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ABSTRACT

'Exit Polls' rest on unstable constitutional tectonic plates eager to erupt without notice. It has equal and opposite forces, pulling at it, as its proponent as well as opponent lie in the Constitution. Conduct of free and fair elections has been the focus of the Election Commission from its conception, but fulfilling its constitutional function reached a roadblock when the Apex Court held that it was overreaching its powers. Hence, the Parliament cleverly took over, and amended the Representation of People's Act, 1951 to add Section.126A. The section imposes a complete ban on exit polls and makes it impossible to legitimately collect any data through the same. Exit polls reveal some unique information which may aide in the casting of an informed vote. An informed voter is a necessary pre-condition for a robust democracy, functioning of the principle of free and fair elections and thus to uphold the basic structure of our Constitution, exit polls or any other method of information extraction or dissemination is necessary.

Besides the above a complete ban on exit polls may well be challenged under Art. 19(1)(a); though, whether this freedom functions dually for the media as well as the citizen, shall be considered. Further, the paper analyses whether exit polls can be legally or logically read into any of the restrictions under 19(2) without 'statutise-ing' the Constitution, a document which lays down basic principles and not nuanced modalities. A modest effort has been made in this behalf to compare the forms of fundamental rights that may be used to protect exit polls, in

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India as well as America. The same, it is noted, is a reflection of the kind of freedom the press is guaranteed by their respective Grundnorms.

INTRODUCTION

A democratic way of life achieved through the instrument of elections is not alien to Indian culture. Taking decisions to run their affairs, be they at the level of individual families or at the community level, collectively and with the consensus of all concerned, has been the pervading philosophy of Indian way of life from times immemorial.¹ In recognition of the above, elections have been time and again been established by Indian Courts to be essential to any legitimate democracy.

The crux of the paper lies in the proposition that since democracy is a sub-sect of the basic structure, and free and fair elections a sub-sect of democracy, by extrapolation free and fair elections be a part of the basic structure and thus un-amendable.

The make-up of free and fair elections is essentially free flow of information and as a consequence an informed voter. Thus, right to information and alternatively the right to know and freedom of speech and expression of the press and citizen are preconditions to free and fair elections and under whose nurturing exit polls too may be protected.

For the modalities of achieving free and fair elections, the founding fathers of the Constitution devoted a separate part, Part XV, containing Arts. 324 to 329 of the Constitution to elections², it also gave rise to the Election Commission of India (hereinafter referred to as “E.C.I.”), whose role was to aide in the materialization of the goals of Part XV. While referring to E.C.I as the mode of achieving these goals, the court in the *Mohinder Singh Gill case*³ in exercise of its powers two limitations can be imposed. First, when Parliament or any State Legislature has made valid law relating to or in connection with elections, the

¹ V.S. RAMA DEVI & S.K. MENDIRATA, HOW INDIA VOTES ELECTION LAWS, PRACTICE AND PROCEDURE 2 (2006).

² DEVI & MENDIRATA, *supra* note 1 at 2.

³ Mohinder Singh Gill v. Chief Election Commissioner, [1978] 2 S.C.R. 272. [Hereinafter “Mohinder v. CEC”].

Commission, shall act in conformity with such and secondly, the Commission shall be responsible to the rule of law, act bona fide and be amenable to the norms of natural justice. The Parliament has as a consequence introduced s.126 A to the Representation of Peoples Act, 1951(hereinafter referred to as “R.P. Act 1951”) which is yet to be challenged. If challenged, exit polls may be defended on the ground that they are protected under the basic structure doctrine.

Apart from being protected under the particular analysis of the basic structure doctrine, it may more simply be protected by the fundamental rights mentioned above. Inter alia, the relationship that exists between exit polls and its implications on the sanctity of secret ballot has been studied. In conclusion the paper suggests methods through which the legitimate concerns about exit polls, like biased or fabricated results may be addressed in conformity of the above elucidated principles.

AN INFORMED VOTER AND FREE AND FAIR ELECTIONS

Exit polls are essentially polls taken on the eve of elections and on polling days, including when all parts of the country have not voted.⁴ Apart from giving the voter an estimate of the tentative results of an election, it also reveals the thought process involved in the casting of a vote. Exit polls provide unique data on the socio-economic composition of the voting population. Media and academic experts use the poll information to study voting behavior, political trends, and the influence of current events on voters' choices. They merit indispensable appreciation since they generate important research data which is otherwise not attainable.⁵ It is deducible from the above that exit polls reveal invaluable information that

⁴ S. Aarthi Anand & Celia Joanne Jenkins, *Exit Polls: Debating Freedom or Fairness*, 39 No. 46/47 ECO. AND POL. WEEKLY, Nov. 20 - 26, 2004, <http://www.jstor.org/stable/4415792> (last visited Aug. 19, 2013). [Hereinafter “Debating Freedom or Fairness”].

