

Association For Democratic Reforms vs Election Commission Of India on 26 April, 2024

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Bench: Dipankar Datta

2024 INSC 341

IN THE SUPREME COURT OF INDIA

EXTRA-ORDINARY ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 434 OF 2023

ASSOCIATION FOR DEMOCRATIC REFORMS

VERSUS

ELECTION COMMISSION OF INDIA
AND ANOTHER

WITH

WRIT PETITION (CIVIL) NO. 184 OF 2023

AND

WRIT PETITION (CIVIL) NO. 184 OF 2023
(DIARY NO. 35782 OF 2023)

JUDGMENT

SANJIV KHANNA, J.

Delay in refiling is condoned.

2. At the outset, we take on record that the counsel for the petitioners, in unison, have stated that the petitioners do not attribute any motive or malice to the Election Commission of India¹, or for that matter contend that the Electronic Voting Machines² have been tutored or configured to favour or disfavour a candidate or political party. However, due to Date: 2024.04.26 12:26:07 IST Reason:

¹ For short, 'ECI'.

2 For short, 'EVMs' possibility of manipulating the EVMs there is suspicion and, therefore, this Court should step in to instil confidence in the voters³ and the people.

Voters have the right to know that the franchise exercised by them has been correctly recorded and counted.

3. On a pointed question put by the Court, it was argued, without prejudice and in the alternative, on behalf of the petitioner – Association for Democratic Reforms, that the Court should direct:

a) return to the paper ballot system; or

b) that the printed slip from the Voter Verifiable Paper Audit Trail machine⁴ be given to the voter to verify, and put in the ballot box, for counting; and/or

c) that there should be 100% counting of the VVPAT slips in addition to electronic counting by the control unit.

4. Other arguments raised relate to — the alleged modification of the VVPAT in the year 2017, whereby the glass window on the VVPAT was made translucent/tinted instead of transparent, depriving the voter from knowing whether the vote cast by him was actually registered and counted; Rule 49MA of the Conduct of Election Rules, 1961⁵ is draconian, arbitrary, and contrary to law as reference to Section 177 of the Indian Penal Code, 1860⁶ in the written declaration under Rule 49MA 3 'Voters' and 'Electors' is used interchangeably.

⁴ For short, 'VVPAT'.

⁵ For short, '1961 Rules'.

⁶ For short, 'IPC'.

is wrong and misconceived; and lastly, the voters' right to know that the vote as cast is duly registered, being a paramount and indelible fundamental right, any administrative reason and ground raised by the ECI objecting to 100% counting of the VVPAT paper trail should be rejected.

5. Paper ballots were the norm, till EVMs were projected as a viable alternative in 1980s. EVMs were first used in an assembly bye-election in Kerala in 1982. All through the 1980s and early 1990s, the use of EVMs for elections was discussed and debated by politicians and experts in the domain of technology and electoral process, and after due deliberations and review, the EVMs were accepted and embraced. In view of the legal challenge⁷ regarding use of EVMs without legislative approval, the Parliament vide Act 1 of 1989 amended the Representation of the People Act, 1951⁸ allowing the use of EVMs. They were used in the General Elections in 2004 and have been used in each and every General and other election thereafter.

6. ECI maintains that the EVMs have been a huge success in ensuring free, fair and transparent elections across the nation in all elections. They restrict human intervention, checkmate electoral fraud and malpractices like stuffing and smudging of votes, and deter the errors and mischiefs faced in manual counting of ballot papers. While earlier it was 7 See A.C. Jose v. Sivan Pillai and others, (1984) 2 SCC 656. 8 For short, 'RP Act'.

apprehended that the introduction of EVMs will lead to hardship and disenfranchisement, independent studies showcase that EVMs have led to increase in voter participation.⁹ Yet, it is also true that time and again use of EVMs has been objected to and questioned, not by one but by all political parties and others. There have been several litigations in this Court and the High Courts, albeit the challenge to the use of EVMs has been rejected recording good grounds and reasons.

7. We deem it appropriate to begin this decision by referring to some of the earlier case laws and judgments of this Court on the efficacy and use of EVMs in the elections in this country.

8. This Court in Subramanian Swamy v. Election Commission of India,¹⁰ held that a paper trail was an indispensable requirement of free and fair elections. The relevant portion of the judgment is reproduced below:

“28. From the materials placed by both the sides, we are satisfied that the ‘paper trail’ is an indispensable requirement of free and fair elections. The confidence of the voters in the EVMs can be achieved only with the introduction of the “paper trail”. EVMs with Vvpat system ensure the accuracy of the voting system. With an intent to have fullest transparency in the system and to restore the confidence of the voters, it is necessary to set up EVMs with Vvpat system because vote is nothing but an act of expression which has immense importance in a democratic system.

29. In the light of the above discussion and taking notice of the pragmatic and reasonable approach of ECI and considering the fact that in general elections all over India, ECI has to handle one million (ten lakh) polling booths, we permit ECI to introduce Vvpat in gradual stages or geographical-wise in the

9 Legal History of EVMs and VVPATs, Edition 1, January 2024, p.654. 10 (2013) 10 SCC 500.

ensuing general elections. The area, State or actual booth(s) are to be decided by ECI and ECI is free to implement the same in a phased manner. We appreciate the efforts and good gesture made by ECI in introducing the same. For implementation of such a system (Vvpat) in a phased manner, the Government of India is directed to provide required financial assistance for procurement of units of Vvpat.” Accordingly, to ensure full transparency and confidence of voters, this Court recommended that EVMs be set up with VVPATs. Amendment to the 1961 Rules was notified on 14.08.2013 to introduce the VVPAT mechanism.

9. In N. Chandrababu Naidu and Others v. Union of India and Another,¹¹ the petitioners prayed that 50% randomised VVPAT slip verification be conducted in every General and Bye Elections instead

of one EVM per assembly constituency or assembly segment in a parliamentary constituency. This Court held as under:

“9. At the very outset the Court would like to observe that neither the satisfaction of the Election Commission nor the system in vogue today, as stated above, is being doubted by the Court insofar as fairness and integrity is concerned. It is possible and we are certain that the system ensures accurate electoral results. But that is not all. If the number of machines which are subjected to verification of paper trail can be increased to a reasonable number, it would lead to greater satisfaction amongst not only the political parties but the entire electorate of the country. This is what the Court should endeavour and the exercise, therefore, should be to find a viable number of machines that should be subjected to the verification of Vvpat paper trails keeping in mind the infrastructure and the manpower difficulties pointed out by the Deputy Election Commissioner. In this regard, the proximity to the election schedule announced by the ECI must be kept in mind.

10. Having considered the matter, we are of the view that if the number of EVMs in respect of which Vvpat paper slips is to be subjected to physical scrutiny is increased from 1 to 5, the additional manpower that would be required would not be difficult 11(2019) 15 SCC 377.

for the ECI to provide nor would the declaration of the result be substantially delayed. In fact, if the said number is increased to 5, the process of verification can be done by the same team of polling staff and supervisors/officials. It is, therefore, our considered view that having regard to the totality of the facts of the case and need to generate the greatest degree of satisfaction in all with regard to the full accuracy of the election results, the number of EVMs that would now be subjected to verification so far as Vvpat paper trail is concerned would be 5 per Assembly Constituency or Assembly Segments in a Parliamentary Constituency instead of what is provided by Guideline No. 16.6, namely, one machine per Assembly Constituency or Assembly Segment in a Parliamentary Constituency. We also direct that the random selection of the machines that would be subjected to the process of Vvpat paper trail verification as explained to us by Mr Jain, Deputy Commissioner of the Election Commission, in terms of the guidelines in force, shall apply to the Vvpat paper trail verification of the 5 EVMs covered by the present order.” Accordingly, instead of one EVM per assembly constituency or assembly segment in a parliamentary constituency, as stipulated under the erstwhile Guideline 16.6 of the Manual on EVM and VVPAT, it was held that five EVMs per assembly constituency or assembly segment in a parliamentary constituency would be subject to VVPAT verification.

10. This Court vide order dated 22.11.2018 dismissed Writ Petition (Civil) No. 1332/2018 titled Nyaya Bhoomi and Another v. Election Commission of India, seeking return to the ballot paper system instead of EVMs.

11. This Court vide order dated 21.05.2019 dismissed Writ Petition (Civil) No. 692/2019 titled Tech for All v. Election Commission of India, seeking 100% verification of VVPATs against the EVM outcomes, as the issue had already been decided in N. Chandrababu Naidu (supra).

12. Even earlier, this Court vide order dated 30.10.2017 in *Prakash Joshi v. Election Commission of India*¹², had rejected a similar prayer with regard to modification of the procedure for counting of votes by use of EVMs, leaving it to the discretion of the ECI. It was observed that this Court was not inclined to enter into the said arena.

