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India's 'Festival of Democracy' Needs Healing

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The many processes that go into the conduct of elections in India have begun to be undermined, in the process weakening the functioning of democracy itself. The Election Commission of India needs to be put back on the rails to repair this weakening.

It is a coincidence that a festival of democracy is currently on in five states of India as this essay is being written. It is not a surprise that a country which is sometimes called 'the land of festivals' has also been treating a critical component of a democratic society as a festival. While there can be no objection to treating an election as a festival, if we treat elections merely as fun festivals, this may have serious implications for democracy in the country.

Almost all festivals have a periodicity associated with them. A large number of them are celebrated annually, but some may occur monthly or even come around every twelfth year. This may well have contributed to elections in India being considered an event that should be celebrated.

This can be — and often is — problematic because it makes voters passive during the intervening periods. But for political parties and an overwhelming number of politicians, election-related activities go on all round the year. It can safely be said that everything political parties and political actors do is focused on the next election.

Justice V.R. Krishna Iyer, while writing the judgment in *Mohinder Singh Gill vs. CEC* in 1978, described democracy as “a continual participative operation, not a cataclysmic, periodic exercise.” This is what should inform our understanding of elections. It is necessary for people at large, voters included, to be sensitised about how electoral activity is an ongoing affair, and it would be useful if they were on the lookout for such activity because it could have a subtle and unobtrusive impact on them.

Choice of candidates

Visible and obvious preparations for an election, typically start a few months before the election. The date when an election is due is well known because it is easy to figure out the last date by when it has to be held, according to the provisions of the Constitution.

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As the date of announcing an election approaches, a frenzy mounts. And, yes, it *is* frenzy. Hectic activity is seen outside the offices of political parties, its intensity being in direct proportion to the perceived chances of the party securing more votes. Activity also intensifies outside the houses of the leaders of political parties and those who are perceived to be able to influence the decisions of these leaders.

The objective is to get a party to support the candidature of a particular person, or to “nominate” the person as a candidate of that party, with the right to use the election symbol of that party. What in common parlance, is called getting the 'ticket' of the party is, arguably, is the most critical feature of democracy and elections in India.

When asked, “Where does the government come from?” almost every Indian, without exception, responds, “We elect the government.” Some, not very deep, reflection leads to the realisation that we do not elect the government. Instead all we do is vote for one of the candidates on the ballot. Exploring this a little deeper, all a voter can do is to vote for one of the persons on a slate of candidates, most of whom have been chosen by the political parties contesting that election.

This leads to Proposition One: *The choice of a voter is pre-constrained by the choices made by a set of political parties.*

After the voters have cast their votes and one of the candidates is declared elected as a member of parliament or a state assembly, does this representative of the people have the freedom to decide whether she supports or opposes a bill that comes before the legislature? Not surprisingly, the answer is “No”. The Anti-Defection Law, contained in the Tenth Schedule of the Constitution,

provides that if (a) a political party issues a “whip” on any matter coming up for consideration in that House, and (b) if any member of parliament or state assembly elected on the support, or ticket, of a political party does not vote as specified in the whip or defies it, such a member will lose her seat. In other words, if a person defies a whip issued by her political party, her membership of the legislature will be terminated.

This leads to Proposition Two: *How an elected representative votes in the House is completely controlled by the political party that gave her the ticket at the time of the election.*

Putting the two propositions together clearly shows that *it is political parties that form the government.*

This shatters the illusion that a vast majority of Indians live under that it is they, the citizens/voters, who elect the government. That political parties form the government was noted by the Law Commission of India in its 1999 report on [Reform of the Electoral Laws](#) : “It is the political parties that form the government, man the Parliament and run the governance of the country” (Para 3.1.2.1).

Implications of political parties running the government

Political parties are a necessity for operationalising representative democracy in a country as large as India. If they are a necessity, it follows that they will staff and run the government through their representatives who are ostensibly elected by the citizens in the prevalent conditions.

The key here is the “prevalent conditions”. A few aspects of the prevalent conditions deserve specific mention.

Do parties have internal democracy?

