform its role by enacting proper legislation to cover the field. The adverse impact of lack of probity in public life leading to a high degree of corruption is manifold. Therefore, if the candidate is directed to declare his/her spouse's and dependants' assets — immovable, movable and valuable articles — it would have its own effect. **This Court in Vishaka v. State of Rajasthan [(1997) 6 SCC 241 : 1997 SCC (Cri) 932] dealt with the incident of sexual harassment of a woman at work place which resulted in**

violation of fundamental right of gender equality and the right to life and liberty and laid down that in the absence of legislation, it must be viewed along with the role of the judiciary envisaged in the Beijing Statement of Principles of Independence of Judiciary in the LAWASIA region. The decision has laid down the guidelines and prescribed the norms to be strictly observed in all work places until suitable legislation is enacted to occupy the field. In the present case also, there is no legislation or rules providing for giving necessary information to the voters. As stated earlier, this case was relied upon in Vineet Narain case [(1998) 1 SCC 226 : 1998 SCC (Cri) 307] where the Court has issued necessary guidelines to CBI and the Central Vigilance Commission (CVC) as there was no legislation covering the said field to ensure proper implementation of the rule of law.

46. To sum up the legal and constitutional position which emerges from the aforesaid discussion, it can be stated that:

6. On cumulative reading of a plethora of decisions of this Court as referred to, it is clear that if the field meant for legislature and executive is left unoccupied detrimental to the public interest, this Court would have ample jurisdiction under Article 32 read with Articles 141 and 142 of the Constitution to issue necessary directions to the executive to subserve public interest.” [emphasis supplied]

J. BECAUSE in view of this Hon'ble Court's judgment in ***Union of India v. Assn. for Democratic Reforms, (2002) 5 SCC 294***, it is respectfully submitted that till an appropriate law is framed by the Parliament in terms of Article 324(2) of the Constitution for the appointment of Chief Election Commissioner and other Election Commissioners, necessary directions, as sought in the instant writ petition, may be given to the Respondent under Article 32 read with Articles 141 and 142 of the Constitution to subserve overwhelming public interest in the appointment of the members of the Election Commission in order to ensure its independence, thereby, preserving the foundation of democracy which has been held to be a part of the basic structure of the Constitution and which includes free and fair elections.

PRAYER

In view of the facts and circumstances aforementioned, it is humbly prayed that this Hon'ble Court may be pleased to: -

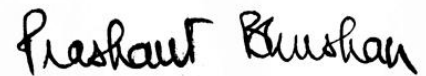
- i. Issue an appropriate writ, order or direction declaring the practice of appointment of Chief Election Commissioner and Election Commissioner solely by the executive as being violative of Articles 324(2) and 14 of the Constitution of India.
- ii. Direct the Respondent to implement an independent system for appointment of members of the Election Commission on the lines of recommendation of Law Commission in its 255th report of March 2015; Second Administrative Reform Commission in its fourth Report of January 2007; by the Dr. Dinesh Goswami Committee in its

Report of May 1990; and by the Justice Tarkunde Committee in its Report of 1975. ; and or;

- iii. Grant such other reliefs as this Hon'ble Court may deem fit and proper in light of the facts and circumstances of the case.

AND FOR THIS ACT OF KINDNESS THE PETITIONER AS IN DUTY BOUND SHALL EVER PRAY.

PETITIONER THROUGH:



(PRASHANT BHUSHAN)

COUNSEL FOR THE PETITIONER

DRAWN & FILED ON: 16.05.2021
PLACE: NEW DELHI

IN THE HON'BLE SUPREME COURT OF INDIA
WRIT PETITION (CIVIL) NO. _____ OF 2021
(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)

IN THE MATTER OF:

ASSOCIATION FOR DEMOCRATIC
REFORMS

....PETITIONERS

VERSUS

UNION OF INDIA & ANR.

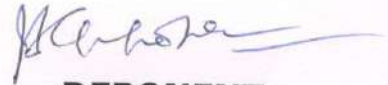
....RESPONDENTS

AFFIDAVIT

I, Jagdeep Chhokar, S/o Raghbir Singh R/o New Delhi, presently at A-278 New Friends Colony, New Delhi-110025, being the Petitioner above named do hereby solemnly affirm and state on oath as under:-

1. That I am Founder-Trustee of the Petitioner organization and duly authorized by it to file the present Petition. I am well conversant with the facts and records of the case. I am competent to swear this affidavit.
2. That I have read and understood the contents of the Synopsis and List of dates (Pages B to M), Writ Petition (Pages 1 to 26 and para 1 - 16), I.A's and the contents of the same are true and correct to my knowledge and based on the records of the case.

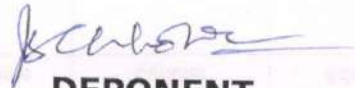
3. I further state that all the Annexures to this Writ Petition are true copies of their respective originals.



DEPONENT

VERIFICATION:

I the above named deponent do hereby verify that the contents of the aforesaid affidavit from para 1 to 3 are true and correct to the best of my knowledge and belief, no part of it is false nothing material has been concealed there from. Verified at N.DELHI on this the 15th day of May, 2021



DEPONENT

ANNEXURE: P1

COMMITTEE ON ELECTORAL REFORMS

REPORT OF THE
COMMITTEE on
ELECTORAL REFORMS

MAY, 1990

GOVERNMENT OF INDIA

MINISTRY Of Law and Justice

LEGISLATIVE DEPARTMENT

CHAPTER I

INTRODUCTION

1.1 Bharat can legitimately be proud of its being the largest democracy in the world and of its unique success as demonstrated through regular periodical elections inspite of steep illiteracy and backwardness of its people.

1.2 The credit for our success with the working of parliamentary democracy based on universal adult suffrage goes, in no small measure, to our people who have displayed their maturity of judgment through their native intelligence and commonsense in choosing, and also changing, the Government according to their choice.

1.3 The massive operation of our country wide elections naturally inspires global awe and respect. Holding of elections in sky high and snow-clad mountains in North; scattered tiny islands in South; thick forests in East; and a vast tracks of marshy and desert lands in West; poses daunting problems which have been, time and again, successfully overcome. At the present reckoning, the electoral machinery has to plan and manage an election for an electorate of nearly 500 million spread over 25 States and 7 Union territories of big, medium and small sizes; nearly 5.5 lakhs of polling stations; requirement of an army of about 3 million personnel; vast quantity of ballot papers, ballot boxes and other materials.

1.4 Sir Antony Eden, Former Prime Minister of United Kingdom was perhaps greatly influenced by these factors when he observed:-

"Of all the experiments in government which have been attempted since the beginning of Time, I believe that the Indian venture into parliamentary government is the most exciting. A vast sub-continent is attempting to apply to its tens and hundreds of millions a system of free democracy which has been slowly evolved over the centuries in this small island, Great Britain. It is a brave thing to try to do so. The Indian venture is not a pale imitation of our practice at home, but a magnified and multiplied reproduction on a scale we have never dreamt of. If it succeeds, its influence on Asia is incalculable for good. Whatever the outcome, we must honour those who attempt it."

1.5 Leaving now our laurels alone, it becomes imperative to take stock of the present state of affairs which causes real concern and anxiety because of the existence of the looming danger threatening to cut at the very roots of free and fair elections.

1.6 The role of money and muscle powers at elections deflecting seriously the well accepted democratic values and ethos and corrupting the process; rapid criminalization of politics greatly encouraging evils of booth capturing, rigging, violence etc.; misuse of

official machinery, i.e. official media and ministerial; increasing menace of participation of non-serious candidates; form the core of our electoral problems. Urgent corrective measures are the need of the hour lest the system itself should collapse.

1.7 Electoral reforms are correctly understood to be a continuous process. But the attempts so far made in this area did not touch even the fringe of the problem. They proved to be abortive. Some of the recent measures like reduction of voting age and anti-defection law are no doubt laudable and the basic principles underlying those measures should be appreciated. But there are other vital and important areas in election field completely neglected and left high and dry.

1.8 All these four decades, especially after 1967, the demand for electoral reforms has been mounting up. The subject of electoral reforms received wide attention at various Seminars and Forums. Many eminent persons and academicians have written on various aspects of electoral reforms. It would be relevant to make reference in brief to some of them.

(1) The Report of the Joint Parliamentary Committee on amendment to election law - Part I and Part 11 - submitted in 1972 in two parts and the draft Bill appended thereto.

(2) The Report of the Committee For Democracy (CFD) set up by Shri Jaya Prakash Narayan under the Chairmanship of Justice Tarkunde in August 1974.

(3) Consideration of the various aspects of electoral reforms by the Sub-Committee of Cabinet appointed in 1977.

(4) Consideration of the various aspects of electoral reforms by the Sub-Committee of the Cabinet between 1982 - 1984.

(5) Various Presidential Addresses in Parliament.

(6) Various Reports of Election Commission containing the views, suggestions and recommendations of the Chief Election Commissioners from 1952 onwards and the package of proposals made by the Commission in 1982.

(7) The comments and views of the present Chief Election Commissioner, Shri R.V.S. Peri Sastri, as contained in his Notes circulated at the meeting of the political parties held on 9-1-1990.

(8) The recommendations of the various Seminars including the one organised in March, 1983 by the Institute of Constitutional and Parliamentary Studies in New Delhi to deal with the various aspects of electoral reforms.

(9) Write ups, articles etc. in national press regarding various aspects of electoral law and procedure.

(10) Articles in Periodical "Swarajya" by Shri R. Venkataraman, President of India in Sixties (1960)

1.9 Some of the books by eminent authors dealing with either comprehensively the various aspects of electoral reforms or particular important aspects thereof are-

(1) 'Lack of Political Will' by Shri Ramakrishna Hegde, former Chief Minister of Karnataka and at present Deputy Chairman of the Planning Commission.

(2) 'Electoral Reforms' a book by Shri L.P. Singh, former Governor.

(3) 'Rescue Democracy From Money Power' by Shri Rajagopalachari (Rajaji), former Governor-General and an eminent statesman.

(4) Reports of various Seminars addressed by Shri S.L. Shaktiher, former Chief Election Commissioner; Shri R.K. Trivedi, Former Chief Election Commissioner; Shri R.V.S. Perisastri, Present Chief Election Commissioner; Shri L.K. Advani (MP) and others.

1.10 Thus, there are in existence informative, productive and useful voluminous materials on the subject. The general public has been getting the feeling that there is lack of political will to undertake any useful exercise of electoral reforms.

1.11 In this context, the quick and timely initiative of the Prime Minister, Shri Visvanath Pratap Singh, on the assumption of office of the National Front Government is refreshing. It has revived the hope that meaningful electoral reforms could now be a distinct possibility and efforts would be directed towards removing the serious drawbacks and distortions in the election law and procedure.

1.12 A meeting mainly of the representatives of political parties in Parliament was convened on the 9th January, 1990 at New Delhi under the Chairmanship of the Prime Minister, Shri Vishwanath Pratap Singh. Various aspects of electoral reforms were discussed at the meeting. In summing up of the deliberations, the Prime Minister outlined the following areas of electoral reforms on which general discussions at the meeting took place and broad consensus on the need for corrective measures emerged :-

- (1) Change of electoral system with special reference to Proportional Representation System and List System on which divergent views were earlier expressed;

- (2) Strengthening of the Election Commission and securing its independence including making the holder of the post of the Chief Election Commissioner ineligible for any office under the government after his term;
- (3) More stringent laws to deal with evil of booth capturing and impersonation;
- (4) Fresh delimitation to cure the various distortions; provision for rotation of seats reserved for scheduled castes; Reservation of seats for women;
- (5) Expeditious disposal of election petitions and appeals by sitting Judges and to manage their other work by appointment of ad hoc Judges;
- (6) Examination of the present provision of Anti-Defection Law and introduction of necessary changes to limit its application only to certain areas of legislative activities and to limit the powers of the presiding officers of the Legislatures;
- (7) Public Funding of elections;
- (8) Fixation of rational basis for ceiling of election expenses and need for removing the present distortions;
- (9) Multi-purpose photo identity cards to voters;

- (10) Statutory time-limit for holding bye-elections;
- (11) Statutory backing to certain provisions of Model Code;
- (12) Statutory backing to the Observers' role;
- (13) Combating the evil of non-serious candidates. contesting elections;
- (14) Elimination of misuse of official machinery.

1.13 On the basis of the conclusions at the meeting of 9th January, 1990, the Government constituted a Committee under the Chairmanship of Law Minister Shri Dinesh Goswami with the following members to go into the various aspects of electoral reforms enumerated above:-

- 1. Shri H.K.L. Bhagat, M.P. (Indian National Congress)
- 2. Shri L.K. Advani, M.P. (Bharatiya Janata Party)
- 3. Shri Somnath Chatterjee, M.P. (Communist Party of India)
[Marxist]
- 4. Shri Ghulam Rasool Matto, M.P. (National Conference)
- 5. Shri Chimanbhai Mehta, M.P.
- 6. Shri Indrajit M.P.
- 7. Shri Homi F. Daji, Former M.P. (Communist Party of India)
- 8. Shri Era Sezhiyan, Former M.P. (Janata Dal)

9. Shri V. Kishore Chandra Deo, Former M.P. (Congress (S))

10. Shri L.P. Singh, Former Governor

11. Shri S.L. Shakhder, Former Chief Election Commissioner

1.14 Shri K. Ganesan, former Secretary, Election Commission of India, who has been appointed honorary Consultant in the Ministry of Law and Justice for the specific work of electoral reforms has been instructed to assist the Committee in its deliberations. Shri J.C. Sharma, Consultant in the Ministry of Law and Justice, Legislative Department has been instructed to assist Shri K. Ganesan in the matter.

1.15 Smt. V.S. Rama Devi, Secretary, Legislative Department, Ministry of Law and Justice, has also been requested to assist the Committee in its deliberations.

1.16 At the first meeting of the Committee held on the 3rd February, 1990 at New Delhi under the Chairmanship of Shri Dinesh Goswami, Law Minister, the Chairman indicated that detailed working paper under various heads of subjects of the contemplated electoral reforms would be prepared and circulated to members.

1.17 Shri K. Ganesan has been instructed to prepare the detailed working paper' in consultation with Shri Era Sezhiyan and the Law Minister.

1.18 Detailed Notes under different Headings have been prepared with necessary Appendices thereto. The number of such main headings are 10 in Part-I and the number of sub-items thereunder are 55 covering every main aspects of election law and procedure.

1.19 Under Part - 11, detailed notes on the different electoral systems obtaining in a few countries and the examination of those systems from the point of view of its suitability to Indian conditions have been prepared with necessary Appendices thereto.

1.20 These notes - Parts I and " - were circulated to the members of the Committee well in advance.

1.21 Thereafter, the Committee had six meetings as per the details given below:-

- 1 . 7th March, 1990 "
2. 8th March, 1990
3. 30th March, 1990
4. 31 st March, 1990
5. 2nd April, 1990
6. 11th April, 1990

1.22 At these meetings, the Committee examined the Notes on subjects in Part-I and Part-II and also considered the following additional notes prepared on specific subjects:-

(1) Note on proposal regarding amendment to section 39 of the Representation of the People Act, 1951 (relating to increase in the number of proposers to a nomination paper in the case of elections to Rajya Sabha and Legislative Councils).

(2) Recommendations made by the National Seminar on 'Elections and role of Law Enforcement' organised by the National Police Academy, Hyderabad and a note thereon.

(3) Additional notes on 'Offence of Booth Capturing' prepared in consultation with Shri L.P. Singh.

(4) The opinion of the Attorney-General on the various legislative measures proposed for discouraging non-serious candidates from contesting elections.

(5) A Note containing broad outlines of U.K. law regarding election expenses prepared by Shri Era Sezhiyan.

(6) A Note on 'Contribution by Companies to Political Parties' prepared by Shri L.P. Singh.

1.23 Apart from the above Notes, a brief statement containing gist of the suggestions in the letters received from Members of Parliament and other important persons on electoral reforms in response to the letter of the Minister of Law and Justice dated the 28th December, 1989 inviting their views and suggestions, were also circulated to the members of the Committee. Such of the important suggestions as a/

having a bearing on the subjects dealt with in the Notes have also been taken into account by the Committee.

1.24 The Committee concluded its work on the 4th May, 1990 at which the draft final report of the Committee has been approved.

CHAPTER II

Electoral Machinery

1. Set up of multi-member Commission

1.1 Set up of Multi member Commission with three members:-

The Committee examined the question of making the Election Commission as a multi-member body. There has been broad agreement among all members about the Commission being a multi-member body. The Committee feels that the Election Commission should be a three member body.