13. This Court vide order dated 30.09.2022 dismissed Special Leave Petition (Civil) No. 16870/2022 titled *Madhya Pradesh Jan Vikash Party v. Election Commission of India* regarding use of EVMs with costs. This Court observed that:

“The election process under the representation of the People Act, 1951 is monitored by a Constitutional Authority like Election Commission. Electronic Voting Machines (EVM) process has been utilized in our Country for decades now but periodically issues are sought to be raised. This is one such endeavor in the abstract.”

14. Recently, this Court vide order dated 22.09.2023 dismissed Writ Petition (Civil) No. 826/2023 titled *Sunil Ahya v. Election Commission of India* seeking independent audit of the source code of EVMs. This Court observed that:

“The Election Commission is a constitutional entity entrusted under Article 324 of the Constitution with superintendence and control over the conduct of the elections. The petitioner has placed no actionable material on the record of the Court to indicate that the Election Commission has acted in breach of its constitutional mandate. Ultimately, the manner in which the source code should be audited and the way the audit should be dealt with bears on sensitive issues pertaining to the integrity of the elections which are conducted under the superintendence of the Election Commission. On such a policy issue, we are not inclined to issue a direction as sought by the petitioner. There is no material before this Court, at this stage, to indicate that the 12 2017 SCC OnLine SC 1734.

Election Commission is not taking suitable steps to fulfill its mandate.”

15. This Court in *Kamal Nath v. Election Commission of India and Others*¹³, observed that it was without doubt that over the last several decades ECI has built the reputation of an impartial body and a constitutional authority which strives to hold fair election in which the people of this country participate with great trust and faith. The challenge to the EVMs and prayer for conducting VVPAT verification on random basis for 10% of the votes was rejected.

16. We could have dismissed the present writ petitions by merely relying upon the past precedents and decisions of this Court which, in our opinion, are clear and lucid, and as repeated challenges based on suspicion and doubt, without any cogent material and data, are execrable and undesirable. However, we would like to put on record the procedure and safeguards adopted by the ECI to ensure free and fair elections and the integrity of the electoral process. For this purpose, we shall refer to and take on record the features of EVMs.¹⁴ Lastly, we would give two directions, and take on record suggestion(s) for consideration of the ECI.

17. The EVM consists of three units, namely, the ballot unit, the control unit, and the VVPAT. The ballot unit acts as a keyboard or a keypad. The 13 (2019) 2 SCC 260.

14 In view of the issue raised, we are not dealing with the post counting handling of EVMs. ballot unit consists of 16 keys/buttons one of which the voter has to press when he exercises his choice to vote for any candidate. The keys are political party and candidate agnostic. The serial numbers, names of the candidates and the symbols of the political parties/candidates are physically pasted on the ballot unit so as to enable the voter to identify the corresponding key/button against the respective candidate and the symbol. The control unit, which is also called the master unit, remains with the polling/presiding officer. Before the ballot unit can be used by a voter, the polling/presiding officer is required to press the 'BALLOT' button on the control unit, thereby enabling the voter to cast his vote on the ballot unit. As soon as the voter presses the 'blue button' and casts his/her vote on the ballot unit, an LED against the candidate button glows red and the control unit sends the command to the VVPAT. The VVPAT then prints the VVPAT slip comprising of the serial number, candidate name and the symbol. The VVPAT slip, after being printed, is displayed through the glass window which is illuminated for 7 seconds to enable the voter to know and verify the serial number, the candidate and the symbol for whom they have voted. The VVPAT slip then gets cut from the roll and falls into the box/compartment attached to the VVPAT. The fall sensor in the VVPAT then sends a confirmation to the control unit. The control unit records the vote.

18. The control unit, as explained below in some detail, has burnt memory, which is agnostic and does not have the names of the candidates and symbols allotted to the candidates or political parties. As noted earlier, the polling/presiding officer has to activate the EVM by pressing the 'BALLOT' button on the control unit. The data stored in the control unit, upon the vote being cast, records and counts the button or the key pressed on the ballot unit. The data, therefore, records the total number of votes as cast by the voters, and the key or the button number on the ballot unit pressed by the voters for casting their vote. After the vote is cast and the control unit has recorded the vote, a loud beep sound confirms the registration of the vote.

19. The EVMs are manufactured and supplied to the ECI by two public sector undertakings, namely, Bharat Electronics Limited¹⁵ (which functions under the Ministry of Defence), and Electronic Corporation of India Limited¹⁶ (which functions under the Department of Atomic Energy).¹⁷ The EVMs in use after 2013 are referred to as 'M3' EVMs. The EVM setup is designed in a rudimentary fashion and the EVM units are standalone and non-networked, that is, they are unconnectable to any other third-party machine or input source. In case any unauthorised attempt is made to access the microcontroller or memory of the EVM, the Unauthorised Access Detection Mechanism (UADM) disables it permanently. The advanced encryption techniques and strong mutual authentication or reception capability rules out the deciphering of 15 For short, 'BEL'.

16 For short, 'ECIL'.

17 Collectively referred to as the 'manufacturers'. communication between the EVM units and any unauthorised interaction with the EVM.

20. The programme loaded in the EVM¹⁸ is key hashed and burnt into a One Time Programmable microcontroller chip at the time of manufacturing, thus dispelling any possibility of tampering. It is pertinent to note that all the three units of the EVM – ballot unit, control unit and VVPAT, have microcontrollers in which the respective firmware is burnt. The burnt programme/code is unalterable and cannot be modified after the EVM is delivered/supplied by the manufacturer to ECI. Every key press of the control unit is dynamically coded, thus making it impossible to decode the signal flowing among the units of the EVM inter se. Further, each key press is recorded with date and time stamp on a real time basis.

21. As mentioned earlier, the firmware of the control unit is agnostic to any candidate name or political party symbol. The control unit only recognises the button/key pressed on the ballot unit. The control unit has a capacity to store up to 2000 vote entries.

22. Apart from the burnt one-time programmable memory, the VVPAT has a flash memory of 4 megabytes. The flash memory of the VVPAT is designed to solely store and recognise a bitmap format file. The VVPAT can store a maximum of 1024 bitmap files containing the symbol, the serial number and name of the candidate. One candidate's name, 18 EVM here refers to the ballot unit, the control unit and the VVPAT unit. symbol, and serial number is packed into a single bitmap file of 4 kilobytes. The VVPAT does not store or read any other software or firmware.¹⁹

23. The VVPAT flash memory is empty and does not contain any symbol or name related details at the time of supply/delivery to the ECI. VVPATs in this form/state are stored in warehouses. The control units and ballot units are also stored and secured in the warehouses.

24. Five to six months before national or state elections are to be held, the required quantity of the EVMs are taken out from the warehouses and stored in the designated strong rooms. The EVMs, after they are put in the strong room, are subjected to First Level Check²⁰ by engineers of the manufacturers in the presence of the representatives of the recognised political parties. The FLC is carried out at the district level under the supervision of the District Election Officer.

25. During the FLC, 100% or all machines are checked by casting of vote in each of the 16 buttons on the ballot unit 6 times. Further, 5% of the machines are randomly selected by the representatives of the recognised political parties for a higher mock poll by them. Out of the 5% ¹⁹ It is apposite to note the difference between firmware and software. Firmware is a form of microcode or instructions embedded into hardware devices to help them operate effectively. Firmware size is usually small and ranges in size of a few kilobytes. Software on the other hand, is installed onto a device and used for interaction, such as browsing the internet, computing, word processing and many more complex tasks. Software usually runs on the top of operating systems and are usually large in size between few hundred kilobytes to gigabytes. Software is upgradable or updatable, and its memory is usually accessible and designed for user interactions. The ECI submits that the VVPATs do not have software as they only have firmware.

20 For short, 'FLC'.

EVMs; 1200 votes are cast in 1% EVMs, 1000 votes are cast in 2% EVMs and 500 votes are cast in 2% EVMs. The voting result indicated in the control unit is tallied with the VVPAT slip count. A list of 'FLC OK' EVMs is prepared and shared with all the recognised political parties.

26. After check and verification that the EVM is working properly, the control unit of each EVM is sealed with a pink paper seal which is signed by the representatives of the political parties. Thereafter, the plastic cabinet of the EVMs cannot be opened. There is no access to any of the EVM components. Till this stage the VVPAT flash memory is empty and it does not have any data or symbols.

27. 10% of the 'FLC OK' EVMs are taken out for training and awareness purpose in the presence of the recognised political parties. The list of the training and awareness units is also shared with the political parties. These training and awareness units are stored separately in a designated warehouse. EVM demonstration centres are set up at the District Election Office, and at the Returning Officer Headquarter/ Revenue Sub-Division Offices. Mobile demonstration vans are also deployed to cover all polling locations. The EVMs used for training and awareness are thereafter not mingled and are taken back to the designated warehouse.