Political parties are registered by the Election Commission of India (ECI) under the [Representation of the People Act, 1951](#) (RP Act). Subsection (5) states that:

The application under sub-section (1) shall be accompanied by a copy of the memorandum or rules and regulations of the association or body, by whatever name called, and such memorandum or rules and regulations *shall contain a specific provision* that the association or body *shall bear true faith and allegiance* to the Constitution of India as by law established, and *to the principles of socialism, secularism and democracy*, and would uphold the sovereignty, unity and integrity of India (emphasis added).

The parts in italics, “shall contain ... specific provision... shall bear true faith and allegiance ... to the principles of ... democracy”, are as clear an indication as is possible that political parties are expected and required to follow democratic principles in the way they function.

However, it is common experience that none of the political parties pay any heed to democratic principles in their internal functioning. To prove that this common experience it is useful to reproduce some of the observations of the Law Commission's report:

We have come to the conclusion that for ... bringing a sense of discipline and order into the working of our political system and in the *conduct of elections*, it is necessary to provide *by law* for the formation, functioning, income and expenditure and the internal working of the recognised political parties both at the national and State level (Para 3.1.1) (emphasis added).

Following the logic described by a nine-judge Constitution Bench of the Supreme Court (SC) on the concept of secularism in [S.R. Bommai vs. Union of India](#) (1994 [3] SCC1, p. 236), the Law Commission said:

With a view to introduce and ensure internal democracy in the functioning of political parties, to make their working transparent and open and to ensure that the political parties become effective instruments of achieving the constitutional goals set out in the Preamble and Parts III and IV of the Constitution of India, it is necessary to regulate *by law* their formation and functioning (Para 3.1.2) (emphasis added).

The Law Commission concluded:

“On the parity of the above reasoning, it must be said that if democracy and accountability constitute the core of our constitutional system, the same concepts must also apply to and bind the political parties which are integral to parliamentary democracy. It is the political parties that form the government, man the Parliament and run the governance of the country. It is therefore, *necessary to introduce internal democracy, financial transparency and accountability in the working of the political parties.* A political party which does not respect democratic principles in its internal working cannot be expected to respect those principles in the governance of the country. *It cannot be dictatorship internally and democratic in its functioning outside*” (Para 3.1.2.1) (emphasis added).

Bringing the focus back to our festival, it is worth reiterating the Law Commission’s considered view that the above is necessary for “bringing a sense of discipline and order into the working of our political system and in the *conduct of elections*” (emphasis added).

Allegiance of elected representatives

Another facet of the prevailing conditions that deserves attention is the allegiance of elected representatives. A feature of a democratic society, that is commonly understood as a given, is that the elected representatives actually represent their electors. In other words, the elected representatives are expected to owe allegiance to those who elect them, vote for them.

However, common experience, once again, is that while candidates do seek out voters before and during the election, once elected, the tables turn. Electors who have to seek out their elected representatives, who tend to become inaccessible. A voter who has cast her vote for a candidate who ends up being elected often thinks that she has a right to approach the elected representative, but the latter seems to think she does not owe anything to the voter.

Since the giving of tickets is not a democratic process and the voters have no role in it, the elected representative is grateful to the ticket-giver and not to the voter.

The elected representative often thinks, rightly so, that if she had not got the ticket of the relevant political party, the question of voters voting for her would not have arisen. And since the giving of tickets is not a democratic process and the voters have no role in it, the elected representative is grateful to, or owes allegiance to, the ticket-giver and not to the voter. This control of the party apparatus over the elected representative, which begins with the ticket-giving process, continues even after the candidate gets elected, through the working of the Anti-Defection Law.

Election process

Article 324 of the Constitution vests the responsibility of conducting elections with the ECI:

324. (1) The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President held under this Constitution shall be vested in a Commission (referred to in this Constitution as the Election Commission).

This article has been subjected to a fair amount of judicial scrutiny and interpretation. It has been said that it bestows what is called plenary power on the ECI. However, its most commonly cited interpretation is contained in the Supreme Court judgment in *Mohinder Singh Gill vs CEC*. This is how the court interpreted this Article:

When Parliament or any State Legislature has made valid law relating to or in connection with elections, the Commission shall act in conformity with, not in violation of such provisions, but *where such law is silent, Article 324 is a reservoir of power, to act for the avowed purpose of, not divorced from, pushing forward a free and fair election with expedition* (emphasis added).

