

Elections and the Indian Constitution

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Abstract

Among developing nations, India has distinguished itself on account of its enduring democratic record. While the substantive content of democracy between elections is often lacking, India's legal and procedural commitments to free and fair elections have been considered sacrosanct. However, India's electoral resilience is not above scrutiny. Despite India's electoral vibrancy, its laws, regulations, and practices governing elections operate in a deeply contested space. This chapter illuminates the sources of India's electoral resilience while also describing the challenges facing the prevailing electoral order. To do so, it focuses attention on five critical issues: the functioning of the Election Commission of India, voter participation, candidate requirements, political parties, and the regulation of political finance.

Introduction

Recent assessments of Indian democracy draw sobering conclusions about the health of India's democratic polity.² They have highlighted the atrophying of norms related to the rule of law, checks on executive power, religious tolerance, and the freedom to dissent. While undemocratic practices between elections are cause for concern, there is a widespread perception that India's electoral procedures remain robust.

India boasts an impressive record of nearly uninterrupted democratic rule since achieving independence from the British Raj in 1947, with the twenty-one-month period of Emergency Rule in the mid-1970s the glaring aberration. Electoral competition is fierce; more than 600 parties and 8,000 candidates contested the most recent general elections in 2019. Such fervor is matched by unprecedented voter participation. Voter turnout in the 2019 election reached its highest level on record and, for the first time in the nation's history, gender-based discrepancies in turnout disappeared completely. While a dominant party with a clear parliamentary majority appears entrenched in power in New Delhi, this same ruling party regularly loses state and local elections.

This chapter seeks to illuminate the sources of India's electoral resilience while also describing the challenges facing the prevailing electoral order. Despite India's electoral vibrancy, its laws,

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² Milan Vaishnav, "The Challenge of India's Democratic Backsliding," *Democracy: A Journal of Ideas* 62 (2022): 40-46; and Ashutosh Varshney, "How India's Ruling Party Erodes Democracy," *Journal of Democracy* 33, no. 4 (2022): 104-18.

regulations, and practices governing elections operate in a deeply contested space. This chapter examines the way in which the interaction of law and policy has evolved over seventy-five years with respect to five aspects of electoral practice.

First, it examines the origins, organization, and functioning of the Election Commission of India (ECI). The ECI is widely recognized as one of the world's most powerful apex elections agencies, but its unique structure has raised questions about its impartiality as well as its independence from the executive.

Second, it looks at voters and the rights they enjoy under the Constitution. While India is unique among longstanding democracies for its decision to guarantee universal suffrage from the outset of independence, the inherently messy process of creating, modifying, and updating electoral rolls have often limited that right in practice.

Third, it studies politicians during their time as candidates contesting elections. Candidates are subject to significant regulation, even prior to taking office as representatives. New rules make the biographical details of candidates more widely available but have not led to a decline in representatives boasting serious criminal records, sparking a flurry of public interest litigation seeking judicial intervention to “cleanse” politics.

Fourth, it explores a key actor that did not find mention in the Indian Constitution until the mid-1980s: political parties. The advent of the anti-defection law, intended to curb fragmentation in politics, has held many unforeseen—and largely unfavorable—consequences for the relationship between parties and lawmakers, not to mention between the legislature and executive.

Finally, it unpacks the legal and constitutional terrain around political finance. This domain has grown in importance as the cost of elections has grown, but it has not produced legal or regulatory remedies that match the scope of the challenge.

Election Commission of India

In recent years, legal scholars have devoted increasing attention to “fourth branch” institutions, or institutions—beyond the executive, legislative, and judicial branches—whose objective is to protecting constitutional democracy. These typically include anti-corruption ombudsmen, auditor generals, and elections management agencies.³ Some of these institutions have been called “guarantor” institutions, reflecting the idea that their core objective is to provide specific, credible guarantees of “non-self-enforcing” constitutional norms that pivotal actors might otherwise have an incentive to disrupt or control.⁴

Electoral management bodies are widely viewed as the quintessential fourth branch institution tasked with guaranteeing free and fair democratic elections. India's elections body, the ECI, has

³ For an excellent overview, see Mark Tushnet, *The New Fourth Branch: Institutions for Protecting Constitutional Democracy* (Cambridge, UK: Cambridge University Press, 2021).

⁴ On “guarantor institutions,” see Tarunabh Khaitan, “Guarantor Institutions,” *Asian Journal of Comparative Law* 6 (2021): S40-S59.

often served as a case study in this regard given its constitutional independence and well-regarded track record holding complex elections in a diverse, fractious polity.⁵

Constitutional origins

India had some experience with limited-franchise elections to bodies with circumscribed powers under British rule. However, its experience with electoral democracy really began after independence in 1947 with simultaneous general and state elections held in 1952.

Article 324 of the Constitution established the Election Commission of India (ECI), granting it broad powers of “superintendence, direction and control” of elections.⁶ This bedrock provision is supplemented by additional articles guaranteeing non-discriminatory adult suffrage (Art. 325) and non-interference by the courts during the time of elections (Art. 329). Elections themselves are governed by two pieces of implementing legislation: the Representation of the People Acts (RPAs) of 1950 and 1951. The ECI has authority over elections to the Lok Sabha, Rajya Sabha, the state assemblies, and the elections of the President and Vice-President.⁷

The ECI was originally run by a single Chief Election Commissioner (CEC) supported by a small permanent staff. In 1993, however, the Congress government of P. V. Narasimha Rao appointed two additional Election Commissioners (ECs), making it a three-member body. This change was legally challenged but upheld by the Supreme Court in 1995. The posts of CEC and ECs have customarily been held by retired Indian Administrative Service (IAS) officers, though in 2019 a civil servant belonging to the Indian Revenue Service was appointed as an EC.

General elections are conducted by hundreds of thousands of government employees (administrators, teachers, and the like) assigned to election duty at the state level. While most officials on election duty are not permanent employees of the ECI, the ECI possesses total command of state functionaries tasked with election duty.

Section 13A of RPA, 1950 establishes the creation of a chief electoral officer (CEO) for each state. The CEO works under the auspices of the ECI to supervise that state’s elections, including the “preparation, revision and correction of all electoral rolls.”⁸ Beneath the CEO is a set of district election officers (DEO) who manage the rolls in their district and are typically dual hatted as returning officers (RO), who supervise the conduct of all electoral affairs in their

⁵ See the chapter by Manpreet Dhillon and Arun K. Thiruvengadam in this volume for additional detail.

⁶ For a comprehensive assessment of the organization and functioning of the ECI, see E. Sridharan and Milan Vaishnav, “Election Commission of India,” in Devesh Kapur, Pratap Bhanu Mehta, and Milan Vaishnav, eds., *Rethinking Public Institutions in India* (New Delhi: Oxford University Press, 2017): 417-463.

⁷ The 73rd and 74th amendments to the Constitution, passed in 1992 and 1993, institutionalized elections to panchayats (rural local government) and municipalities (urban local government), but these elections are conducted by State Election Commissions which are separate from the ECI.

⁸ Representation of the People Act, 1950, s. 13a.

districts. In practical terms, the work of creating and maintaining the rolls is given to the electoral registration officer (ERO) under Section 13B.⁹ The EROs are government employees serving under the ECI; their efforts can also be supplemented by additional officers.¹⁰

Although not specifically listed in the RPA, 1950 the ECI later inaugurated the position of the booth level officer (BLO), a frontline employee of the ECI tasked with verifying and updating the electoral rolls for a specific polling booth in their region.¹¹ BLOs are recruited from the community on the logic that they are better able to learn of new residents, births, deaths, and other demographic changes that could impact the rolls. While the number of voters per polling booth varies based on population density and geography, most booths contain between 1,000 and 1,500 voters.