1.2 Mode of Appointment:- As regards the mode of appointment of the Chief Election Commissioner and the two Election Commissioners, the Committee recommends as follows.-

- (i) The appointment of the Chief Election Commissioner should be made by the President in consultation with Chief Justice of India and the Leader of the Opposition (and in case no Leader

of the opposition is available, the consultation should be with the leader of the largest opposition group in the Lok Sabha).

(ii) The consultation process should have a statutory backing.

(iii) The appointment of the other two Election Commissioners should be made in consultation with the Chief Justice of India, Leader of the Opposition (in case the Leader of the opposition is not available, the consultation should be with the leader of the largest opposition group in the Lok Sabha) and the Chief Election Commissioner.

(iv) Appointment of Regional Commissioners:- The appointment of Regional Commissioners for different zones as proposed is not favoured. However, such appointment should be made only as envisaged in the Constitution and not on a permanent footing.

2. Steps for securing independence of the Commission

2.1 Various measures have been considered for securing the real independence of the Election Commission.

2.2 The Committee recommends that the protection of salary and other allied matters relating to the Chief Election Commissioner and the Election Commissioners should be provided for in the Constitution itself on the analogy of the provisions in respect of the Chief Justice and Judges of the Supreme Court. Pending such measures being

taken, a parliamentary law should be enacted for achieving the object.

2.3 The Committee feels that the proposal to make the expenditure of the Commission to be 'charged' is not necessary. Such expenditure should continue to be 'voted' as of now.

2.4 Ineligibility for any appointment under the Government after expiry of term- The Committee further recommends that on the expiry of the terms of office, the Chief Election Commissioner and the Election Commissioners should be made ineligible not only for any appointment under the Government but also to any office including the post of Governor the appointment to which is made by the President.

.....

Preshant Bhusan
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GOVERNMENT OF INDIA

SECOND ADMINISTRATIVE REFORMS COMMISSION

FOURTH REPORT

ETHICS IN GOVERNANCE

JANUARY 2007

.....

2.1.5 Appointment of the Chief Election Commissioner/Commissioners

2.1.5.1 The present procedure of appointment of the Chief Election Commissioner and other Election Commissioners, is laid down in Article 324 of the Constitution and stipulates that they are to be appointed by the President on the advice of the Prime Minister.

2.1.5.2 During debates in the Constituent Assembly on the procedure for appointment, there were suggestions that the person appointed as the Chief Election Commissioner should enjoy the confidence of all parties and therefore his appointment should be confirmed by a 2/3 majority of both the Houses. Thus even at that stage, there was a view that the procedure for appointment should be a broad based one, above all partisan considerations. In recent times, for statutory bodies such as the National Human Rights Commission (NHRC) and the Central Vigilance Commission (CVC), appointment of Chairperson and Members are made on the recommendations of a broad based Committee. Thus, for the appointment of the Chief Vigilance Commissioner, the Committee consists of the Prime Minister, the Home Minister and the Leader of the Opposition in the Lok Sabha, whereas for the NHRC, the Committee is chaired by the Prime Minister and has as its members, the Speaker of the Lok

Sabha, the Home Minister, the Leader of the Opposition in the Lok Sabha, the Leader of the Opposition in the Rajya Sabha and the Deputy Chairman of the Rajya Sabha.

2.1.5.3 Given the far reaching importance and critical role of the Election Commission in the working of our democracy, it would certainly be appropriate if a similar collegium is constituted for selection of the Chief Election Commissioner and the Election Commissioners.

2.1.5.4 Recommendation:

a. A collegium headed by the Prime Minister with the Speaker of the Lok Sabha, the Leader of Opposition in the Lok Sabha, the Law Minister and the Deputy Chairman of the Rajya Sabha as members should make recommendations for the consideration of the President for appointment of the Chief Election Commissioner and the Election Commissioners.

Preshant Bhusan
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ANNEXURE: P3

GOVERNMENT OF INDIA

LAW COMMISSION OF INDIA

Report No.255

Electoral Reforms

March 2015

D.O. No.6(3)/240/2013-LC(LS)

12 March, 2015

Dear Shri Sadananda Gowda ji,

The Ministry of Law and Justice, in January 2013, requested the Twentieth Law Commission of India to consider the issue of "Electoral Reforms" in its entirety and suggest comprehensive measures for changes in the law. While working on the subject, the Supreme Court of India, in the matter of "Public Interest Foundation & Others V. Union of India & Anr - Writ Petition (Civil) No. 536 of 2011, directed the Law Commission of India to make its suggestions on two specific issues, viz., (i) 'curbing

criminalization of politics and needed law reforms'; and (ii) 'impact and consequences of candidates filing false affidavits and needed law reforms to check such practice'. In the light of this judgment, the Commission worked specifically on these two areas and, after series of discussions, followed by a National Consultation held on 1st February 2014, submitted its 244th Report titled "Electoral Disqualifications" on 24th February 2014 to the Government of India.

After the submission of Report No.244, the Commission circulated another questionnaire to all registered national and State political parties seeking their views on ten points, the response received was not very encouraging, though. However, the Commission undertook an extensive study to suggest electoral reforms, held various rounds of discussions with the stakeholders and analysed in-depth the issues involved. After detailed deliberations, the Commission has now come up with its recommendations which are put in the form its final Report, Report No.255, titled "*Electoral Reforms*", which is sent herewith for consideration by the Government.

With warm regards,

Yours sincerely,

Sd/-

[Ajit Prakash Shah]

Shri D.V. Sadananda Gowda
Hon'ble Minister for Law and Justice
Government of India
Shastri Bhawan
New Delhi – 110 115

CHAPTER VI

STRENGTHENING THE OFFICE OF THE ELECTION COMMISSION OF INDIA

A. Constitutional Protection of all the Members of the ECI

6.1 The ECI is an independent, constitutional body, which has been vested with the powers of superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all Parliamentary and State elections and elections to the office of the President and Vice President *vide* Article 324(1) of the Constitution.

6.2 Article 324(2) stipulates that the ECI shall comprise of the CEC and “such number of other Election Commissioners, if any, as the President may from time to time fix.” By an order dated 1st October 1993, the President has fixed the number of Election Commissioners as two until further orders. There is all round consensus, evident from the Goswami Committee’s Report in 1990 (Goswami Committee Report, *supra* note 113, at para 1.1); the ECI’s 1998 letter (Mendiratta, *supra* note 161, at 186.); and its 2004 proposed reforms that the number of Election Commissioners should remain at two to ensure the “smooth and effective functioning” of the ECI. Their stated rationale is that:

“The three-member body is very effective in dealing with the complex situations that arise in the course of superintending, directing and controlling the electoral process, and allows for quick responses to developments in the field that arise from time to time and require immediate solution. Increasing the size of this body beyond the existing three-member body would, in the considered opinion of the Commission, hamper the expeditious manner in which it has

necessarily to act for conducting the elections peacefully and in a free and fair manner". (ECI 2004 Reforms, supra note 203, at 14)

6.3 Article 324(5) of the Constitution is intended to ensure the independence of the ECI and free it from external, political interference and thus expressly provides that the removal of the CEC from office shall be on "*like manner and on the like grounds as a Judge of the Supreme Court*". Nevertheless, a similar impeachment procedure is not prescribed for the other Election Commissioners under Article 324(5), and they are treated on par with the Regional Commissioners. Instead Article 324(5) stipulates that subject to any Parliamentary law, the office tenure of the Election and Regional Commissioners shall be determined by the President and that they cannot be removed except on the CEC's recommendation.

6.4 The ECI in its 2004 Report expressly opined that the current wording of Article 324(5) was "inadequate" and required an amendment to bring the removal procedures of Election Commissioners on par with the CEC, and thus to provide them with the "same protection and safeguard[s]" as the CEC (ECI 2004 Reforms, *supra* note 203, at 14). The proposed amendment by the Background Paper on Electoral Reforms prepared by the Legislative Department of the Law Ministry in 2010 is along the same lines.

6.5 Equating the removal procedures of the two Election Commissioners with that of the CEC is also in line with the legislative intent of the Parliament. In 1991, the Parliament enacted the Chief Election Commissioner and other Election Commissioners (Conditions of Service) Act whereby the retirement age of the CEC was fixed at 65 years, with a salary and other perquisites equal to that of a Supreme Court judge; whereas that of the other Election Commissioners was fixed at 62 years

with benefits equivalent to a High Court judge. However, in 1993, the above Act was amended and the CEC and other Election Commissioners were placed on par on matters of retirement age, salaries and other benefits (Mendiratta, *supra* note 161, at 181). Section 10 of the Act also provided for all three members to have an equal say in the decision making process, with any difference in opinion being resolved "according to the opinion of the majority."

6.6 Commenting on this Act, the Supreme Court in *T.N. Seshan, CEC v Union of India* (1995) 4 SCC 611 held that the CEC was not superior to the Election Commissioners stating:

"As pointed out earlier, the scheme of Article 324 clearly envisages a multi-member body comprising the CEC and the ECs. The RCs may be appointed to assist the Commission. If that be so the ECs cannot be put on par with the RCs. As already pointed out, ECs form part of the Election Commission unlike the RCs. Their role is, therefore, higher than that of RCs. If they form part of the Commission it stands to reason to hold that they must have a say in decision-making. If the CEC is considered to be a superior in the sense that his word is final, he would render the ECs non-functional or ornamental. Such an intention is difficult to cull out from Article 324 nor can we attribute it to the Constitution-makers. We must reject the argument that the ECs' function is only to tender advise to the CEC." [Emphasis supplied]

6.7 It is thus clear that the CEC is at the same position as the other Election Commissioners and only functions as a first amongst equals. Moreover, the Election Commissioners are clearly superior to the Regional Commissioners and Article 324(5) should be amended to reflect that. Given that the removal (impeachment) procedure of the judges of the High Court and Supreme Court is also the same, the benefit of the CEC's

removal procedures under Article 324(5) should also be extended to the other Election Commissioners.

6.8 The Law Commission thus, relying on the Court's observations in the *Seshan's* judgment, and for the reasons aforementioned reiterates and endorses the ECI's proposal to extend the same protection under the Constitution in the matter of removability from office to the Election Commissioners as is available to the CEC. Thus, the second proviso in Article 324(5) after the words "Chief Election Commissioner", the words "and any other Election Commissioner" should be added. In the third proviso, the words "and any other Election Commissioner" should be deleted.

Recommendation

6.9 The following change should be made in Article 324:

- In sub-section (5), delete the words "the Election Commissioners and" appearing after the words "tenure of office of".
- In the first proviso to sub-section (5), after the words "Chief Election Commissioner" appearing before "shall not be removed", add the following words, "and any other Election Commissioner"; also, after the words "conditions of service of the Chief Election Commissioner", add the following words, "and any other Election Commissioner".
- In the second proviso to sub-section (5), after the words "provided further that", delete the words "any other Election Commissioner or" occurring before "a Regional Commissioner".

B. Appointment of the Election Commissioners and the CEC

(i) Appointment process

6.10.1 The power to appointment the CEC and the Election Commissioners lies with the President *vide* Article 324(2) of the Constitution, which states that:

"The Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix and the appointment of the Chief Election Commissioner and other Election Commissioners shall, subject to the provisions of any law made in that behalf by Parliament, be made by the President."

6.10.2 Although the issue of appointments was discussed in the Constituent Assembly and a suggestion was floated to make the appointments subject to confirmation by a two-thirds majority, in a joint session of the Parliament, it was rejected (Mendiratta, *supra* note 161, at 179). Consequently, Article 324(2) left it open for the Parliament to legislate on the issue.

6.10.3 The Goswami Committee in 1990 recommended a change to the appointment process, suggesting that the CEC should be appointed by the President in consultation with the Chief Justice of India and the Leader of the Opposition in the Lok Sabha. In turn, the CEC should be additionally consulted on the question of appointment of the other Election Commissioners and the entire consultation process should have statutory backing (Goswami Committee Report, *supra* note 113, at 9).

6.10.4 This was followed by the introduction of the Constitution (Seventieth Amendment) Bill 1990, which was introduced in the Rajya Sabha on 30th May, 1990 providing that the CEC would be appointed by the President after consultation with the Chairman of the Rajya Sabha, the Speaker of the Lok Sabha, and the Leader of the Opposition (or the leader of the largest party) in the Lok Sabha. The CEC was further made a part of the

consultative process in the appointment of the Election Commissioners. However, on 13th June 1994, the Government moved a motion to withdraw the Bill, which was finally withdrawn with the leave of the Rajya Sabha on the same day (Rajya Sabha debates, 13th June 1994, at 600 and 637. See also Mendiratta, *supra* note 161, at 179.).

6.10.5 Consequently, in the absence of any Parliamentary law governing the appointment issue, the Election Commissioners are appointed by the government of the day, without pursuing any consultation process. This practice has been described as requiring the Law Ministry to get the file approved by the Prime Minister, who then recommends a name to the President (Qureshi, *supra* note 1, at 39-40). Thus, there is no concept of collegium and no involvement of the opposition.

6.10.6 The Commissioners are appointed for a six year period, or up to the age of 65 years, whichever is earlier. Further, there are no prescribed qualifications for their appointment, although convention dictates that only senior (serving or retired) civil servants, of the rank of the Cabinet Secretary or Secretary to the Government of India or an equivalent rank, will be appointed. The Supreme Court in *Bhagwati Prashad Dixit Ghorewala v Rajiv Gandhi* (AIR 1986 SC 1534) rejected the contention that the CEC should possess qualifications similar to that of a Supreme Court judge, despite being placed on par with them in terms of the removal process.

(ii) Comparative practices

6.11.1 An examination of comparative practices is instructive. In South Africa, the Independent Electoral Commission comprises of five members, including one judge. They are appointed by the President on the recommendations of the National Assembly, following nominations by a National Assembly inter-party committee, which receives a list of at least

eight candidates. This list of (at least) eight nominees is recommended by the Selection Committee, which has four members being, the President of the Constitutional Court; a representative of the Human Rights Commission and the Commission on Gender Equality each; and the Public Prosecutor.

6.11.2 In Ghana too, the seven member Election Commission is appointed by the President on the advice of the Council of State, with the Chairman and two Deputy Chairmen having permanent tenure.

6.11.3 In Canada, the Chief Electoral Officer of "Elections Canada" is appointed by a House of Commons resolution for a non-renewable ten-year term, and to protect their independence from the government, he/she reports directly to Parliament. In the United States, the six Federal Election Commissioners are appointed by the President with the advise and consent of the Senate. The Commissioners can be members of a political party, although not more than three Commissioners can be members of the same party.

6.11.4 In all these cases thus, it is clear that the appointment of the Election Commissioners or the electoral officers is a consultative process involving the Executive/Legislature/other independent bodies.

(iii) Recommendations

6.12.1 Given the importance of maintaining the neutrality of the ECI and to shield the CEC and Election Commissioners from executive interference, it is imperative that the appointment of Election Commissioners becomes a consultative process.

6.12.2 To this end, the Commission adapts the Goswami Committee's proposal with certain modifications. *First*, the appointment of all the Election Commissioners (including the CEC) should be made by the

President in consultation with a three-member collegium or selection committee, consisting of the Prime Minister, the Leader of the Opposition of the Lok Sabha (or the leader of the largest opposition party in the Lok Sabha in terms of numerical strength) and the Chief Justice of India. The Commission considers the inclusion of the Prime Minister is important as a representative of the current government.

6.12.3 *Second*, the elevation of an Election Commissioner should be on the basis of seniority, unless the three member collegium/committee, for reasons to be recorded in writing, finds such Commissioner unfit.

6.12.4 Such amendments are in consonance with the appointment process in Lokpal and Lokayuktas Act, 2013, the Right to Information Act, 2005 and the Central Vigilance Commission Act, 2003.

6.12.5 Pursuant to Article 324(2), an amendment can be brought to the existing Election Commission (Conditions of Service of Election Commissioners and Transaction of Business) Act, 1991 to amend the title and insert a new Chapter 1A on the appointment of Election Commissioners and the CEC as follows:

- Act and Short Title: The Act should be renamed the "Election Commission (Appointment and Conditions of Service of Election Commissioners and Transaction of Business) Act, 1991".
- The short title should state, "An Act to determine the appointment and conditions of service of the Chief Election Commissioner and other Election Commissioners and to provide for the procedure for transaction of business by the Election Commission and for matters connected therewith or incidental thereto."

- Chapter I-A – Appointment of Chief Election Commissioner and Election Commissioners.

