

EXIT POLLS: DO THEY NEED AN EXIT?

*Piyush Mishra**

*Ankur Jain**

Introduction

On 14th September 1999, a Constitutional Bench¹ of the Supreme Court of India dismissed the writ petition of the Election Commission seeking enforcement of its guidelines banning publication/ telecast/ broadcast of exit and opinion poll results by the media during the period of elections.² Earlier, on 8th September, a Full Bench of the Supreme Court³ had referred the matter to a Constitutional Bench, as it felt the matter involved substantial questions of constitutional importance, including the freedom of speech and expression.⁴ Also, another Full Bench of the Supreme Court heard an interlocutory application⁵ and a stay was granted till the matter was decided by the Constitutional Bench. The Election Commission was forced to withdraw its guidelines because the Supreme Court was disinclined to accept the contentions of the Commission.⁶

As of now, the Election Commission has withdrawn its guidelines and, therefore, the controversy has abated. However, matters of substantial Constitutional importance are involved in the controversy, viz., the nature of guidelines of the EC exit polls and opinion polls and their standing in a constitutional democracy in the context of the freedom of speech and expression. This article attempts to analyse the controversies and legal issues involved therein.

The Dilemma of Exit Polls

Like any other statistical device, exit and opinion polls are prone to errors. The DD-DRS in 1998 and DD-CSDS in 1996 were almost on target while Lokmat in 1999 and TVI-ORG in 1998 were wide off the mark.

* III Year, B.A., LL.B. (Hons.), National Law School of India University, Bangalore.

1 *R. Rajgopal v. Union of India*, 1999 (7) SCALE 217. The bench comprised of S. P. Bharucha, B. N. Kirpal, V. N. Khare, S. M. Quadri and D. P. Mohapatra, JJ.

2 T. Padmanabha Rao, *Poll Panel Plea on Exit Polls for Statute Bench*, *The Hindu*, Bangalore, 10th September, 1999.

3 The bench comprised of S. B. Majmudar, M. B. Shah and U. C. Banerjee, JJ.

4 *R. Rajgopal v. Union of India and Others*, 1999 (6) SCALE 343.

5 The bench comprised of A. S. Anand, C.J., K. T. Thomas and M. Srinivasan, JJ.

6 *Supra.*, n. 1.

Seat Projections based on exit polls:⁷

Agency	BJP + Allies	Congress + Allies	Others
1999			
DD-DRS	287	174	77
Star TV-Insight	295-305	145-155	85-95
Jain TV-C-Insight	291	147	87
Lokmat-IMS-CMCR	242	227	69
<i>Actual results</i>	<i>296</i>	<i>136</i>	<i>107</i>
1998			
DD-DRS	252	140	145
TVI-ORG	208	171	164
<i>Actual results</i>	<i>252</i>	<i>147</i>	<i>138</i>
1996			
DD-CSDS	192	142	201
Outlook DB/MRAS	192	142	203
Times-Bhalla	165	169	203
<i>Actual results</i>	<i>189</i>	<i>132</i>	<i>215</i>

The complexity of the election process and the Indian Electorate is one of the major reasons for such errors. The heterogeneity of the Indian Electorate gives rise to unavoidable sampling errors. A host of complex factors (caste, creed, religion, region, sex, etc.) determine the outcome of elections and it is not possible to isolate the effect of each one of these on the voting pattern, thereby making predictions inaccurate. One of the biggest problems is converting vote shares into number of seats. Thus, while in the 1991 and 1996 Lok Sabha Elections the BJP polled the same share of votes (20.1% and 20.3% respectively), it won 120 seats in 1991 and 161 seats in 1996.⁸

Perhaps, there is also a lack of quality work. The level of research in this field is poor and we have one of the worst "lead citation index values" (citations of sources, publications and inputs by the agencies).⁹ Also, the exit poll process may be manipulated to arrive at a desired result. But how far it is helpful is an open

⁷ *Exit Polls and reality*, Business Standard, Bangalore, 13-14 November, 1999.

⁸ *Ibid.*

⁹ *Ibid.*

question. In 1999, in Karnataka for instance, in spite of all opinion polls predicting a BJP sweep, the Congress had a land slide victory. This throws doubt both on their research quality as well as their effect on the outcome.