To create—and occasionally redraw—electoral districts on a non-partisan basis, Article 81 of the Constitution authorized the creation of a Delimitation Commission, a body tasked with periodically redrawing constituencies, upon the completion of each decennial census. Delimitation of constituencies was supposed to be done after each decennial census to roughly equalize the size of the electorate in individual constituencies, thereby avoiding issues of malapportionment. This was done by a Delimitation Commission after the 1951, 1961 and 1971 censuses, increasing the number of Lok Sabha seats from 494 to 522 to 543 respectively, where it now remains. Due to the introduction of a population control policy in the 1970s and the desire not to disincentivize states who implemented population control more effectively, in 1976 Parliament froze the inter-state allocation of Lok Sabha seats on the basis of the 1971 census. This ensured that states that reduced their fertility rates would not lose out in terms of their relative representation in parliament.¹²

The Delimitation Act, 2002, authorized a new Delimitation Commission but froze inter-state allocation of seats until 2026, after which there would be a fresh reallocation of seats based on first Census held after that year. In 2008, the Delimitation Commission submitted its report on fresh delimitation of constituencies in advance of the 2009 General Elections, redrawing constituency boundaries to roughly equalize constituencies based on the 2001 census. This measure addressed malapportionment within states, reallocate reserved constituencies but did not alter inter-state seat allocation.¹³

Evolution in organization and functioning

⁹ Representation of the People Act, 1950, s. 13b.

¹⁰ Representation of the People Act, 1950, s. 13c.

¹¹ E. Sridharan and Milan Vaishnav, “Election Commission of India.”

¹² Alistair McMillan, “Delimitation, Democracy, and End of Constitutional Freeze,” *Economic and Political Weekly* 35, no. 15 (2000): 1271-1276.

¹³ The freeze on the total number of parliamentary seats and their inter-state allocation has led to significant malapportionment across states. For more detail on the scale of the issue, see Milan Vaishnav and Jamie Hinton, “India’s Emerging Crisis of Representation,” Carnegie Endowment for International Peace, March 14, 2019, <https://carnegieendowment.org/2019/03/14/india-s-emerging-crisis-of-representation-pub-78588>.

The 1970s and 1980s saw a trend towards “dirty” elections due to the increasing use of money and “muscle” power to influence elections (including “booth capturing,” or the stuffing of ballot boxes).¹⁴ However, against the backdrop of Congress dominance, successive CECs did not exercise their full powers under Article 324. Like many other referee or guarantor institutions, the ECI exhibited excessive deference toward the executive during the era of single-party dominance at the center. The dawn of the coalition era in Indian politics (1989-2014), during which all union governments were either minority or coalition governments, stimulated the rise of regulatory activism and embrace of these powers, particularly under former CEC T. N. Seshan.¹⁵

Seshan developed a larger-than-life reputation for his aggressive attempts to “cleanse” elections.¹⁶ In several instances, he countermanded elections and ordered recounts in response to alleged irregularities. He also attempted to enforce the Model Code of Conduct (MCC)—an inter-party, non-binding agreement enumerating the norms of appropriate conduct for political parties during campaigns, elections, and governance—more strictly, threatening to deregister parties that did not adhere to their internal constitutions (despite the ECI’s lack of explicit authority to sanction parties in this manner). The MCC is an intriguing innovation in that it does not carry the force of law but rather functions on the basis of the ECI’s moral credibility.¹⁷

Following Seshan, the ECI began to enforce the MCC more strictly by relying on their moral authority to “name and shame.” In 2001, it was agreed that the MCC would apply to all political activity starting the date the ECI announced the schedule for forthcoming elections, typically less than three weeks before the date elections are formally notified. Despite the alacrity with which the ECI has supported the MCC, the agency remains hamstrung in its capacity to discipline parties for violating the code. The RPA, 1951 gives the ECI the power to register parties but it cannot discipline them unless it resorts to the so-called “nuclear option” of suspending or withdrawing its allotted symbol under the Election Symbols Order (Reservation and Allotment Order 1968, Clause 16A). The ECI has never taken this extreme step.

Seshan’s successor, M. S. Gill, built on the former’s activist legacy and exercised the ECI’s prerogatives on scheduling to eliminate the ECI’s perceived pro-ruling party bias.¹⁸ He also initiated the practice of transferring all district-level civil servants and police officers before elections to ensure bureaucratic neutrality in election management. In the early 2000s, Gill

¹⁴ Milan Vaishnav, *When Crime Pays: Money and Muscle in Indian Politics* (New Haven: Yale University Press, 2017).

¹⁵ For more on the regulatory expansionism of the ECI, see Alistair McMillan, “The Election Commission of India and the Regulation and Administration of Electoral Politics,” *Election Law Journal* 11, no. 2 (2012): 187-201.

¹⁶ David Gilmartin, “One Day’s Sultan: T.N. Seshan and Indian Democracy,” *Contributions to Indian Sociology* 43, no. 2 (2009): 247-84.

¹⁷ Ujjwal Kumar Singh, “Between Moral Force and Supplementary Legality: A Model Code of Conduct and the Election Commission of India,” *Election Law Journal* 11, no. 2 (2012): 149-169.

¹⁸ E. Sridharan and Milan Vaishnav, “Election Commission of India.”

thwarted the Atal Bihari Vajpayee-led National Democratic Alliance (NDA) government's desire to appoint two more ECs, a blatant attempt to exercise more control over the agency.

Historically, the ECI has been a strong proponent of transparency in elections. For instance, in the early 2000s, it backed a new disclosure regime that mandated candidates publish their criminal records, financial assets, and educational qualifications during the nominations process.¹⁹ This policy was a key demand of civil society groups, such as the Association for Democratic Reforms (ADR), but political parties of all stripes uniformly opposed it. The Supreme Court, in *People's Union of Civil Liberties v. Union of India* (2003), eventually upheld the new disclosure regime over the objections of Parliament.

The ECI also modernized the electoral process by adopting Electronic Voting Machines (EVMs) for all national and state assembly elections in 2003, building on its 1990s-era innovation of voter identity cards. The security of, and public confidence in, EVMs was bolstered by the introduction of Voter Verifiable Paper Audit Trails (VVPATs). VVPATs were implemented experimentally in eight constituencies in the 2014 general election, then in several state elections. Finally, they were adopted in all constituencies in the 2019 general election. The VVPAT machine, attached to the EVM, enables the EVMs to record each vote cast by generating a slip that instantly verifies the correct recording of the voter's selection.

While the ECI has been a votary of transparency in the conduct of elections, its reliance on extralegal modes of regulation, namely the MCC, has raised troubling questions about the opacity of its own functioning. The ECI oversees the implementation of the MCC with little external deliberation, transparency, or accountability related to its decisions. Yet its decisions have significant reach in ways that can reshape political competition in India. As the scholar Mohsin Alam Bhat notes, the trouble is not so much the agency's widening ambit so much as with the character of the agency's functions.²⁰

Emerging questions about impartiality and independence

While the ECI developed a reputation for fair-mindedness, in recent years its impartiality has been called into question. Democracy activists and good governance watchdogs have lodged complaints about the ECI's behavior ever since the Bharatiya Janata Party (BJP)'s stunning rise to power in 2014 and the reinstallation of single-party dominance. Indeed, the ECI's deference toward the ruling party can, at least in part, be explained by the new balance-of-power equilibrium in which a fragmented, multi-party system has given way to a dominant party system

¹⁹ Ronojoy Sen, "Identifying Criminals and Crorepatis in Indian Politics: An Analysis of Two Supreme Court Rulings," *Election Law Journal* 11, no. 2 (2012): 216-25.

²⁰ M. Mohsin Alam Bhat, "Governing Democracy Outside the Law: India's Election Commission and the Challenge of Accountability," *Asian Journal of Comparative Law* 16 (2021): S85-S104.

revolving around the BJP.²¹ Political scientist Sanjay Kumar argues that ECI partiality can be seen in two types of actions/inaction.²²

First, the ECI has shown bias towards the ruling party at the center by using its scheduling powers to adjust the election schedule to the incumbent's benefit. For example, breaking with past practice, the ECI did not simultaneously announce the dates of the 2017 Gujarat and Himachal Pradesh elections even though the two polls were slated to occur at the same time. Several former CECs were disconcerted by the appearance that the ECI delayed the Gujarat polls announcement to allow the BJP state government there more time to roll out major social welfare schemes. Similarly, the ECI allegedly delayed the announcement of 2019 general election schedule by one week, allowing the government to ratify thirty cabinet decisions before the MCC kicked in, which prohibits new government announcements.

The second type of alleged partiality pertains to the biased enforcement of the MCC during the 2019 elections. During this election cycle, the ECI made questionable decisions that generally favored the ruling party. For instance, the commission considered several complaints against leading BJP officials, including the Prime Minister, relating to improper or intolerant electoral speech. Despite the spirited dissent of one EC, the panel refused to act.²³ Even after the election, the ECI appeared partial to the ruling party, taking regulatory actions that appeared to disadvantage opposition parties.