2A. Appointment of Chief Election Commissioner and Election Commissioners – (1) The Election Commissioners, including the Chief Election Commissioners, shall be appointed by the President by warrant under his hand and seal after obtaining the recommendations of a Committee consisting of:

(a) the Prime Minister of India – Chairperson

(b) the Leader of the Opposition in the House of the People – Member

(c) the Chief Justice of India – Member

Provided that after the Chief Election Commissioner ceases to hold office, the senior-most Election Commissioner shall be appointed as the Chief Election Commissioner, unless the Committee mentioned in sub-section (1) above, for reasons to be recorded in writing, finds such Election Commissioner to be unfit.

Explanation: For the purposes of this sub-section, “the Leader of the Opposition in the House of the People” shall, when no such Leader has been so recognised, include the Leader of the single largest group in opposition of the Government in the House of the People...

Prashant Bhusan
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ANNEXURE:P4

ITEM NO.14

COURT NO.1

SECTION PIL-W

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

WRIT PETITION (CIVIL) NO(S). 104/2015

ANOOB BARANWAL

PETITIONER(S)

VERSUS

UNION OF INDIA

RESPONDENT(S)

(FOR [AMENDMENT OF W.P. , RAISING ADDITIONAL FACTS, ADDITIONAL
GROUNDS, ADDITIONAL PRAYERS] ON IA 2/2015)

Date : 23-10-2018 This matter was called on for hearing today.

CORAM :

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

For Petitioner(s)

Mr. Prashant Bhushan, AOR
Mr. Devesh Kumar Agnihotri, Adv.

For Respondent(s)

Mr. K.K. Venugopal, AG
Mr. Aman Lekhi, ASG
Ms. Shraddha Deshmukh, Adv.
Ms. Madhavi Divan, Adv.
Ms. Niranjana Singh, Adv.
Mr. Arvind Kr. Sharma, AORUPON hearing the counsel the Court made the following
O R D E RI.A. No.2 for amendment of writ petition; raising
additional facts, grounds and prayer is allowed.The matter relates to what the petitioner perceives
to be a requirement of having a full-proof and better
system of appointment of members of the Election
Commission.

Having heard the learned counsel for the petitioner and the learned Attorney General for India we are of the view that the matter may require a close look and interpretation of the provisions of Article 324 of the Constitution of India. The issue has not been debated and answered by this Court earlier. Article 145 (3) of the Constitution of India would, therefore, require the Court to refer the matter to a Constitution Bench. We, accordingly, refer the question arising in the present proceedings to a Constitution Bench for an authoritative pronouncement.

Post the matter before the Hon'ble the Chief Justice of India on the Administrative Side for fixing a date of hearing.

[VINOD LAKHINA]
AR-cum-PS

[ASHA SONI]
ASSISTANT REGISTRAR

Preshant Kushan
(TRUE COPY)

An Inquiry into India's Election System

REPORT OF THE CITIZENS' COMMISSION ON ELECTIONS

VOLUME II

Are Elections in India Free and Fair?



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.	Paranjay 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](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

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. 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 campaigning² :** 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.

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 Commissioners 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. The 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 dissensions 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.



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

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 Vidyalayas. 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 its 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 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 protestors 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.



Preshant Bhusan
(TRUE COPY)

ANNEXURE: P6

The Caravan

COMMENTARY POLITICS

The Biased Referee

Why the Election Commission's neutrality is in doubt

SEEMA CHISHTI

31 March 2021

The Election Commission's actions during some of the recent elections, such as the 2019 Lok Sabha polls and the 2020 Bihar assembly polls, have been widely questioned. PARWAZ KHAN / HINDUSTAN TIMES

On 12 March, the Election Commission announced an unprecedented eight-phase polling schedule for West Bengal's 294 assembly seats and a three-phase one for 126 seats in Assam. The way the phases have been marked out has drawn attention, especially since Bihar's elections, in 243 seats last year, were divided into just three phases, and polling in Tamil Nadu (234 seats), Kerala (140 seats) and Puducherry (30 seats) would all be over in one day, on 6 April. The EC says the prolonged schedule in West Bengal would help make available adequate security forces in all the areas. But concerns are being raised that the scheduling will load the dice in favour of the Bharatiya Janata Party.

Since the BJP has fewer workers on the ground in West Bengal, dividing the polls into eight phases would allow the party to focus more intensively on smaller regions at a time. Upper Assam, where the BJP is expected to perform well, went to the polls first. But this was also where the party was on the defensive about the controversial Citizenship (Amendment) Act of 2019, which was met with massive protests on the ground last year. The scheduling allowed the BJP to not speak of the CAA at all in the beginning of the campaign. However, once polling finished in Upper Assam, the BJP

began claiming credit for the CAA to woo the politically significant Matua community, which has been demanding implementation of the act.

The commission also recently changed a rule that required a booth's polling agent to be picked from among voters of that booth. According to the new rule, a polling agent can be from any part of the constituency. The Trinamool Congress recently put out a phone conversation, allegedly between the BJP leader Mukul Roy and his colleague Shishir Bajoria, in which Roy urges Bajoria to get the EC to change the rule, failing which the party would not have adequate polling agents in the state. The Trinamool Congress has alleged the EC changed the rule at the BJP's request, without wider consultation with other parties.

Such partisan behaviour is now routinely on display. The EC's current lack of independence is made more conspicuous by its historical perception as an independent institution. The EC's actions during some of the recent elections, such as the 2019 Lok Sabha polls and the 2020 Bihar assembly polls, have been widely questioned. The blatant harassment of one of the election commissioners, Ashok Lavasa, whom the government had not found pliable enough, has also indicated the extent of the government's interference. The behaviour has been noticed globally as well, as India's ranking on several global democratic indices has plummeted. When questions are raised about the electoral process, they are often about electronic voting machines or electoral bonds. While these issues are central to the electoral process, sustained attention also needs to be paid to the activities of the EC, whose role is to ensure a free and fair electoral process.

In the past, the commission has been eulogised by scholars for its quiet but robust presence. In *How India Became Democratic*, the scholar Ornit Shani talked about the crucial role the existence of an autonomous election commission played in the making of the Indian democracy. Post-Independence, the self-e!acing EC continued to function quietly without really becoming the news. This changed with the appointment of TN Seshan as the chief election commissioner, in

December 1990, during the era of coalition governments. The EC became much more visible, as it took on those in power. Seshan battled with the Rashtriya Janata Dal chief Lalu Prasad Yadav, who was then at the peak of his political career. When JM Lyngdoh took the post, he postponed elections in riots-hit Gujarat in 2002, while Narendra Modi was the chief minister. SY Quraishi, who held the office between July 2010 and June 2012, sent a notice to Salman Khurshid, a union minister at the time, when he announced a reservation policy shortly before a state election in 2012. These were important instances when the EC demonstrated its independence.

The reverence invoked by the model code of conduct (<https://www.prsindia.org/theprsblog/model-code-conduct-and-2019-general-elections>)—a set of guidelines issued by the EC that define appropriate conduct for political parties and governments, regarding election meetings, speeches and slogans, from the time of announcement of election dates till the declaration of results —can also be seen as a vote of confidence in the commission.

Thus, enormous powers, such as control of the police, are handed over to the EC while the MCC is in place. The MCC guidelines are not enshrined in law but all parties have agreed in principle to adhere to them. Thus, there was a general perception that the EC was trusted by all sides, had a mind of its own and was happy to exercise it whenever required. But now, those who have been watching the institution closely find a difference.

This credibility began eroding especially in the run-up to the 2019 general elections. Mukulika Banerjee, the author of *Why India Votes*, wrote an essay (<https://blogs.lse.ac.uk/southasia/2019/05/10/the-new-indian-election-free-but-not-fair/>) before the results were declared and described the EC as “the referee” that “is partisan.” Banerjee wrote: “News of discord among the three election commissioners has emerged and their repeated failure to create a level playing field for all players is evident.” She added that “utterances that lower standards of public discourse immeasurably, blatant violation of electoral rules such as the instrumental use of armed forces are nodded through while a retired soldier is disallowed from standing for election on the other.”

According to Banerjee, the BJP had not been “shown the red card” despite several “bad tackles.” She also questioned the new system of electoral finance introduced by the BJP. “Between 2014 and 2019, the new instrument of ‘electoral bonds’ was introduced by the BJP government, without any parliamentary debate, to make funding of political parties and candidates utterly opaque,” Banerjee continued. After the general elections in 2019, the EC did not make the final tally of votes “final” for a long time. The word “provisional” stayed on even after the declaration of results. On 31 May 2019, The Quint reported that two sets of data shared by the EC on its website—“voter turnout” and votes counted on EVMs—did not tally with each other. In several constituencies, votes counted on EVMs were higher than the total voter turnout in the respective constituencies.

The next day, the EC issued a press release (<https://eci.gov.in/files/file/10291-eci-press-release-on-voter-turnout-data/>) in response, claiming that it was waiting for “Index Forms” from each of the 542 constituencies before it could give final numbers. “In earlier elections, it used to take months to collect such authenticated election data from all the ROs”—returning officers—the press release said. “Even in 2014, it took between 2 to 3 months after the declaration of results to collect and collate such data in authenticated form. Due to the innovative IT initiatives taken by the Commission this time, the final data on votes counted has been made available within a few days of declaration of results. The reconciliation of voters’ data for all PCs”—parliamentary constituencies—“have been completed in all states and the Index Forms of all 542 PCs are expected to reach ECI from Returning Officers shortly, which after compilation, shall be immediately be made Public by the Election Commission.” The commission added that the “provisional voter turnout data reported on ECI Website is only the tentative number of voters and not the final nos. therefore it is incorrect inference to find Ghost voters when there are none.”

“The Election Commission pulled down the data of final votes polled in phases 1 to 4 of 2019 Lok Sabha Elections, after my story

appeared in May 2019,” The Quint’s Poonam Agarwal, who wrote the story, told me. After six months, the EC put out final data, in October, which tallied with votes counted on EVMs. “If it took the EC six months to compile the complete data,” Agarwal asked, “does that mean they declared Lok Sabha Election results based on provisional data? After I pointed out the discrepancy in votes polled and votes counted data, the Election Commission has stopped sharing this information entirely in the subsequent elections.”

On 15 November 2019, the election-watch organisation Association for Democratic Reforms and the NGO Common Cause moved the Supreme Court seeking a probe into the alleged discrepancies in the voter-turnout data. The petitioners asked for “a court order directing the Election Commission of India to conduct actual and accurate reconciliation of (votes) data before the declaration of the final result of any election,” and called for an investigation of all such discrepancies. Raising concerns on the election process, the petition stated: “The infirmities in the existing system of conducting elections, by declaring the election results even before the authenticated election data is released by the Election Commission, is far more serious and an alarming trend and therefore, cannot be disregarded.” As the petitioners pointed out in the Supreme Court, there were six seats where the discrepancy in votes was higher than the winning margin. A table enclosed with the petition listed out the constituencies—for instance, in Anantnag, votes counted in EVMs exceeded the voter turnout by 29,746 votes, while the winning margin was only 6,676 votes. Such discrepancies may not be big enough to alter the final national result but, as the ADR co-founder Jagdeep Chhokar told me, in an atmosphere of sharp political contestation, they damage the credibility of the process. According to a former EC official, the discrepancies were a result of the commission’s desire to get ahead of the media, which reports leads and counts before the result is officially declared.

The official said that the EC “walked into a mess of its own making by trying to compete with the media and the dissemination game, by relaying what the minute-by-minute leads were, other than what it puts out on the website.” Despite objections from at least one of the

election commissioners who asked for restraint, the EC released the Voter Turnout app on 23 April 2019. The numbers on the app did not tally perfectly with the final results on the EC's website, according to the official. While discrepancies were few, the official said, "everything ended up getting questioned. Earlier, when we uploaded just a final statistic, everyone believed it."

The Supreme Court issued a notice to the EC in December 2019, but there has been no hearing since. I reached out to the commission with queries on 12 March but, despite repeated reminders on email and WhatsApp, have not received the answers. The official EC spokesperson, Sheyphali Sharan, said that the officials were "preoccupied with other time-bound work these days."

The controversy received added attention due to an atmosphere of suspicion over EVMs. After it lost the 2009 general elections, the BJP published a detailed treatise questioning EVMs with a famous foreword by its prime-ministerial candidate, LK Advani. While a general suspicion has since been aired by several parties that have lost elections, there is no agreement on what exactly is the problem with EVMs. When I spoke to him in March, the former chief election commissioner SY Quraishi recounted how, in October 2010, he had invited opposition parties to hear their side of the story. "I told ex-chief minister of Andhra Pradesh Chandrababu Naidu, who appeared to be the most leading critic of the EVMs then, that he was once termed the CEO and tech czar of the state. I said, 'You should be the brand ambassador of the technology and not a cynic.' He suggested that we institute a paper printout as a sample, or a Voter Verified Paper Audit Trail system, and we agreed, to boost confidence."

The commission referred the matter to its technical expert committee shortly after the meeting. The committee consulted manufacturers, political parties and other civil society members to explore the design requirements of the VVPAT system. In 2011, Bharat Electronics Limited and Electronics Corporation of India Limited made a prototype of the VVPAT, and the EC conducted simulated elections for the field trial of the VVPAT system in Thiruvananthapuram, Ladakh, Cherrapunji and Jaisalmer. On 19 February 2013, the

committee approved the VVPAT design and also recommended that the commission take action on amending necessary rules to implement the system. Consequently, the government amended the Conduct of Elections Rules of 1961, to allow the EC to use VVPATs along with EVMs. These were first used in the by-election for the Noksen assembly seat in Nagaland that year. VVPATs have been used in some constituencies in all state elections since then and in eight parliamentary constituencies in 2014. In the 2019 general elections, they were used with all EVMs.

Before the 2019 polls, 21 opposition parties approached the Supreme Court to insist that 50 percent of the VVPATs be counted. The Election Commission engaged the Delhi head of the Indian Statistical Institute to arrive at a “mathematically sound, statistically robust and practically cogent solution” for verifying VVPAT slips with the electronic count of the EVMs. On 22 March 2019, the EC submitted a report along with its affidavit in court, claiming that tallying of 479 randomly selected booths was enough to verify the fairness of the elections.

But the Supreme Court ordered that, instead of the EC proposal that VVPATs of just one booth per parliamentary constituency be counted—which would amount to about 0.44 percent of EVMs in the country—five booths per constituency should have their VVPATs counted. The Supreme Court observed on 8 April 2019, that an increase in VVPAT verification “would be of greater satisfaction not only of political parties but also for the entire electorate.” It added: “This court would like to observe that neither the satisfaction of the Election Commission, which is a constitutional body, nor the system of EVMs, is being doubted.” The opposition parties demanded that counting the VVPATs in five booths be conducted before starting the EVM count, so that VVPAT verification could be conducted in all the booths in case of a mismatch. But the EC refused to do this without stating any reasons, again failing to inspire full confidence.

On 22 July 2019, the Economic Times reported (<https://economictimes.indiatimes.com/news/politics-and-nation/eight-cases-of-vvp-at-evm-mismatch-in-lok-sabha->

polls/articleshow/70323347.cms?from=mdr) that, in the general elections, “eight cases of mismatch between EVMs and VVPATs were found.” These cases accounted for one in every 2,500 votes, with no impact on overall results. Chhokar told me that there are further complications. “The problem also is that when the voter presses the button, the signal first goes to the VVPAT and then onto the control unit. So we are not exactly sure if the VVPAT is conveying the same to the control unit. Ideally, the VVPAT signal should emanate from the control unit in each machine.” Even if the VVPAT confirms that the voter voted for a particular candidate, that vote might not have been registered in the machine.

A citizens’ commission comprising the former Supreme Court judge Madan B Lokur, the former chief information commissioner Wajahat Habibullah, the former Madras High Court judge Hariparanthaman, the economist Arun Kumar, the IIT Delhi professor of computer science and engineering Subhashis Banerjee and several bureaucrats, who have supervised elections in the past, came out with a detailed report in two volumes. The report raised serious questions about whether EVMs, the VVPAT system and the EC are helping Indian democracy. “The response of ECI to all these serious public concerns was indifferent bordering on hostility,” the report said. “The 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, experienced in conducting elections. The Citizens’ Commission on Elections 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.”

As a former EC official said, “The problem with the EC is their inability to communicate and, like all bureaucracies, PR is not their strongest suit.”

Another concern with the EVMs involves the secrecy of the ballot. According to Section 59A in The Conduct of Elections Rules of 1961, ballot papers across booths should be mixed before they are counted, so that it is impossible to ascertain who voted for whom in a

particular booth. This was important so that ruling parties could not discriminate against booths that voted against them by denying them a share in development schemes or plans. More importantly, socially vulnerable groups, including Dalits and minorities, often residing in clusters, felt secure about their vote being a secret. "Now, with EVMs, the secret-ballot principle stands compromised as the tally from each machine, and therefore each booth, is publicly available," Mukulika Banerjee told me. "There is a machine called a totaliser that can electronically mix the votes before counting, but the BJP and others have blocked its adoption."

