

An ineffectual angel

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"The judiciary's rhetoric has little purpose if it evades cases that call for it to enforce the grand principles of democracy."

The transition from a colonial regime to a democratic republic was one of the most singular achievements in Indian history. In her magisterial *How India Became Democratic*, Ornit Shani details the Herculean efforts that went into pulling off independent India's first general election. By stipulating in the Constitution that elections must be conducted on the basis of universal adult suffrage, our framers transformed an entire population from subjects to citizens in one sweeping stroke. It was an achievement that many doubted would be possible, but one whose success should make us all proud.

Free and fair elections

At the heart of this achievement is the citizen's right to vote. It is through the vote that the democratic legitimacy is periodically renewed and the foundations of the republic remain stable. But it is not simply the act of voting that is enough: rather, voting must take place as part of a free and fair election. And for that, there must exist a number of institutional factors and conditions, all of which, taken together, culminate in that final act of the voter casting her ballot. The Indian Supreme Court has recognised this basic principle. In many judgments over the years, the court has set out the enabling conditions that guarantee that voting remains a meaningful activity. These include, for example, the citizen's right not to be arbitrarily denied the vote (the court has, therefore, held that voting is a fundamental freedom guaranteed under Article 19(1)(a) of the Constitution); the right to know (thus, requiring compulsory declaration of certain information by candidates); and the right to a secret ballot (that has prompted the court to order the inclusion of a NOTA, or None of the Above option). As the Supreme Court has reminded us many times, public faith in the electoral process is crucial to the continued survival of republican democracy, and it is these institutional safeguards that come together to ensure it.

Judicial inaction

Like with any other competitive process, the ground rules that constitute the framework of the competition must be enforced by an impartial umpire. It is here that the role of an independent judiciary is crucial. While in popular imagination, the primary role of the courts is to protect the fundamental rights of individuals against the state, another — equally critical — task of courts is to ensure that the ground rules of electoral competition, which are necessary to ensure free and fair elections, are maintained. For obvious reasons, this is not a task that can be left to political actors, and can, in essence, only be performed by the judiciary. This, therefore, is an arena where courts have to be even more vigilant than usual, because what is at stake is the foundational legitimacy of democracy itself.

In this context, the recent conduct of Indian courts reveals an unfortunate gap between judicial rhetoric and actual enforcement. First, the right to know: this much-vaunted principle, which has repeatedly been accorded pride of place by the Supreme Court, was flagrantly violated when the government introduced the electoral bond scheme early

last year. The electoral bond scheme allows limitless, secret donations to political parties, including (and especially) by corporations. It strikes a dagger through the heart of the right to know, because it denies to voters the knowledge of who funds the people who ask for their vote. The electoral bonds scheme was challenged immediately after it came into force; the Supreme Court, however, held off on hearing the case until a few weeks ago, and then it postponed the case to after the elections, citing a paucity of time. In the meantime, significant sums of anonymous donations have come in through electoral bonds, and an overwhelming percentage of them have gone to the ruling party.

Second, the secret ballot. During this election season, Maneka Gandhi's threat to Muslim voters to vote for her or else she would refuse to help them after she was elected, raised eyebrows across the country. However, as scholar Mukulika Banerjee had pointed out as early as 2017, and as journalist Ishita Trivedi demonstrated more recently, political parties are now able to determine voting outcomes at the level of individual booths. This destroys the very concept of the secret ballot, and makes threats like the ones Ms. Gandhi delivered extremely credible and capable of distorting the electoral process. However, when in 2018 a case was filed before the Supreme Court asking for the use of totaliser machines in elections — that would restore the secrecy of the ballot — the court dismissed it without even according it a hearing.

Voter complaints

Third, the freedom to vote itself. This election season has seen multiple complaints from voters who have found their names deleted from electoral rolls, without intimation or a chance to be heard. However, this is not new. The issue of voter deletions surfaced late last year, especially in the context of Assembly elections in Telangana, where the Election Commission of India (EC) itself admitted to the existence of the problem. It was alleged at the time — and has subsequently been established through detailed investigative reporting carried out by The Huffington Post — that the EC was using an un-audited de-duplication software, alongside (unauthorised) Aadhaar linking, to “cleanse” the electoral rolls, but the result, instead, was to remove a very large number of genuine voters. Accordingly, late last year, Srinivas Kodali, a Hyderabad-based technologist, filed a case before the High Court, asking that the EC be required to reveal the source code of the algorithm it was using, and open it up for auditing. Months have passed, the general election has come, but the High Court has failed to decide the petition.

And lastly, public faith in the electoral process: in mid-March, Opposition parties filed a petition before the Supreme Court that would have settled, once and for all, any qualms about the use of electronic voting machines (EVMs). The request was to verify 50% of the EVMs using the voter-verifiable paper audit trail (VVPAT) machines. The EC's only objection to this was that it would increase the time of counting by six days. One would imagine that a six-day increasing of the counting period, in the context of a seven-phase month-and-a-half-long general election, is a ridiculously small price to pay for maintaining public faith in the electoral process. However, the Court only increased the verification from one EVM per constituency to five, without any detailed reasons.