The expansion of the ECI's ambit during the coalition era between 1989-2014 shows how fourth-branch institutions can gather strength during a period characterized by a weak executive and political fragmentation. The flipside of this argument, observed during the heyday of Indira Gandhi and potentially under Narendra Modi in the present era, is that a strong executive backed by a parliamentary majority can reclaim authority it once ceded to independent institutions, curbing the latter's autonomy.²⁴

Looking to the future, the key question facing the ECI is whether it has stabilized itself as an autonomous institution or has succumbed to undue executive influence. Four features of the ECI make it vulnerable to executive interference by the ruling party of the day.

First, the Constitution allows the government to add more ECs, leaving the agency vulnerable to "packing," a move previously attempted by the Vajpayee government. Second, the tenure of additional ECs is less secure than that of the CEC, who can only be removed by a procedure akin to that of a Supreme Court judge. This matter was left unaddressed in the Supreme Court's 1995

²¹ Milan Vaishnav, "Backsliding in India? The Weakening of Referee Institutions," Working Paper, Carnegie Endowment for International Peace, July 2022.

²² Sanjay Kumar, "Election Commission's Partisan and Controversial Functioning," in M.G. Devasahayam, ed. *Electoral Democracy? An Inquiry into the Fairness and Integrity of Elections in India* (New Delhi: Paranjy Guha Thakurta, 2022): 148-72.

²³ Milan Vaishnav, "Backsliding in India?"

²⁴ Amit Ahuja and Susan Ostermann, "From Quiescent Bureaucracy to Undocumented Wonder: Explaining the Indian Election Commission's Expanding Mandate," *Governance* 31, no. 4: 759-776.

judgement that gave legitimacy to the appointment of two additional ECs. Thus, the government could remove ECs with relative ease. Third, the rules for elevating one of the two ECs to CEC are unclear. Seniority, while the norm, is not mandated, leaving the ECs vulnerable to pressure to secure a promotion. Finally, conflict among the three ECs could create an entry point for executive manipulation.

The second and fourth vulnerabilities emerged in the January 2009 conflict between then-CEC N. Gopalaswamy and EC Navin B. Chawla, who had been a close associate of the Nehru-Gandhi family. Two Constitutional issues were involved in this tussle: whether under Art. 324(5) the CEC has *suo motu* powers to recommend removal of an EC and whether the CEC could ask an EC for an explanation of his conduct. The issue was eventually resolved when the Law Ministry refused to remove Chawla, eventually allowing him to become CEC.

Thus, despite the strengthening of the ECI's powers and its impartial legacy during the era of coalition rule, the body is still vulnerable to the influence of a strong majority government. However, in March 2023, a five-judge Constitution bench of the Supreme Court ordered that Election Commissioners would be appointed by the President of India on the advice of a committee consisting of the Prime Minister, the leader of Opposition in the Lok Sabha (or leader of the largest opposition party), and the Chief Justice of India. This mimics the selection procedure for the Director of the Central Bureau of Investigation. The bench clarified that this practice will be enforced until a law in this regard is made by the Parliament. In a separate judgement, Justice Ajay Rastogi—a member of the same Bench—laid down that the grounds for the removal of Election Commissioners should be the same as that of the CEC.

Voters

Article 325 of the Constitution gives the ECI power to prepare voter rolls and stipulates they ensure non-discrimination on grounds of religion, race, caste, and sex.²⁵ This role is clarified by Article 326, which outlines the basic principles of voter eligibility and universal suffrage.²⁶ Any citizen of India aged 18 or older, who is not otherwise disqualified by Constitution or any other law made by Parliament on grounds of non-residence, unsoundness of mind, criminal or corrupt practice, is eligible to vote in Indian elections.

Further, the RPA, 1950 provides guidance on the preparation and revision of electoral rolls, the drawing of electoral boundaries, and the qualification and eligibility criteria of voters.²⁷ Under the law, there is one unified electoral roll used for elections at the state and national levels.²⁸ The electoral roll for every parliamentary constituency in the country is an aggregation of the electoral rolls for the individual assembly constituencies nested within the larger unit. The rolls are revised before every state, national, and by-election, or at any other interval deemed necessary by the ECI. The RPA, 1951 authorizes an appeals and adjudication process for individuals who believe they have wrongly been excluded from the electoral rolls. Unlike

²⁵ Constitution of India 1950, art 325.

²⁶ Constitution of India 1950, art 326.

²⁷ Representation of the People Act, 1950.

²⁸ Representation of the People Act, 1950, part IIb.

prevailing conditions in other democracies, the default in India is for the ECI to ensure all eligible citizens are included in electoral rolls. Citizens, for their part, are tasked with ensuring the thoroughness of the agency's work.²⁹

The practice of preparing electoral rolls, while logistically complex given India's demographic and geographic diversity, appears straightforward in operational terms. In reality, it has been anything but.³⁰

Citizenship controversies

The Constitution does not grant the ECI power to determine a person's citizenship status, but this task is exactly what it has been asked to do in practice.³¹ As Alistair McMillan notes, at the time of India's first general election in 1952, the ECI was faced with the daunting prospect of ensuring only citizens exercised the franchise—despite the fact that citizenship was not codified until the passage of the Citizenship Act in 1955.³² The commission pragmatically decided to enroll those who declared their intention to permanently reside in India.

However, this flexible approach would soon come under fire.³³ In late 1970s, the Assam Movement pressured the Government of India to identify and deport illegal residents of the state. Subsequently, petitions were filed before the Gauhati High Court asking the ECI to postpone elections on account of defective voter rolls. The plaintiffs challenged both the 1979 and 1983 elections, arguing they would be fundamentally flawed due to illegal immigration and asked the High Court to stay the election. The Court refused to intervene, but a second set of petitions followed the election, seeking to nullify the 1983 result on account of invalid electoral rolls.

The Supreme Court ultimately took up the matter and, in *Indrajit Barua v. Election Commission of India* (1984), found that once the election was held using the ECI's final roll, "it is not open to anyone to challenge the election from any constituency or constituencies on the ground that the electoral rolls were defective."³⁴ At the same time, the Court directed the ECI to include a review of citizenship in future electoral roll revisions.³⁵ The responsible electoral officer, in the eyes of the court, should "take steps" to confirm the citizenship status of any individual seeking to be included on the electoral rolls. In essence, the Court determined that the preparation of the electoral rolls included the power to identify citizens, even though the ECI had no clear

²⁹ E. Sridharan and Milan Vaishnav, "Election Commission of India," 435.

³⁰ For an excellent history of the preparation of India's first electoral roll, see Ornit Shani, *How India Became Democratic: Citizenship and the Making of the Universal Franchise* (New York: Cambridge University Press, 2017).

³¹ Roy (2013) provides a detailed examination of the controversies involving citizenship and electoral registration.

³² McMillan, "The Election Commission of India and the Regulation and Administration of Electoral Politics."

³³ Anupama Roy, "Identifying Citizens: Electoral Rolls, the Right to Vote, and the Election Commission of India," *Election Law Journal* 11, no. 2 (2012): 170-186.

³⁴ *Indrajit Barua v. Election Commission of India* (1984).

³⁵ Roy, "Identifying Citizens."

procedure or competence to do so. Relying primarily on self-disclosure, the onus was on the ECI to ensure that the rolls excluded non-citizens.

As Anupama Roy notes, the issue came to a head in the early 1990s when the ECI granted the ERO powers to identify and expunge foreign nationals from the voter rolls.³⁶ As a result of these orders, the ECI deleted the names of thousands of voters, disproportionately affecting Muslims (in some instances, entire communities of residents) and depriving eligible citizens of their voting rights. Although lower courts upheld the move, the Supreme Court took exception in *Lal Babu Hussein and Others v. Electoral Registration Officer* (1995), placing explicit limits on the ECI's efforts to purge electoral rolls of purported non-citizens. Roy argues the Court's decision in *Barua* was open-ended, ceding almost unlimited authority to the ECI to use its discretion in determining matters of citizenship. In *Hussein*, however, the Court outlined procedural norms the elections agency was to follow to determine citizenship. Thus, the Court affirmed the ECI's powers to determine citizenship, but also circumscribed those powers to protect against sweeping, arbitrary disenfranchisement.