Article 324 has come into consideration in various subsequent judgements and varied interpretations have been given, but by and large this interpretation has come to be widely accepted.

The same judgment also raises the question, “What, then, is an election?” and goes on to answer it by saying, “Every step from start to finish of the total process constitutes ‘election’, not merely the conclusion or culmination”. It continues with a description of the process: “The constitutionally appointed authority, the Election Commission, takes over the whole conduct and supervision of the mammoth enterprise involving a plethora of details and variety of activities, and starts off with the notification of the time table for the several stages of the election...The assembly line operations then begin. An administrative machinery and technology to execute these enormous and diverse jobs (is prepared by the EC). The precise exercise following upon the calendar for the poll,... location of polling stations, ... presentation of nomination papers, polling drill and telling of votes, culminating in the declaration and report of results,... (t)he secrecy of the ballot, the authenticity of the voting paper and its later identifiability with reference to particular polling stations” are all part of the process.

Actions of the Election Commission of India are most keenly observed by all the other characters and any and all variations are noted and commented on.

In practical and formal terms, the election process begins with the announcement of the schedule of elections by the ECI specifying the dates for filing, scrutiny, and withdrawal of nominations, and polling, counting, and declaration of results. The Model Code of Conduct (MCC) for political parties comes into effect with the announcement. Verification of electoral rolls is, of course, done well ahead of the announcement of elections. It is during this process that the ECI has the most critical role and even slight deviations have the potential of making large differences to the outcome of the electoral process.

Role of the Election Commission

The ECI has been described as the “super-authority” for the conduct of elections, presumably based on the plenary power that Article 324 bestows on it. The expression “superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections” has been given a very wide interpretation. The ECI, therefore, is *the* central character and has *the most critical role* in the entire process. Actions of the ECI are most keenly observed by all the other characters and any and all variations are noted and commented on.

Consistent application of rules and norms

Given that the ECI has a role akin to an umpire in cricket, all players (in this case, candidates and political parties) expect the ECI to be fair and neutral. This implies that the ECI would apply all rules, norms, and laws to the participants in a consistent and transparent way. Yet, a number of instances of doubtful or seemingly inconsistent actions by the ECI in the 2019 election to the Lok Sabha have been mentioned in Chhokar (2022).

Some such debatable issues are visible in the ongoing elections to five state assemblies. Given that the ECI has laid down certain conditions in the way election campaigns can be conducted in view of Covid-19 infections, candidates, major leaders, and star campaigners of political parties tend to push these to their limits. These are situations where the ECI has to make delicate and nuanced calls. It is in such situations that the ECI does not only have to be neutral but also seen to be neutral.

Regrettably, a perception seems to have developed in the past few years that the ECI has fallen short of the standards that had come to be expected of it.

Treatment of party in power

Arguably, the trickiest situation is when some of the top leaders of the party in power in the state and at the centre violate the restrictions laid down in the MCC or by the ECI in obvious ways. The situation gets even more complex when such political leaders also happen to occupy some of the highest executive positions. It causes grave misgivings and consternation when the ECI appears to be treating such persons with kid gloves while, at the same time, reading the riot act to lesser leaders and politicians. There were a large number of such instances in the 2019 Lok Sabha election, which have been documented in Devasahayam (2022).

In the ongoing state assembly elections in five states, videos of the top leaders of the party in power in the state as well as at the centre conducting door-to-door campaigns, surrounded by large unmasked crowds that show no signs of maintaining a physical distance, have been widely seen on TV news channels and on YouTube. This appears to be an obvious and large-scale violation of the Covid-19 guidelines issued by the ECI. However, there is no information about the ECI having taken any action on this.

The declaration that free and fair elections are a part of the Basic Structure means that the provision for their conduct cannot be changed even by Parliament.

While it is impossible to identify all possible reasons for the erratic behaviour of the ECI, based on the patterns of behaviour, two possibilities seem to emerge.. One is that the ECI does not have the requisite power to discipline violators of the process that has been laid down, and the other is that the ECI is ambivalent, or even hesitant, about using its powers.

