

# Voter Verifiable Paper Audit Trail, Tallying, and the Supreme Court

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## Supreme Court

### Bar & Bench

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### **Introduction**

In May 2021, when Mamata Banerjee lost her seat in Nandigram in the Bengal Legislative Assembly elections, her demand for a recounting of the votes was rejected as the Election Commission sought to tally the Voter Verifiable Paper Audit Trail (VVPAT) slips with the vote count on the Electronic Voter Machine (EVMs) of the sample size before finally declaring the results.

Rule 63, Conduct of Elections Rule, 1961 allows for application to the Returning Officer for re-counting votes, and the Rules provide such Returning Officer the discretion to allow or reject such application. In the 2021 Legislative assembly elections, the ECI stated how the tallying process resulted in a 100% match after perusing 1492 VVPATs in West

Bengal, 1,183 in Tamil Nadu, 728 in Kerala, 647 in Assam, and 156 in Puducherry – which was apparently sufficient to affirm upon the reliability and credibility of both the EVMs and thereby the electoral process. However, this procedure of post-poll tallying has not been devoid of judicial ponderance in the past. This essay seeks to analyze how the Indian Supreme Court has evolved the jurisprudence on post-poll tallying in an ostensibly deferential manner to the Election Commission of India (ECI), while also commenting on the potential issues that may make legal compliance difficult.

### **The Contours of VVPAT Tallying vis-à-vis the deferential Supreme Court**

The genesis of the Supreme Court’s approach finds its roots in *Subramaniam Swamy v. Union of India*, (2013) 10 SCC 500 in 2013, where the petitioner raised the concern of EVM hacking while also contending the ECI’s initial denial in using the paper-trail mechanism as a proof requirement owing to high logistical cost. While the ECI stressed upon the high-end technology of the EVMs, it also highlighted how the VVPAT mechanism would be inculcated within the EVMs manufactured by the two specific companies contracted in making EVMs - Electronics Corporation of India Ltd and Bharat Electronics Ltd. Section 61-A of the Representation of People’s Act, 1951 provides the ECI plenary discretionary powers in the manner of recording votes by voting machines. The court lauded the ECI’s efforts in coordinating with various stakeholders – including the National and State political parties, the Ministry of Law and Justice, and specialized committees – and acknowledged that the paper trail system would indeed be an “indispensable requirement” for free and fair elections. While the paper trail mechanism was thereby directed to be incorporated into the electoral process for vote verification, the Court termed such efforts and approach of the ECI as “pragmatic and reasonable” and being aware of the million booths the ECI has to handle, the court resorted to a deferential approach in providing the ECI ample leeway and discretion to implement such voting mechanism.

It is noteworthy that neither the Representation of People Act, 1951 nor the Conduct of Elections Rules, 1960 currently recognize the existence of VVPATs expressly – the only counting provisions in the Rules pertain to counting ballot papers (as provided in Rules 56-A, 56-B, and 59), while VVPATs are envisaged in a ballot-less electoral paradigm. While the Government was directed to provide financial assistance to the ECI in ensuring the addition of the VVPATs with the EVMs, no amendment to the Rules has occurred to legislatively enshrine this process. Post the Supreme Court decision, Guideline 16.6.1 of the ECI’s Election Handbook (04 February 2019 edition) provided for the verification of VVPATs with the electronic votes for one polling station randomly selected by the draw of lots for every constituency or segment after the last round of counting culminates on the EVMs.

Prior to the Gujarat Assembly election in 2017, Prakash Joshi filed a writ petition under Article 32 before the Supreme Court, raising concerns over the usage of old EVM machines with the additional VVPAT mechanism. One of the reliefs sought in the petition was that if any candidate demanded a recounting of votes, the VVPATs of a minimum of 10% of such booths in the constituency must be counted so as to ensure the credibility of

the EVMs. However, the Supreme Court, in *Prakash Joshi v. Election Commission of India, 2017 SCC Online SC 1734*, dismissed the petition via a brief order, where they reiterated the discretionary powers of the ECI, and stated that the court was not ‘inclined’ to enter the said arena. Again, the Court was deferential to the discretion and functions the ECI possesses and discharges – the autonomy of a constitutional body like the ECI under Article 324 of the Constitution was thereby kept sacrosanct.