The erosion of the EC's credibility has been accelerated by moves blatantly supportive of the ruling party, especially the top leadership. "The one thing I would certainly not have done was to lose the confidence of the opposition," a former chief election commissioner told me.

"ECI responds differently to what look like similar, if not identical, violations of MCC," Chhokar said. "Cases of Navjot Singh Sidhu, Mayawati, and Azam Khan"—politicians belonging to opposition parties—"for similar violations, misuse of religion, were treated differently during the 2019 Lok Sabha elections." He said a different yardstick was used for the then BJP president, Amit Shah, and the prime minister, Narendra Modi.

The lowest point in the perception about the EC's fairness came during the 2019 polls, in the matter of Ashok Lavasa. Lavasa, the second-most senior election commissioner, dissented in five decisions taken by the EC in March and April 2019, most of them involving Modi. Campaigning in Latur on 9 April, shortly after ordering an airstrike at Balakot in Pakistan, Modi said that a vote for his party would be a vote in support of the armed forces.

While election officers in the district and the state found Modi's speech inconsistent with the MCC, the EC overruled them, saying that their opinion was based on "just five lines of the speech." There were several complaints against Modi, but the EC refused to act, saying there had "not yet been a full meeting of the Commission." After

Rahul Gandhi chose to contest the election from Wayanad in Kerala, Modi said that constituency was a place where “the majority is in a minority,” in a speech in Wardha on 1 April. That too was deemed to not be in violation of the MCC, as were at least five other speeches (<https://scroll.in/article/924268/the-silent-army-10-reasons-why-public-trust-in-the-election-commission-stands-eroded>)

Lavasa disagreed with the other two commissioners—the chief election commissioner Sunil Arora and the election commissioner Sushil Chandra—and maintained that Modi was in violation of the EC’s guidelines. Later, as his colleagues refused to record his views, he started staying away from meetings.

Ultimately, Lavasa opted out of meetings relating to the MCC, in protest against the EC rejecting his demand that his dissent notes be recorded. Arora issued a statement referring to the whole episode as an “unsavoury and avoidable controversy,” and took a strong view of making public “the internal functioning of the ECI.”

Lavasa was in line to succeed Arora as the next chief election commissioner but, barely four months after Modi’s re-election, Lavasa’s banker wife, Novel, his son Abir and his sister

Shakuntala, each received notices from the income-tax department and faced severe, lengthy and “hostile” questioning. Lavasa seemed to have no option but to resign, which paved the way for Sushil Chandra, an officer from the revenue service, to be next in line for the post of the chief election commissioner.

The mysterious NaMo TV, a channel with a photo of Modi as its logo, began appearing on direct-to-home services from 26 March 2019, just when the campaign for the Lok Sabha polls was heating up. It disappeared equally mysteriously from the airwaves after 17 May, when campaigning ended. NaMo TV, which broadcast Modi’s speeches and images, was aired free of cost by DTH operators such as Tata Sky, Videocon and Dish TV. Despite complaints to the EC, no action was taken against the channel, the BJP or Modi, who owns the NaMo app. NaMo TV was said to be a part of the app. Modi’s personal twitter handle mentioned NaMo TV on 31 March 2019. But nothing has happened till date, other than the EC asking the ministry

of information and broadcasting about the channel. The ministry told the EC that NaMo TV was not a licenced channel but a DTH advertisement platform, and that the BJP was incurring the costs of the advertisements.

More recently, during the Bihar polls last year, the EC did not act when the BJP listed “free vaccines” as a poll promise. Sanjay Kumar of the Centre for the Study of Developing Societies, writes in a citizens’ commission report: “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.”

Sanjay noted that for simultaneous elections in Gujarat and Himachal Pradesh in 2017, the announcement for the schedule in Gujarat was delayed. Allegations have been made that this was done to provide the ruling party more time to announce schemes before the MCC took effect. For the 2019 general elections too, the announcement of the schedule was delayed as compared to the announcement in 2014, he alleges, to give more time to the BJP-led government to make poll-friendly announcements. The Karnataka by-polls were first announced on 21 September 2019, to be held simultaneously along with 49 other elections in 17 states but were abruptly postponed a week after. This received severe criticism and was cited as the first time the EC had gone back on a poll schedule after announcing it.

The system of appointments to the commission, currently only on the advice of the government of the day, first came under scrutiny when the Congress government chose to make the one- person commission into a multi-member one. On 15 October 1989, two new election commissioners were appointed by the president, in addition to the chief election commissioner. The two additional posts were suddenly abolished on 1 January 1990. But in 1993, two additional commissioners were again appointed. TN Seshan, the chief election commissioner at the time, challenged the appointment in the Supreme Court but the court upheld them in 1995.

After retirement, some election commissioners have gone on to assume political roles. MS Gill became a central minister after demitting office. In January 2009, N Gopalaswami, the chief election commissioner at the time, called for the removal of his to-be successor, Navin Chawla, on the grounds that Chawla was being partisan towards the Congress. The opposition BJP backed the allegations vociferously. Gopalaswami's recommendation was rejected and Chawla went on to become the chief and conduct the 2009 elections. The Administrative Reforms Commission in 2009, recommended that a collegium, and not the executive, should appoint people to this most crucial of institutions. On 3 June 2012, LK Advani wrote a letter (<https://www.thehindu.com/news/national/advani-demands-collegium-for-appointments-to-constitutional-bodies/article3487227.ece>) to the then prime minister Manmohan Singh, on the subject. "The present system, whereby members to the Election Commission are appointed by the President, solely on the advice of the Prime Minister, does not inspire confidence among the people," Advani wrote. "Keeping these important decisions as the exclusive preserve of the ruling party renders the selection process vulnerable to manipulation and partisanship."

But ever since the BJP assumed power in 2014, it has closed this discussion. Instead, it has been filling the commission with its loyalists. Sunil Arora, a 1980-batch Indian Administrative Service officer, has been a high-flyer whenever BJP has held office. He was influential during Bhairon Singh Shekhawat's third term as the chief minister of Rajasthan, between 1993 and 1998, and was considered close to him. He did well under the NDA regime when Vajpayee was prime minister—he was made the chairman and managing director of Air India. He also served as the principal secretary in the Rajasthan government when the BJP's Vasundhara Raje was chief minister. In 2014, after Modi came to power, he held important positions in the ministries of skill development and entrepreneurship and of information and broadcasting. He also made an appearance in the infamous Radia tapes, in which he can be heard discussing corruption in the higher judiciary with the lobbyist Nira Radia.

Sushil Chandra—also from the 1980 batch—is an unusual appointee to the job of supervising elections, having never conducted an election so far. A former chairman of the Central Board of Direct Taxes, he has been a taxman through his career. According to his official CV, he “spearheaded the Department’s action against tax evasion in the wake of demonetization.” He has held powerful posts ever since 2014, when the present regime assumed office. The third election commissioner, Rajiv Kumar, was brought in after Lavasa abruptly resigned. Kumar is a 1984 Jharkhand cadre IAS officer who has been a bureaucrat trusted by this dispensation. He was finance secretary from 2017 to February 2020. He was the chairperson of the department of personnel, public grievances and pensions, overseen by the prime minister’s office, before he joined the commission.

The pressure on the election commissioners to demonstrate their loyalty to those who have appointed them is immense. “We need a wider consensus on appointments to the Election Commission if we are to restore credibility,” another former EC official said. “As with all institutions, there are discretionary powers and non- discretionary powers. We need to draw up a transparent and predictable framework for the model code of conduct now and minimise the amount of discretionary power available to ECs. The time has come to impose some rationality on the system now, otherwise Commissioners get turned into heroes or villains, as the case might be.”

The deterioration of the EC’s independence has raised questions about India’s status as a democracy. On 10 March, the Sweden-based organisation Varieties of Democracy put out its Democracy Report 2021. The report classified India as an “Electoral Autocracy,” instead of a democracy. But what really stood out was that, among the various components of the Liberal Democracy Index that had led to the fall, the loss of autonomy of the Election Management Body—what we call the Election Commission—was among the top three factors. “The decline in EMB autonomy for India is notable, and we noticed this when we looked at all the indicators (46) that constitute the Liberal Democracy Index,” the director of the institute, Stefan I Lindberg, told me. “We looked at those because we wanted to show

for the readers, and know ourselves, which indicators recorded the most negative changes over the past 10 years for India.”

In his paper, “Killing the Constitution with a Thousand Cuts,” Tarunabh Khaitan, a professor of public law and legal theory at Oxford University, listed three ways in which liberal constitutions hold the executive accountable: first vertically, by demanding electoral accountability to the people; then horizontally, by subjecting it to accountability demands of other state institutions like the judiciary; then diagonally, by requiring accountability by the media, academics and civil society. He concluded that all three kinds of accountability were eroded by the Modi government between 2014 and 2019. “The BJP government’s mode of operation was subtle, indirect, and incremental, but also systemic,” Khaitan wrote.

This month, the US government-funded think tank Freedom House classified India a “partly free” country. Last month, India slipped to the fifty-third position in The Economist Intelligence Unit’s 2020 Democracy Index, which said the “democratic backsliding” by authorities and “crackdowns” on civil liberties has led to a further decline in India’s ranking.

The World Press Freedom Report 2020 showed a steep decline in freedoms of the press, leaving India at rank 142 among 180 countries—lower than Bhutan, Nepal and Sri Lanka—which is shorthand for how poorly India is faring as a liberal democracy. The Chatham House Report puts India in the “Difficult Four,” on par with Saudi Arabia, China and Turkey. The Modi government has done little in response, except for issuing instructions(<https://theprint.in/india/new-panel-of-officials-credible-journalists-to-help-improve-indias-press-freedom-rank/415305/>) that a global index-monitoring cell be set up to keep a track of 32 global indices.

The Modi government is exercising control over all institutions, not just the EC. As winning elections is essential to deriving legitimacy for the government, controlling their outcome is vital. “As we saw in the 1970s, when the prime minister’s office was so powerful, vast powers

flowed out and away from institutions and rested in the PMO,” James Manor, an emeritus professor at the University of London’s Institute of Commonwealth Studies, told me. “It is only when that power flows back out that institutions get to breathe, become independent and come into their own.

There is no doubt that the Election Commission went easy on Prime Minister Modi during the 2019 elections and that has serious consequences on how level the field for holding elections was then and now is.”

SEEMA CHISHTI (/AUTHOR/44507) is a writer and journalist based in Delhi. She has worked in print, radio and television, in English and in Hindi, since 1990. She was the Delhi editor for BBC India and a deputy editor at the Indian Express. She is the co-author of Note by Note: The India Story (1947-2017), a history of independent India told alongside the sound of Hindi film music for each of the years. Her endeavour remains to tease out, untie and then help interpret the many strands of change in a large and diverse country.

Preshant Bhusan
(TRUE COPY)

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

I.A. NO. _____ OF 2021
IN
WRIT PETITION (CIVIL) NO. _____ OF 2021

IN THE MATTER OF:

ASSOCIATION FOR DEMOCRATIC REFORMS.	..PETITIONER
VERSUS	
UNION OF INDIA & ANR.	...RESPONDENTS

APPLICATION FOR INTERIM DIRECTIONS

To,
THE HON'BLE CHIEF JUSTICE OF INDIA AND HIS COMPANION JUDGES
OF THE HON'BLE SUPREME COURT OF INDIA

The Humble Application of the
Petitioner above-named

MOST RESPECTFULLY SHOWETH: -

1. The Applicant by way of present application is seeking a direction for constituting an interim neutral and independent collegium/ selection committee for appointment of new Election Commissioner in terms of the recommendation Law Commission in its 255th report of March 2015; Second Administrative Reform Commission in its fourth Report of January 2007; by the Dr. Dinesh Goswami Committee in its Report of May 1990; and by the Justice Tarkunde Committee in its Report of

1975. The post of Election Commissioner stood vacated on 12.04.2021 after the retirement of Chief Election Commissioner Mr. Sunil Arora.

2. That the instant application seeking interim directions is being preferred by the Applicant in view of the recent developments which have questioned the credibility and the functioning of the Election Commission of India. To protect the democratic fabric from being jeopardized, the long pending need of electoral reforms needs to be dealt with immediately.
3. In recent years questions have been raised about the conduct of the Election Commission in supervision and management of the election process. It is the responsibility of the Election Commission to conduct the elections in a free, fair, impartial, and efficient manner because the sanctity of elections is the most important requirement in the Indian Democracy. Unfortunately, there has been a growing impression that the Election Commission is indulgent towards the ruling government at the centre, and the commission has a different standard to determine the actions of the members of the ruling government and the complaints that arise during the campaign/elections.

Parliamentary Election of 2019

4. The Citizens' Commission on Elections (CCE) chaired by the retired Supreme Court Judge, Justice Madan B. Lokur, in its second report of

"An Inquiry into India's Election System" of March, 2021, examined the critical aspects of Parliamentary elections of 2019. The Commission highlighted several instances of inaction or omission on the part of the Election Commission which has raised doubts regarding its fairness and neutrality. The report with respect to Electoral Process and Model Code of Conduct has said:

- ❖ *"For Parliament Election-2019, ECI deliberately delayed the announcement to enable the 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 to 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."*

5. Further, the report as regards to the functioning of Election Commission of India and Autonomy states:

*"ECI has plenipotentiary powers drawn from Article 324 of the Constitution of India to conduct free and fair elections. 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..."

6. On 08.04.2019, The Wire reported that 66 former bureaucrats wrote a letter to President Ram Nath Kovind expressing their concern over the functioning of the Election Commission. In the letter, the Bureaucrats cited several instances of *"abuse and blatant disregard of the Model Code of Conduct (MCC) by the ruling party at the Centre, and the ECI's pusillanimity in coming down with a heavy hand on these violations"*. The letter further stated that the failure of the Election Commission to take action against the ruling government *"has reduced the credibility of this constitutional body to an all-time low. Any erosion in the people's confidence in the fairness of the ECI has very grave consequences for the future of our democracy and we hope that the gravity of the situation will be appreciated by the ECI."* And thereby requested *"ECI to conduct itself in a manner where its independence, fairness, impartiality and efficiency are not questioned and to firmly exercise the extensive mandate given to it under Article 324 of the Constitution of India to ensure that the Indian voter is able to exercise her/his franchise without fear or favour."*

A true copy of The Wire report dated 08.04.2019 titled “Retired Civil Servants Pen Letter to President over EC's 'Crisis of Credibility’” is annexed as **Annexure-A (Page No. 122 to133)**

7. That in another article dated 22.05.2019 by the Scroll highlighted various decisions of the Election Commission during the 2019 Lok Sabha election that eroded public trust in the institution. The two decisions amongst others reported in the article are as follows:

“7. Questionable transfers

Through the campaigning period, the Election Commission transferred officials. This is a part of its powers to ensure a free and fair election. Some transfers, however, occurred after officials took action against Modi. For instance, in Sambalpur in Odisha, the Election Commission suspended the general observer Mohammed Mohsin, an IAS officer from Karnataka, after a flying squad team inspected Modi’s helicopter. On April 24, a day after polling in Sambalpur ended, the commission revoked his suspension soon after the Central Administrative Tribunal in Bengaluru stayed it. The commission, however, asked the Karnataka government to ensure Mohsin was not assigned to any election duty after this.

..

10.Curtailing campaign in West Bengal only after Modi rallies were done

Perhaps the sternest action the Election Commission took was when it curtailed election campaigning in West Bengal by a day. On May 14, at a campaign for BJP president Amit Shah, a bust of social reformer Ishwar Chandra Vidyasagar was smashed in north Kolkata's Vidyasagar College. Videos from the event showed people wearing saffron scarves attacking the bust. The campaign in West Bengal was already fraught with violence. Political workers of both the BJP and ruling Trinamool Congress were killed, with two workers from each party found dead and two others shot on polling day on May 12. A Congress worker was stabbed and a voter killed in a queue on April 23. Reacting to the vandalism of the bust, the Election Commission announced on May 15 that campaigning in West Bengal would end a day before schedule, on the night of May 16 instead of May 17. Over the next two days, the state transferred four police officials and bureaucrats citing their interference in the election process. But as Opposition parties pointed out, the Election Commission allowed campaigning to continue for 48 hours after the violence. This window allowed two of Modi's scheduled rallies to continue. "The decision by EC [Election Commission] to stop campaigning a day in advance is not understood," Communist Party of India (Marxist) leader Sitaram Yechury tweeted. "The first thing being expected by the EC was action against the lumpen elements of BJP and TMC for violence yesterday. Why has no action been initiated?"