Real powers of ECI

In addition to the basic power of the ECI — the plenary power on it bestowed by Article 324 of the Constitution — the impact of Supreme Court decisions on its powers has been mixed. A chain of decisions where fair and free elections have been declared to be one of the components of the Basic Structure of the Constitution have boosted the powers of the ECI. The Basic Structure doctrine lays down that while Article 368 of the Constitution gives Parliament the power to “amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article”, Parliament does *not* have the power to amend the basic structure of the Constitution. This was laid down by the SC in 1973’s landmark case, *Kesavananda Bharati Sripadagalvaru and Others vs State of Kerala and Another*. The declaration that free and fair elections are a part of the Basic Structure means that the provision for their conduct cannot be changed even by Parliament.

Another source of power of the ECI, acquired under Article 324 of the Constitution, Section 29A of the RP Act, 1951, and Rules 5 and 10 of the Conduct of Elections Rules, 1961, is called the [Election Symbols \(Reservation and Allotment\) Order, 1968](#). Clause 16A of this order empowers the ECI to either suspend or withdraw the recognition of a political party violating the MCC after giving the party a reasonable opportunity of showing cause in relation to the action proposed. The order reads as follows:

16A. Power of Commission to suspend or withdraw recognition of a recognised political party for its failure to observe Model Code of Conduct or follow lawful directions and instructions of the Commission - Notwithstanding anything in this Order, if the Commission is satisfied on information in its possession that a political party, recognised either as a National Party or as a State Party under the provisions of this order, has failed or has refused or is refusing or has shown or is showing defiance by its conduct or otherwise (a) to observe the provisions of the Model Code of Conduct for Guidance of Political parties and “Candidates” as issued by the Commission in January, 1991 or as amended by it from time to time, or (b) follow or carry out the lawful directions and instructions of the Commission given from time to time with a view to furthering the conduct of free, fair and peaceful elections or safeguarding the interests of the general public and the electorate in particular, the Commission may, after taking into account all the available facts and circumstances of the case and after giving the party a reasonable opportunity of showing cause in relation to the action proposed to be taken against it, either suspend, subject to such terms as the Commission may deem appropriate, or withdraw the recognition of such party as the National party or, as the case may be, the State party (emphasis added).

Ambivalence of ECI

The track record of the ECI in using its powers has been very uneven, at times even bordering on the shocking (Chhokar, 2020). Devasahayam (2022) contains a detailed description of what transpired during the 2019 Lok Sabha election (Devasahayam, 2022). Rather than trying to summarise a few issues, what might be more appropriate is to reproduce part of the observations of a person who held the position of the Chief Election Commissioner (CEC) for almost two full years (30 July 2010 to 10 June 2012).

In the last few years, the reputation of the ECI has, unfortunately, taken a beating. To pretend that all is well and nothing has happened would be worse than ostrich-like. ... There is absolutely no doubt that the organisation that was highly respected for its neutrality and independence has come in for sharp criticism and rebuke. And not only from the citizens but even from the higher judiciary. ...

Not just the media, even former President Pranab Mukherjee commented, "There is some doubt about the functioning of the Election Commission during these elections. There should be a different method of choosing the members of the Commission. It is imperative that the Election Commission asserts the ample authority that it already possesses constitutionally. It has the full support of the

Supreme Court. It must act tough. This is not a mere question of its discretion, but a constitutional duty. Governments come and go, but the reputation of the Election Commission stays for good." These were the wise words from the country's most experienced and knowledgeable political leader.

In an unprecedented and extraordinary development, even one of the three serving ECs registered his disapproval for the way things were going, leading to his hounding and eventual ouster. "It would only be fair to accept that all is not wrong with the ECI. It still conducted the biggest election in the world with clockwork precision and creditable efficiency. ... Where it faltered was on the yardstick of independence and neutrality in the enforcement of the model code of conduct, which caused a big dent to its enormous reputation. Scarred reputation is a huge price. ... The ECI does need to be put back on the rail(s)" (Quraishi, 2022).

The last sentence leaves no doubt that the ECI has lost its way.

Role of the Supreme Court

Though a former president has said that the EC "has the full support of the Supreme Court" and that "it must act tough", the reality is not that simple.