In 2018, after the Madhya Pradesh elections, Congress affiliate Kamal Nath filed a writ petition challenging the voter rolls prepared by the ECI which was only provided in “text mode” and did not support the “search feature” in the PDF document. Dismissing the petition, the Supreme Court, in *Kamal Nath v. Election Commission of India and Ors., (2019) 2 SCC 260*, held that there was no mandate in the ECI manual to publish the rolls in searchable form, while upholding the ECI’s contention of publishing such rolls in searchable format would violate the privacy of voters, and thereby result in voter profiling and data mining. However, one of the other reliefs sought as a result of the challenge to the electoral rolls in the election petition was that free and fair elections should be conducted through the VVPAT verification of at least 10% randomly selected polling booths in a constituency. While the Court placed reliance upon *Prakash Joshi v. ECI*, the appreciation and deference expressed towards the ECI is particularly interesting – it noted how the ECI had gained the reputation of an “impartial body” and had been discharging its functions “satisfactorily”, especially when the “trust” in the institution bestowed upon by the People of India is significant as they have the capacity to translate the electoral “will of the people” to “reality”.

Ultimately, prior to the 2019 Lok Sabha elections, in *N Chandrababu Naidu and Ors. v. Union of India and Ors., (2019) 15 SCC 377*, several political leaders approached the Supreme Court to issue a writ of mandamus to direct the ECI to conduct randomized VVPAT slip verification for a minimum of 50% slips in every constituency. Here, the ECI relied upon a study conducted by the Indian Statistical Institute (ISI) – while the details or methodology was not revealed by the court in the judgment, the ECI submitted that the current sample supported the credibility of the current verification scale under Guideline 16.6.1. Further, the ECI argued that raising the sample size to 50% would result in infrastructure and manpower difficulty, along with a delay in the release of results. The court commented that, although it may be certain that the system would result in an accurate result, it recommended to increase the number of EVMs from one to five booths per segment.

While no statistical data was expressly revealed as to why the court chose to particularly increase the number of EVMs for verification to 5, the obiter presented by the Bench again tilts towards a high degree of deference to the constitutional and economic stature of the ECI. The court in fact states that, as the ECI being a “constitutional body of integrity” which is satisfied of the electoral mechanism, the court itself is also “certain that the system ensures accurate electoral results”.

Review petitions were filed against this order, as raising the physical verification of VVPAT slips to 5 seats per segment only raises the percentage to 2% verification, while the relief sought pertained to 50% verification. However, the court's decision was not modified as it rejected the review petitions via a subsequent order, and Guideline 16.6.1 was accordingly changed.

### **Mismatches and procedural incompliances that raise issues for the future**

Therefore, the current standing revolves around the verification of 5 booths per constituency or segment. However, the court's laying down of a procedural rule is not the absolute solution of problems. In the 2019 Lok Sabha elections, there was a mismatch of 50 votes from 8 EVMs, signifying that 0.0004 per cent of the votes did not match. While the ECI denied the impact of such mismatch in the decision of the general elections, the VVPAT thereby becomes an instrumental accessory in the Indian electoral democratic machinery – in such cases of mismatch, it is the vote in the VVPAT which gets counted. Having the VVPAT as a safeguard mechanism for a technical glitch in the EVM (regardless of how minor it is) is an instrumental feature in protecting a citizen's right to vote.

In a Right to Information application inquiring about the investigation pertaining to the mismatch, the District Election Officer responded stating that the VVPATs of that election had been 'disposed' of in September 2019. A perusal of Rule 93(1)(cc), Conduct of Election Rules states that the packets of printed paper slips shall not be opened, and its content was not to be inspected without the order of a competent court. Further, Rule 94(b) provides for the destruction of such packets only after its retention for a period of one year – a further specification for printed paper slips provide for it to be destroyed only after the previous approval of the ECI.

A bare interpretation of the Rules entail that for VVPAT destruction, both the time element as well as the ECI's approval are necessary requisites. The significance of VVPATs as a verification tool was thereby discarded when it was 'disposed' off or destroyed in September, merely around four months after the declaration of results. Such ostensible non-compliance raises questions on the efficient functioning of the election machinery, which fails to preserve its VVPAT slips which possess verification capacity of the electoral process.

### **Conclusion**

Thus, the flaws in the voting mechanism may be minor, but still points towards a gap in terms of both logistical efficiency as well as legal compliance. While inculcating VVPATs are efficient, the Supreme Court's absence as a supervisory unit may stand out sorely in such future cases, considering that it has deliberated more on matters of logistical and practical efficiency, rather than the matters of legality and compliance i.e., it resorted to deference over supervision.

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