28. To dispel any scenario of bias or prior knowledge, the verified EVMs undergo a two-stage randomization process. It is submitted that not even the manufacturer of the EVMs would be able to know the allotment of a particular machine for a particular state or constituency. The randomization process is conducted without any human intervention by the EVM Management System software application. The first randomization is conducted to allocate the EVMs Assembly constituency/segment-wise. The second randomization is conducted to allocate the machines polling station wise and for the reserve pool. The randomization process is done in the presence of the representatives of the political parties/candidates and the Central Observers deputed by the ECI. The list of EVMs containing serial number as randomly allocated constituency wise and then to a particular polling station are provided to the representatives of the political parties/candidates.

29. It is important to reiterate that till this stage, particulars of the candidates or the political parties are not loaded or stored in the VVPAT. The flash memory of the VVPAT is blank/empty. The control unit being agnostic to any political party or candidate, only recognises the push button on the ballot unit. It is programmed to compute the number of times all and a particular button/key has been pressed.

30. About 10 to 15 days prior to the date of polling, the symbol loading process is undertaken by using the symbol loading units. The symbols are loaded in the flash memory of the VVPATs in the form of a bitmap file, comprising the symbol of the political party/candidate, serial number and name of the candidate. A laptop/PC with the symbol loading application is used to create a bitmap file comprising the serial number, the candidate name and the symbol. This file is loaded on VVPAT units by using the symbol loading units. Authorised engineers of the manufacturers and the District Election Officer are involved in the symbol loading process. The whole process takes place in the presence of the candidates or their representatives and a monitor/TV screen displays the symbol loading process.

31. It is at this stage that the specific button/key on the ballot unit is allocated to each candidate. The sequence/location of button/key allocated to a candidate of a political party is done in alphabetical order on the basis of the name of the candidate, first for the National and State recognised political parties, followed by other State registered parties, and then for independent candidates. Thus, the sequence/location of the button/key on the ballot unit and the consequent allotment for the purposes of the VVPAT varies from constituency to constituency. For example, candidate or political party 'A' may be allocated button '1' in one parliamentary constituency, whereas button '1' may be allocated to political party 'B' in another constituency.

32. There are 16 buttons/keys on each ballot unit. In case there are more than 15 candidates (one button is for NOTA), more than one ballot units are attached to the control unit. A total of 24 ballot units can be connected to a control unit to make a single EVM set. Therefore, a maximum of 384 candidates (including NOTA) can be catered by the EVM.

33. The advantages of the EVM-VVPAT mechanism are noted below:

- It runs on battery/power-packs and does not require any external power supply.
- Voting is done by pressing a button thereby negating a scenario of invalid vote akin to an invalid paper ballot.
- It does not permit more than 4 votes per minute, thereby deterring and disincentivising booth capturing.
- After the pressing of 'CLOSE' button on the control unit, there is no possibility of voting.
- It ensures quick, error-free and mischief-free counting of votes.
- Voter is instantly able to verify the recording of their vote through the beep sound. Further, the VVPAT slip helps verify that the vote casted is recorded correctly.
- By pressing the 'TOTAL' button on the control unit at any time, the total number of votes polled up to the time of pressing the button is displayed, without indicating the candidate-wise result of votes.
- The original program, which is political party and candidate agnostic, is ported on to the microcontroller of the EVM21 during the manufacturing at the factory. This process is done way before the elections and it is impossible to know the serial number of any 21 The EVM, as earlier observed and we clarify here, means the ballot unit, the control unit and the VVPAT unit.

candidate in advance. Thus, it is not possible to pre-program the EVM in a spurious manner.

34. After the symbol loading process is completed, all or 100% of the EVMs, including the VVPATs, are checked by casting one vote by pressing each candidate button, including NOTA. A higher mock poll is also conducted in 5% randomly selected units wherein 1000 votes are cast, and the electronic result is tallied with the VVPAT slip count. The candidates or their representatives are also allowed to choose the 5% EVMs and conduct a mock poll. Once the symbol loading process or the candidate setting is completed, and the mock polls are conducted, the ballot unit of the EVM is also sealed with the thread or plain paper seals. The symbol loaded VVPATs are sealed with address tags. The paper seals and address tags bear the signatures of the representatives of the political parties/candidates.

35. Thus, it is clear that till the symbol loading into the VVPAT is done by using the symbol loading unit, the EVM is blank and has no data/particulars of political parties or candidates. One cannot ascertain and know which button/key in the ballot unit will be allocated to a particular candidate or a political party.

36. It has been highlighted before us by the ECI that the symbol loading process conducted by using symbol loading unit in the VVPAT cannot be equated with the uploading of the software. A bitmap file comprising of the serial number, name of the candidate and the symbol allocated to the particular candidate is uploaded in the symbol loading process. The symbol loading process undertaken by using the symbol loading unit cannot alter or modify the programme/firmware in the VVPAT which has been burnt/loaded in the memory. The control unit and the ballot unit are not subjected to the symbol loading process and not touched. The burnt/loaded firmware in the control unit and the ballot unit is and remains candidate and political party agnostic. The control unit acts and functions as the calculator, computing the total votes cast on the basis of the number of times the key/button on the ballot unit are pressed, and the number of times a specific key/button on the ballot unit is pressed.

37. On the polling date, one and a half hours before the start of polling, the presiding officer/polling officer takes out the EVMs and conducts a mock poll of 50 votes. The votes are counted electronically. The VVPAT paper slips are also counted and tallied with electronic votes. Each EVM unit is thereupon again sealed with a paper seal of a different colour. Paper seals are also signed by the candidates or their representatives.

38. The paper seals used from time to time at different stages have a serial number. They also have security features and cannot be replicated. As paper seals are used at different stages, they are given different colours.

39. The polled EVM22 units are sealed and stored in the strong room in the presence of the candidates or their representatives. The candidates or their representatives are also allowed to put their seals on the lock of the strong room. The strong room is guarded by minimum one platoon of armed security and has CCTV coverage. The candidates or their representatives are allowed to stay and watch the strong room and in case where the entrance to the strong room is not visible, CCTV display facility is provided.

40. The VVPAT paper slips are in a roll form of 1500 slips. The control unit can store up to 2000 votes. In view of the restriction on the number of VVPAT paper slips, each EVM can be used for casting of up to 1500 votes and not more. The control unit is configured in a way that each vote would take about 15 seconds. Thus, in one minute only four votes can be cast. This prevents and checks bogus voting.

41. As explained earlier and to recapitulate, after each vote is cast by pressing the button on the ballot unit, the VVPAT glass window illuminates and the name, serial number, and symbol of the candidate voted is displayed for 7 seconds to the voter. The display of VVPAT slip informs and assures the voter that the vote as cast has been recorded. Thereafter, the VVPAT printer cuts the slip from the roll and the VVPAT slip drops in the box compartment of the VVPAT. The fall sensor in the 22 The EVM, as earlier observed and we clarify here, means the ballot unit, the control unit and the VVPAT unit.

VVPAT printer drop box senses and chronicles the fall of the slip in the drop box, and thereupon the control unit records the button/key pressed on the ballot unit. The burnt memory, as noticed above, which records this data is agnostic to the candidates/political parties. The control unit records the serial number of the button/key pressed on the ballot unit by each voter. The presiding officer by pressing the 'TOTAL' key on the control unit can ascertain the total number of votes recorded in the control unit. However, the breakup of votes cast in favour of each candidate is not known. On the counting day, in the presence of the candidates/their representatives, the 'RESULT' key on the control unit is pressed. The control unit displays the number of times each button/key was pressed in the ballot unit on the polling day, thus depicting the result. EVMs are standalone machines which cannot be connected to internet. The EVMs do not have any ports so as to enable a person to have access to the burnt memory.

42. It flows from the above discussion that the possibility to hack or tamper with the agnostic firmware in the burnt memory to tutor/favour results is unfounded. Accordingly, the suspicion that the EVMs can be configured/manipulated for repeated or wrong recording of vote(s) to favour a particular candidate should be rejected. At this stage we would refer to other checks and protocols to ensure and ascertain the legitimacy and integrity of the EVMs and the election process.

43. Part IV, Chapter II of the 1961 Rules, which relates to voting by EVMs, lays down details of preparation of the voting machine by the returning officer, arrangements at the polling station, admission to the polling stations, and preparation of voting machine for poll. The three units of the EVM have to bear the serial number of the unit, name of the constituency, serial number and name of the polling station(s), and the date of poll. Before the commencement of the poll, the presiding officer has to demonstrate to the polling agent and other persons present that no vote has already been recorded in the control unit, the three units bear the label as prescribed and the drop box of the VVPAT printer is empty. Paper seal is thereupon used for securing the control unit. The presiding officer affixes his own signature on the paper seal and also obtains the signatures of the polling agents who are desirous of affixing the same. The VVPAT and the ballot unit are put in the voting compartment and are connected with the control unit in the manner directed.

44. Before permitting any elector to vote, the polling officer is required to record the electoral roll number of the elector as mentioned in the electoral rolls, signature or thumb impression of the elector, name of the elector and the document produced by the elector in proof of their identification. These particulars are recorded in Form 17A prescribed under Rule 49L of the 1961 Rules. The format prescribed in terms of Form 17A is as under:

Sl.No. Sl.No. of Details of the document Signature/Thumb Remarks elector in the
produced by the elector impression of electoral roll in proof of his/her elector
identification (1) (2) (3) (4) (5)

1.