⁵ Ronald J. Busch and Joel A. Lieske, *Does Time of Voting Affect Exit Poll Results?* 49 No. 1 PUB. OPINION Q. 94-104 (Spring, 1985), available at <http://www.jstor.org/stable/2748933> (last visited Aug. 19, 2013) (the

may aide the casting of a vote. An informed voter is essential for a robust democracy, which upholds the principles of free and fair elections, without which it is pretence. Therefore, it is imperative to ensure the availability of the right to a citizen to receive the information so essential for casting his vote.⁶

The media has been recognised to be the conveyer of such “*essential*” information.⁷ In fact, it is deemed so important that it has been given the status of the Fourth Estate in a democracy. The media aids in the moulding of public opinion through the transmission of ideas and facts. Thus specific rights such as the right to be informed and the right to inform are indispensable.⁸

The court has previously acknowledged the importance of an informed vote when it held in the case of *People’s Union for Civil Liberties v. Union of India*⁹ that the voter has the right to know the antecedents of a candidate standing for elections. Thus it is but logical to extend the above rationale to include exit polls.

However, defying the above logic time and again, the E.C.I has come down upon conduct and publication of opinion and exit polls, branding them as potential influences on the electors “*when they are in the mental process of making up of their minds to vote or not to vote for a certain political party or a candidate.*”¹⁰ In 1999, the E.C.I.’s order to restrict the publication of opinion and exit poll results was overturned by the Supreme Court, which

essence of exit polls is that you catch respondents fresh from their voting experience and that you can use realistic sample ballots that should more readily represent their actual behaviour a minute or two earlier.).

⁶ *Union of India v. Association for Democratic Reforms and Another*, (2002) 5 S.C.C. 294; *See also* DEVI & MENDIRATA, *supra* note 1.

⁷ *De Haes and Gijssels v. Belgium*, (1997) 25 E.H.R.R. (¶ 39); *See also* ACHARYA DR.DURGA DAS BASU, COMMENTARY ON THE CONSTITUTION OF INDIA 2559 (2011).

⁸ JAGDISH SWARUP & DR. L.M. SINGHVI, CONSTITUTION OF INDIA 831 (2013).

⁹ A.I.R. 2003 S.C. 2363. [Hereinafter “PUCL v. UOI”].

¹⁰ GUIDELINES FOR PUBLICATION AND DISSEMINATION OF RESULTS OF OPINION POLLS/EXIT POLLS, ELECTION COMMISSION OF INDIA, Order ECI/MCS/09/01/20.

stated that the E.C.I. did not have such authority and was overreaching its powers.¹¹ Again in 2004, the E.C.I. proposed similar guidelines and recommended that the R.P. Act, 1951 be amended so as to ban exit polls.¹² A writ petition filed in 2004 seeking the prohibition of exit and opinion polls is pending in the Supreme Court.¹³

Subsequently the R.P. Act, 1951 was amended by way of insertion of s.126A which banned conduct of exit polls and publishing these results from the time as notified by the E.C.I.¹⁴

The Section is clearly violative of Part III of the constitution and the same has been elucidated as under:-

FREEDOM OF SPEECH AND EXPRESSION OF THE MEDIA

The strength of a democracy can be judged by the extent of freedom granted to the press.¹⁵ The Press impresses upon the public by moulding public opinion by the entry of ideas and information into the public space.¹⁶ It aids the 'little man' conduct a 'social audit' of the parliament when he marks his vote.¹⁷ Justice Hidayatullah equated a free and thus fearless

¹¹ R. Rajgopal v. Union of India, W.P. No. 80 of 1998; *see also* S.C. refuses ban on opinion, exit polls, THE TRIBUNE, Sept. 15, 1999, *available at* <http://www.tribuneindia.com/1999/99sep15/head.htm>.

¹² ELECTORAL REFORMS, ELECTION OF INDIA, 2004. (this Brief has been developed on the basis of The Representation of the People (Second Amendment) Bill, 2008, which was introduced in Rajya Sabha on Oct. 24, 2008 and referred to the Standing Committee on Personnel, Public Grievances, Law and Justice), *available at* http://www.google.co.in/url?sa=t&rct=j&q=prs%20exit%20poll&source=web&cd=3&ved=0CDMQFjAC&url=http%3A%2F%2Fwww.prsindia.org%2Fuploads%2Fmedia%2FRepresentation%2Flegis1228369557_Legislative_Brief__Representation_of_the_People_Second_Amendment_Bill.pdf&ei=uLYIUtyCGI_QrQejqYFw&usg=AFQjCNF_xLXm0ttjRdZ0iOZj7MMdVaQSUA&bvm=bv.51495398,d.bmk

¹³ *Id.*

¹⁴ REPRESENTATION OF THE PEOPLE ACT, 1951 § 126A.