Aadhaar-electoral roll linkage

The emergence of the Aadhaar universal biometric identification platform has ushered in new controversies linked to the ECI's maintenance of electoral rolls. In December 2021, Parliament passed the Election Laws (Amendment) Bill, 2021. The bill amends both RPAs, authorizing the ERO to require a person to furnish their Aadhaar number to establish their identity or authenticate an existing entry on an electoral roll. The text clarifies that Aadhaar remains voluntary; citizens who are unable or unwilling to provide an Aadhaar number to verify their status as an elector can provide alternative documentation. In the words of the act: "No application for inclusion of name in the electoral roll shall be denied and no entries in the electoral roll shall be deleted for inability of an individual to furnish or intimate Aadhaar number due to such sufficient cause as may be prescribed, provided that such individual may be allowed to furnish such other alternate documents as may be prescribed."³⁷

The bill's passage provoked a furious debate.³⁸ On the one hand, the bill's supporters contend that linking the Aadhaar database with electoral rolls will enable efficient identity confirmation, thereby reducing duplicate registration and fraud. Proponents also argue that the connection will facilitate the registration (or re-registration) of the country's estimated 300 million migrant workers, whose itinerant status has often meant that their names are not on the rolls in their migration destination.³⁹ While Aadhaar does not serve as proof of citizenship—it is available to

³⁶ Roy, "Identifying Citizens."

³⁷ The Election Laws (Amendment) Act, 2021, s. 4.

³⁸ For a summary of the pros and cons of Aadhaar-voter identification linkage see Vibhav Mariwala and Prakhar Misra, "Integrating Aadhaar and Voter ID Data: Promises and Dangers," Data Governance Network and IDFC Institute, December 14, 2020, <https://datagovernance.org/report/integrating-aadhaar-and-voter-id-data-promises-and-dangers>.

³⁹ Shailesh Pathak, "Voter ID-Aadhaar Linking a Good Idea," *Financial Express*, January 6, 2022, <https://www.financialexpress.com/opinion/voter-id-aadhaar-linking-a-good-idea/2399384/>.

any resident of India—Aadhaar numbers are often used as verification for other citizenship-confirming documents, like passports, thus decreasing citizens’ chances of disenfranchisement.

On the other hand, critics are deeply worried about the unforeseen consequences of the Aadhaar-voter list linkage. First, they posit that the linkage will do little to prevent fraud, as several studies demonstrate that the Aadhaar system is replete with errors and false profiles. One collection of civil society organizations argues that the “self-reported errors in Aadhaar data are reportedly one-and-one-half times higher than errors in the electoral database.”⁴⁰

Opponents have also voiced concerns about data protection and security in India, alleging that the linkage of demographic information to the ECI’s Electors Photo Identification Card (EPIC) database could open the floodgates to a torrent of politically targeted advertising, misinformation, or even disenfranchisement.

In addition, many opponents believe that the law contradicts the Court’s previous ruling in *Puttaswamy v Union of India II* (2018). While the case upheld the constitutionality of the Aadhaar Act, the use of Aadhaar for welfare delivery, and the linking of Aadhaar and Personal Account Number (PAN) cards, it struck down the mandatory linking of Aadhaar to bank accounts, as well as Aadhaar verification requirements imposed by private service providers on citizens.⁴¹ The linking of the EPIC database and the Aadhaar system operates in a grey area between these two stipulations; while allowed, the system may not be required, a stipulation which seems unclear in the law’s implementation.

Using technology to clean up electoral rolls is an arguably worthy enterprise, but it is not immune to errors. Indeed, critics of the Aadhaar-voter identification linkage believe that an earlier campaign to connect the systems resulted in mass mistaken voter deletions. In March 2015, the ECI initiated a sweeping program—known as the National Electoral Roll Purification and Authentication Programme (NERPAP)—to “purify” state electoral rolls of duplicate and bogus voters by linking Aadhaar numbers to residents’ EPIC voter identification cards. More than 300 million voters had been processed before the Supreme Court halted the process until a larger Constitutional bench discussed the matter.

However, the consequences of the abbreviated NERPAP were extensive. According to media reports, nearly 55 lakh voters in just two states—Andhra Pradesh and Telangana—were deleted from the voter rolls.⁴² Civil society organizations protesting the moves argue that the algorithm used by the ECI was faulty, and that the agency did not follow due process in amending the voter

⁴⁰ “‘Dangerous Move’: Over 500 Individuals, Orgs Decry EC Proposal to Link Aadhaar, Voter ID,” *The Wire*, September 26, 2021, <https://thewire.in/rights/dangerous-move-over-500-individuals-orgs-decry-ec-proposal-to-link-aadhaar-voter-id>.

⁴¹ *Puttaswamy v Union of India II* (2018).

⁴² Gaurav Vivek Bhatnagar, “Lakhs of Voters Deleted Without Proper Verification in Andhra, Telangana,” February 26, 2019, <https://thewire.in/rights/lakhs-of-voters-deleted-without-proper-verification-in-andhra-telangana>.

lists. The organizations criticized the ECI for its opacity and political favoritism.⁴³ Typically, when a voter is deleted from the rolls, the ERO is required to follow due process by notifying the voter that his or her name has been removed; this condition was violated repeatedly during the implementation of NERPAP.⁴⁴

The issue created significant controversy in the 2018 Telangana assembly election, where many voters complained they were abruptly dropped from the voter list. The complaints forced the state's chief electoral officer to apologize after the election, clarifying that verification would now be conducted at the polling booth level to ensure deletions were genuine. The admission confirmed that the ECI had not followed due process norms.⁴⁵

"Doubtful" voters

In 1997, the government introduced the category of "doubtful voter" (also known as "d-voter") in Assam during a routine revision of the electoral roll by the ECI. During this process, more than 300,000 individuals were marked as "doubtful citizens" and, thus, deemed ineligible to vote.⁴⁶

Although the classification of "doubtful voter" or "doubtful citizen" is neither specified in the Citizenship Act of 1955 nor the 2003 Citizenship Rules, it denotes individuals whose citizenship could not be confirmed by the government. If the ECI concurs with the findings of the verification report completed by local authorities, the individual's file is transferred to a Foreigners' Tribunal for adjudication. If the latter, in turn, is unable to verify an individual's citizenship—the burden of which rests on the individual, rather than the state—then they are classified as a d-voter and stripped of their right to vote in elections.⁴⁷

Foreigners' Tribunals have been criticized for a lack of transparency and the absence of uniform, rulebound procedures. Because neither "doubtful voter" nor "doubtful citizen" originates from India's citizenship statute or corresponding regulations, there is also concern that the designation could be wielded as a political weapon by local officials to target certain classes of individuals

⁴³ Mithun MK, "Democracy at Stake: Why Many Eligible Voters Might Not Vote in Telangana on Dec 7," *The News Minute*, December 4, 2018, <https://www.thenewsminute.com/article/democracy-stake-why-many-eligible-voters-might-not-vote-telangana-dec-7-92706>.

⁴⁴ Abhishek Dey, "How Your Voter ID Was Linked to Aadhaar Without Your Knowledge or Consent," *Scroll.in*, February 26, 2019, <https://scroll.in/article/914123/scroll-investigation-you-may-not-even-know-how-your-voter-id-was-linked-to-aadhaar>.

⁴⁵ Yunus Y. Lasania, "Deletions of Voter Names in Telangana: Electoral Officer Admits to Lapses," *Mint*, February 25, 2019, <https://www.livemint.com/news/india/deletion-of-voter-names-in-telangana-electoral-officer-admits-to-lapses-1551030042664.html>.

⁴⁶ Pavithra K.M., "Explainer: All You Need to Know About the 'D-Voter,'" *Factly*, April 10, 2020, <https://factly.in/explainer-all-you-need-about-the-d-voter/>; and M. Mohsin Alam Bhat, "Twilight Citizenship," *Seminar* 729, May 2020.

⁴⁷ Nazimuddin Siddique, "Discourse of Doubt: Understanding the Crisis of Citizenship in Assam," *Economic and Political Weekly* 65, no. 10 (2019): 25-30.

like religious minorities. Indeed, during the most recent National Register of Citizens (NRC) process in Assam, Foreigners' Tribunals were found to be badly deficient. Although the regulations underpinning the tribunals' work might appear neutral, its bureaucratic norms raise doubts about their impartial, unbiased functioning.⁴⁸

To date, the matter of “d-voters” has been restricted to the state of Assam, where there is an ongoing update of the NRC taking place at the behest of the Supreme Court. The NRC in Assam was established to quell widespread outrage over alleged illegal immigration from Bangladesh following the 1971 Indo-Pakistan war. However, the Union BJP government has indicated its desire to have an all-India NRC process to enumerate who is an Indian citizen and who is an illegal alien across all states. This process would create the National Population Register (NPR) with the objective of enumerating all residents of India, regardless of nationality, in accordance with the 1955 Citizenship Act and subsequent 2003 Citizenship Rules.