A true copy of the Scroll article dated 22.05.2019 titled “The Silent Army: 10 reasons why public trust in the Election Commission stands eroded” is annexed as **ANNEXURE B (Page No. 134 to 144)**

State Assembly Election, 2021

8. That a similar pattern of inaction and abdication of the functions and duties of the Election Commission was seen in the current round of assembly elections in various states, especially in the State of West Bengal. The Caravan in its article titled as “*The Biased Referee*” has highlighted several instances from announcing eight-phase polling schedule for West Bengal’s 294 assembly seats to amending the rule regarding booth’s agent in order to show Election Commission blatant biasness in favor of the ruling government.
9. On the 9th of May 2021, it was reported that Trinamool Congress MPs submitted a memorandum to officials of the Election Commission alleging shortcomings of the apex poll body during the assembly polls in West Bengal. It said that the party is bringing on record the “deplorable” state of affairs of the Election Commission in respect of its approach towards the TMC and the BJP in West Bengal during the ongoing assembly elections. The TMC listed instances under three categories — inaction of the EC, underaction of the EC and overaction by the EC. In the first category, the party listed speeches of Prime Minister Narendra Modi and Home Minister Amit Shah alleging that they have made statements that are in “violation” of the Model Code of Conduct (MCC) as well as the Representation of The People Act

1951. The party has also provided YouTube links of these speeches to the EC. "The ECI claims that it monitors speeches. However, it has not taken any action for such serious violations. For all the above, Shri Narendra Modi and Shri Amit Shah should be banned from campaigning for the remaining phases," it said. The TMC also alleged that other than being in violation of the MCC, these speeches were in "poor taste" and "are also disrespectful to women". Under the category of "underaction of ECI", the party has listed instances of various middle level and lower level leaders of BJP who have allegedly tried to influence voters on communal lines. "Despite the ECI being aware/made aware of the ground on which those speeches are violations of the MCC, the ECI refused to take sufficient steps and/or any steps, though in all such cases there should have been a ban on campaigning," it said. In the third category of "over-action", the party listed the restraining of West Bengal Chief Minister and TMC boss Mamata Banerjee from campaigning for 24 hours. "Such an act is mala fide, suffers from non-application of mind and is in violation of her fundamental rights. ECI was formed under the Constitution of India to be an independent body that would monitor and conduct general elections in India. Neutrality is sine qua non in discharge of its functions but during this assembly election, it is apparent that EC is acting in a partisan manner, absolutely in favour of the BJP and/or on its instructions, that is pre-announced by BJP," it said. The delegation that met the EC include parliamentarians Derek O'Brien, Kalyan Banerjee, Pratima Mondal and Santanu Sen.

A true copy of The Print report dated 14.04.2019 titled "TMC MPs list EC's inaction, understand, overaction during Bengal polls" is annexed and marked as **ANNEXURE C (Page No. 145 to 146)**

10. That the conducts of the Election commission during the recent assembly elections and afterwards have brought embarrassment to the institution. The Madras High Court, while hearing a Writ Petition for ensuring COVID-related protocols at the polling booths, came down heavily on the Election Commission for not stopping political parties from violating Covid protocols during the campaign rallies. In its oral observations, the High Court deplored that perhaps *murder charges should be imposed on the panel for being the only institution responsible for the situation that we are in today*. Further, to submit that the Election Commission was split over its response to the censure by the Madras High Court on its role in conducting elections during the second wave of the Covid-19 Pandemic.

A true copy of the Live Law report dated 26.04.2021 containing the remarks of High Court is annexed and marked as **ANNEXURE D Page No. 147 to 148)**

A true copy of The Print report dated 07.05.2021 titled as "EC Rajiv Kumar wanted to file separate affidavit in Madras HC, denied due to "lack of precedence" is annexed and marked as **ANNEXURE E (Page No. 149 to 151)**

11. That it is to point that due to the current functioning of the Election Commission of India, under the complete influence of the ruling government, the Panel Counsel of the Election Commission in the Supreme Court, tendered his resignation stating *"It was an honour to represent the Election Commission of India (ECI). I had a cherishing milestone of my career, in the journey which began with being part of the office of Standing Counsel of ECI and progressed as one of the panel counsels of the ECI (Since 2013). However, I have found that my values are not in consonance with the current functioning of the ECI; and hence I withdraw myself from the responsibilities of its panel counsel before Supreme Court of India."* Copy of the Letter of Resignation dated 06.05.2021 is annexed as **Annexure- F (Page 152)**.

12. That because the Election commissioners are appointed solely on the pick and choose method by the ruling party in the government, which tends to weaken the democratic and independent functioning of the Election Commission as an Institution. The recent incidents and examples have shown the partisan behavior of the Election Commission, it is to further substantiate that because there is no restriction to post-retirement honours of the retiring CEC or EC's, the officers who are picked for appointment as EC's adjust to requirements of the ruling party in the government, even if in the course of doing so, he or she assists in the weakening of an institution of governance or, worse, its eventual destruction.

13. The practice of appointment of members of Election Commission by the government creates apprehensions regarding the neutrality of the Commission. Further, in recent years the Election Commission has acted as an organ of the Central Government rather than an independent agency.

14. That This Hon'ble Court had passed certain interim orders in *Kudrat Sandhu v. Union of India and others* 2018 SCC OnLine SC 2898 for constituting interim Search-cum-Selection Committee in relation to appointments to the post of members of all the tribunals. The relevant extract of the order dated 09.02.2018 passed in case is as follows:

"1. We have heard learned counsel for the petitioners and Mr. K.K. Venugopal, learned Attorney General for India.

*2. In the course of hearing, suggestions for an interim order in respect of Central Administrative Tribunal have been filed. **The suggestions read as follows :***

"1. Staying the composition of Search-cum-Selection Committee as prescribed in Column 4 of the Schedule to the Tribunal, Appellate Tribunal and Other Authorities (Qualification, experience and other conditions of service of members) Rules, 2017 both in respect of Chairman/Judicial Members and Administrative Members. A further direction to constitute an interim Search-cum-Selection Committee during the pendency of this W.P. in respect of both Judicial/Administrative members as under

a. Chief Justice of India or his nominee - Chairman

b. Chairman of the Central Administrative Tribunal - Member

c. Two Secretaries nominated by the Government of India - Members

2. Appointment to the post of Chairman shall be made by nomination by the Chief Justice of India.

3. Stay the terms of office of 3 years as prescribed in Column 5 of the Schedule to the Tribunal, Appellate Tribunal and other Authorities (Qualification, experience and other conditions of service of members) Rules, 2017. A further direction fixing the term of office of all selectees by the aforementioned interim Search-cum-Selection Committee and consequent appointees as 5 years.

4. All appointments to be made in pursuance to the selection made by the interim Search-cum-Selection Committee shall be with conditions of service as applicable to the Judges of High Court.

5. A further direction to the effect that all the selections made by the aforementioned interim selection committee and the consequential appointment of all the selectees as Chairman/Judicial/Administrative members for a term of 5 years with conditions of service as applicable to Judges of High Court shall not be affected by the final outcome of the Writ Petition."

3. Mr. Venugopal, learned Attorney General has submitted that he has no objection if the suggestions, barring suggestion nos. 4 and 5, are presently followed as an interim measure. On a query being made whether the said suggestions shall be made applicable to all tribunals, learned Attorney General answered in the affirmative.

4. He would, however, suggest that suggestions nos. 4 and 5 should be recast as follows :

"4. All appointments to be made in pursuance to the selection made by the interim Search-cum-Selection Committee shall abide by the conditions of service as per the old Acts and the Rules.

5. A further direction to the effect that all the selections made by the aforementioned interim selection committee and the consequential appointment of all the selectees as Chairman/Judicial/Administrative members shall be for a period as has been provided in the old Acts and the Rules.

6. In view of the aforesaid, we accept the suggestions and direct that the same shall be made applicable for selection of the Chairpersons and the Judicial/Administrative/Technical/Expert Members for all tribunals."

A true copy of the order dated 09.02.2018 passed in Kudrat Sandhu v. Union of India and others 2018 SCC OnLine SC 2898 is annexed and marked as **ANNEXURE G (Page No. 153 to 157).**

15. That aforementioned interim order was passed because the composition of Search-cum-Selection Committee as prescribed in Column 4 of the Schedule to the Tribunal, Appellate Tribunal and Other Authorities (Qualification, experience and other conditions of service of members) Rules, 2017, was against the constitutional scheme and independence of judiciary. The Composition of a Search-cum-Selection Committee in the Rule 2017 especially in the appointments of Member, Vice-President, and President of tribunal were predominantly made by nominees of the Central Government. The final judgment reported as *Rojew Mathew v. South India Bank Ltd.* (2020) 6 SCC 1 struck down the composition of search-cum-selection committee by also observing that in most of the case

executive are litigating parties and hence they cannot be allowed to be in a dominant position in selecting the members of tribunal.

16. Likewise, in the present case too, the ruling government ought not have the dominant say in the appointment of members of the Election Commission, as not only it is responsible for conduct of free and fair elections but also renders an adjudicatory role between the various political parties. Therefore, in order to ensure purity of election process and for proper implementation of the rule of law, it is in the interest of justice that the post vacated for an Election Commissioner after the retirement of the CEC in April 2021, be filled through the collegium/selection process through fair and transparent process and not through the pick and choose method of the government from the cadre of civil servants of their own choice.

17. The present Application seeking interim directions is in bonafide and in the interest of justice.

PRAYER

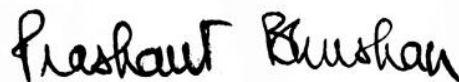
In view of the facts and circumstances aforementioned, it is humbly prayed that this Hon'ble Court may be pleased to: -

- i. Direct the respondents to appoint the Election Commissioner on the vacant post through collegium/selection committee as recommended by Law Commission in its 255th report of March

2015; Second Administrative Reform Commission in its fourth Report of January 2007; by the Dr. Dinesh Goswami Committee in its Report of May 1990; and by the Justice Tarkunde Committee in its Report of 1975

- ii. Grant such other reliefs as this Hon'ble Court may deem fit and proper in light of the facts and circumstances of the case.

AND FOR THIS ACT OF KINDNESS THE APPLICANT AS IN DUTY BOUND SHALL EVER PRAY.



(PRASHANT BHUSHAN)
COUNSEL FOR THE PETITIONER

FILED ON:16.05.2021
NEW DELHI

ANNEXURE-A

The Wire

Retired Civil Servants Pen Letter to President over EC's 'Crisis of Credibility'

"Any erosion in the people's confidence in the fairness of the ECI has very grave consequences for the future of our democracy."

8TH APRIL 2019

New Delhi: In a letter addressed to President Ram Nath Kovind, a group of bureaucrats have bemoaned the 'weak-kneed' responses of the Election Commission in the run up to the 2019 Lok Sabha elections. The letter points to various violations of the model code of conduct and illustrates how the EC took little action, if any, on most of the complaints that have been filed with it.

In the letter, which has also been sent to the Chief Election Commissioner and other Elections Commissioners, the Concerned Group of Citizens ask the EC to "conduct itself in a manner where its independence, fairness, impartiality and efficiency are not questioned and to firmly exercise the extensive mandate given to it under Article 324 of the Constitution of India to ensure that the Indian voter is able to exercise her/his franchise without fear or favour".

The bureaucrats give several examples of violations where the EC has not taken the proper steps – from Yogi Adityanath's 'Modiji ke sena' speech, to NaMo TV, a channel dedicated to all things Prime Minister Narendra Modi. It also brings up the prime minister's speech after India conducted an anti-satellite test as well as a TV show, *Modi: A Common Man's Journey*, about Modi that has five episodes out.

It also ask why the EC has so far only sought a report about the prime minister's divisive speech at Wardha, where he had said: "The Congress insulted Hindus. People have decided to punish it in the election. Leaders of that party are now scared of contesting from constituencies dominated

by the majority population. That is why they are forced to take refuge in places where the majority is a minority.”

The retired civil servants also bring up the EC’s “obdurate conduct and its reluctance to undertake a proper VVPAT audit”.

Read the full letter below:

Respected Rashtrapatiji,

We are a group of former civil servants of the All India and Central Services who have come together to use our pooled experience of decades of service to the Constitution of India to protect and further the values enshrined in it. As a group, we have no affiliations with any political party. Many in our group have, over the past six decades, been involved with the conduct and supervision of elections in India.

We write to express our deep anguish that the Election Commission of India (ECI), which has had a long and honourable record of holding free and fair elections despite the enormous challenges of scale and complexity, is suffering from a crisis of credibility today. The ECI’s independence, fairness, impartiality and efficiency are perceived to be compromised today, thereby endangering the integrity of the electoral process which is the very foundation of Indian democracy. We are distressed to note the misuse, abuse and blatant disregard of the Model Code of Conduct (MCC) by the ruling party at the Centre, and the ECI’s pusillanimity in coming down with a heavy hand on these violations. We would like to bring to your attention a number of glaring instances:

1) The Prime Minister made a public announcement on 27 March 2019 about the successful launch of India’s first anti-satellite weapon (ASAT), which made India the fourth nation in the world with anti-satellite missile capabilities. While the timing of the exercise is questionable, even more questionable is the fact that the announcement of the launch was made with much fanfare by the Prime Minister when propriety demanded that it should have been left to the officials of the Defence Research and Development Organisation (DRDO) at a time when the MCC was operative. The country was facing no immediate security threat that required the Prime Minister, who is an election candidate himself, to make a public announcement. On the purely technical ground that the announcement was not made on the public broadcasting service, the ECI held that there

had been no violation of the MCC. We feel, however, that parading the achievements of a government in this manner after the announcement of elections is tantamount to a serious breach of propriety and amounts to giving unfair publicity to the party presently in government and that the ECI's decision does not stand up to the standards of impartiality expected of it.

2) Our group addressed a letter to the Chief Election Commissioner (which was also made public) on 26 March 2019, requesting the ECI to issue directions to withhold the release of all biopics and documentaries on any political personages through any media mechanism until the conclusion of the electoral process. While the ECI is still to respond to our letter, we understand from media reports that a biopic on the present Prime Minister is slated for release on 11 April 2019, on the day of commencement of the polling process. This, in our opinion, represents a backdoor effort to garner free publicity for a political person (and his party). In the event that this biopic is released even while the election process is ongoing, we contend that the entire expenses on the production, distribution and publicity of the biopic should be debited to the election expenses of Shri Narendra Modi.

3) The same principle should also be applied to the 10-part web series "Modi: A Common Man's Journey" the first five episodes of which are out on the streaming platform Eros Now, with the ECI again doing nothing but going through the motions of calling for details.

4) The ECI has been acting with the same lethargy in respect of the NaMo TV channel launched on 31 March 2019, which, without any formal approval of the Ministry of Information and Broadcasting, is propagating the image and views of Shri Narendra Modi. The DTH service provider Tata Sky initially called it a "Hindi news service channel" and later back-tracked and called it a "special service" not requiring any licence. The brazen violation of democratic norms may be seen from the fact that the channel has been added to all subscribers' accounts "as a launch offer" with "no option to delete the individual channel."

5) While the ECI has passed orders transferring three top police officers and the Chief Secretary in Andhra Pradesh and four top police officers in West Bengal, we find it curious that no such steps have been taken in

Tamil Nadu, where the present Director General of Police (DGP) is reportedly under investigation by the Central Bureau of Investigation in the Gutkha scam case and there have been repeated appeals by the Opposition parties in Tamil Nadu seeking his removal from that post. He is also on extension beyond the normal date of his superannuation and, as per ECI norms, such officers should not be assigned election duties. Even more significantly, the same officer had been ordered by the ECI to be transferred during the 2016 Tamil Nadu Assembly elections. It is unfortunate that different yardsticks have been applied in the cases of the former Commissioner of Police, Kolkata and the DGP, Tamil Nadu.

6) The Governor of Rajasthan, Shri Kalyan Singh, has made certain statements that virtually amount to canvassing for a specific political party. The ECI has also apparently apprised your office that the MCC has been violated in the instant case. Since this amounts to a grave misdemeanour, which impacts the sanctity of the Constitution of India, we request you to either remove Shri Kalyan Singh from the post of Governor or direct him to submit his resignation forthwith.