2.

Form 17A is required to be signed by the presiding officer.

45. Every elector is permitted to vote in secrecy in the voting compartment of the polling station. They are required to press the blue button or key on the ballot unit against the name and symbol of the candidate/political party they intend to vote. In terms of the proviso to Rule 49M(3), the elector is entitled to view through the transparent window of the printer of VVPAT, kept along with the ballot unit inside the voting compartment, the printed paper slip showing the serial number, the name and the symbol of the candidate for whom he has voted. Thereupon, the paper slip gets cut and drops into the drop box attached to the VVPAT. No elector is permitted to enter the voting compartment when another voter is inside.

46. Rule 49O deals with the scenario where an elector, even after entering her/his details in Form 17A and having put signature or thumb impression thereon, does not vote. The presiding officer is then required to make a remark in Form 17A and take the signature or thumb impression of the elector against such remark.

47. Rule 49M(6) deals with the scenario where the elector who has been permitted to vote under Rule 49L or Rule 49P refuses, even after the warning by the presiding officer, to observe the procedure of voting laid down in Rule 49(M)(3). In such a case, the presiding officer, or the polling officer under the direction of the presiding officer, shall not allow such elector to vote. Rule 49M(7) lays down that in such a scenario, a remark to that effect shall be made against the elector's name in Form 17A by the presiding officer under his signature.

48. As per instructions issued by the ECI, the presiding officer is periodically required to check the total number of votes cast as recorded in the control unit with the data as recorded in Form 17A.

49. As per Rule 49S, at the close of the poll, the presiding officer is required to prepare an account of votes recorded in Form 17C. This is a detailed form, which in Part I, requires the presiding officer to mention the total number of electors assigned to the polling station, the total number of voters as entered in the register for voters, that is, Form 17A, the total number of voters who had decided not

to vote even after recording their details in Form 17A (Rule 49O scenario), and the total number of voters not allowed to vote (Rule 49M scenario). The form also requires to give details of the total number of votes recorded per voting machine. This total number recorded in the voting machine should tally with the total number of voters entered in Form 17A minus the number of voters deciding not to vote and the number of voters not allowed to vote. The details of the paper seals supplied for use, paper seals used, unused paper seals returned to the returning officer etc. are also recorded and entered after the close of the poll.

50. Under Rule 49S of the 1961 Rules, at the time of close of the poll, the presiding officer furnishes attested true copy of the account of votes recorded in Part I of Form 17C to the polling agents of the candidates. He also retains a receipt of the same from the polling agent.

51. Before start of counting of votes, the serial number of the EVMs and the paper seals affixed on the EVMs are verified with details mentioned in Form 17C and are shown to the counting agents. The total votes displayed by pressing the 'TOTAL' button on the control unit is also tallied with the total votes polled as per Form 17C.

52. The counting is done in the presence of the polling agents/candidates by pressing the 'RESULT' button on the control unit. The total votes polled and the total votes polled by each candidate is thereupon displayed on the display panel.

53. In terms of the directions issued by this Court in N. Chandrababu Naidu (supra), the VVPAT slips of five polling stations per assembly constituency/assembly segment of the parliamentary constituency, are randomly selected and counted. The results are then tallied with the electronic results of the control unit.

54. It may be relevant here to also refer to Rule 56D of the 1961 Rules, which reads as under:

“56-D. Scrutiny of paper trail.—(1) Where printer for paper trail is used, after the entries made in the result sheet are announced, any candidate, or in his absence, his election agent or any of his counting agents may apply in writing to the returning officer to count the printed paper slips in the drop box of the printer in respect of any polling station or polling stations.

(2) On such application being made, the returning officer shall, subject to such general or special guidelines, as may be issued by the Election Commission, decide the matter and may allow the application in whole or in part or may reject in whole, if it appears to him to be frivolous or unreasonable.

(3) Every decision of the returning officer under sub-rule (2) shall be in writing and shall contain the reasons therefor.

(4) If the returning officer decides under sub-rule (2) to allow counting of the paper slips either wholly or in part or parts, he shall—

- (a) do the counting in the manner as may be directed by the Election Commission;
- (b) if there is discrepancy between the votes displayed on the control unit and the counting of the paper slips, amend the result sheet in Form 20 as per the paper slips count;
- (c) announce the amendments so made by him; and
- (d) complete and sign the result sheet.”

55. Any candidate, or in his absence an election agent or counting agent, as per the said Rule, can apply in writing to the returning officer to count the printed paper slips in the drop box in respect of any polling station(s). The returning officer, subject to any general or special guidelines issued by the ECI, has to decide the matter and can allow the application in whole or in part, or may reject the application in full if it appears to be frivolous or unreasonable. Every decision of the returning officer is to be in writing and has to contain reasons. If the returning officer decides to allow counting of paper slips, either wholly or in part, he has to do so in the manner prescribed in sub-rule (4) to Rule 56D of the 1961 Rules.

56. As per the ECI guidelines, in case there is any mismatch between the total number of votes recorded in the control unit and Form 17C on account of non-clearance of mock poll data or VVPAT slips, in terms of Rule 56D(4)(b) of the 1961 Rules etc., the printed VVPAT slips of the respective polling stations are counted and considered if the winning margin is equal to or less than total votes polled in such polling stations.

57. At this stage, we would refer to the data on the performance of the EVMs.

More than 118 crore electors have cast their votes since EVMs have been introduced. In 2019, about 61.4 crore voters had cast their votes in 10.35 lakh polling stations. 23.3 lakh ballot units, 16.35 lakh control units and 17.40 lakhs VVPAT units were used in the 2019 General Elections. For the purpose of the 2024 General Elections, 10.48 lakh polling stations have been established to enable 97 crore registered voters to cast their votes. 21.60 lakh ballot units, 16.80 lakh control units and 17.7 lakh VVPAT units have been made ready for being used.

58. ECI has conducted random VVPAT verification of 5 polling booths per assembly segment/constituency for 41,629 EVMs-VVPATs. Further, more than 4 crore VVPAT slips have been tallied with the electronic counts of their control units. Not even a single case of mismatch, (except one which we will refer to subsequently), or wrong recording of votes has been detected. Returning officers have allowed VVPAT slip recounting under Rule 56D in 100 cases since 2017. The VVPAT slip count matched with the electronic count recorded in the control unit in all cases.²³

59. In the 2019 Lok Sabha Elections, 20,687 VVPAT slips were physically counted, and except in one case, no discrepancy or mismatch was noticed.

60. The discrepancy during mandatory verification of VVPAT slips happened in polling station No. 63, Mydukur Assembly Constituency, Andhra Pradesh during the 2019 Lok Sabha Elections. On verification, it was found that the discrepancy had arisen on account of failure of the presiding officer to delete the mock poll data.²⁴ While it is not possible to rule out human errors, paragraph 14.5 of Chapter 14 of the Manual on EVM and VVPATs deals with such situations and lays down the protocol which is to be followed.

61. During the course of hearing, our attention was drawn to Rule 49MA which permits an elector to raise a complaint regarding the mismatch between the name and symbol of the candidate shown on paper slip generated by the VVPAT and the vote cast on the ballot unit. Such elector is required to make a written declaration to the presiding officer. There have been 26 such cases in which the electors have complained.²³ The above figures are updated on the basis of the response given by the ECI to the queries raised by the Court on 16.04.2024. The figures given in the counter affidavit filed by the ECI are as follows:

38,156 randomly selected VVPATs have been physically counted and they have tallied with the electronic count of their control unit. Not even a single case of mismatch or transfer of vote meant for candidate A to candidate B has been detected. Counting of VVPAT slips under Rule 56D has been allowed in 61 cases but there is not even a single case of mismatch.

24 The said discrepancy was duly rectified in terms of the protocol laid down in the Manual on EVM and VVPAT.

under Rule 49MA. There is not even a single case in which any mismatch or defect was found.

62. The EVMs have been subjected to test by technical experts committee from time to time. These committees have approved and did not find any fault with the EVMs. The M3 EVMs currently in use are designed by engineers of BHEL and ECIL. These designs are vetted by the technical experts committee.

63. Our attention was drawn to the query of the Parliamentary Committee on Government Assurances regarding the data on discrepancy between the EVM and VVPAT counts in 2019 Lok Sabha Elections. Reliance is placed on a news report published in The Wire to submit that the ECI failed to submit the requisite information and revert back to the parliamentary committee despite multiple reminders. The ECI has explained that a reply regarding the said query was sent to the Parliamentary Committee on 05.07.2019.