Using data from the NPR, the government could first create a preliminary list of doubtful citizens and then formally verify their identification through an NRC process like Assam's. Those deemed to be doubtful voters/citizens and whose documentation could not be verified would be ruled ineligible to vote and likely stripped of citizenship.⁴⁹

The union between the NPR and NRC cannot be separated from their joint relevance to the Citizenship Amendment Act (CAA), a 2019 law that creates an expedited pathway to citizenship for non-Muslim religious minorities from one of three neighboring countries: Afghanistan, Bangladesh, and Pakistan. Critics believe that non-Muslims who are deemed to be “d-citizens” (and, by extension, d-voters) through any NPR/NRC process would be given a route to citizenship via the CAA—a lifeline unavailable to Muslims lacking proof of citizenship.⁵⁰

For its part, the government has dissembled on connections between the NRC and NPR and any potential linkage between the NRC and the CAA. Senior government officials have issued multiple, contradictory statements on this matter. In a December 2019 interview, Home Minister Amit Shah stated, “NPR is register of population, NRC is register of citizens. There is no link between the two and the two have different processes.”⁵¹ However, in April of that same year, Shah remarked on a campaign stop in West Bengal, “Understand the chronology, first we will

⁴⁸ One former member of a Foreigners' Tribunal remarked to Human Rights Watch: “I admit that there might be arbitrary actions by Foreigners' Tribunals because there is an integral government policy that more and more people should be deemed foreigners. We are hired on the basis of contracts – those with records of declaring more and more people as foreigners are preferred.” See Human Rights Watch, *“Shoot the Traitors”: Discrimination Against Muslims under India's New Citizenship Policy* (New York: Human Rights Watch, 2020).

⁴⁹ Pamela Philipose, “A National Register of Citizens for India,” *The India Forum*, October 29, 2019, <https://www.theindiaforum.in/article/national-register-citizens-india>.

⁵⁰ Niraja Gopal Jayal, “Reinventing the Republic: Faith and Citizenship in India,” *Studies in Indian Politics* 10, no. 1 (2022): 14-30.

⁵¹ “‘Clearly Stating No Link Between NPR And NRC,’ Says Amit Shah,” *NDTV*, December 24, 2019, <https://www.ndtv.com/india-news/clearly-stating-no-link-between-npr-and-nrc-says-amit-shah-2153910>.

bring Citizenship Amendment Bill (CAB) and after that we will bring National Register of Citizens (NRC) and the NRC will not only be for [West] Bengal but for the entire country.”

BJP officials have also repeatedly indicated that data from the NPR would provide vital information for the NRC. In April 2015, the government notified Parliament that it had decided “that National Population Register (NPR) should be completed and taken to its logical conclusion, which is the creation of National Register of Indian Citizen (NRIC).”⁵²

At the time of writing, the NRIC remains a hypothetical, but the Assam NRC is underway and holds important ramifications for the ECI. Those deemed “d-voters” in the process that began in 1997 remain ineligible to vote unless they were subsequently verified by a Foreigners’ Tribunal; formally, the ECI has disqualified them from participating in elections. However, the ECI has clarified that those residents who are on the electoral rolls but whose names did not figure into the final NRC are eligible to vote so long as they are listed on the rolls.⁵³ In other words, exclusion from the NRC list does not automatically imply removal from the electoral roll and disqualification from voting.⁵⁴

Missing or deleted voters

A related issue concerns voters who have been deleted from electoral rolls due to administrative action. These errors are most common in urban environments where the twin forces of urbanization and migration make it difficult to keep electoral rolls properly updated. Typically, experts have posited, these errors are not the result of ineptitude or nefarious motivations but rather the complexities of a burgeoning, mobile urban population.⁵⁵

In 2015, the non-profit Janaagraha released a study detailing the magnitude of errors in Delhi’s voter list.⁵⁶ They found that approximately 41 percent of entries included an error, with 11 percent of all addresses on the list unable to be located. Additionally, 23 percent of the sample was liable for deletion, with the most common justification being that 21 percent of sampled citizens on the list had moved to another location.

⁵² “Fact Check: Has Government Always Denied NPR-NRC Link?” *Outlook*, December 25, 2019, <https://www.outlookindia.com/website/story/india-news-fact-check-has-government-always-denied-npr-nrc-link/344665>.

⁵³ Utpal Parashar, “Those Excluded From Assam NRC Can Vote if Their Names Are on Electoral Rolls: EC,” *Hindustan Times*, January 21, 2021, <https://www.hindustantimes.com/india-news/those-excluded-from-assam-nrc-can-vote-if-their-names-are-on-electoral-rolls-ec-101611144425805.html>.

⁵⁴ We appreciate the comments provided to us from Mohsin Alam Bhat on this point.

⁵⁵ Ramesh Ramanathan, Swati Ramanathan, T S Krishnamurthy, and N R Narayana Murthy, “The Urban Voter, Not on a Roll,” *Indian Express*, August 1, 2012, <http://archive.indianexpress.com/news/the-urban-voter-not-on-a-roll/982125/4>.

⁵⁶ Janaagraha Centre for Citizenship and Democracy, *Proper Urban Electoral Lists: Analysis of the Quality of the Voter List in Delhi* (Bengaluru: Janaagraha, 2015).

The organization also conducted citizen surveys, checking random citizens of Delhi against the voter list to detect errors of omission. Here, researchers found that 49 percent of individuals were omitted from their polling booth voter lists. However, 28 percent of these individuals claimed they were registered elsewhere in Delhi. Of this group, approximately 61 percent were verified in the same Assembly Constituency (AC) but registered in a different polling list. Additionally, 77 percent of individuals responded that they believed they were on the voter roll. Of this group who claimed to be registered at their current address, 34 percent were not found on the list.

The ECI has taken cognizance of the challenges posed by inaccurate voter lists. In 2015, it announced the creation of a nationwide program to link data from the Registrar of Birth and Deaths for each district with its electoral roll data to facilitate the real-time updating of electoral rolls.⁵⁷ In this regard, the ECI is well intentioned, but its efforts are challenged by the messy realities of urbanization and mobility on display in contemporary India.

Registration gender gap

A fourth challenge facing the ECI has to do with women voters. Thanks in part to a sustained effort by the commission to boost women's electoral participation, female voter turnout is now roughly on par with male voter turnout.⁵⁸ This transition marks a big shift in a country where female turnout traditionally lagged male turnout by eight to ten percentage points. However, women continue to be underrepresented in India's voter rolls. The recent increase in female voter participation is not driven by increases in female voter registration; on the contrary, the shift is a result of greater female turnout among those already registered to vote.⁵⁹

While the specter of India's "missing women voters" is well known, there is limited scholarly work on the causes of the registration gap. Some have suggested that "social resistance" within households could be a factor preventing the registration of women. One report notes that some parents may not choose to have their daughter registered to vote to avoid revealing her age or having her photographed.⁶⁰ Another possible explanation is linked to migration: since women

⁵⁷ "Names to be Deleted 'Automatically' from Election Commission List After Death," Press Trust of India, December 29, 2015, <https://economictimes.indiatimes.com/news/politics-and-nation/names-to-be-deleted-automatically-from-election-commission-list-after-death/articleshow/50371140.cms?from=mdr>.

⁵⁸ Milan Vaishnav and Jamie Hinton, "Will Women Decide India's 2019 Elections?" Carnegie Endowment for International Peace, November 12, 2018, <https://carnegieendowment.org/2018/11/12/will-women-decide-india-s-2019-elections-pub-77689>.

⁵⁹ Rithika Kumar, "India's Female Voters Not Turning Out To Vote As They Should," *IndiaSpend*, September 15, 2018, <https://www.indiaspend.com/indias-female-voters-not-turning-out-to-vote-as-they-should-95710/>.