7) The Chief Minister of Uttar Pradesh, Yogi Adityanath, had, at a recent public election meeting, referred to the armed forces as the army of Shri Narendra Modi. A similar statement has been made at another election meeting by Shri Mukhtar Abbas Naqvi, a senior BJP functionary. Such irresponsible statements by a very high constitutional functionary and a political party official not only constitute an insult to your position as the Supreme Commander of the Defence Forces of India, but also amount to a deliberate attempt to mislead the general public, apart from damaging the tradition of the armed forces as apolitical formations. Strongest action is required from the ECI to nip such cavalier statements in the bud, but the ECI has contented itself in the present case with a mild reprimand to the UP CM. We certainly hope and pray that such mild responses do not embolden others to violate the MCC and weaken the institutions that support our democracy.

8) We also note with consternation the departure from all civilised norms in the speeches being delivered by political personages, both those holding high constitutional positions and others. In particular, we would like to draw attention to a speech by Shri Narendra Modi at Wardha, Maharashtra

on 1 April 2019 where, to quote the news channel News18.com, he allegedly said "The Congress insulted Hindus. People have decided to punish it in the election. Leaders of that party are now scared of contesting from constituencies dominated by the majority population. That is why they are forced to take refuge in places where the majority is a minority." He has made a similar statement at an election rally in Nanded, Maharashtra on 6 April 2019. Such divisive speeches, with clear innuendoes, constitute a violation of one of the first requirements stipulated in the MCC: **"No party or candidate shall indulge in any activity which may aggravate existing differences or create mutual hatred or cause tension between different castes and communities, religious or linguistic."**

It is incumbent on the ECI to keep a close watch on all such activities and make it clear to all political parties, candidates and their workers that any such efforts to exploit communal or other divisions in society will attract the strongest action. We understand from media reports that the ECI has sought a report from the Chief Electoral Officer, Maharashtra. We hope that appropriate strict action will be taken to discourage all such incendiary speeches.

9) *In our open letter dated 24 February 2019, our group detailed our proposal to the ECI for the proper implementation of VVPAT-based audits of EVMs in the forthcoming elections. The ECI made an astonishing submission before the Supreme Court that if manual counting of VVPAT slips of 50% of EVMs is done (as prayed for in a joint PIL by 21 Opposition Parties), the election results would be delayed by six days when everyone is aware that, even in the days of paper ballots, the counting used to get over within 8 to 15 hours and the results were declared either the same day or the next day. The ECI had constituted an Experts Committee to make recommendations on VVPAT-based audit. This was a simple matter which required only two or three sittings of the Expert Committee and could have been finalised in less than a month. The first meeting of the Expert Committee was held on 4 October 2018. The next meeting of the Expert Committee was mysteriously delayed by five months and it was held without inviting the members who expressed dissenting views in the first meeting! The ECI's obdurate conduct and its reluctance to undertake a proper VVPAT audit when its present sample size fails to detect a 'defective*

EVM' (i.e. a malfunctioning or manipulated EVM) 99% of the time raise serious questions about its motives for doing so.

Hon'ble Rashtrapatiji, we are deeply concerned about the weak-kneed conduct of the ECI, which has reduced the credibility of this constitutional body to an all-time low. Any erosion in the people's confidence in the fairness of the ECI has very grave consequences for the future of our democracy and we hope that the gravity of the situation will be appreciated by the ECI.

We appeal through you, Hon'ble Rashtrapatiji, to the ECI to conduct itself in a manner where its independence, fairness, impartiality and efficiency are not questioned and to firmly exercise the extensive mandate given to it under Article 324 of the Constitution of India to ensure that the Indian voter is able to exercise her/his franchise without fear or favour.

Yours faithfully,

1.	Salahuddin Ahmad	IAS (Retd.)	Former Chief Secretary, Govt. of Rajasthan
2.	S.P. Ambrose	IAS (Retd.)	Former Additional Secretary, Ministry of Shipping & Transport, GoI
3.	N. Bala Baskar	IAS (Retd.)	Former Principal Adviser (Finance), Ministry of External Affairs, GoI
4.	Vappala Balachandran	IPS (Retd.)	Former Special Secretary, Cabinet Secretariat, GoI
5.	Gopalan Balagopal	IAS (Retd.)	Former Special Secretary, Govt. of West Bengal
6.	Chandrashekhar Balakrishnan	IAS (Retd.)	Former Secretary, Coal, GoI

7.	Pradip Bhattacharya	IAS (Retd.)	Former Additional Chief Secretary, Development & Planning and Administrative Training Institute, Govt. of West Bengal
8.	Meeran Borwankar	C IPS (Retd.)	Former DGP, Bureau of Police Research and Development, GoI
9.	Ravi Budhiraja	IAS (Retd.)	Former Chairman, Jawaharlal Nehru Port Trust, GoI
10	Sundar Burra	IAS (Retd.)	Former Secretary, Govt. of Maharashtra
11	R. Chandramohan	IAS (Retd.)	Former Principal Secretary, Transport and Urban Development, Govt. of NCT of Delhi
12	Som Chaturvedi	IRTS (Retd.)	Former Additional Member, Railway Board, GoI
13	Anna Dani	IAS (Retd.)	Former Additional Chief Secretary, Govt. of Maharashtra
14	Vibha Puri Das	IAS (Retd.)	Former Secretary, Ministry of Tribal Affairs, GoI
15	P.R. Dasgupta	IAS (Retd.)	Former Chairman, Food Corporation of India, GoI
16	Nareshwar Dayal	IFS (Retd.)	Former Secretary, Ministry of External Affairs and former High Commissioner to the United Kingdom

17	Nitin Desai	IES (Retd.)	Former Secretary and Chief Economic Adviser, Ministry of Finance, GoI
18	Keshav Desiraju	IAS (Retd.)	Former Health Secretary, GoI
19	M.G. Devasahayam	IAS (Retd.)	Former Secretary, Govt. of Haryana
20	Sushil Dubey	IFS (Retd.)	Former Ambassador to Sweden
21	Arif Ghauri	IRS (Retd.)	Former Governance Adviser, DFID, Govt. of the United Kingdom (on deputation)
22	Gourisankar Ghosh	IAS (Retd.)	Former Mission Director, National Drinking Water Mission, GoI
23	Tuktuk Ghosh	IAS (Retd.)	Former Special Secretary and Financial Adviser, Ministry of Road Transport & Highways, Shipping & Tourism, GoI
24	S.K. Guha	IAS (Retd.)	Former Joint Secretary, Department of Women & Child Development, GoI
25	Meena Gupta	IAS (Retd.)	Former Secretary, Ministry of Environment & Forests, GoI
26	Sajjad Hassan	IAS (Retd.)	Former Commissioner (Planning), Govt. of Manipur
27	Siraj Hussain	IAS	Former Secretary, Department of

		(Retd.)	Agriculture, GoI
28	Jagdish Joshi	IAS (Retd.)	Former Additional Chief Secretary (Planning), Govt. of Maharashtra
29	Najeeb Jung	IAS (Retd.)	Former Lieutenant Governor, Delhi
30	Rahul Khullar	IAS (Retd.)	Former Chairman, Telecom Regulatory Authority of India
31	Ajai Kumar	Indian Forest Service (Retd.)	Former Director, Ministry of Agriculture, GoI
32	Arun Kumar	IAS (Retd.)	Former Chairman, National Pharmaceutical Pricing Authority, GoI
33	Brijesh Kumar	IAS (Retd.)	Former Secretary, Department of Information Technology, GoI
34	Sudhir Kumar	IAS (Retd.)	Former Member, Central Administrative Tribunal
35	Subodh Lal	IPoS (Retd.)	Former Deputy Director General, Ministry of Communications, GoI
36	P.M.S. Malik	IFS (Retd.)	Former Ambassador to Myanmar & Special Secretary, MEA, GoI
37	Harsh Mander	IAS (Retd.)	Govt. of Madhya Pradesh

38	Lalit Mathur	IAS (Retd.)	Former Director General, National Institute of Rural Development, GoI
39	Aditi Mehta	IAS (Retd.)	Former Additional Chief Secretary, Govt. of Rajasthan
40	Shivshankar Menon	IFS (Retd.)	Former Foreign Secretary and Former National Security Adviser
41	Sonalini Mirchandani	IFS (Resigned)	GoI
42	Sunil Mitra	IAS (Retd.)	Former Secretary, Ministry of Finance, GoI
43	Deb Mukharji	IFS (Retd.)	Former High Commissioner to Bangladesh and former Ambassador to Nepal
44	Nagalsamy	IA&AS (Retd.)	Former Principal Accountant General, Tamil Nadu & Kerala
45	Sobha Nambisan	IAS (Retd.)	Former Principal Secretary (Planning), Govt. of Karnataka
46	P.G.J. Nampoothiri	IPS (Retd.)	Former Director General of Police, Govt. of Gujarat
47	Amitabha Pande	IAS (Retd.)	Former Secretary, Inter-State Council, GoI
48	Niranjan Pant	IA&AS	Former Deputy Comptroller & Auditor

		(Retd.)	General of India
49	Alok Perti	IAS (Retd.)	Former Secretary, Ministry of Coal, GoI
50	V.P. Raja	IAS (Retd.)	Former Chairman, Maharashtra Electricity Regulatory Commission
51	K. Rajivan	IAS (Resigned)	Former Director, Prime Minister's Office, GoI
52	Julio Ribeiro	IPS (Retd.)	Former Adviser to Governor of Punjab & former Ambassador to Romania
53	Manabendra N. Roy	IAS (Retd.)	Former Additional Chief Secretary, Govt. of West Bengal
54	Deepak Sanan	IAS (Retd.)	Former Principal Adviser (AR) to Chief Minister, Govt. of Himachal Pradesh
55	N.C. Saxena	IAS (Retd.)	Former Secretary, Planning Commission, GoI
56	Ardhendu Sen	IAS (Retd.)	Former Chief Secretary, Govt. of West Bengal
57	Abhijit Sengupta	IAS (Retd.)	Former Secretary, Ministry of Culture, GoI
58	Aftab Seth	IFS (Retd.)	Former Ambassador to Japan

59	Navrekha Sharma	IFS (Retd.)	Former Ambassador to Indonesia
60	Pravesh Sharma	IAS (Retd.)	Former Additional Chief Secretary, Govt. of Madhya Pradesh
61	Raju Sharma	IAS (Retd.)	Former Member, Board of Revenue, Govt. of Uttar Pradesh
62	Rashmi Shukla Sharma	IAS (Retd.)	Former Additional Chief Secretary, Govt. of Madhya Pradesh
63	Jawhar Sircar	IAS (Retd.)	Former Secretary, Ministry of Culture, GoI, & former CEO, Prasar Bharati
64	P.S.S. Thomas	IAS (Retd.)	Former Secretary General, National Human Rights Commission
65	Hindal Tyabji	IAS (Retd.)	Former Chief Secretary rank, Govt. of Jammu & Kashmir
66	Ramani Venkatesan	IAS (Retd.)	Former Director General, YASHADA, Govt. of Maharashtra

Source- <https://thewire.in/politics/retired-civil-servants-letter-president-ec-crisis-of-credibility>

Preshant Bhusan
(TRUE COPY)

ANNEXURE-B

Scroll.in

The Silent Army: 10 reasons why public trust in the Election Commission stands eroded

A series of questionable decisions, and dissent by one of the three top poll body officials, have cast a long shadow over the 2019 general elections.

SHREYA ROY CHOWDHURY & MRIDULA CHARI

MAY 22, 2019 · 07:30 AM

It takes five million workers to pull off India's election. Shreya Roy Chowdhury and Mridula Chari bring you their stories in a series called The Silent Army.

In addition to five million workers, a more elusive and unquantifiable element has made Indian elections work – public trust.

The Election Commission of India, which is responsible for the conduct of the elections, has enjoyed great public confidence particularly since the 1990s when TN Seshan raised the organisation's profile as Chief Election Commissioner. This has helped India's vast and diverse population accept the election system and its results.

But the trust stands eroded in the 2019 Lok Sabha elections, with the poll body facing allegations of partisanship.

Opposition parties have accused it of favouring Prime Minister Narendra Modi and BJP president Amit Shah, of going soft on them in cases where the model code of conduct was breached, and allowing the use of official machinery for electioneering by them.

The controversial decisions have been made right at the top of the organisation.

Three officers lead the Election Commission of India: Chief Election Commissioner Sunil Arora, and Election Commissioners Ashok Lavasa and

Sushil Chandra. Arora and Lavasa are retired officers of the Indian Administrative Service, who were both Election Commissioners under the previous Chief Election Commissioner OP Rawat.

Chandra is from the Indian Revenue Service – only the second officer from the service to be appointed to the Election Commission, as the Caravan magazine reported in March.

It also said that Chandra was the director of the Central Board of Direct Taxes at the time the Income Tax department raided senior Karnataka Congress leader Shivakumar's home in 2017 and found copies of BJP leader Yeddyurappa's diary that noted huge payoffs to BJP leaders in 2009. "He [Chandra] was due to retire on May this year, but in February, the Modi government promoted him," the magazine said.

Who selects the commissioners?

The Election Commission insists on randomised selection of workers for election duty to limit the possibility of political bias, but there are no safeguards in the procedure for its own appointments. The government picks the commissioners with no consultation.

In 1990, a committee on electoral reforms had recommended that the leader of the Opposition and the Chief Justice of India be included in the appointment process. This recommendation was not implemented. At present, the prime minister just has to recommend a name to the president.

Despite this, the system was trusted "because it was very transparent", explained a retired deputy election commissioner, asking not to be identified. "All orders were put on the website with full details and reasoning," he said. "Without that transparency, people do not know what is happening and make their own judgements."

Lack of transparency

But, in this election, orders clearing Modi and Shah of violating the model code of conduct were not made public initially. Lavasa did not agree with the views of Arora and Chandra but his dissent was not recorded at all.

This led to an embarrassing rift, with Lavasa speaking to the Indian Express about it, which further dented the poll body's impartial image.

"The EC [Election Commission] should have been more open and transparent," said the retired deputy election commissioner. Political parties have seized upon this confusion and are questioning "the legitimacy of the process", he added. This can have serious consequences. "If the public starts doubting [the independence of the Election Commission], we will be heading in the same direction as some of the African countries where there is violence after every election."

Here are some of the most controversial decisions made by the Election Commission this election season and the criticism they have invited.

1. Clearing speeches by Modi and Shah on the armed forces while censuring Adityanath

In 2013, the commission had barred candidates from using photographs of the armed forces in advertisements. On March 9, the Election Commission reminded all parties of its 2013 order. On March 19, it followed up with an advisory that campaigners and candidates "should desist, as part of their election campaigning, from indulging in any political propaganda involving activities of the Defence Forces".

But BJP leaders, including the prime minister, frequently referred to the armed forces during the election campaign.

Early in its campaign, BJP's posters had featured Indian Air Force pilot Wing Commander Abhinandan Varthaman, who was briefly captured by Pakistan after the Balakot strike in February. Later, the BJP sidestepped the 2013 order by making only verbal and textual references to the troops, including slogans such as "We enter the houses of terrorists to kill them" on election posters.

The Election Commission cleared these banners on May 6, saying that its advisory applied only to advertisements paid for by the public exchequer, contradicting its own advisory of March 19.

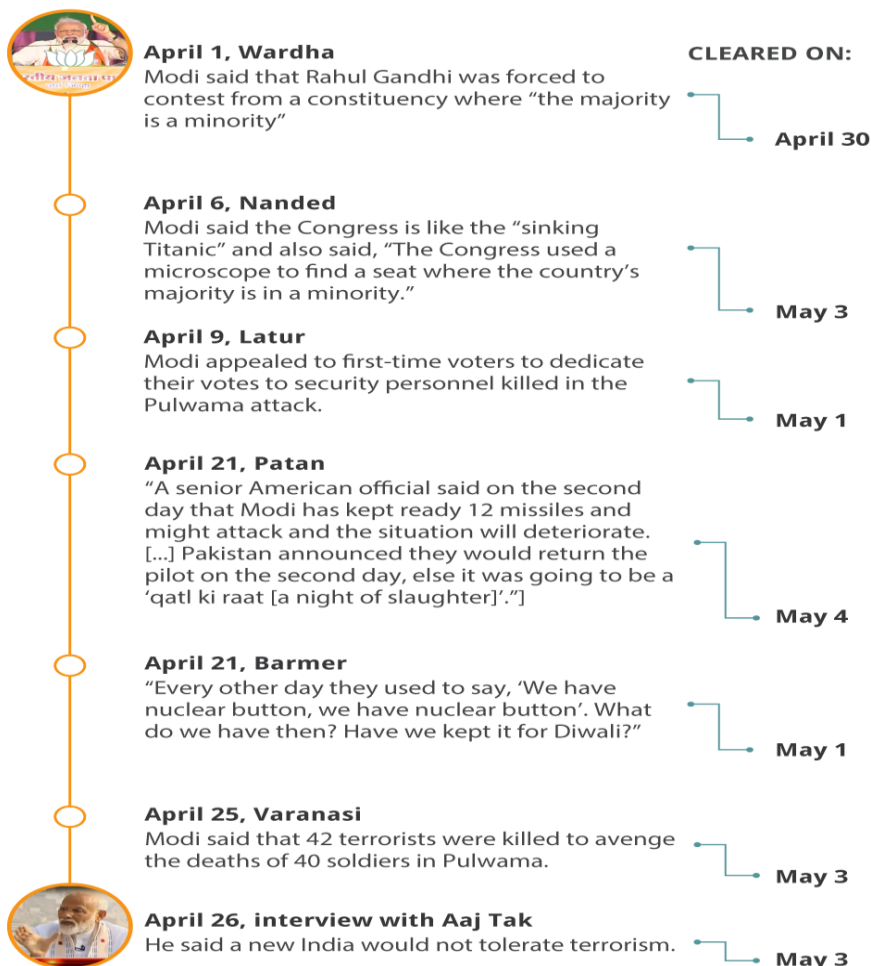
Modi continued to refer to Abhinandan Varthaman, Pulwama and Balakot in speeches and interviews through April and May.