64. Reliance was placed on a news report of The Quint to contend that there were discrepancies in 2019 Lok Sabha Elections, viz. the electronic votes recorded in the control unit and the total votes polled/voter turnout. The ECI has explained that the report referred to in the Quint is with reference to the live voter turnout data uploaded on the website of the ECI during 2019 Lok Sabha Elections. The voter turnout data is dynamic in nature and is uploaded by the ECI on real time approximation by taking inputs from the presiding officers of the polling stations. Inaccuracies were found in the

real-time inputs given by the presiding officers.

However, there was no mismatch of the data of votes recorded in the EVMs and the data of total votes recorded in Form 17C. The data in the EVM and Form 17C matched and accordingly the results were declared in Form 20.

65. On a question being put by the Court, it was stated that a minimum of 50% of the polling stations are equipped with CCTV cameras. Data from the CCTV cameras is stored and retained at least for a period of 45 days from the date of announcement of the polling results. Similarly, the EVMs are retained in the strong room along with seals etc. as affixed after counting of the votes. The candidates have the right to challenge the poll result by filing an election petition within 45 days from the date of election of the returned candidate. The ECI guidelines/protocol stipulate that confirmation regarding the filing status of election petitions must be obtained from the relevant High Courts. If challenge is made, the EVMs are retained in the strong room along with the seals etc. for a longer period. In cases where no election petitions are filed, the strongrooms are opened and the EVMs are shifted to the warehouse.

66. The ECI has also in its counter affidavit stated that the EVMs have been continuously used in different elections since the year 2000. The electoral outcome had been divergent, favouring or disfavours different political parties. Details of the political parties with maximum number of seats since 2004 is tabulated as under:

PARTY WITH MAXIMUM NUMBER OF SEATS IN LEGISLATIVE ASSEMBLY
ELECTION SINCE 2004 Andhra Pradesh 2004 2009 2014 2019 Meghalaya 2008
2013 2018 2023 INC INC TDP YSRCP INC INC INC NPEP Arunachal Pradesh 2004
2009 2014 2019 Mizoram 2008 2013 2018 2023 INC INC INC BJP INC INC MNF
ZPM Assam 2006 2011 2016 2021 Nagaland 2008 2013 2018 2023 INC INC BJP BJP
NPF NPF NPF NDPP Bihar 2005 2010 2015 2020 Odisha 2004 2009 2014 2019 RJD
JD(U) RJD RJD BJD BJD BJD BJD Chhattisgarh 2008 2013 2018 2023 Punjab 2007
2012 2017 2022 BJP BJP INC BJP SAD SAD INC AAP Goa 2007 2012 2017 2022
Rajasthan 2008 2013 2018 2023 INC BJP INC BJP INC BJP INC BJP Gujarat 2007
2012 2017 2022 Sikkim 2004 2009 2014 2019 BJP BJP BJP BJP SDF SDF SDF SKM
Haryana 2005 2009 2014 2019 Tamil Nadu 2006 2011 2016 2021 INC INC BJP BJP
DMK AIADMK AIADMK DMK Himachal Pradesh 2007 2012 2017 2022 Telangana
2014 2018 2023 BJP INC BJP INC TRS TRS INC Jammu & Kashmir 2008 2014
Tripura 2008 2013 2018 2023 JKNC JKPD CIP(M) CIP(M) BJP BJP Jharkhand
2005 2009 2014 2019 Uttarakhand 2007 2012 2017 2022 BJP BJP & BJP JMM BJP
INC BJP BJP JMM Karnataka 2004 2008 2013 2018 2023 Uttar Pradesh 2007 2012
2017 2022 BJP BJP INC BJP INC BSP SP BJP BJP Kerala 2006 2011 2016 2021 West
2006 2011 2016 2021 CPI(M) CPI(M) CPI(M) CPI(M) Bengal CPI(M) TMC TMC
TMC Madhya Pradesh 2008 2013 2018 2023 NCT of Delhi 2008 2013 2015 2020
BJP BJP INC BJP INC BJP AAP AAP Maharashtra 2004 2009 2014 2019 Puducherry
2006 2011 2016 2021 NCP INC BJP BJP INC AINRC INC AINRC Manipur 2007
2012 2017 2022 INC INC INC BJP

67. We have referred to the data, after elucidating the mechanics and the safeguards embedded in the EVMs to check and obviate wrongdoing, and to evaluate the efficacy and performance of the EVMs. We acknowledge the right of voters to question the working of EVMs, which are but an electronic device that has a direct impact on election results. However, it is also necessary to exercise care and caution when we raise aspersions on the integrity of the electoral process. Repeated and persistent doubts and despair, even without supporting evidence, can have the contrarian impact of creating distrust. This can reduce citizen participation and confidence in elections, essential for a healthy and robust democracy. Unfounded challenges may actually reveal perceptions and predispositions, whereas this Court, as an arbiter and adjudicator of disputes and challenges, must render decisions on facts based on evidence and data. This is the reason why we had re-listed the matters for directions and clarifications on 24.04.2024, when specific points/questions raised were answered by the ECI. The petitioners were also heard.

68. The counsel for the petitioners, on 24.04.2024, drew our attention to a Wikipedia article which states that firmware is a software which provides low-level control of computing device hardware etc. It also states that programmable firmware memory can be reprogrammed via a procedure sometimes called flashing. This is stoutly denied by the officer of the ECI, who states that this would require the EVMs to be re-engineered by the manufacturers. It is submitted that the microcontroller used in the EVM has one-time programable memory, that is, it is unalterable once burned. It is only the VVPAT which has a flash memory component for the purpose of storing the bitmap file. To us, it is apparent that a number of safeguards and protocols with stringent checks have been put in place. Data and figures do not indicate artifice and deceit. Reprogramming by flashing, even if we assume is remotely possible, is inhibited by the strict control and checks put in place and noticed above. Imagination and suppositions should not lead us to hypothesize a wrong doing without any basis or facts. The credibility of the ECI and integrity of the electoral process earned over years cannot be chaffed and over-ridden by baroque contemplations and speculations.

69. The test for determining the scope of unenumerated rights is based on tracing them to specific provision of Part III of the Constitution or to the core values which the Constitution espouses. While we acknowledge the fundamental right of voters to ensure their vote is accurately recorded and counted, the same cannot be equated with the right to 100% counting of VVPAT slips, or a right to physical access to the VVPAT slips, which the voter should be permitted to put in the drop box. These are two separate aspects – the former is the right itself and the latter is a plea to protect or how to secure the right. The voters' right can be protected and safeguarded by adopting several measures. This Court in *Subramanian Swamy* (supra) had directed gradual introduction of VVPATs to guarantee utmost transparency and integrity in the system.

This direction was made to safeguard the right of the voters to know that the vote has been correctly recorded in the EVM. The direction has been implemented. The voter can see the VVPAT slip through the glass window and this assures the voter that his vote as cast has been recorded and will be counted. In *N. Chandrababu Naidu* (supra), the direction for counting the VVPAT paper trail in 5 EVMs per assembly constituency or assembly segment in a parliamentary constituency was issued, primarily as a precautionary measure rather than a justification or necessity. This decision was aimed at ensuring the highest level of confidence in the accuracy of election results. Giving physical

access to VVPAT slips to voters is problematic and impractical. It will lead to misuse, malpractices and disputes. This is not a case where fundamental right to franchise exists only as a parchment, rather, the entire electoral process protocol, and the checks as well as empirical data, ensure its meaningful exercise.

70. VVPAT slip is made of a 9.9 cm x 5.6 cm thermal paper coated with chemical to ensure print retention for about 5 years. It is very soft and sticky, which makes the counting process tedious and slow. The counting process is undertaken through the following steps: the verification of unique ID of the VVPAT, opening of the VVPAT drop box, taking out the paper slips, counting the total number of slips, matching the number of slips with the total votes polled as per Form 17C, segregation of candidate-wise VVPAT slips, making candidate-wise bundles of 25 slips and counting of bundles and leftover slips. There are instances of recounting and reverification of the slips till the candidate-wise tallying is done. Thus, the counting process, it is stated, takes about five hours. The counting is done by a team of three officers under CCTV coverage and under direct supervision of the supervising officer and the ECI observer of the constituency. Candidates/agents can remain present. We are not inclined to modify the aforesaid directions to increase the number of VVPAT undergoing slip count for several reasons. First, it will increase the time for counting and delay declaration of results. The manpower required would have to be doubled. Manual counting is prone to human errors and may lead to deliberate mischief. Manual intervention in counting can also create multiple charges of manipulation of results. Further, the data and the results do not indicate any need to increase the number of VVPAT units subjected to manual counting.

71. During the course of hearing, it was suggested that instead of physically counting the VVPAT slips, they can be counted by a counting machine. This suggestion, including the suggestion that barcoding of the symbols loaded in the VVPATs may be helpful in machine counting, may be examined by the ECI. These are technical aspects, which will require evaluation and study, and hence we would refrain from making any comment either way.