The maximum power that the Election Symbols (Reservation and Allotment) Order, 1968, gives to the ECI is to "either suspend ... or withdraw the recognition of such party as the National party or ... the State party." This power was granted unto itself by the ECI under the plenary power bestowed on it by Article 324 of the Constitution, RP Act, 1951, and Conduct of Elections Rules, 1961, and has not been challenged in any court. What is worth noting, however, is that the ECI has not used this power even once since it acquired it in 1968. During informal discussions, ECI sources say that they have been extremely cautious, actually reluctant, to use this as they think it is a *brahmastra*, an ultimate weapon, which, once used, might lose its effectiveness.

However, in reality, the real reason for ECI's diffidence might well lie elsewhere—in the actions of the Supreme Court.

Political parties know that the ECI may do whatever else it likes, but it cannot de-register them. The ECI is also acutely aware of this.

The most disturbing, bordering on bizarre, action of the Supreme Court came in a judgment in 2002 in the case *Indian National Congress (I) vs. Institute of Social Welfare & Ors.* The crux of the judgment was:

1. That there being no express provision in the Act or in the Symbol Order to cancel the registration of a political party, and as such *no proceeding for de-registration can be taken by the Election Commission against a political party* for having violated the terms of Section 29A(5) of the Act on the complaint of the respondent (emphasis added).
2. The Election Commission while exercising its power to register a political party under Section 29A of the Act, acts quasi-judicially and decision rendered by it is a quasi-judicial order and *once a political party is registered, no power of review having conferred on the Election Commission, it has no power to review the order registering a political party for having violated the provisions of the Constitution or for having committed breach of undertaking given to the Election Commission at the time of registration* (emphasis added).

Possibly in an attempt to make the directions somewhat palatable, the judgment provided three exceptions. One, if a political party has obtained registration by practising fraud or forgery; two, if a political party "intimat(es) the Election Commission that it has ceased to have faith and allegiance to the Constitution of India"; and three, "any like ground where no enquiry is called for on the part of the Commission".

On decriminalisation of politics, the Supreme Court has been dilly-dallying for years after an initial demonstration of a progressive mindset in 2002 and 2003.

As a cursory reading shows, the exceptions cannot be practically implemented. The judgement, therefore, creates a very strange situation. India is, perhaps, the only country in the whole world where once a political party is registered, it will remain registered for eternity. Political parties know that the ECI may do whatever else it likes, but it cannot de-register them. The ECI is also acutely aware of this and, therefore, shies away from taking really effective steps.

There are [other instances](#) that have been documented in the public domain. On the issue of decriminalisation of politics, the Supreme Court has been dilly-dallying for years after an initial demonstration of a progressive mindset while deciding two public interest litigations (PILs) in [2002](#) and [2003](#). The principle of “filling a gap in legislation” was invoked very effectively in the 2002 judgment:

Cumulative reading of plethora of decisions of this Court as referred to, it is clear that if the field meant for legislature and executive is left unoccupied detrimental to the public interest, this Court would have ample jurisdiction under Article 32 read with Articles 141 and 142 of the Constitution to issue necessary directions to the Executive to subserve public interest.

The matter came up again in another PIL filed in 2011, which was decided in [March 2014](#). Since then, there have been five more orders by the apex court, on [27 August 2014](#), [1 November 2017](#), [25 September 2018](#), [13 February 2020](#), and [10 August 2021](#). All these orders have pushed the envelope marginally without making any significant or observable change to the reality on the ground. This is reflected in the number of Lok Sabha members with self-declared criminal cases pending against them rising from 24% in 2004 to 30% in 2009, and further to 34% in 2014 before reaching a high of 43% in 2019. Some of these feeble attempts have been detailed in a [recent piece](#).

The Supreme Court seems to be quite unconcerned about several other electoral reforms. Two issues require specific mention.

The first is making the functioning, including financial affairs, of political parties transparent by bringing them under the Right to Information Act, 2005. This was approved by a full bench of the Central Information Commission in 2013, [an order that political parties have blatantly refused to comply with](#). A petition has been pending in the Supreme Court since 2015.

The second issue is of electoral bonds, which the government introduced in 2017. While petition was filed in the Court the same year, the only substantive hearing was held in 2019, after an application for a stay on the bonds was filed. [An interim order](#) was issued, which said that “the rival contentions give rise to *weighty issues which have a tremendous bearing on the sanctity of the electoral process in the country*. Such weighty issues would require an in-depth hearing which cannot be concluded and the issues answered within the limited time that is available” (Italics added).

