



defending human rights in the courts and beyond

April 1, 2019

To,
Shri Sunil Aurora
The Chief Election Commissioner,
New Delhi

Sub: Urgent Amendment to [Rule 49MA\[Conduct of Election \(Amendment\) Rules 2013\]](#) to remove its Penal Provisions

Dear Sir,

The Citizens for Justice and Peace (CJP) is in receipt of a complaint (attached) that has serious implications for the Indian citizen. The issue relates to the penal provisions provisions in rule 49MA [Conduct of Election (Amendment) Rules 2013]which in its current form, unjustifiably punishes the voters and thus undermines the country's free election process.

The matter was brought to our attention by Shri Philose Koshy, a resident of Kerala (details given in the complaint which is attached) and a copy was addressed to us, cjp.org.in. We are therefore taking this forward in the interests of free and fair elections and a coercion free complaint process.

Sir, as Chief Election Commissioner , it must be your goal to constructively engage citizens in every stage of the VVPAT monitoring process so that faith in the electoral process--badly shaken by the reports of EVM tampering -- is restored. It has been brought to our information that there is a stringent penal provision contained within section 49A MA of the the Conduct of Election (Amendment) Rules 2013 that could have the impact of terrifying a voter into *not complaining* and thus impacting negatively on a free and fair election process.

Under section 49 MA of the Conduct of Election (Amendment) Rules 2013 - in the eventuality of a voter's complaint about a wrong choice printed on the VVPAT slip, the presiding officer of the polling station first 'warns' the voter on the consequences of filing a false complaint. This itself is an intimidation and a deterrent (given our vast socio economic disparities). So, first come this 'warning' to an ordinary citizen against the filing of a complaint.

Now how does the system work? First, the Election Commission obtains an affidavit from the voter regarding his/ her complaint, the presiding officer then asks the voter to cast a test vote in the same machine in the presence of all polling officials and the representatives of all candidates. Now, during this test vote, if it turns out that the VVPAT correctly displays the choice (of the voter) as cast in the machine, the ECI is empowered to declare the voter's complaint as false and then authorised to files charges under section IPC 177 where the voter potentially faces a prison term of up to six months in prison.



Sir, why is the testing method outlined in the section 49 MA is irrational? The answer is that it fails to distinguish true and false complain in objective manner. *One* of the *two* possible reasons for the printing of incorrect choice in VVPAT is the malfunctioning of the EVM-VVPAT unit itself. Now, *malfunctioning* does not necessarily imply a faulty output at every instance or on every occasion that the EVM-VVPAT machine is used.

For example, an automobile that sometimes faces glitches during ignition (starting a vehicle) is a case of mechanic malfunctioning. However, only a bad mechanic would infer that the vehicle has no problems with its engine if it still starts after umpteen such attempts are made. Meaning that, there is no guarantee that the malfunctioned EVM-VVPAT machine, which shows the incorrect choice of the voter during the voting process would repeat its incorrect outcome during the test vote.

[Note: There is a seven second window of display when the voter is given a chance to see in who's name his vote has been cast. There is no provision yet of maintaining a record of this screen display]

The second possible cause for wrong output on VVPAT slip is hacking or tampering of the EVM itself. If an EVM-VVPAT unit has been tampered with, then the machine, which registered an incorrect choice for the first time, certainly may not (or will not) register this incorrect registration of the vote/mistake for the second time. The incorrect choice would be repeated only randomly as decided upon by the hacker.

Both scenarios imply and indicate that an honest complaint is likely to be “found” to be false and the voter (to whom this democracy belongs!) would be prosecuted for participating in the country’s fundamental democratic process with both courage and honesty.

The free and fair election process, which is the bedrock of Indian democracy, will be under serious threat if voters fail to report the false VVPAT display for fear of criminal prosecution in case the complaint “found” as false by the ECI officials.

The Honourable Supreme Court has held in a catena of cases that the constitutional protection for the fundamental political expression is calculated to insulate the freedom from such a chilling effect.

As section 49 MA is manifestly arbitrary and undermines the country’s election process, we add our voice and weight to that of the original complainant and urge, urgently that you remove the penal provision with immediate effect. Other methods and options may be out in place to deter false and frivolous complaints.

Suggested methods to resolve the voters’ VVPAT complaint

1. Create a facility for the voters to take pictures of the VVPAT display, which can later on enable the voter to prove their complaint.



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2. Instead of dropping the VVPAT slip directly into a ballot box, allow it to be taken by voters and after the voter inspecting it, if the VVPAT printing is correct, let the voters themselves drop the slips into the ballot papers. While having full physical access of VVPAT, voters themselves can correct the serial numbers in the slips if the VVPATs print it incorrectly.

3. The pragmatic considerations that the ECI flagged while upholding this invalid testing system is no reason to side-line the basic principles of a democracy. At the minimum, the ECI should at least drop penal provisions associated with the testing method and make public the number of complaints received in each polling station, irrespective of whether they found it true or not, before the counting process begins.

The only concern the ECI should have is the possibility of false complaints. Presently, the ECI does not have any empirical basis to argue that the voters are prone to misusing the provisions. Hence the institution of penal provisions is premature and prejudicial.

We urge immediate and urgent action in the matter, Sir

Yours sincerely

Anil Dharker President

Teesta Setalvad Secretary