However, these problems are not unique to exit and opinion polls and are rather common to all statistical surveys - that is hardly a reason to reject them outright. As the market for exit and opinion polls becomes competitive, agencies will be constrained to provide reliable information so as to survive.

Does the Election Commission have the Power to Issue Directions that have the Force of Law?

Naturally, the contentions of the Election Commission call for an examination of its power to issue directions and the nature of those directions, i.e., whether they have the "force of law". It is true that Article 324 is widely worded¹⁰, but it has to be harmoniously read with other provisions of the Constitution, particularly Articles 326 to 329¹¹. Time and again, the Election Commission has claimed wide powers¹² under the phrase "superintendence, direction and control", but the Supreme Court has unambiguously rejected these unilateral claims.¹³ These powers are definitely not legislative in nature and are intended to supplement rather than supplant law.¹⁴ Election Commission directions cannot prevail over Acts of Parliament and rules made thereunder. The result of the decisions of the Supreme Court may be summed up thus: The Election Commission cannot claim unbridled arbitrary power under Article 324. It cannot assume legislative functions and defy laws enacted by a legislature. To hold otherwise would cause friction between the legislature and the Election Commission and lead to absurd results. How exactly are those directions enforceable?¹⁵ Why should the executive enforce them when they are in direct conflict with legislative mandates?

10 In *Kanhayi Lal Omar v. R. K. Trivedi*, AIR 1986 SC 81, powers to issue Symbols Order was read into Article 324 which was said to occupy areas left unoccupied by legislation.

11 *A. C. Jose v. Sivan Pillai*, (1984) 2 SCC 656.

12 A. B. Kafaltiya, *Election Administration and its jurisdictional limitations: The Election Commission*, AIR 1999 Journ. 208.

13 *M. S. Gill v. Chief Election Commissioner*, AIR 1978 SC 851; *A. C. Jose v. Sivan Pillai*, (1984) 2 SCC 656.

14 *Ibid.*

15 It is interesting to draw parallels from the controversy regarding the enforcement of the model code of conduct. Some commentators have contended that by virtue of Article 324, the Commission could not only issue the code but also directions for its enforcement - L. P. Singh, *Electoral reforms*, 47 (1986). However the Election Commission itself entertained doubts regarding the validity of the code; thus in the second annual report of the EC of India (1984 at p. 82) amendments were suggested in the Representation of Peoples Act, 1951 to make violation of the code an electoral offence, *cited from*, K. C. Sunni, *Corrupt Practices in Election Law*, 246 (1996).

This leads us to another point- when directions of the Election Commission are not traceable to any existing law they do not have the force of law.¹⁶ However, in order to abridge a fundamental right, the directions must have the force of law.¹⁷ In the present controversy, therefore, as a fundamental right was curtailed, the directions must be traceable to a law.¹⁸ The Commission sought to read it under section 126¹⁹ of the Representation of Peoples Act, 1951.²⁰ However, firstly, the ban under the section can only be for 48 hours before each stage of election²¹ and secondly, it applies only to constituencies where polls are about to be held.

Even if it could be said that exit and opinion polls are “election matters” (intended or calculated to influence the result of an election), is it possible to ban them under section 126 of The RP Act? It is submitted that this, by itself, does not constitute sufficient reason for banning such polls. It is to be borne in mind that under Article 19(2), a law restraining freedom of speech and expression has to be reasonable. Any information that permits informed judgements on the part of voters is also calculated to influence the results of the elections. As for example, suppose a candidate takes a bribe from someone and that fact is published in a newspaper within 48 hours of the election in that constituency. Action may be taken against the candidate but can it be contended that the publication violates section 126 of the RP Act? Is action to be initiated against the newspaper? Such a construction would definitely be unreasonable and is precluded by the presumption of constitutionality.²²

16 See, *Laxmi Charan Singh v. A. K. M. Hassan Uzzaman*, (1985) 4 SCC 689; *Sadiq Ali v. Election Commission of India*, (1972) 4 SCC 664.

17 *Edwards Mills Company Limited v. Ajmer*, AIR 1955 SC 25; *Amathalal Gandhi v. Union of India*, AIR 1961 SC 21 at 199; *Narayanappa v. Mysore*, AIR 1960 SC 1073.

18 *Sadiq Ali v. Election Commission of India*, (1972) 4 SCC 664.