72. We must reject as foible and unsound the submission to return to the ballot paper system. The weakness of the ballot paper system is well known and documented. In the Indian context, keeping in view the vast size of the Indian electorate of nearly 97 crore, the number of candidates who contest the elections, the number of polling booths where voting is held, and the problems faced with ballot papers, we would be undoing the electoral reforms by directing reintroduction of the ballot papers. EVMs offer significant advantages. They have effectively eliminated booth capturing by restricting the rate of vote casting to 4 votes per minute, thereby prolonging the time needed and thus check insertion of bogus votes. EVMs have eliminated invalid votes, which were a major issue with paper ballots and had often sparked disputes during the counting process. Furthermore, EVMs reduce paper usage and alleviate logistical challenges. Finally, they provide administrative convenience by expediting the counting process and minimizing errors.

73. ECI has been categorical that the glass window on the VVPAT has not undergone any change. The term used in Rule 49M is 'transparent window'. The tinted glass used on the VVPAT printer is to maintain secrecy and prevent anyone else from viewing the VVPAT slips. The voter in the voting compartment who is viewing the glass from the top can have clear view of the slip for 7 seconds.

Marginal tint on the VVPAT glass window, or the fact that the cutting and dropping of the slip from the roll in to the drop box of the printer is not visible, does not violate Rule 49M. The words 'before such slips get cut' in the proviso to Rule 49M(3) indicate and require that the slip should be cut from the roll after the elector has seen the print through the glass window. Use of glass window prevents damage, smudging, attempt to deface or physically access the VVPAT slip. The rule ensures that the voter is able to see the slip along with the serial number with name of the candidate and the symbol for whom they have voted.

74. Similarly, we would reject the submission that any elector should be liberally permitted as a routine to ask for verification of vote. Rule 49MA permits the elector to raise a complaint if she/he is of the view that the VVPAT paper slip did not depict the correct candidate/political party she/he voted. However, whenever a challenge is made, the voting process must be halted. An overly liberal approach could cause confusion and delay – hindering the election process and dissuading others from casting their votes.²⁵ ECI has stated that only 26 such requests in terms of Rule 49MA were received, and in all cases, the allegation was found to be incorrect.

75. We have conducted an in-detail review of the administrative and technical safeguards of the EVM mechanism. Our discussion aims to address the uncertainties and provide assurance regarding the integrity of the electoral process. A voting mechanism must uphold and adhere to 25 However, we refrain from making any comments on the application of Section 177 of the Indian Penal Code, 1860.

the principles of security, accountability, and accuracy. An overcomplex voting system may engender doubt and uncertainty, thereby easing the chances of manipulation. In our considered opinion, the EVMs are simple, secure and user-friendly. The voters, candidates and their representatives, and the officials of the ECI are aware of the nitty-gritty of the EVM system. They also check and ensure righteousness and integrity. Moreover, the incorporation of the VVPAT system fortifies the principle of vote verifiability, thereby enhancing the overall accountability of the electoral process.

76. Nevertheless, not because we have any doubt, but to only further strengthen the integrity of the election process, we are inclined to issue the following directions:

(a) On completion of the symbol loading process in the VVPATs undertaken on or after 01.05.2024, the symbol loading units shall be sealed and secured in a container. The candidates or their representatives shall sign the seal. The sealed containers, containing the symbol loading units, shall be kept in the strong room along with the EVMs at least for a period of 45 days post the declaration of results. They shall be opened, examined and dealt with as in the case of EVMs.

(b) The burnt memory/microcontroller in 5% of the EVMs, that is, the control unit, ballot unit and the VVPAT, per assembly constituency/assembly segment of a parliamentary constituency shall be checked and verified by the team of engineers from the manufacturers of the EVMs, post the announcement of the results, for any

tampering or modification, on a written request made by candidates who are at SI.No.2 or SI.No.3, behind the highest polled candidate. Such candidates or their representatives shall identify the EVMs by the polling station or serial number. All the candidates and their representatives shall have an option to remain present at the time of verification. Such a request should be made within a period of 7 days from the date of declaration of the result.

The District Election Officer, in consultation with the team of engineers, shall certify the authenticity/intactness of the burnt memory/ microcontroller after the verification process is conducted. The actual cost or expenses for the said verification will be notified by the ECI, and the candidate making the said request will pay for such expenses. The expenses will be refunded, in case the EVM is found to be tampered.

77. The writ petitions and all pending applications, including the applications for intervention, are disposed of in the above terms.

.....J. (SANJIV KHANNA)J. (DIPANKAR DATTA) NEW
DELHI;

APRIL 26, 2024.

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (C) NO. 434/2023

ASSOCIATION FOR DEMOCRATIC REFORMS

...PETITIONER

VERSUS

ELECTION COMMISSION OF INDIA & ANOTHER

...RESPONDENTS

With

WRIT PETITION (C)/2024 (@ DIARY NO. 35782/2023) WRIT PETITION (C) NO. 184/2024 JUDGMENT DIPANKAR DATTA, J.

1. I have had the privilege of reading the opinion authored by brother Hon'ble Khanna, J. His Lordship, in my opinion, has dealt with the legal and techno-legal issues arising in connection with the challenge to the process of polling of votes through Electronic Voting Machines¹ mounted by the writ EVMs petitioners and the several intervenors with unmatched finesse and admirable clarity. I do not recollect any previous decision of this Court having explained the working of the EVMs in such great detail with lucidity and dexterity. The reasons assigned by His Lordship for negating the challenge, without doubt, are cogent and valid. The twin directions in the penultimate paragraph, notwithstanding that the electoral process for constituting the 18th Lok Sabha is in full swing, are in the nature of forward- looking measures to strengthen the electoral system by bringing in more transparency. Such directions do not have the effect of retarding, interrupting, protracting or stalling the counting of votes, and is a course of action that seems to be perfectly permissible in the light of the Constitution Bench decision of this Court in Election Commission of India v Ashok Kumar².

2. Though His Lordship's opinion has my whole-hearted concurrence, I have thought of penning a few words to express my own views, keeping in mind the customary challenges that are laid before this Court whenever an election is reasonably imminent, by way of emphasis. Hon'ble Khanna, J. and I are speaking through different judgments, but our voices are not too different.

3. I have heard senior counsel/counsel for the three petitioners suspect, without however attributing any malice to the Election Commission of India³ (in which vests the superintendence, direction and control of (2000) 8 SCC 216 ECI elections per Article 324 of the Constitution of India 4), the efficacy of exercise of the right of franchise through the EVMs which, according to them, are not entirely reliable and open to manipulation, and that completely tallying the Voter Verifiable Paper Audit Trail⁵ slips with the votes cast on the ballot unit is the plausible solution to ensure a taint-free election. I have also heard counsel for the petitioning association in the lead matter rely on certain reports to persuade the Court hold that casting of votes through EVMs is not fool-proof and that voting through electronic means has been discontinued by a European nation in compliance with a judicial verdict. He was also heard to suggest, when called upon by the Court regarding the nature of relief the petitioning association seeks, that the electoral process in India should return to the "paper ballot system" upon discontinuance of voting through the EVMs.

4. I place on record that although such a suggestion was subsequently withdrawn by counsel in course of the proceedings that ensued following listing of the writ petitions "For Directions" on 24 April, 2024 to seek clarifications from the ECI on certain points, nothing much turns on it. The withdrawal was more of an attempt to erase the impression we, the Judges forming the Bench, were urged to form by senior counsel for the ECI while arguing that the petitioning association's utter lack of bona fides (in invoking this Court's writ jurisdiction under Article 32 of the Constitution) is completely exposed thereby. I have no hesitation to accept the submission of senior counsel for the

ECI that reverting to the “paper ballot system” of Constitution VVPAT the bygone era, as suggested, reveals the real intention of the petitioning association to discredit the system of voting through the EVMs and thereby derail the electoral process that is underway, by creating unnecessary doubts in the minds of the electorate.

5. It is of immediate relevance to note that in recent years, a trend has been fast developing of certain vested interest groups endeavouring to undermine the achievements and accomplishments of the nation, earned through the hard work and dedication of its sincere workforce. There seems to be a concerted effort to discredit, diminish, and weaken the progress of this great nation on every possible frontier. Any such effort, or rather attempt, has to be nipped in the bud. No Constitutional court, far less this Court, would allow such attempt to succeed as long as it (the court) has a say in the matter. I have serious doubt as regards the bona fides of the petitioning association when it seeks a reversion to the old order. Irrespective of the fact that in the past efforts of the petitioning association in bringing about electoral reforms have borne fruit, the suggestion put forth appeared inexplicable. Question of reverting to the “paper ballot system”, on facts and in the circumstances, does not and cannot arise. It is only improvements in the EVMs or even a better system that people would look forward to in the ensuing years.

6. At the same time, one cannot be oblivious that in a society pledged to uphold the rule of law, none - howsoever high or low – is above the law. Everyone is subject to the law fully and completely, and authorities within the meaning of State in Article 12 of the Constitution are no exception. Concepts of unfettered discretion or unaccountable action has no place in the matter of governance; hence, neither can the ECI nor can any other authority claim to possess arbitrary power over the interests of an individual voter and seek cover from the sunlight of judicial scrutiny if, indeed, a valid cause is set up for interference. After all, “let right be done” is also the motto of our nation like any other civilised State. That the sanctity of the electoral process has to be secured at any cost has never been in doubt.