⁶⁰ Soutik Biswas, "India Election 2019: The Mystery of 21 Million 'Missing' Women Voters," *BBC News*, March 14, 2019, <https://www.bbc.com/news/world-asia-india-47521208>.

traditionally move to their husbands' home after marriage, their registrations might not keep up with their relocation.⁶¹

A third hypothesis has to do with voter identification. Since most women change their surnames after marriage, they must obtain new, accurate personal identification without which they may not be able to secure a place on the electoral roll. Finally, the scholar Manuka Khanna argues there could be a psychological variable behind the gender registration gap.⁶² Politics has often been associated with displays of physical strength, unhealthy competition, and a struggle for power and authority. As a result, many women are socialized to view politics as a "male domain."

Therefore, while the ECI has done an admirable job spreading voter awareness and increasing voter turnout, it continues to face social and cultural obstacles in realizing the Constitution's vision of universal suffrage.

Candidates

Qualifications

Article 84 of the Constitution provides a succinct list of minimum qualification requirements for Indian legislators.⁶³ It states that a Member of Parliament (MP) must be an Indian citizen, make an oath or affirmation in allegiance to the Constitution of India, be 25 years of age (for Lok Sabha) or 30 years of age (for Rajya Sabha), and possess any other qualification Parliament may make by law. An identical set of membership requirements is enumerated in Article 173 for the state assemblies.⁶⁴ In recent years, several states have passed laws to enforce strict eligibility requirements on candidates contesting local body elections. These requirements run the gamut from education to sanitation and family planning. In *Rajbala v. State of Haryana* (2016), the Supreme Court affirmed the constitutionality of educational requirements imposed on candidates contesting panchayat elections in the state of Haryana.⁶⁵

⁶¹ Barbara Crossette, "Indians Ask Why 21 Million Women Are Not on Voter Rolls," *PassBlue*, March 20, 2019, <https://www.passblue.com/2019/03/20/indians-ask-why-21-million-women-are-not-on-voter-rolls/>.

⁶² Anuradha Nagaraj, "What's in a Name? India's Citizenship Drive Hits Women Hardest," *Reuters*, October 7, 2019, <https://www.reuters.com/article/us-global-rights-stateless-india/whats-in-a-name-indias-citizenship-drive-hits-women-hardest-idUSKBN1WL0LL>

⁶³ Constitution of India 1950, art 84. The definitive text on qualifications and disqualifications of legislative representatives is M.R. Madhavan, "Legislature: Composition, Qualifications, and Disqualifications," in Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta, eds., *The Oxford Handbook on the Indian Constitution* (New York: Oxford University Press, 2016): 270-89.

⁶⁴ Constitution of India 1950, art 173.

⁶⁵ Anurag Bhaskar, "Damage to Democracy: Elitist Judgment of Supreme Court in *Rajbala v State of Haryana*," *Economic and Political Weekly* 51, no. 40 (2016): 47-54.

Article 102 elaborates the reasons a candidate or member may be disqualified from contesting elections and serving in Parliament.⁶⁶ This article outlines six scenarios in which a candidate or member would be subject to disqualification: if the candidate holds any office of profit under the Government of India or any state government, if they are of unsound mind, if they are an undischarged solvent, if they are not a citizen (or acquired the citizenship of a foreign country), if they are disqualified by any law enacted by Parliament, or if—as a member—they are disqualified under the Tenth Schedule (as the anti-defection law is formally known).⁶⁷

Article 103(1) of the Constitution renders the President responsible for the final decision regarding the disqualification of MPs. Under Article 103(2), the President must also act in accordance with the opinion of the Election Commission of India (ECI) on these decisions.⁶⁸ Article 191 enumerates similar provisions for the state assemblies.⁶⁹ The lone exception is when disqualification results from a violation of the Tenth Schedule, in which case the speaker of the respective assembly is charged with rendering a final determination, subject to judicial review.

Regarding disqualifications codified in legislation, the RPA, 1951 stipulates that any candidate seeking election as an MP or MLA must be registered as an elector on the electoral rolls in a constituency located in the country or state, respectively.⁷⁰ The RPA, 1950 further clarifies that in order to be on the electoral roll, an individual must be a citizen, of sound mind, and qualified to vote.⁷¹ Regarding the latter clause, a person may be terminated from the electoral roll if they are disqualified from voting due to corrupt practices or other election-related offences.⁷²

The RPA, 1951 outlines several scenarios in which a candidate, if convicted of certain classes of crimes, would be disqualified from holding office for six years following the completion of their sentence.⁷³ The list of applicable crimes includes promoting enmity between groups (Section 153A of the Indian Penal Code), bribery (171E), undue influence during an election (171F), violence against women, terrorism, or any other offence for which a conviction entails a prison sentence of at least two years.

Candidate details

Prior to 2003, candidates were not required to publicly disclose their criminal, educational or financial records. However, as concerns about the nexus between crime and politics intensified,

⁶⁶ Constitution of India 1950, art 102.

⁶⁷ The Constitution (Fifty-Second) Amendment Act, also known as the anti-defection law, was passed in 1985.

⁶⁸ Constitution of India 1950, art 103.

⁶⁹ Constitution of India 1950, art 191.

⁷⁰ Representation of the People Act, 1951, s. 4-5. For more detail on the scenario of legislators disqualified due to holding an office of profit, see M.R. Madhavan, “Legislature: Composition, Qualifications, and Disqualifications.”

⁷¹ Representation of the People Act, 1950, s. 16.

⁷² Representation of the People Act, 1950, s. 16.

⁷³ Representation of the People Act, 1951, s. 8.

public interest litigation sought to increase candidate transparency.⁷⁴ This issue came to a head in *Union of India v. Association for Democratic Reforms* (2002) when the court recognized that citizens of India have a fundamental right to know the personal backgrounds of elected officials. The decision, drawing on core principles of the freedom of speech and expression codified in Article 19(1)(a) of the Constitution, stated that candidates must publicly disclose their criminal background, financial assets and liabilities, and educational qualifications when they file their nomination papers.⁷⁵ These disclosures include details about the candidate, their spouse, and dependents. When the ECI implemented this court order, however, Parliament—in a rare display of cross-partisan comity—amended Section 33B of the RPA, 1951 to specify that an electoral candidate is not bound to disclose any information apart from that expressly required under the Act.⁷⁶

Parliament's rebuke immediately prompted a clutch of civil society organizations to challenge the constitutional validity of its maneuver. In *People's Union of Civil Liberties v. Union of India* (2003), the Supreme Court upheld the citizens' right to access information on candidates' backgrounds, arguing that a candidate's biographical details were essential to voters' careful and informed consideration of their candidacy. The Court struck down Section 33B as unconstitutional and the affidavit disclosure requirement was reinstated with immediate effect.

In recent years, several public interest suits have sought to obtain Court intervention to further stem the criminalization of politics. Although Section 8(4) of the RPA, 1951 originally allowed sitting legislators to postpone their disqualification for three months or while an appeal was outstanding, the Supreme Court struck down this stipulation in 2013 in *Lily Thomas v. Union of India*. This decision ended the ability of lawmakers to avoid disqualification on account of judicial appeals that languished for years, if not decades.

Many pro-democracy organizations have argued that candidates charged with serious crimes should be barred from contesting elections in the first instance. Given the lengthy nature of criminal cases and the judiciary's endemic backlog, candidates with criminal cases could evade disqualification on the grounds that their cases were still ongoing. This issue was brought before the Court in *Public Interest Foundation v. Union of India* (2011), which referred the matter to the Law Commission of India.⁷⁷

In 2014, the Law Commission recommended that candidates against whom charges have been framed by a court of law should be disqualified from contesting elections. However, to protect candidates from disqualification due to politically motivated cases, the commission suggested

⁷⁴ Milan Vaishnav, *When Crime Pays*.

⁷⁵ *Union of India v. Association for Democratic Reforms* (2002)

⁷⁶ Constitution of India 1950, art 102.