19 Section 126:

- (1) No person shall –
- (b) display to the public any election matter by means of cinematograph, television or other similar apparatus...in any polling area during the period of forty eight hours ending with the hour fixed for the conclusion of the poll for any election in that polling area.
- (3) in this Section the expression “election matter” means any matter intended or calculated to influence or affect the result of an election.

20 Hereinafter referred to as the “RP Act”.

21 In *N. P. Ponniswami v. Returning Officer, Namakkal Constituency*, AIR 1952 SC 64, election process was broadly interpreted. However, the wording of Section 126 precludes a similar construction.

22 There is a presumption that the law is within the competence of the legislature and does not transgress other constitutional mandates. Thus when two constructions are possible - one rendering it constitutional and the other unconstitutional, the one which upholds the constitutionality of the statute is to be preferred. See, *Chiranjeev Lal Choudhary v. Union of India*, AIR 1951 SC 41; *State of Bombay v. F. N. Balsara*, AIR 1951 SC 318.

Exit polls may or may not affect election results. Even if they do, is such an influence undesirable? It might be argued that such influence is not only desirable but a modern prerequisite for a meaningful exercise of the right to franchise as it promotes informed judgement by broadly outlining the trend of voting. It is an extra meaningful input that a voter gets to exercise his or her franchise. It is true that the exit poll process is capable of abuse but that is not sufficient reason to ban it. Obviously, it will be unjust to put a blanket ban on exit/opinion polls - many of which are genuine - just because a few may be politically motivated.²³

Do the Guidelines Violate Fundamental Rights under Article 19(1)(a)?

The guidelines of the Election Commission banned publication / broadcast / telecast of exit poll and opinion poll results on and from 5 p.m. on 3rd September 1999 and till the closing of all polls in all States and Union Territories at 5 p.m. on 3rd October 1999.

In a catena of Supreme Court decisions, freedom of the press has been read into Article 19(1)(a).²⁴ Freedom of the press includes the freedom to write and publish what the author considers proper, subject of course to reasonable restrictions under Article 19(2).²⁵ This right takes within its ambit freedom of circulation as well. Prohibitive burdens restricting circulation are unconstitutional because "liberty of circulation is as essential... as a liberty of publication. Indeed, without circulation, publication is of little value"²⁶

It is submitted; that the guidelines clearly violated freedom of speech and expression and freedom of information²⁷ (of the public) implicit therein, as it restricted circulation of information by banning broadcast / telecast and publication of exit and opinion polls.

As early as 1985, a U.S. District Court²⁸ had invalidated a law of the State of Washington which made it illegal for any person to conduct an exit poll or

23 In *Romesh Thappar v. State of Madras*, AIR 1950 SC 124 at 128, it was observed that "A freedom (of speech and expression) of such amplitude might involve risks of abuse but the framers of the Constitution may well have reflected with Madison, who was a leading spirit in the preparation of the First Amendment of the Federal Constitution, that it is better to leave a few of its noxious branches to their luxuriant growth than by pruning them away, to injure the vigour of those yielding the proper fruits."

24 *Brij Bhushan v. State of Delhi*, AIR 1950 SC 129; *Express Newspapers (P) Limited v. Union of India*, AIR 1958 SC 578; *Sakal Newspapers (P) Ltd. v. Union of India*, AIR 1962 SC 305.

25 *Romesh Thappar v. State of Madras*, AIR 1950 SC 124; *Sakal Newspapers (P) Ltd. v. Union of India*, AIR 1962 SC 305.

26 *Ex. P Jackson*, 24 L. ed 877 (1877).

27 *Right of Press to gather information*, 71 Colum. L. Rev. 838 (1971); *Open Meeting Statute - press fights back for the right to know*, 75 Harv. L. Rev. 1199 (1982).

28 *Daily Herald v. Monroe*, 747 F.2d 1251 (1985).

public opinion poll within 300 feet of any polling place on an Election Day - as it violated the First Amendment²⁹ - by blocking free speech rights of reporters to ask questions³⁰ (perhaps the court could instead have read newsgathering rights in the first amendment and struck down the law³¹). Similarly, the Canadian Election Act put restrictions on election advertisements and new opinion polls. The Supreme Court of Canada in the *Thomson Newspapers Case*³² of 1998, struck down directions that banned the publication of opinion polls on the last 3 days of election campaigning, as they restricted freedom of speech and expression.³³

Can these Guidelines be Read under Article 19(2)?