7. Conducting elections in India is a difficult task, is an understatement; rather, it is a humongous task and presents a novel challenge, not seen elsewhere in the world. India is home to more than 140 crore people and there are 97 crore eligible voters for the 2024 General Elections, which is more than 10% of the world population. These voters represent the largest electorate in the world. The Representation of the People Act, 1951 which, to my mind, amidst the vast legislative landscape of the nation is the most important enactment after the Constitution of India, is also the most effective instrument to uphold democratic and republican ideals, which are the hallmarks of our preambular promise. The RoP Act, which has established the legal framework for conducting elections, ensures that each and every citizen has a fair and equal opportunity to exercise his/her right of vote and to participate in the democratic process for electing his/her governor. The duties, functions and obligations to be performed/discharged by the ECI are ordained by the RoP Act, which are paramount and non- negotiable. Being a complete code in itself, the RoP Act reinforces the rule of law and upholds the principles of justice, fairness and transparency. The RoP Act enlarges the electorate, greater are the challenges associated with the elections. As it is, the ECI has an onerous responsibility to shoulder and there is absolutely no margin for error. Periodical challenges to electoral processes, which gain momentum particularly when General Elections are imminent,

require the ECI as of necessity to raise robust, valid and effective defence to spurn such challenges failing which any adverse judgment by a court is bound to undermine the authority and prestige of the ECI and bring disrepute to it.

8. The 2024 General Elections, which are proposed to be conducted in 7 (seven) phases and presently underway, will entail an estimated expenditure of around Rs. 10,00,00,00,00,000 (Rupees One lakh crore); more than 10 lakh polling booths are required to be setup to facilitate the voting process. The EVMs are carried to the remotest areas of this country, occasionally on the backs of horses and other animals; voting booths have been set up in far-off villages at the foothills of the Himalayan mountains as well as the delta of the Sundarbans which are only accessible through boats. These challenges are unique to India, and the election process has to be considered in this context.

9. Taking an example, West Bengal is the 13th largest state in terms of area, spread over 88,752 sq. km. The density of population of the state is 1028 persons/sq. km. Even a small state like West Bengal is more densely populated than most European nations. This being the scenario, any comparison of the nature which was sought to be drawn on behalf of the petitioning association with a particular European nation, may not be adequately representative since the demographic and logistical challenges in the conduct of elections in each country are unique to it. Also, it was not demonstrated before the Court that the machines put to use in the electoral system of such nation are similar and what was said by its court applies *ex proprio vigore* to India.

10. Electronic voting is not something which is prevalent only in India. Multiple countries use electronic voting in varying degrees in their national elections. However, use of EVMs in elections in India are not without its checks and balances. Reasonable measures to ensure transparency, such as tallying 5% VVPAT slips with votes polled, are already in place after the decision of this Court in *N. Chandrababu Naidu v. Union of India*⁷. This measure, as has been noticed by Hon'ble Khanna, J., was undertaken out of abundant caution and not as an admission of a flaw in the process.

11. The exercise of tallying 5% VVPAT slips with votes cast by the electors has not, till date, resulted in any mismatch. This assertion of the ECI has not been proved to be incorrect by the petitioners by referring to any credible material or data. So long no mismatch is detected even after tallying 5% of VVPAT slips, as directed in *N. Chandrababu Naidu (supra)*, it would defy the sense of logic and reason of a prudent man to issue a Mandamus to the ECI to arrange for tallying 100% VVPAT slips on the specious ground of the petitioners' apprehension that the EVMs could be manipulated.

12. The petitioning association has relied on the Report titled 'An inquiry into India's Election System: Is the Indian EVM and VVPAT system fit for (2019) 15 SCC 377 democratic elections?' submitted by the Citizens' Commission on Elections⁸, to emphasize the vulnerabilities of the current electronic voting system. The CCE Report, on a bare reading, appears to be the culmination of inputs given by domain experts. For whatever such report is worth and though counsel claimed that the efficacy of the voting system through EVMs has been doubted, the CCE Report itself concludes, *inter alia*, that no hacking of any EVM has been detected; what it observes is that there is no guarantee that the EVMs cannot be hacked. This, in essence captures the underlying weakness in the

petitioning association's entire case, inasmuch as the only grounds for the reliefs sought lie in the realm of apprehension and suspicion. In arguendo, even if the CCE Report is taken on face value and it is believed that the EVM-VVPAT system can be hacked, can it be said that there is absence of a redressal mechanism for the same? Should there be hacking, resulting in violation of a right of an elector in any manner, and if there be proof adequate enough to upturn an election result, the law already has in place a remedy, i.e., an election petition under section 80 of the RoP Act. Such an election petition can be filed not just by an aggrieved candidate, but also by a voter, within 45 (forty-five) days from the date of declaration of the result of election. Since there is already a remedy in law to allay the fears that have been expressed by the petitioners, if and when a discrepancy in the results arises, the Courts are not powerless to uphold the sanctity of the democratic process by appropriate intervention. CCE Report

13. The petitioning association has also attempted to highlight a public trust deficit with respect to the current voting system by relying on a survey conducted by the Centre for the Study of Developing Societies – Lokniti, which concluded that a majority of the Indian population did not trust the EVMs. It is a private report and I find little reason to trust such a report. Over the years, more and more voters have participated in the election process. Had the voters any doubt regarding the efficacy of the EVMs, I wonder whether the voting percentage would have seen such increase. EVMs have stood the test of time and the increased voting percentage is sufficient reason for us to hold that the voters have reposed faith in the current system and that the report to the contrary, which has been relied on, merits outright rejection.

14. Next, the petitioners submit that their right to be informed under Article 19(1)(a) vis-à-vis the electoral process have two facets. First, a voter has a right to know that the vote is recorded as cast; and, secondly that the vote as cast is counted. These facets need to be dealt with separately.

15. A citizen's right 'to freedom of speech and expression' under Article 19(1) is not absolute; the State by virtue of Article 19(2) can place reasonable restrictions on these rights. There can be no doubt that the electorate has a right to be informed if the votes, as cast, are accurately recorded. The dispute, in the present writ proceedings, centres around the modality of delivering the information. The petitioners have characterised the present procedure, wherein the voter after pressing the 'blue button' and casting his/her vote can see his VVPAT slip for 7 seconds through an illuminated glass window, as inadequate for the voter to verify if his/her vote, as cast, is recorded.

16. To buttress their submission, the petitioners have relied on the proviso to Rule 49M (3) of the Conduct of Election Rules, 1961. The petitioners urge that the ECI is not following the statutory mandate provided in the Election Rules. I am ad idem with the interpretation of the relevant rule placed by Hon'ble Khanna, J. The ordainment of Rule 49M (3) is that the VVPAT slip should be momentarily visible to the voter; and it is not the requirement of the rule that the VVPAT slip or its copy has to be handed over to the voter. Recording of the vote cast signifying the choice of the voter and its projection on the VVPAT slip, albeit for 7 (seven) seconds, is fulfilment of the voter's right of being informed that his/her vote has been duly recorded. In my considered view, as long as there is no allegation of statutory breach, there can be no substitution of the Court's view for the view of the ECI that the light in the VVPAT would be on for 7 (seven) seconds and not more.

17. We now address the second facet of the argument based on the right guaranteed by Article 19(1)(a) – the voter’s right to know that his/her vote, as recorded, has been counted. To deal with this contention, a question comes to my mind – did this right not exist when the “paper ballot system”, which the petitioning association wishes to be reverted to, was in vogue? Then, voters would simply drop their paper ballots into a box, for it to be safely ferried away to the counting stations, whereafter the same were Election Rules counted by election officials far away from the voter’s scrutiny, with no way of knowing whether the vote cast by the voter was indeed counted or had not fallen victim to human error and missed from being counted. In the present far more technologically advanced system of the EVM – VVPAT, every voter who enters the polling booth has his/her name recorded, along with an affixation of signature in the Register of Voters maintained by the Presiding Officer, as provided by Form 17A of the Election Rules. Thereafter, the voter presses the desired button on the ballot unit to cast his/her vote, sees a visual confirmation of the same on the transparent VVPAT screen and hears a loud beep. At the end of the voting process, the Presiding Officer is required to record in Form 17C, not just the total number of voters as per the Register of Voters, but also the total number of votes recorded per voting machine as well as those staying away from the voting process despite affixing signature on the register. The total votes polled as per Form 17C is then again tallied with the total votes recorded by the control unit. Rule 56D(4) also provides that if there is any mismatch between these two totals, the printed VVPAT slips of the polling station would be counted. Furthermore, if a voter is aggrieved by a mismatch in the candidate voted for in the ballot unit vis-a-vis that recorded in the VVPAT, Rule 49M allows the voter to approach the Presiding Officer. Upon the conclusion of polling, there exists yet another remedy under Rule 56-D, for a candidate to apply for a count of the VVPAT slips, should any discrepancy be suspected. Thus, it is manifest that there is in place a stringent system of checks and balances, to prevent any possibility of a miscount of votes, and for the voter to know that his/her vote has been counted. There can be no doubt that such a system, which is distinctly more satisfactory compared to the system of the yester-years, suitably satisfies the voter’s right under Article 19(1)(a) to know that his/her vote has been counted as recorded.