On March 27, he announced in a nationwide address that India had successfully shot down a live satellite in space, adding to the country's defence capabilities in Mission Shakti. The Election Commission concluded two days later that the election code had not been violated as this was filmed by ANI, and not at the cost of the public exchequer.

The commission also cleared BJP President Amit Shah for referring to the Air Force as belonging to Modi in a speech in Krishnanagar in West Bengal on April 22, even as it censured Union minister Mukhtar Abbas Naqvi and Uttar Pradesh Chief Minister Adityanath. It cleared another speech Shah delivered in Nagpur, Maharashtra, on April 9, where he had said only Pakistan and Rahul Gandhi's party – the Congress – mourned after the Balakot airstrikes.

Taking a swipe at the Election Commission, which had already cleared most of his speeches, Modi asked if “his” jawans needed permission from the poll body to kill terrorists at a rally in Kushinagar in Uttar Pradesh on

The EC cleared a slew of complaints against Modi's speeches in the first week of May



Scroll.in

Source: Media reports

May 12.

OP Rawat, former Chief Election Commissioner, told Scroll.in that he had analysed Modi’s speeches on Balakot and discussed them with defence analysts who were of the opinion that there was nothing wrong with the government communicating its policy on terrorism.

However, Rawat said the commission could have explained its stand further. “The commission has not given facts in that letter,” he said. “They

have just given five or six lines saying that nothing wrong was found. [...] That really puts a lot of confusion [in the minds of people].”

2. Taking long to decide on cases involving Modi

The Election Commission took one month to take a decision on Modi’s speeches in Wardha and Nanded where he said that Rahul Gandhi was contesting from Wayanad because it was dominated by minority communities. It cleared both the speeches.

Rawat said that during his own term as chief election commissioner, with Arora and Lavasa as election commissioners, they cleared complaints of code violations within a week at most.

“During that period, we had elections for nine state assemblies, but never was an MCC [Model Code of Conduct] decision taken beyond one week,” Rawat said. He added that all facts were not before the public so it would be difficult to judge why there were delays in this case.

“We are outsiders, we do not know [what has happened in the commission],” he said. “The commission has not come out with any reason for delay, but there is no reason given so we are not aware.”

The former deputy election commissioner agreed that such delays are unusual and suggest something is wrong.

“You do not expect a complaint against a very important figure in the government to wait for one month,” he said. “[...] This year, the public and the political parties feel they are not being listened to. So many clean-chits are being given, religion is being used constantly for campaigning, the Army is being used – the message going out is that something is wrong.”

3. Acting only after the Supreme Court’s intervention

The delay in decision-making led several individuals to approach the Supreme Court. The Congress filed a case in the apex court asking it to order the Election Commission to take action.

On May 2, the Supreme Court ordered the Election Commission to take a decision on the remaining eight of the 11 complaints filed by the Congress against Modi for violations of the Model Code of Conduct by May 6. The

commission pleaded that it still had to receive transcripts of those speeches, but soon after, it issued a spate of orders.

Earlier, in April, the Election Commission had told the Supreme Court that its powers were limited and that it could only issue notices and seek replies. It could not de-recognise a party or disqualify a candidate. The Supreme Court in turn asked if it was calling itself “toothless”. The apex court was hearing a writ petition filed by an NRI asking for strict action against political figures who introduce religion into the election campaign.

In an interview with the Indian Express on May 21, Lavasa said that he felt the need to record his dissent after the Supreme Court’s observation in the case on hatred in political speeches.

4. Failing to enforce orders against Namo TV

When it came to the BJP, the commission struggled to enforce the orders it did pass. On April 11, the Commission instructed Namo TV, a 24-hour television channel dedicated to Modi, to get its political content certified by Delhi’s Chief Electoral Officer. Then, on April 17, it was ordered to follow the silence period. But Namo TV allegedly aired content during the silence period before Delhi voted on May 12. The commission sent the BJP a notice.

While the commission wrangled with Namo TV, online platform Eros Now began screening a web series on Modi on April 3. The commission ordered Eros Now to stop only on April 18.

Some BJP campaigners have circumvented silence periods and temporary bans by visiting temples.

On the first day of a three-day ban on campaigning for describing the 2019 polls as a contest between Ali and Bajrangbali – shorthand for Muslims and Hindus – Adityanath, made much-publicised visits to two temples in Ayodhya. He even chanted the Hanuman Chalisa, a Hindu prayer for Hanuman or Bajrangbali.

Bahujan Samaj Party leader Mayawati accused the commission of being “lenient on him”.

Pragya Thakur, BJP's candidate for Bhopal, was banned from campaigning for three days in early May for making provocative statements about Hemant Karkare, a Mumbai policeman killed by terrorists in 2008, and the demolition of Babri Masjid. Karkare led the investigation of Thakur's alleged role in the 2006 bomb blasts in Malegaon, Maharashtra. She too worked around the ban by visiting temples but in her case, the Election Commission served another notice.

5. Failing to put conditions on Modi's Kedarnath visit

Modi spent the day before the final phase of polling on May 19 being photographed while walking around the Kedarnath temple in Uttarakhand and meditating in a cave. His statement was only sartorial – he wore a robe that resembled the kind worn by author and poet Rabindranath Tagore, celebrated by Bengalis, and a Himachali cap. Parts of West Bengal and Himachal Pradesh voted on May 19.

Rawat said that the commission's actions in this instance had "a slight deficiency".

"While giving permission, the commission fell a little short," Rawat said. "They should have put a condition saying that while the commission has no objection to the honourable prime minister's visit to Kedarnath or Badrinath, it must be ensured that no publicity, propaganda should be made before the end of poll on May 19."

He added that as the political class was becoming innovative, the commission's machinery should also measure up.

"[The Election Commission] always says a rap on the knuckles is enough, but it is not enough," said Anil Verma, head of the Association for Democratic Reforms, a Delhi-based non-profit. "If a guy is a repeat offender [...] they should just be banned – no more election campaign, just sit quietly."

6. Prompt action against the Opposition

On complaints against the Congress, the Election Commission did not drag its heels.

On April 23, Rahul Gandhi, in a rally at Madhya Pradesh, said that a law enacted by the BJP allowed the government to attack and take land from Adivasis. The Election Commission served him a show-cause notice within a week. This complaint is yet to be resolved.

7. Questionable transfers

Through the campaigning period, the Election Commission transferred officials. This is a part of its powers to ensure a free and fair election. Some transfers, however, occurred after officials took action against Modi. For instance, in Sambalpur in Odisha, the Election Commission suspended the general observer Mohammed Mohsin, an IAS officer from Karnataka, after a flying squad team inspected Modi's helicopter.

On April 24, a day after polling in Sambalpur ended, the commission revoked his suspension soon after the Central Administrative Tribunal in Bengaluru stayed it. The commission, however, asked the Karnataka government to ensure Mohsin was not assigned to any election duty after this.

8. Overlooking the misuse of Niti Aayog

But the commission found nothing objectionable in the activities of another set of government officials who got entangled in BJP's campaign process.

The Centre's think tank, Niti Aayog, had written to bureaucrats in the Union territories and one BJP-ruled state seeking information about districts where Modi was scheduled to campaign. Based on Scroll.in's initial report on this, the Congress had filed a complaint. The commission, without seeking further information from Niti Aayog, concluded on May 12 that its activities did not violate the election code and was not a misuse of state machinery.

Lavasa's split with the Election Commission began here. He believed the commission should have sought more information before disposing of the complaint. On May 16, the Indian Express reported that the commission would revisit this decision.

However, earlier in the election season, the commission did caution Niti Ayog head Rajiv Kumar for his statement that the Congress's proposed NYAY scheme was unworkable.

9. Failing to regulate Income Tax raids

The commission also failed to check the Department of Revenue, which conducted raids on members of Opposition parties, without keeping it informed. Ignoring the commission's order to keep election officers informed, the Income Tax department raided the residence of DMK leader Kanimozhi on April 16. Nothing was recovered in this raid.

10. Curtailing campaign in West Bengal only after Modi rallies were done

Perhaps the sternest action the Election Commission took was when it curtailed election campaigning in West Bengal by a day.

On May 14, at a campaign for BJP president Amit Shah, a bust of social reformer Ishwar Chandra Vidyasagar was smashed in north Kolkata's Vidyasagar College. Videos from the event showed people wearing saffron scarves attacking the bust.

The campaign in West Bengal was already fraught with violence. Political workers of both the BJP and ruling Trinamool Congress were killed, with two workers from each party found dead and two others shot at on polling day on May 12. A Congress worker was stabbed and a voter killed in queue on April 23.

Reacting to the vandalism of the bust, the Election Commission announced on May 15 that campaigning in West Bengal would end a day before schedule, on the night of May 16 instead of May 17. Over the next two days, the state transferred four police officials and bureaucrats citing their interference in the election process.

But as Opposition parties pointed out, the Election Commission allowed campaigning to continue for 48 hours after the violence. This window allowed two of Modi's scheduled rallies to continue.

"The decision by EC [Election Commission] to stop campaigning a day in advance is not understood," Communist Party of India (Marxist) leader Sitaram Yechury tweeted. "The first thing being expected by EC was action against the lumpen elements of BJP and TMC for violence yesterday. Why has no action been initiated?"

Source- <https://scroll.in/article/924268/the-silent-army-10-reasons-why-public-trust-in-the-election-commission-stands-eroded>

Preshant Bhusan
(TRUE COPY)

ANNEXURE- C

The Print

TMC MPs list EC's 'inaction, understand, overaction' during Bengal polls

TMC MPs listed speeches of PM Modi and Home Minister Amit Shah alleging that they have made statements that are in 'violation' of the Model Code of Conduct.

PTI 14 April, 2021 10:04 PM IST

New Delhi: Stepping up its criticism of the Election Commission, a delegation of TMC MPs on Wednesday met its officials and submitted a memorandum alleging shortcomings of the apex poll body during the assembly polls in West Bengal.

It said that the party is bringing on record the “deplorable” state of affairs of the Election Commission in respect of its approach towards the TMC and the BJP in West Bengal during the ongoing assembly elections.

The TMC listed instances under three categories — inaction of the EC, underaction of the EC and overaction by the EC.

In the first category, the party listed speeches of Prime Minister Narendra Modi and Home Minister Amit Shah alleging that they have made statements that are in “violation” of the Model Code of Conduct (MCC) as well as the Representation of The People Act 1951.

The party has also provided YouTube links of these speeches to the EC.

“The ECI claims that it monitors speeches. However, it has not taken any action for such serious violations. For all the above, Shri Narendra Modi and Shri Amit Shah should be banned for campaigning for the remaining phases,” it said.

The TMC also alleged that other than being in violation of the MCC, these speeches were in “poor taste” and “are also disrespectful to women”.

Under the category of “underaction of ECI”, the party has listed instances of various middle level and lower level leaders of BJP who have allegedly tried to influence voters on communal lines.

“Despite the ECI being aware/made aware of the ground on which those speeches are violations of the MCC, the ECI refused to take sufficient steps and/or any steps, though in all such cases there should have been a ban on campaigning,” it said.

In the third category of “over-action”, the party listed the restraining of West Bengal Chief Minister and TMC boss Mamata Banerjee from campaigning for 24 hours.

“Such an act is mala fide, suffers from non-application of mind and is in violation of her fundamental rights. ECI was formed under the Constitution of India to be an independent body that would monitor and conduct general elections in India. Neutrality is sine qua non in discharge of its functions but during this assembly election, it is apparent that ECI is acting in a partisan manner, absolutely in favour of the BJP and/or on its instructions, that is pre-announced by BJP,” it said.

The delegation that met the EC include parliamentarians Derek O’Brien, Kalyan Banerjee, Pratima Mondal and Santanu Sen.

Source- <https://theprint.in/politics/tmc-mps-list-ecs-inaction-understand-overaction-during-bengal-polls/640066/>

Preshant Kushan
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ANNEXURE- D

LiveLaw.in

Election Commission Singularly Responsible For COVID Second Wave; Officers Should Probably Be Booked For Murder : Madras High Court

LIVELAW NEWS NETWORK

26 April 2021 12:14 PM

The HC pulled up the ECI for allowing political rallies during the pandemic and for not enforcing COVID protocols during campaigns

The Madras High Court on Monday came down heavily on the Election Commission of India for allowing political rallies during the COVID-19 pandemic. A visibly upset Chief Justice Sanjib Banerjee told the Election Commission's counsel "Your institution is singularly responsible for the second wave of COVID-19". The Chief Justice went to the extent of orally saying "Your officers should be booked on murder charges probably". The Chief Justice observed that the Commission had failed to enforce COVID norms regarding wearing of facemasks, use of sanitizers and maintaining social distancing during election campaigning, despite court orders. "Were you on another planet when the election rallies were held?", Chief Justice asked the ECI counsel. The Court warned that it will stop the counting scheduled on May 2 if the ECI does not put in place a blueprint of a plan to ensure following of COVID19 protocol on the counting day. "Public health is of paramount importance and it is distressing that constitutional authorities have to be reminded in such regard. It is only when a citizen survives that he'll be able to enjoy the rights that a democratic republic guarantees", the Chief Justice added. "The situation now is of survival and protection. Everything else comes next", the Chief Justice said.

The bench, also comprising Justice Senthilkumar Ramamoorthy, directed the Election Commission of India and the Tamil Nadu Chief Electoral Officer

to hold consultations with the Health Secretary and come up with a plan on following COVID-19 protocol on the counting day. The bench directed that the blueprint must be placed on record before it on April 30. "The matter will appear on April 30 to review the situation when a complete picture as to adequate steps having been taken will be clear", the bench said in the order.

Source- <https://www.livelaw.in/top-stories/madras-high-court-pulls-up-election-commission-for-allowing-political-rallies-during-amid-covid-173135>

Preshant Kushan
(TRUE COPY)

ANNEXURE- E

ThePrint

EC Rajiv Kumar wanted to file separate affidavit in Madras HC, denied due to 'lack of precedence'

The split in the EC came over the Madras HC's censure and 'murder-charges' remark. The body was reportedly not unanimous in its approval for the plea on a gag order on media.

SANYA DHINGRA

7 MAY, 2021 10:10 PM IST

New Delhi: Election Commissioner Rajiv Kumar had sought to file a separate affidavit with the Madras High Court on the panel's role in conducting elections during the second wave of the Covid-19 pandemic. But the move was denied since there is no precedence of two separate affidavits being filed by the Election Commission of India (ECI) in the same case, a senior ECI official told ThePrint.

"There is no precedence of more than one affidavit being filed in the court by the ECI. It is a constitutional body, and cannot file multiple affidavits in the same case," the ECI official said on condition of anonymity.

"The matter was consulted with our senior counsels, and then a decision was taken that his (Kumar's) request cannot be agreed upon," the official added.

The official also pointed out that the affidavit which was filed in the Madras HC was mutually agreed upon by both the Chief Election Commissioner Sushil Chandra, and EC Kumar even as the latter was keen on filing a separate affidavit.

ThePrint reached Kumar for a comment via WhatsApp texts and calls, but there was no response until the publishing of this report.

The row over HC censure

The current split in the ECI over the Madras High Court's censure came to light after *The Indian Express* reported that the panel's plea in the HC for a gag on the media from reporting oral observations of judges, and its subsequent petition in the apex court against the HC's "murder-charges" remark were not unanimously approved by the commission.

However, the ECI issued a statement Thursday in response: "The Election Commission was unanimous that before Hon'ble Supreme Court there should not be any prayer for restriction on media reporting."