¹⁵ BASU, *supra* note 11 at 2559.

¹⁶ Paul H Weaver, *The New Journalism and the Old Thoughts After Watergate, the Public Interest*, 67 (SPRING, 1975); *see also* SWARUP & SINGHVI, *supra* note 12 at 834.

¹⁷ Mohinder v. CEC, *supra* note 6.

press with strong public opinion in the maintenance of equality and the rule of law,¹⁸ the essentials of any bona fide democracy. However, in order to formulate such public opinion, unobstructed access to information is required for the press.¹⁹

India's experience with the contentious idea of 'freedom of press' began from the time of the Constituent Assembly debates. On 1st December 1948, Shri Dhamodar Swarup Seth stated with much clairvoyance that Art.13²⁰ of the Draft Constitution has one 'significant omission' that is the freedom of the press.²¹ Consequently, an attempt was made to amend the draft to include "*the freedom of press and publication*".²² Although it was a failed attempt, it was significant in as much that the freedom was recognized as an essential ingredient of the freedom of speech and expression.

Agreeing with Shri Dhamodar Swarup Seth, Prof. K. T. Shah, a member of the Constituent Assembly, admitted to being bewildered at the 'omission', whether deliberate or by oversight, in Art.13 and found the above amendment necessary. He vehemently held,

*"The freedom of the press is one of the items round which the greatest, the bitterest of constitutional struggles have been waged in all constitutions and all countries in which liberal constitutions prevail. They have been attained with considerable sacrifice and suffering and have now been achieved and enshrined in those countries...In those(Countries) which have written constitutions they have ... expressly included the freedom of press".*²³

¹⁸ LALA LAJPAT RAI MEMORIAL LECTURES, DEMOCRACY IN INDIA AND JUDICIAL PROCESS, 1963.

¹⁹ SWARUP & SINGHVI, *supra* note 12 at 828-829.

²⁰ Freedom of Speech and Expression, finally became Art.19(1)(a) of the Constitution of India.

²¹ 7, ASSEMB. DEB. 712, (Nov. 4, 1948 to Jan. 1, 1949).

²² 7, ASSEMB. DEB. 715, (Nov. 4, 1948 to Jan. 1, 1949).

²³ 7, ASSEMB. DEB. 716, Amendment 421 (1949).

Later in *Maneka Gandhi v. Union of India*,²⁴ the Supreme Court drew a direct connection between “*free and open debate*” in a democracy with “*the freedom of press*”. The press acts as the “eyes” and “ears” of the general public. As held by Lord Donaldson, “Their right to know and their right to publish are neither more or less than the general public for whom they are *trustees*”.²⁵

In India, predictably, since the Constitution did not mention any specific freedom of Press, the onus was on the judiciary to interpret Art. 19 (1)(a) in a way to keep the fourth estate alive and active, which it indeed did so. This includes the liberty of publication and circulation, which is essential in the “*functioning of a democracy*”.²⁶ In *Life Insurance Corporation v. Manubhai Shah*,²⁷ the Supreme Court held that freedom of speech and expression is the lifeline of any democracy. It is thus, unnecessary to add it as a separate specific freedom. Any unreasonable restriction to fetter this freedom is ostensibly unconstitutional and ‘*cannot be held ransom to an intolerant group of people*’.²⁸

Dr. B.R. Ambedkar in response to repeated clamouring for the specific freedom of the press to be entered into the Constitution stated that the Press and the Citizens’ freedom are coextensive.²⁹ Further the word ‘*expression*’ is said to envelop within its folds the ‘*freedom of press*’.³⁰

²⁴ A.I.R. 1978 S.C. 640.

²⁵ A.G. v. Guardian, (1988) 3 All E.R. 545.

²⁶ Romesh Thapper v. Madras 1950 S.C.R. 594; *see also* 1, H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA: A CRITICAL COMMENTARY 709 (2006).

²⁷ A.I.R. 1993 S.C. 171.

²⁸ M Hassan v. Government of Andhra Pradesh, A.I.R. 1998 A.P. 35.

²⁹ The same view was suggested by the court in Arundhati Roy, In re, A.I.R. 2002 S.C. 1375.