It is difficult by a process of strained reasoning or even by a wild stretch of imagination to read the EC guidelines under one of the heads in Article 19(2).³⁴ The aforesaid provision is exhaustive of limitations that can be put on the freedom of speech and expression.³⁵ "Public order" has been interpreted to mean public safety and tranquillity.³⁶ Examples of offences against public safety are interference with supply or distribution of essential commodities or services, while public tranquillity is disturbed by unlawful assembly, rioting, affray, promoting enmity between different classes, etc.³⁷. It does not seem that a ban on exit and opinion polls could be "in the interest of public order". Manifestly, the ban cannot possibly be covered under other heads mentioned in Article 19(2).

Conclusion

The statement of the Commission accompanying withdrawal of guidelines said that the substantial issues of opinion and exit polls in a poor and half literate

29 First Amendment - "The Congress shall make no law...abridging the freedom of speech, or of the press...", cited from, Alfred Thomas, *American Constitutional Law*, 773 (1978).

30 *Daily Herald v. Monroe*, 747 F.2d 1251 (1985).

31 *The rights of the public and the press to gather information*, 87 Harv. L. Rev. 1505 (1974); L. C. Malmgren, *First amendment: freedom of the press to gather news*, 20 Villanova Law Review 189 (1974); cited from D. R. Pember, *Mass media law*, 264-316 (1987); *Right of Press to gather information*, 71 Colum. L. Rev. 838 (1971).

32 See, *1999 Electoral Reforms: New Rules for advertising and Election Opinion surveys*, at (visited on 10th November, 1999) <<http://www.elect.ca/gen-info/ref/ea905056-e.html>>.

33 *Ibid.* Incidentally in response to this a new Bill C-2, was tabled on 14th October 1999. The proposed Canadian Elections Act seeks to ban opinion polls 48 hours before the end of a federal election campaign. It would apply to registered parties, candidates and third parties. Also, a detailed methodology has been prepared for conducting the opinion polls. The media includes the Internet besides the usual print, television, radio, magazines, etc.

34 Promod Nair, *Opinion polls: A Constitutional Dilemma*, Vol. 13, *Lawyers Collective*, 16 (1998).

35 *Bennet Coleman v. Union of India*, AIR 1973 SC 106, at 121.

36 D. D. Basu, *Law of the Press*, 92 et. seq. (1996).

37 See, Chapter VIII of IPC and *Virendra v. State of Punjab*, AIR 1957 SC 896; *Kedarnath v. State of Bihar*, AIR 1962 SC 955.

society having multi-party democracy, however, still remains to be debated by the country, and by the new Parliament, in a calm, post-election atmosphere.³⁸ It is true that the Washington and the Canadian legislature was of the opinion that exit polls have an undue effect on the voters. They definitely are not a “poor and half literate society” (the Canadian and Washington) - to borrow the phrase of the Election Commission.

The authors would like to emphasise that factors like region, caste, religion, etc. dominate the elections. Exit polls as a criterion of voting in such a situation are a welcome change. But they cater to the needs of a specific class - the literate middle and upper classes. The exact effect of exit polls on their voting behaviour is not ascertainable but it is easy to assume that the effect is negligible or at any rate not very substantial.³⁹ It is possible that exit polls are popular more because they provide an estimate of the election results rather than because they give information relevant for voting. Nonetheless, it is the legislature and not the Election Commission that is entitled to ban them. In view of Article 19(2), such a ban can only be by means of a Constitutional Amendment.

In conclusion, to say that a thing is constitutional is not to say that it is desirable.⁴⁰ Therefore, to say that restraints on the freedom of speech and expression are permissible under our constitution is not to say that any particular restraint is desirable or ought to be imposed. In a liberal democracy like ours, it will be dangerous practice to ban dissemination of information that is considered to be undesirable or unreliable by a particular group of people. The essence of our system is an agreement to disagree and free exchange of ideas and thoughts. Hence, it is submitted that Exit and Opinion Polls should not be banned even if it is constitutionally possible.

38 *EC withdraws guidelines*, The Hindu, Bangalore, 15th September, 1999.

39 Manoj Narod, *The Ban makes its exit*, Business India, 22nd September - 3rd October, 1999, pp. 40,41 citing Yogendra Yadav, a noted psephologist.

40 *Dennis v. U.S.*, 95 L. ed. 1137, per Frankfurt, J.