While the HC turned down the ECI's plea for a gag on media, the Supreme Court too refused to gag the media from reporting court proceedings, including oral observations made by judges. The top court said that the proceedings augment public scrutiny and are crucial to maintain institutional transparency and accountability.

However, in what the ECI sees as a vindication of its stand, the SC also noted that the remarks made by the HC were harsh and the metaphor was inappropriate.

Past cases of divide

This is not the first time when a split between commissioners in the ECI has come to the fore.

In 2019, then EC Lavasa had dissented against the majority opinion of then CEC Sunil Arora and Chandra regarding giving clean chits to Prime Minister Narendra Modi and then BJP president Amit Shah for allegedly violating the Model Code of Conduct during the general elections.

There is a provision in law to tackle a disagreement in case of majority opinion of the ECI.

According to Section 10 of The Election Commission (Conditions of Service of Election Commissioners and Transaction of Business) Act, 1991, all business of the EC "shall, as far as possible, be transacted unanimously". However, in case the CEC and the Election Commissioners differ in opinion, "such matter shall be decided according to the opinion of the majority".

It is not clear what can be done in case there are only two commissioners, and they have a difference of opinion like in the case of Kumar and Chandra.

Who is Kumar?

Rajiv Kumar was appointed as an Election Commissioner in August last year, days after Ashok Lavasa, who is known to have had a tense relationship with the Narendra Modi government, resigned from the post.

A 1984-batch IAS officer of the Jharkhand cadre, Kumar retired as finance secretary in February last year.

He was then picked by the government to head the Public Enterprises Selection Board, the body that clears names of government officials for various top posts in public sector undertakings. Kumar was then named EC.

Source- <https://theprint.in/india/governance/ec-rajiv-kumar-wanted-to-file-separate-affidavit-in-madras-hc-denied-due-to-lack-of-precedence/654401/>

Prashant Kushan
(TRUE COPY)

ANNEXURE: G

By Email6th May, 2021**Election Commission of India**

Kind Attention : Mr. Vijay Kumar Pandey, Director Law

Subject: Resignation from the position of Panel Counsel of Election Commission of India before the Hon'ble Supreme Court of India.

Dear Sir,

It was an honour to represent the Election Commission of India (ECI). I had a cherishing milestone of my career, in the journey which began with being part of the office of Standing Counsel of ECI and progressed as one of the panel counsels of ECI (since 2013).

However, I have found that my values are not in consonance with the current functioning of the ECI; and hence I withdraw myself from the responsibilities of its panel counsel before the Supreme Court of India.

I undertake to ensure smooth transition of files, NOC and vakalatnamas in all pending matters with my office.

Warm regards

MOHIT D. RAM
(Advocate-on-Record)
6, Birbal Road, Jangpura Extension
New Delhi - 110014

Prashant Bhushan
(TRUE COPY)

ITEM NOS.7 + 9 + 17

COURT NO.1

SECTION PIL-W

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Writ Petition(s)(Civil) No(s).279/2017

KUDRAT SANDHU

Petitioner(s)

VERSUS

UNION OF INDIA & ANR.

Respondent(s)

WITH

[ITEM NO.7.1 - W.P.(C) No. 558/2017 (PIL-W)
(IA No.81648/2017-STAY APPLICATION and FOR ADMISSION)];
[ITEM NO.7.2 - W.P.(C) No. 561/2017 (PIL-W)
(IA No.86008/2017-STAY APPLICATION and)];
[ITEM NO.7.3 - W.P.(C) No. 640/2017 (X)
(FOR ADMISSION and IA No.68312/2017-STAY APPLICATION and IA
No.140712/2017-impleading party and IA No.140715/2017-PERMISSION TO
FILE APPLICATION FOR DIRECTION)];
[ITEM NO.7.4 - W.P.(C) No. 1016/2017 (PIL-W)
(FOR STAY APPLICATION ON IA 107276/2017)
[ITEM NO.7.5 - W.P.(C) No. 788/2017 (X)];
[ITEM NO.7.6 - W.P.(C) No. 925/2017 (PIL-W)
(FOR ADMISSION)];
[ITEM NO.7.7 - W.P.(C) No. 1098/2017 (PIL-W)
(FOR STAY APPLICATION ON IA 118155/2017)];
[ITEM NO.7.8 - W.P.(C) No. 1129/2017 (PIL-W)
(FOR STAY APPLICATION ON IA 122573/2017)];
[ITEM NO.9 - T.P.(C)NO.1990/2017 - (FOR ADMISSION AND I.A.
NO.112338/2017 - STAY APPLICATION)]; AND
[ITEM NO.17 - W.P.(C)NO.33/2018 (FOR ADMISSION)]

Date : 09-02-2018 This petition was called on for hearing today.

CORAM :

HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE A.M. KHANWILKAR
HON'BLE DR. JUSTICE D.Y. CHANDRACHUD

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Mr. V. K. Verma, AOR
Ms. Priya Hingorani, Adv.
Mr. Kripa Shanker Prasad, Adv.
Mr. Tarun Verma, Adv.

- 2 -

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Mr. Karan Batura, Adv.
Mr. Karan Kanwal, Adv.
Mr. Anushree Prashit Kapadia, Adv.
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Mr. Varun Sharma, Adv.
Ms. Prabha Swami, Adv.
Mr. Nikhil Swami, AOR
Ms. Divya Swami, Adv.

Mr. Arvind P. Datar, Sr. Adv.
Mr. Nikhil Nayyar, Adv.
Mr. M.V. Swaroop, Adv.
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Mr. Arun Monga, Adv.
Ms. Divya Sharma, Adv.
Ms. Marrellina, Adv.
Mr. Gopal Jha, Adv.
Ms. Mayuri Raghuvanshi, AOR

Mr. Mukesh Kumar Maroria, AOR

Mr. K. Krishna Kumar, AOR

- 3 -

Mr. Annam D. N. Rao, AOR
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 Mr. Sudipto Sircar, Adv.
 Mr. Rahul Mishra, Adv.
 Ms. Tulika Chikker, Adv.

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 fMr. Harish V. Shanker, Adv.
 Mr. S.S. Shamsbery, Adv.
 Ms. Rukmani Bobde, Adv.
 Ms. Sradha Deshmukh, Adv.
 Mr. Sanjay Kumar Pathak, Adv.
 Mr. Kumar Shashank, Adv.
 Ms. Sumi P.S., Adv.
 Mr. M.K. Maroria, Adv.
 Mr. Raj Bahadur Yadav, Adv.
 Mr. G.S. Makker, Adv.

Ms. Shivani Kapoor, Adv.
 Mr. Prakash Ranjan Nayak, AOR

Mr. Zoheb Hossain, AOR
 Mr. Ashok Mathur, AOR
 Mrs. Anil Katiyar, AOR

UPON hearing the counsel the Court made the following
 O R D E R

We have heard learned counsel for the petitioners and Mr. K.K. Venugopal, learned Attorney General for India.

In the course of hearing, suggestions for an interim order in respect of Central Administrative Tribunal have been filed. The suggestions read as follows :

"1. Staying the composition of Search-cum-Selection Committee as prescribed in Column 4 of the Schedule to the Tribunal, Appellate Tribunal and Other Authorities (Qualification, experience and other conditions of service of members) Rules, 2017 both in respect of Chairman/Judicial Members and Administrative Members. A further direction to constitute an interim Search-cum-Selection Committee during the pendency of this W.P. in respect of both Judicial/Administrative members as under :

- 4 -

- a. Chief Justice of India or his nominee - Chairman
- b. Chairman of the Central Administrative Tribunal - Member
- c. Two Secretaries nominated by the Government of India - Members

2. Appointment to the post of Chairman shall be made by nomination by the Chief Justice of India.

3. Stay the terms of office of 3 years as prescribed in Column 5 of the Schedule to the Tribunal, Appellate Tribunal and other Authorities (Qualification, experience and other conditions of service of members) Rules, 2017. A further direction fixing the term of office of all selectees by the aforementioned interim Search-cum-Selection Committee and consequent appointees as 5 years.

4. All appointments to be made in pursuance to the selection made by the interim Search-cum-Selection Committee shall be with conditions of service as applicable to the Judges of High Court.

5. A further direction to the effect that all the selections made by the aforementioned interim selection committee and the consequential appointment of all the selectees as Chairman/Judicial/Administrative members for a term of 5 years with conditions of service as applicable to Judges of High Court shall not be affected by the final outcome of the Writ Petition."

Mr. Venugopal, learned Attorney General has submitted that he has no objection if the suggestions, barring suggestion nos.4 and 5, are presently followed as an interim measure. On a query being made whether the said suggestions shall be made applicable to all tribunals, learned Attorney General answered in the affirmative.

He would, however, suggest that suggestions nos.4 and 5 should be recast as follows :

"4. All appointments to be made in pursuance to the selection made by the interim Search-cum-Selection Committee shall abide by the conditions of service as per the old Acts and the Rules.

W.P.(C)No.279/17 etc. (contd.)

- 5 -

5. A further direction to the effect that all the selections made by the aforementioned interim selection committee and the consequential appointment of all the selectees as Chairman/Judicial/Administrative members shall be for a period as has been provided in the old Acts and the Rules.

In view of the aforesaid, we accept the suggestions and direct that the same shall be made applicable for selection of the Chairpersons and the Judicial/Administrative/Technical/Expert Members for all tribunals.

List after twelve weeks along with W.P.(C)Nos.120 of 2012; 267 of 2012.

T.P.(C)No.1990 of 2017 stands disposed of in terms of the signed order.

(Subhash Chander)
AR-cum-PS

(H.S. Parasher)
Assistant Registrar

[Signed Order is placed on the file]

Preshant Bhusan
(TRUE COPY)

I. A _____ of 2021
IN
WRIT PETITION (CIVIL) NO. _____ OF 2021

ASSOCIATION FOR DEMOCRATIC REFORMSPETITIONER

VERSUS

UNION OF INDIA & ANR.RESPONDENTS

**APPLICATION FOR EXEMPTION FROM FILING NOTARISED
COPY OF AFFIDAVIT**

1. That the Applicant has filed the above captioned Writ Petition challenging the constitutional validity of the practice of the Respondent in appointing the members to the Election Commission as being violative of Articles 14, 324 (2) and basic features of the Constitution. The Petitioner by way of present Petition is also seeking a direction for constituting a neutral and independent collegium/selection committee for appointment of members of Election Commission on the lines of the recommendations of Law Commission in its 255th Report of March 2015; Second Administrative Reform Commission in its fourth Report of January 2007; Dr. Dinesh Goswami Committee in its Report of May 1990; and Justice Tarkunde Committee in its Report of 1975.

2. That the Applicant by way of the present Application is seeking exemption from filing notarized/attested affidavit due to the ongoing pandemic of COVID-19 and lockdown in Delhi. Thus, the Applicant is only able to file the affidavit in the present form.
3. That it would be in the interest of justice if the Applicant is exempted from filing attested/ notarised affidavit and the Applicant may be allowed to file scanned copy of the supporting affidavit.

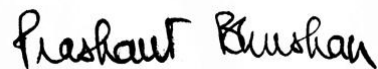
PRAYER

In view of the facts and circumstances aforementioned, it is humbly prayed that this Hon'ble Court may be pleased to:

- a) Exempt the Applicant from filing notarised/ attested affidavit; AND
- b) Grant such other reliefs as this Hon'ble Court may deem fit and proper in light of the facts and circumstances of the case.

AND FOR THIS ACT OF KINDNESS THE PETITIONER AS IN DUTY BOUND SHALL EVER PRAY.

PETITIONER THROUGH:



(PRASHANT BHUSHAN)

COUNSEL FOR THE PETITIONER

DRAWN & FILED ON: 16.05.2021
PLACE: NEW DELH

In The Supreme Court of India

ORIGINAL/CRIMINAL/CIVIL/ JURISDICTION

WRIT PETITION (CIVIL) NO. _____ OF 2021

ASSOCIATION FOR DEMOCRATIC REFORMS

-----Petitioner (s)

VERSUS

UNION OF INDIA & ORS.

-----Respondent (s)

I, Jagdeep Chhokar, New Delhi the Petitioner

In the above petition/Appeal do hereby appoint and retain **MR. PRASHANT BHUSHAN**, Advocate on Record of the Supreme Court to act and appear for me/us in the above Petition/Appeal and on my /our behalf to conduct and prosecute (or defend) or withdraw the same and all proceedings that may be taken in respect of any application connected with the same or any degree or order passed there in, including proceeding in taxation and application for review, to file and obtain return of document and to deposit and receive money on may/our behalf in the said petition/appeal Reference and application, Review Petition and to represent me/us and to take all necessary steps on may /our behalf in the above matter, I. We agree to rectify all acts done by the aforesaid advocate on record in pursuance of this authority.

Dated 15th day of May, 2021

(Signed)

Accepted, certified and identified the client.

*Prashant Bhushan***PRASHANT BHUSHAN**
ADVOCATE*Jagdeep Chhokar***CLIENT**

/Petitioner(s)/

(JAGDEEP CHHOKAR)
FOUNDER-TRUSTY, ADRTo,
The Registrar,
Supreme Court of India,
New Delhi,**MEMO OF APPEARANCE**

Sir,

Please enter my appearance on behalf of the Appellant(s)/Petitioner(s)/ Respondent(s) opposite Parties/intervener in the matter mentioned above:

New Delhi dated this the 16TH day of MAY, 2021

Yours faithfully,

*Prashant Bhushan***(PRASHANT BHUSHAN)**

Advocate for Appellant(s)/Petitioner(s)/Respondent(s)

HIGH COMMISSION FOR PAKISTAN



Serial No. 2319 Dt. 29/4/2015

162

Spl./R. s./1 g.

No.:- 8777

Certificate of Registration

Under the Rules of Society Registration Act, 1860

(21st Rules of 1860)

Registration No.:- GUJ/9481/AHMEDABAD

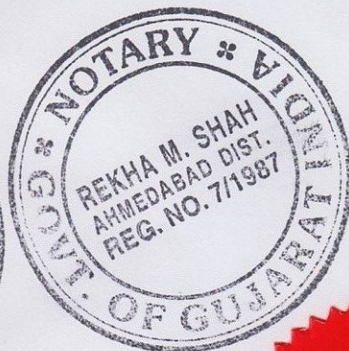
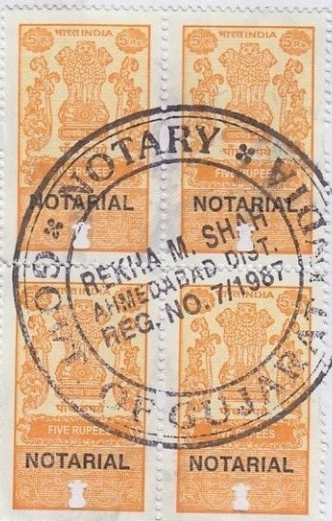
This is to certify that Association for Democratic Reforms, Ahmedabad is properly registered on today i.e. 17/04/2003 under the Society Registration Act, 1860 (21st Rules of 1860)

Given with my signature on dated 17/04/2003

Asst.
Registrar of
Society
Ahmedabad
Region

Sd/-

Asst. Registrar, Society Registration,
Ahmedabad Region, Ahmedabad



True Translation
R. M. SHAH
NOTARY
29-4-15



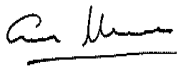
17th May, 2021

AUTHORISATION LETTER

This is to certify that Mr. Jagdeep Chhokar, Founder Trustee, 'Association for Democratic Reforms' (ADR), a Registered Society under the Societies Registration Act XXI of 1860 (Registration No. S/11017 of 5th June 1980), is authorized to file Writ Petition in the matter of appointment of 'Members of Election Commission' as per the Indian Constitution and recommendations of Committees and Commissions, under the provision of Rule 22 of the Rules and Regulations of the Society which is reproduced below:

We further authorize him to perform all such acts in the present Writ Petition which he deems fit and proper in the interest of justice. It is further clarified that this includes the authority to file applications in the above-mentioned matter

Rule 22: The Society may sue or be sued in the name of the President or Director of the Society.



Maj Gen General Anil Verma (Retd)

Gulmohar Complex, Gautam Nagar

Head,
Association for Democratic Reforms
T-95, C.L House, Second Floor
New Delhi-110049



भारत सरकार
GOVERNMENT OF INDIA



जगदीप सिंह छोकर
Jagdeep Singh Chhokar
DOB: 25-11-1944
Gender: Male



6161 0899 8835

आधार - आम आदमी का अधिकार



भारतीय विशिष्ट पहचान प्राधिकरण
UNIQUE IDENTIFICATION AUTHORITY OF INDIA

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