³⁰ BASU, *supra* note 11 at 2573.

THE DEFENCE OF EXIT POLLS VIS-A-VIS FREEDOM OF SPEECH AND EXPRESSION

The kind of constitutional acknowledgement that freedom of press gets has a direct bearing on the kind of defence which may be used to protect exit polls. To establish the same, a comparative approach between the American and Indian constitution has been taken.

The American Constitution expressly confers freedom to the press via the First Amendment.³¹ Although worded in absolute terms, the judiciary has from time to time made inroads into this right on various grounds.³²

This express freedom makes the defence of conduct and dissemination of information received from exit polls much simpler.³³ First, the “*laws that restrict the collection or dissemination of exit poll data infringe on the First Amendment guarantee of freedom of speech, not only is the dissemination of exit poll results a form of speech, but exit polling itself involves discussions between willing participants on the political issues of the day.*”

³⁴Second, the conduct of exit polls is defensible under freedom of press,³⁵ that is the right to gather news.³⁶ Because of this explicit mention of freedom of press there is no need for special interpretation so as to include conduct.³⁷

³¹ BASU, *supra* note 11 at 2560.

³² BASU, *supra* note 11 at 2564.

³³ U.S. CONST., amend. I.

³⁴ The Harvard Law Review Association, *Exit Polls and the First Amendment*, 98 No. 8 HARV. L. REV. 5 (Jun., 1985), available at <http://www.jstor.org/stable/1341071> (last visited Aug. 19, 2013). [Hereinafter “Exit Polls”].

³⁵ *Id.*

³⁶ *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972).- Opinion of the Court by MR. JUSTICE WHITE, announced by THE CHIEF JUSTICE “ We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection”, available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=408&invol=665> (last visited Sept.28, 2013)

³⁷ Exit Polls, *supra* note 38.

In India while publication of exit poll data may be protected under Art.19 (1) (a), the absence of an express freedom of press is an impediment. To overcome the same , as indicated in the previous section, the freedom of press to conduct an exit poll may be recognized to be a facet of Art.19(1)(a). In the alternative, to overcome this impediment, one may use the interpretation lent to Art 21 by the Supreme Court, which is ‘*right to know*’.³⁸ As suggested earlier, the media aids in the moulding of public opinion through the transmission of ideas and facts. The media have a right to impart information³⁹ in order to support the ‘*right to know*’. Therefore, exit polls reveal important information, which the public have a right to know.

FREEDOM OF SPEECH AND EXPRESSION OF AN ELECTOR

Exit polls may also be protected by looking at the same from the perspective of the voter. Exit polls are an opportunity for the citizen to voice his or her opinion, to give expression to thought.

In *Kuldip Nayar v. Union of India*,⁴⁰ the question that arose was whether the right to vote was a Constitutional or Fundamental right? The court answered this drawing a fine line between the right to vote and freedom of voting, as species of freedom of expression.

The right to vote on account of numerous precedents was held to be a mere statutory right.⁴¹ On the other hand in light of *Union of India v. Association for Democratic Reforms*,⁴² wherein it was held that the voter’s speech or expression in case of election would include

³⁸ *Reliance Petrochemicals v. Indian Express* A.I.R. 1989 S.C. 190; Sabyasachi Mukharji, J’ right to know is a basic right which citizens of a free country aspire in the broader horizon of the right to live in this age in our land under Article 21 of our Constitution’

³⁹ *Indian Express Newspapers (Bombay) Pvt. Ltd. v. Union of India* A.I.R. 1986 S.C. 515

⁴⁰ (2006) 7 S.C.C. 1.

⁴¹ *Jyothi Basu v. Debhi Ghosal*, A.I.R. 1982 S.C. 986.

⁴² (2002) 5 S.C.C. 294.

casting of votes, that is to say, voter speaks out or expresses by casting vote, the court chose to hold freedom to vote as a sub-sect of freedom of expression.⁴³

The case is limited in its scope as the elections in question were that of Council of states⁴⁴, however, it still raises the all important proposition of freedom to vote and Art. 19(1)(a). The most recent recognition of the same by the Supreme Court was the right to a negative vote.⁴⁵

An exit poll seeks to simulate the process of voting where the voter is asked about the vote cast and by declaring so he/she is merely giving rise to an expression, protected under Art. 19(1)(a).

Further by voluntarily declaring one's vote, the elector does not violate secrecy of ballot. Secrecy of ballot has become one of the prerequisites of free and fair elections, and on which a democratic country may be judged.⁴⁶ In *People's Union for Civil Liberties (PUCL) v. Union of India*,⁴⁷ the Court held that:

“It ...requires to be well understood that democracy based on adult franchise is part of the basic structure of the Constitution.”