⁷⁷ *Public Interest Foundation v. Union of India* (2011). In *Manoj Narula v. Union of India* (2014), the plaintiff argued that persons with criminal records—especially those charged with heinous criminal acts—should be deemed ineligible for ministerial appointments at the central and state levels, even if a conviction had not yet been obtained. The Court, while sympathetic to the scourge of criminality in public life, held that the judiciary could not mandate ministerial qualifications not already specified in Article 75 of the Constitution.

several safeguards: that disqualification proceed only when cases involve charges meriting a jail sentence of at least five years, that it only apply in cases when charges were framed at least one year before elections, and that the disqualification only operate until a trial court takes action (or for a period of six years, whichever comes first). In addition, the commission recommended that trials involving sitting MPs and MLAs be expedited so that they conclude within a one-year period.⁷⁸

Although Parliament failed to implement the commission's recommendations, litigants continued to press the apex court to support the recommended measures. In *Public Interest Foundation v. Union of India* (2018), the plaintiff requested the Court to disqualify candidates and sitting legislators facing serious criminal charges framed by a court under the provisions of the RPA, 1951.⁷⁹

Good governance advocates were dismayed when the court ruled that it neither possessed the unilateral power to disqualify legislative members upon the framing of charges nor could it insist on punishments for the filing of false affidavits not specifically enumerated by the law. In a separate case, *Lok Prahari v. Election Commission of India* (2018), the Court was asked to strike down the provision that allows convicted legislators to remain in office provided they obtain a stay on their conviction.⁸⁰ The court demurred.

Despite the earlier 2003 judgement affirming voters' right to information on candidate backgrounds, many civil society organizations argued that these details were still insufficiently publicized, perpetuating voter ignorance. In *Rambabu Singh Thakur v. Union of India* (2020), the Court went beyond its earlier ruling on affidavit disclosure to mandate that parties proactively publicize information about their candidates.⁸¹ Specifically, the court directed parties to upload information on candidates with pending criminal cases to their websites, along with the reasons for their selection for candidacy. Such reasons, the court held, had to elucidate the specific merits of criminally charged candidates. In addition to these measures, the court directed parties to publish criminal details in local media and on social media within forty-eight hours of candidate selection.

A year later, the court found several parties guilty of non-compliance of these mandates. The court urged the ECI to swiftly bring future infractions to its attention so it could take prompt corrective action. Unfortunately, this is another example of where neither law nor judicial intervention have been able to keep up with the machinations of politicians and parties.

Political parties

Unlike many other constitutions, the Indian Constitution as originally drafted contained no mention of political parties. That only changed in 1985 with the passage of the Tenth Schedule,

⁷⁸ Law Commission of India, *Electoral Disqualifications*, Report. No. 244 (New Delhi: Government of India, 2014).

⁷⁹ *Public Interest Foundation v. Union of India* (2018)

⁸⁰ *Lok Prahari v. Election Commission of India* (2018)

⁸¹ *Rambabu Singh Thakur v. Union of India* (2020)

also known as the anti-defection law (ADL). The law was intended to curb the proliferation of defections that beset Indian politics in the 1960s and 1970s by disqualifying MPs or MLAs for defying a party whip. The law empowers the Speaker of the respective legislature to decide whether a legislator has in fact defected, a determination that the Supreme Court later ruled is subject to judicial review. The 1985 amendment stated that defections are to be considered legitimate splits in a party if one-third or more members defected *en masse* (in 2003, the minimum fraction required for a party split was raised to two-thirds). If a party were to merge with another, a two-thirds majority of the merging party must be on board.

The ADL has many ramifications for legislators and parties. Most importantly, it renders legislators prisoners of their party leadership; all parties in India have a top-down authority structure without much internal democracy.⁸² If a whip is called, and it almost always is, legislators are unable to make independent decisions on votes without risking their seat. Thus, the ADL breaks the chain of democratic accountability in which legislators are accountable to their constituents and the political executive, in turn, to the legislature. Instead, the ADL allows the legislature to become subordinate to the executive in a majority government since the prime minister, who leads the ruling party, can exercise complete control of his legislators under the law. Although often overlooked, the ADL destroys legislative checks on the executive that are a basic part of parliamentary democracy.⁸³

Furthermore, the ADL has failed on an even more basic measure: it has failed to provide the very governmental stability it was ostensibly enacted to ensure. Over time, crafty politicians have found creative ways to destabilize governments. For instance, the Speaker is empowered to make the disqualification determination for current members, which has meant they are inevitably pressured to delay disqualification when the defection could bring down the numerical strength of their ruling party.

While the law was amended to ensure that defectors cannot become ministers (to deter *quid pro quos*) and the Supreme Court has ruled Speakers have to act in a timely fashion, it is unclear what consequences they face if they do not. Furthermore, the Supreme Court itself has issued contradictory guidance on this front; in the 2022 controversy over the defection of a large number of Shiv Sena MLAs, the Court allowed a trust vote to take place even before the Speaker had dispensed with pending disqualification petitions. Another way around the ADL is to resign before an anti-defection decision can be made, reducing the total membership of the House, and disadvantaging the party from which defectors fled. This scenario is exactly what happened in March 2020 in Madhya Pradesh. The Congress government lost its majority to the BJP when Jyotiraditya Scindia and his loyalists resigned, only to join the BJP after subsequent by-elections.

⁸² For instance, research has found that the efforts to mandate strict party discipline through legal measures such as the anti-defection law have adverse impacts on party deliberation. See Udit Bhatia's contribution to this volume as well as Udit Bhatia, "Cracking the Whip: The Deliberative Costs of Strict Party Discipline," *Critical Review of International Social and Political Philosophy* 23, no. 2 (2020): 254-279.

⁸³ Madhav Khosla and Milan Vaishnav, "The Three Faces of the Indian State," *Journal of Democracy* 32, no. 1 (January 2021): 111-125.

The anti-defection law is notable for at least one another reason: for all practical purposes, it made parties—not candidates—the principal unit of representation. In upholding the constitutionality of the Tenth Schedule, the Supreme Court in *Kihoto Hollohan v. Union of India* argued that a candidate's party affiliation is a foremost concern of the voter when casting their ballot. Hence, a legislator's ability to defect and switch parties undermines the sanctity of a voter's selection. But, as the section on political finance below clarifies, election law continues to treat candidates as the principal unit of representation.⁸⁴

Political finance

There are four major features of political finance in democracies around which most cross-national comparisons are made: (1) limits on expenditures (by candidates and/or parties); (2) limits on contributions to candidates or parties (by individual and/or corporate donors); (3) public subsidies to candidates and/or parties for election or inter-election activities; and (4) systems of reporting and disclosure of candidate and/or party receipts and expenditures.

In India, the RPA, 1951 imposed spending limits on candidates. However, the law did not place limits on contributions or institute any meaningful system of disclosure. From as early as the independence movement, political parties like the Congress had funded themselves from private sources. This practice continued throughout the import-substitution industrialization period of the 1950s and 1960s, often taking the form of black (tax-evading) money in exchange for regulatory favors to the dominant Congress Party. The nexus between political contributions and black money was noted in both the Santhanam Committee (1964) and Wanchoo Committee (1971) reports.⁸⁵

The key inflection point came with the 1969 ban on company donations to political parties, a political maneuver by Prime Minister Indira Gandhi to stem the rising flow of political contributions to upcoming right-of-center opposition parties like the big business-oriented Swatantra Party and the small business-based Hindu nationalist Bharatiya Jana Sangh (BJS), the predecessor of today's ruling BJP. The ban on company donations swiftly abolished any legal sources of large-scale political finance in what was then, and remains today, a poor country. It drove political finance under the table and the informal system of black money donations to the ruling party in exchange for regulatory favors became further entrenched. The regulatory policy environment of the late 1960s and early 1970s saw further restrictions of large business groups through developments like the Monopolies and Restrictive Trade Practices Act of 1969, Foreign Exchange Regulation Act of 1973, and the nationalization of banking, coal, petroleum, and general insurance in the early to mid-1970s. Thus, donations to the ruling party were often synonymous with extortion.⁸⁶

⁸⁴ For more on this disjuncture, see Aradhya Sethia, "Where's the Party? Towards a Constitutional Biography of Political Parties," *Indian Law Review* 3, no. 1 (2019): 1-32.

⁸⁵ E. Sridharan and Milan Vaishnav, "India," in Pippa Norris and Andrea Abel van Es, eds., *Checkbook Elections? Political Finance in Comparative Perspective* (New York: Oxford University Press, 2016): 64-83.

⁸⁶ Stanley A. Kochanek, "Briefcase Politics in India: The Congress Party and the Business Elite," *Asian Survey* 27, no. 12 (1987): 1278-1301.