18. The Republic has prided itself in conducting free and fair elections for the past 70 years, the credit wherefor can largely be attributed to the ECI and the trust reposed in it by the public. While rational scepticism of the status quo is desirable in a healthy democracy, this Court cannot allow the entire process of the underway General Elections to be called into question and upended on mere apprehension and speculation of the petitioners. The petitioners have neither been able to demonstrate how the use of EVMs in elections violates the principle of free and fair elections; nor have they been able to establish a fundamental right to 100% VVPAT slips tallying with the votes cast.

19. In view of the foregoing discussion, the petitioners’ apprehensions are misplaced. Reverting to the paper ballot system, rejecting inevitable march of technological advancement, and burdening the ECI with the onerous task of 100% VVPAT slips tallying would be a folly when the challenges faced in conducting the elections are of such gargantuan scale.

20. There are two other ancillary issues, to add to the issues already covered in detail by Hon’ble Khanna, J.

21. The first is the very issue of maintainability of writ petitions of the nature presented before us. Should mere suspicion of infringement of a right be considered adequate ground to invoke the writ jurisdiction? In my opinion, the answer should be 'NO'.

22. A writ petition ought not to be entertained if the plea is based on the mere suspicion that a right could be infringed. Suspicion that a right could be infringed and a real threat of infringement of a right are distinct and different.

23. To succeed in a claim under Article 32 or 226, one must demonstrate either mala fide, or arbitrariness, or breach of a law in the impugned State action. Though a writ of right, it is not a writ of course. The writ jurisdiction under Article 32/226 of the Constitution of India being special and extraordinary, it should not be exercised casually or lightly on the mere asking of a litigant based on suspicions and conjectures, unless there is credible/trustworthy material on record to suggest that adverse action affecting a right is reasonably imminent or there is a real threat to the rule of law being abrogated. It must be shown, at least prima facie, that there is a real potential threat to a right, which is guaranteed by law to the person concerned.

24. I am not oblivious of two decisions rendered by this Court on the aforesaid issue.

25. A Constitution Bench of this Court in *D.A.V. College, Bhatinda v. State of Punjab*¹⁰ held thus:

“5. [...] a petition under Article 32 in which petitioners make out a prima facie case that their fundamental rights are either threatened or violated will be entertained by this Court and that it is not necessary for any person who considers himself to be aggrieved to wait till the actual threat has taken place.” (1971) 2 SCC 261

26. In *Adi Saiva Sivachariyargal Nala Sangam v. State of Tamil Nadu*¹¹ a Bench of two Hon'ble Judges of this Court held:

“12. [...] The institution of a writ proceeding need not await actual prejudice and adverse effect and consequence. An apprehension of such harm, if the same is well founded, can furnish a cause of action for moving the Court.”

27. While a writ petition may be instituted, if there is a genuine and looming threat of a right being trampled upon, what is, however, clear from the aforesaid decisions is that such threat or apprehension has to be well founded and cannot be based merely on assumptions and presumptions as is found in the present set of writ petitions.

28. The mere suspicion that there may be a mismatch in votes cast through EVMs, thereby giving rise to a demand for a 100% VVPAT slips verification, is not a sufficient ground for the present set of writ petitions to be considered maintainable. To maintain these writ petitions, it ought to have been shown that there exists a tangible threat of infringement; however, that has also not been substantiated. Thus, without any evidence of malice, arbitrariness, breach of law, or a genuine threat to invasion of rights, the writ petitions could have been dismissed as not maintainable. But,

considering the seriousness of the concerns that the Court suo motu had expressed to which responses were received from the official of the ECI as well as its senior counsel, the necessity was felt to issue the twin directions in the greater public interest and to sub-serve the demands of justice.

(2016) 2 SCC 725

29. Finally, I wish to touch upon one other issue of importance.

30. It is pertinent to reiterate that the doctrine of res judicata is applicable to writ petitions under Article 32 and Article 226 as well. The inclusion of the term “public right” in Explanation VI of Section 11 of the Civil Procedure Code, 1908 aims to avoid redundant legal disputes concerning public rights. Given this clarification, there is no room for debate regarding the application of Section 11 to matters of public interest litigation presented through writ petitions.

31. In *Daryao and others v. State of U.P. and others*¹², a Constitution Bench of this Court emphasized that the rule of res judicata is founded on significant public policy considerations rather than being a mere technicality. It was clarified that petitioners seeking to challenge a decision must present new grounds distinct from those previously raised in order to escape the bar of res judicata. The Bench articulated this as follows:

“31. [...] We are satisfied that a change in the form of attack against the impugned statute would make no difference to the true legal position that the writ petition in the High Court and the present writ petition are directed against the same statute and the grounds raised by the petitioner in that behalf are substantially the same.”

32. Another Constitution Bench of this Court in *Direct Recruit Class II Engineering Officers' Association. v. State of Maharashtra and others*¹³ followed the aforesaid dictum to hold that the principles of res judicata are not foreign to writ petitions. A reference may be made to the following paragraph:

(1962) 1 SCR 574 (1990) 2 SCC 715

35. [...] It is well established that the principles of res judicata are applicable to writ petitions. The relief prayed for on behalf of the petitioner in the present case is the same as he would have, in the event of his success, obtained in the earlier writ petition before the High Court. The petitioner in reply contended that since the special leave petition before this Court was dismissed in limine without giving any reason, the order cannot be relied upon for a plea of res judicata. The answer is that it is not the order of this Court dismissing the special leave petition which is being relied upon; the plea of res judicata has been pressed on the basis of the High Court's judgment which became final after the dismissal of the special leave petition. In similar situation a Constitution Bench of this Court in *Daryao v. State of U.P.* [(1962) 1 SCR 574 : AIR 1961 SC 1457] held that where the High Court dismisses a writ petition under Article 226 of the Constitution after hearing the matter on the merits,

a subsequent petition in the Supreme Court under Article 32 on the same facts and for the same reliefs filed by the same parties will be barred by the general principle of res judicata. The binding character of judgments of courts of competent jurisdiction is in essence a part of the rule of law on which the administration of justice, so much emphasised by the Constitution, is founded and a judgment of the High Court under Article 226 passed after a hearing on the merits must bind the parties till set aside in appeal as provided by the Constitution and cannot be permitted to be circumvented by a petition under Article 32. An attempted change in the form of the petition or the grounds cannot be allowed to defeat the plea [...]”.

33. No doubt, res judicata bars parties from re-litigating issues that have been conclusively settled. It is true that this principle is not rigid in cases of substantial public interest and Constitutional Courts are empowered to adopt a flexible approach in such cases, acknowledging their far-reaching public interest ramifications.

34. However, this standard is applicable only when substantial evidence is presented to validate the irreversible harm or detriment to the public good resulting from the action impugned. The Court must come to the conclusion that the petition is not just an old wine in a new bottle, but rather raises substantial grounds not previously addressed in litigation. Only under these circumstances may it consider such a petition; otherwise, it is within its authority to dismiss it at the threshold.

35. This issue at hand of doubting the efficacy of the EVMs has been previously raised before this Court and it is imperative that such issue is concluded definitively now. Going forward, unless substantial evidence is presented against the EVMs, the current system will have to persist with enhancements. Regressive measures to revert to paper ballots or any alternative to the EVMs that does not adequately safeguard the interests of Indian citizens have to be eschewed.

36. I also wish to observe that while maintaining a balanced perspective is crucial in evaluating systems or institutions, blindly distrusting any aspect of the system can breed unwarranted scepticism and impede progress. Instead, a critical yet constructive approach, guided by evidence and reason, should be followed to make room for meaningful improvements and to ensure the system's credibility and effectiveness.

37. Be it the citizens, the judiciary, the elected representatives, or even the electoral machinery, democracy is all about striving to build harmony and trust between all its pillars through open dialogue, transparency in processes, and continuous improvement of the system by active participation in democratic practices. Our approach should be guided by evidence and reason to allow space for meaningful improvements. By nurturing a culture of trust and collaboration, we can strengthen the foundations of our democracy and ensure that the voices and choices of all citizens are valued and respected. With each pillar fortified, our democracy stands robust and resilient.

38. I conclude with the hope and trust that the system in vogue shall not fail the electorate and the mandate of the voting public shall be truly reflected in the votes cast and counted.

.....J (DIPANKAR DATTA) New Delhi;

26th April, 2024.