Three more applications requesting for an early hearing have been filed but the petition has not yet been listed for hearing.

Aadhaar-voter ID linkage

The latest instance of inexplicable behaviour by the ECI is on linking voter IDs with Aadhaar. This story began in March 2015 when the ECI launched the National Electoral Roll Purification and Authentication Programme (NERPAP) “a comprehensive programme [...] with the prime objective of bringing a totally error-free and authenticated electoral roll.”¹ A stated objective of the NERPAP was to link and authenticate Electoral Photo Identity Card (EPIC) data with the Unique Identification Authority of India’s (UIDAI) Aadhaar data. This was banned by the Supreme Court in August, but by then 320 million voters had already been linked to their Aadhaar IDs. Multiple other problems were reported, including disenfranchisement of some groups of voters in a seemingly systemic manner.

After going through the motions of trying to meet the Supreme Court’s conditions, the government got the Election Laws (Amendment) Bill, 2021 surreptitiously passed by Parliament.

The issue came to life again in June 2021 when the ECI wrote to the Law Ministry seeking approval of the linking, circumventing the court order. After going through the motions of ostensibly trying to meet the conditions stipulated by the Supreme Court, the government got Parliament to pass the [Election Laws \(Amendment\) Bill, 2021](#). The bill was introduced in the Lok Sabha in December 2021 and passed the same day. It was then presented to, and passed by, the Rajya Sabha the next day. This tearing hurry showed the keenness of the government to ratify this dubious action.

Given that one of the ECI’s stated reasons for linking the electoral roll to the Aadhaar database is to create “a totally error-free and authenticated electoral roll”, it is astounding how it seems to be blind to the infirmities in the Aadhaar ecosystem, which are by now well known. The ECI does not seem to have noticed a fundamental conceptual inconsistency in combining these two databases. Aadhaar, as has often been pointed out even by government authorities, was designed as, and is, a proof of identity, and, if stretched further, a proof of residence. On the other hand, the registration of a person as a voter is a proof of citizenship, which confers on her

the right to vote. It is strange to claim that combining these two will improve the accuracy of one, particularly when the other one is also not error free.

Of course, there often is more than meets the eye in such strange actions. Two former CECs have been quoted as saying, on condition of anonymity, that the UIDAI had lobbied long and hard to link voter IDs and Aadhaar as a way to legitimise the controversial biometric ID project. “They said we should integrate Aadhaar with electoral rolls to eliminate duplicates; the Commission held the view that we should hold off until we fully understand the implications,” said one of these former CECs. The ECI succumbed in February 2015 when H. S. Brahma was the CEC, and the exercise was launched in March.

The preparation of electoral rolls and periodic verification of their accuracy is one of the most important tasks that the ECI is mandated to do. The only way it can be done is the hard way, by actually going from door to door. It is possible that the ECI is looking for quick fixes and technical solutions, and linking its database with the Aadhaar ecosystem was one such attempt. On the face of it, it is likely to do more harm than good.

There is, of course, another possibility that is not obviously visible. The ECI may well be under pressure to do this, not as an end in itself but as a preparatory step to pave the way for other ambitions the government of the day may have. These could be holding simultaneous elections or implementing a one nation, one election plan, which have been discussed for almost three years with no acceptable consensus.

Conclusion

Election are not periodic festivals that comes every five years, to be celebrated with pomp and show and empty hyperbole. It is just one visible event for operationalising democratic functioning that involves orchestration of an enormously complex set of activities, which, in themselves, go on every day of the year. The Constitution entrusts this complex task to the ECI, which Justice Krishna Iyer called “the super-authority.” The ECI has, in the past, attracted global admiration but today, alas, needs to be put back on the rails.

Footnotes:

1 It has been extensively documented. (a) “Who Gets to Vote”, India Today, 17 Aug 2018 ; (b) “The Case of the Missing Voters”, India Today, 16 Nov 2018; (c) “A Negative Vote for Aadhaar”, India Today, 23 Dec 2018; (d) “Why Has the EC Brought Back the Dangerous Proposal to Link Voter IDs With Aadhaar?”, The Wire, 24 Oct 2021; (e) “Should Electoral ID Data be linked to Aadhaar?” Down to Earth, 15 Jan 2022.

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