The next major development occurred in 1974 with the Supreme Court's ruling in *Amar Nath Chawla vs. Kanwarlal Gupta*. The Court ruled that party spending on behalf of a given candidate should be counted for the purposes of calculating the candidate's spending limit. This decision greatly restricted the amount parties could spend in elections. In response, the Indira Gandhi government amended the RPA 1951 to exempt party spending from candidate spending limits, effectively ending all pretense of campaign spending limits since party spending had no cap. In 1979, parties were exempted from income and wealth taxes provided they filed income tax returns, which are not subject to public disclosure.

In 1985, the Rajiv Gandhi-led Congress government re-legalized company donations to political parties, permitting contributions up to 5 percent of average net profits over the past three years and subject to declaration in the company's accounts. However, this move was too little, too late. There was no tax incentive for corporates to donate legally and, beyond that, the system of trading contributions for regulatory favors had become deeply engrained. Companies, as well as parties, had a stake in anonymity and opaqueness, partly fearing offending the ruling party or opposition parties which might return to power in the future.

The early coalition period saw coalition and/or minority governments at the center, regional parties in power in many states, and economic liberalization gaining steam. These developments opened political space for reform of an opaque and corrupt equilibrium in which neither the hegemonic party nor private donors had incentive to change. In 1990, the minority coalition National Front government of Prime Minister V. P. Singh established the Dinesh Goswami Committee to investigate election finance reform. The report was a damp squib, offering weak policy prescriptions.

In response to a PIL petition by Common Cause, the Supreme Court ordered all political parties to file their annual income tax returns or risk losing the exemption of party spending from candidate spending limits. On paper, parties had already been required to file annual income tax returns to maintain tax exempt status, but almost none had regularly done so. The Supreme Court ruling forced parties to disclose their tax returns annually. These returns remained confidential, were prepared by hand-selected accountants, and were not to be disclosed by the Income Tax Department. In 1996, the campaign period was shortened to fourteen days, relieving parties of some financial pressure. In 1998, free airtime for parties (proportional to their vote share) on state-owned television and radio was introduced, the beginning of some form of state subsidy.⁸⁷

Important reforms in political finance arrived in 2003, introducing a modicum of transparency for the first time. As discussed, above, the Supreme Court upheld mandatory candidate disclosures of their financial and other details. In September 2003, the NDA government passed the Election and Other Related Laws (Amendment) Act, introducing 100 percent tax

⁸⁷ Also in 1998, the Indrajit Gupta Committee on State Funding of Elections submitted its report recommending a weak form of state funding to be jointly financed by the Centre and the states. The report stopped short of advocating for the removal of Explanation 1 to Section 77(1), which left party spending uncapped. In 1999, the NGO Lok Satta recommended the tax deductibility of political donations.

deductibility of political contributions by companies and individuals under Sections 80GGB and 80GGC of the Income Tax Act, incentivizing open political contributions. It also amended Section 29C of the RPA 1951 to require parties to detail all donations above Rs. 20,000 to the ECI.

Further, in 2005, the Congress-led United Progressive Alliance (UPA) government of Prime Minister Manmohan Singh enacted the Right to Information (RTI) Act, allowing ADR to press the Central Information Commission (CIC) to publish the income tax returns filed by political parties. This effort was finally successful in 2008 and, as a result, the income statements of parties from 2004-05 onwards is now publicly available. However, one important caveat remains: these returns are audited by party-appointed, not independent, auditors, so it is quite likely that they undercount party income.

Party financing regulations were again updated in 2013 when the Electoral Trust scheme was introduced. This legislation allowed electoral trusts to be set up to pool funds from donors to political parties. Section 182 of the Companies Act 2013 was also amended to raise the cap on corporate giving from 5 percent of average net profit over the prior three years to 7.5 percent. Many major conglomerates established electoral trusts, but there is significant debate as to whether trusts represent a more transparent form of political giving.

Also in 2013, the CIC ruled that six national political parties were actually “public entities” and therefore subject to the RTI Act. The CIC reiterated its judgment again in 2015, but all parties steadfastly resisted its ruling, and the matter remains before the Supreme Court.

In November 2016, the Modi government abruptly implemented the sweeping demonetization of all high-value currency notes, affecting 86 percent of currency in circulation in effort to check black money and digitize the economy. Most economists harshly judged this scheme and several commentators noted that the government did little to crack down on political parties in particular.

In 2017, the Modi government finally unveiled its signature political finance “reforms.” Three measures stand out. First, the government capped cash donations at Rs. 2,000, a symbolic gesture given that the threshold for public disclosure remains at Rs. 20,000. Second, the government eliminated the cap on corporate giving and dropped the requirement that companies must disclose details of their political donations on their annual profit and loss accounts. Third, the government loosened rules on foreign contributions to political parties, which had been strictly prohibited. Parliament also amended the Foreign Contribution Regulation Act (FCRA) such that companies previously designated as “foreign” entities were deemed to be Indian firms so long as they adhered to the foreign direct investment norms prescribed for their sector. In other words, majority foreign ownership would no longer be the standard by which a company would be deemed to be “foreign” or not. This amendment was cynically supported by both the BJP and the Congress, both of whom had been found guilty of accepting foreign contributions in a case before the Delhi High Court.⁸⁸

⁸⁸ Milan Vaishnav, “Political Finance in India,” in Sumit Ganguly and E. Sridharan, eds., *The Oxford Handbook on Indian Politics* (forthcoming).

Perhaps the most consequential change to campaign finance law was ushered in by the introduction of electoral bonds in 2018. The 2017 Finance Bill first introduced a new funding instrument: time-limited bearer bonds that could be purchased by associations, companies, and individuals from the State Bank of India (SBI) during specified windows and then transferred to the registered bank account of a political party as a donation. While the SBI would know the donor's identity (and, as SBI is state-owned concern, presumably so would the government), neither the donor nor recipient is under any obligation to disclose the specific transaction; only the aggregate amount of electoral bonds parties receive is disclosed.

Not surprisingly, the vast majority of electoral bond donations (roughly 65 percent) purchased between 2017-18 and 2020-21 has gone to the ruling BJP. This is nearly six times that of its foremost rival, the Congress Party.⁸⁹ Thus, while the net effect is a regime less reliant on cash and more dependent on digital transactions, donations are still remarkably opaque—this time protected by the force of law. Although, at the time of writing, the Supreme Court has yet to pronounce on the constitutionality of electoral bonds, the Court's previous rulings on citizens' "right to know" and the importance of the "informed vote" raise serious questions about how the scheme conforms with these judicial doctrines.⁹⁰

Conclusion

This chapter explored the Constitutional and legal architecture of elections, as well as the debates it has provoked. While India's electoral record is unparalleled among developing countries, it is not free of controversy. Yes, India is unique in granting universal adult suffrage from the moment of independence, especially at such a low level of per capita income. But controversies over citizenship and voting rights still threaten to disenfranchise legitimate voters.

Both the Constitution and implementing legislation are relatively silent about political parties—apart from the Tenth Schedule—but they are voluble on the topic of electoral candidates, an obvious lacuna that has distorted the nature of electoral competition. The ECI, a body which has done an admirable job of administering large, complex elections, is vulnerable to political pressure—a fact that has become more apparent as India has reverted to single-party dominance. Finally, the scourge of political finance controversy continues to cast a pall on the notion that parties compete on a level playing field.

In the coming years, Parliament will need to confront the fact that the framework governing the conduct of elections is in desperate need of updating. It will have to do so at a time when the body is less effective in carrying out studied deliberation, not least because of the pernicious effects of the Tenth Schedule. The judiciary, too, will be a key player in how "free and fair" elections are conducted in the future. In the past, the courts have been great allies to democratic reformers and civil society activists who wish to improve the probity of India's political class. But the judiciary and other accountability institutions, as this chapter has shown, are itself not

⁸⁹ Association for Democratic Reforms, "Electoral Bonds and Opacity in Political Funding," March 27, 2023.

⁹⁰ On the constitutionality of electoral bonds, see Aradhya Sethia, "Where's the Money? Paths and Pathologies of the Law of Party Funding," *NLUD Journal of Legal Studies* 1 (2019): 86-118.

free from political considerations. Furthermore, their ability to enforce the decisions they pass down is mixed at best. The executive, especially in its current domineering avatar, has not refrained from dominating the legislative branch or seeking to control the judiciary—although its effectiveness in meeting its objectives has been uneven.

In relative terms, electoral life in India has thrived compared to the experience of many of its post-colonial peers. But the past, as always, is only an imperfect predictor of the future.