Just words?

On multiple occasions, over the course of many years, the Supreme Court has waxed eloquent about the glories of Indian democracy, the importance of free and fair elections, and the supreme sanctity of the vote. And indeed, our democracy is a genuine achievement, worthy of pride. Democracy, however, does not sustain itself. The court's rhetoric has little purpose if, when it comes to the crunch, it evades deciding cases that call for it to descend from the commanding heights of eloquence, and into the weeds of actually enforcing the grand principles of democracy. The voter's right to know, the secret ballot, and the freedom to vote itself — all these have been undermined to various degrees in the last few years, throwing into serious doubt the freedom and fairness of elections. But on each occasion, when the courts have been called upon to address these problems, they have dodged and ducked the issues, instead of solving them. The rhetoric is beautiful, but without enforcement, the judiciary remains, in the words of Mathew Arnold, “an ineffectual angel beating in the void [its] luminous wings in vain.”

Electoral bond

Why in the discussion?

- Recently, an NGO in his petition challenging the validity of the scheme had said that this scheme should be banned or the names of the donors should be made public under it.
- While deciding on this petition, the Supreme Court has asked the political parties to give the details of donors through electoral bonds, the amount received from them, payment received on each bond, etc. to the Election Commission by May 30.
- Apart from this, the Right to Information (RTI) application has revealed that out of the total electoral bonds purchased between March 2018 and January 24, 2019, 99.8 percent of the electronic bonds were of 10 lakhs and one crore rupees.
- State Bank of India (SBI) sells of bonds of one thousand, ten thousand, one lakh, one million and one crore rupees.
- According to information received from RTI, 1,258 electoral bonds of worth one crore rupees and 1,459 of worth 10 lakh rupees were bought.

What is it?

- If we talk about Bond, then it is a debt security. The mention of election bond was first made in the General Budget of 2017.
- In fact, it was said that the RBI will issue a type of bond and the person wants to donate to political parties, he will first buy the bond from the bank, and then whichever political party he wants to donate can give it.
- The political parties will sell these bonds to the authorized bank and during the validity period, the amount will be deposited in proportion to Bond's purchase in bank accounts of political parties.
- The election bond will be like a promissory note on which no interest will be given. It is notable that the election bond can be purchased only through check or e-payment.

Its process

- The government has made several rules for election bonds, some of which are: -
- The first rule is that any political party registered under Section 29-A of the Representation of the People Act, 1951, who has secured at least one percent vote in the previous Lok Sabha or Assembly election, can take donation through

electoral bonds.

- Through this provision, there is a intention to stop those groups which are given to parties who take donations in the name of contesting but do not take part in the elections.
- The second rule is that electoral bonds are issued for only 10 days in one quarter of any financial year. But 30 days of extra time will be given in the year of Lok Sabha elections.
- The third rule is that validity of electoral bonds issued from certain branches of State Bank of India stays for 15 days of issuance.
- The donor has to cash in on the bonds of his favorite political party during these 15 days. Only intend to give 15 days time is that these bonds can not be misused as parallel currency.
- The fourth rule is that these bonds are valued at least one thousand rupees and maximum one crore rupees. The buyer of the electonal bond will have to fulfill all the KYC rules so that these bonds can not be purchased from the illegal account.

Drawbacks

- There is no fixed limit for the expenditure of the parties and the Election Commission can not monitor it. It is difficult to ensure that the amount is coming is black money or white, because the donor is confidential.
- There can also be foreign money and any financially poor company can also donate money. In these circumstances, first of all, it appears that this plan has not really been successful in achieving its initial objective.
- This scheme facilitates the complete anonimity of the donor and neither is the buyer of Bond nor the disclosure of the identity of the political party receiving the donation is disclosed.
- Shareholders of a company will be unaware of the donations given by their company. With this, it can also be said that the voters will not even know how and through whom, funding has been given to any political party.
- In addition, the condition of being in existence for at least three years before donating to any donor company has been removed. This condition prevents black money from being consumed in politics through Shell companies.

Expected Questions (Prelims Exams)

1. Consider the following statements-
1. Election commission of India is an independent and quasi-judicial Institute.
 2. At present, Election Commission consists of one Chief Election Commissioner and 3 other Election Commissioner.
 3. The number of National Parties in India is 8.
 4. Recently the Election Commission has ordered to put VVPAT machines on all the seats.

Which of the above statements is/are correct?

- (a) 1, 3 and 4
- (b) 2 and 4
- (c) 1 and 4
- (d) All of the above

Expected Questions (Mains Exams)

- Q. Evaluate the power and workings of Election Commission in conducting independent and fair election. (250 Words)

Note: Answer of Prelims Expected Question given on 27 Apr. is 1(a),