The Supreme Court took this proposition a step further and held, *“free and fair election is a constitutional right of the voter, which includes the right that a voter shall be able to cast, the vote according to his choice, free will and without fear, on the basis of information*

⁴³ *Kuldip Nayyar v. UOI* (2006) 7 S.C.C. 1. [Hereinafter referred to as “Kuldip v.UOI”].

⁴⁴ Rajeev Kadambi, *Prevailing Debate Regarding: Right to Vote as a Fundamental Right: ‘Mistaking the Woods for Trees.’ P.U.C.L. v Union of India*, available at <http://ssrn.com/abstract=1631767>. (last visited Sept. 28, 2013).

⁴⁵ 27 September, 2013, available at <http://indiankanoon.org/doc/58263027/> (last visited Oct. 28, 2013)

⁴⁶ Robert A. Dahl, *What Political Institutions Does Large-Scale Democracy Require?*, POLITICAL SCIENCE QUARTERLY, 195, Vol. 120, No. 2 (Summer, 2005).

⁴⁷ *PUCL v. UOI*, *supra* note 13.

received.”⁴⁸ Courts have continued to hold that secrecy of the ballot is “*considered sacrosanct in a democratic process of election and it cannot be disturbed lightly*”.⁴⁹

To strengthen the foundation of this right, the parliament in its wisdom, through legislation, provided for the secrecy of ballot so that the voter may be free from any political pressures.⁵⁰ The R.P. Act, 1951 and the relevant rules⁵¹ contain provisions for the preservation of the sanctity of the secret ballot.

The few words that s.94 contain provides profound implications on the kind of democracy India wishes to lead. In *Raghubir Singh Gill v. Gurcharan Singh Tohra & Ors*⁵², while trying to resolve the conflict between secrecy of ballot and free and fair elections, the Supreme Court unravelled the intent of the section. The court backed many earlier Supreme Court decisions which held that legitimate democracies conduct free and fair elections based on adult suffrage. This particular constitutional disposition must be kept in mind, while interpreting the section, so as to propel and not retard the above process.

The question of vital importance which was answered by the court was whether s.94, “*enacted with a view to ensuring total secrecy of ballot as an integral part of free and fair election vouchsafed by the Constitution, puts a complete embargo on the disclosure for which the vote was cast?*”⁵³ The court reasoned that the phrase “*shall be required*” has an element of compulsion and on a pure grammatical construction it means that the voter cannot be compelled against his will to disclose how he has voted. However, if wished to voluntarily

⁴⁸ *Kuldip v. UOI*, *supra* note 47.

⁴⁹ *P.H. Pujar v. Kanthi Rajashekhar Kidiyappa and Others*, (2002) 3 S.C.C. 742. *P.H. Pujar v. Kanthi Rajashekhar Kidiyappa and Others*, (2002) 3 S.C.C. 742.

⁵⁰ *Kuldip v. UOI*, *supra* note 47.

⁵¹ CONDUCT OF ELECTION RULES, 1961.

⁵² A.I.R. 1980 S.C.1362.

⁵³ *Id.*

disclose for whom he cast his vote, he may do so. S.94, as the court suggested, is a privilege given to the voter that may be waived.⁵⁴

Thus a voter revealing his vote in an exit poll is only exercising his/her freedom of speech and expression and it is not antithetical to secrecy of the ballot.

RESTRICTIONS ON FREEDOM OF SPEECH AND EXPRESSION

The First Amendment of the American Constitution ‘enacts a prohibition so heavy that there lies a heavy burden on the person transgressing it to justify it’ and that exceptions evolved are the acts of the judiciary.⁵⁵ On the other hand, in India, reasonable restrictions are allowed in those matters enlisted in Art 19(2)⁵⁶, which is an exhaustive provision.⁵⁷

As pointed out by J. Douglas in *Kingsly Corp v. Regents of the University of New York*,⁵⁸ the difference between the First Amendment and Art 19(1) (a) is that the latter provides for censorship on reasonable and listed grounds.⁵⁹ Reasonable implies intelligent care and deliberation that is the choice of a course which reason directs.⁶⁰ Thus, the Press’ freedom is only to the extent that it does not invade into the rights of a citizen, sovereignty of the state, public order, decency and morality.⁶¹

⁵⁴ *Id.*

⁵⁵ H.M. SEERVAI, *supra* note 30

⁵⁶ H.M. SEERVAI, *supra* note 30 at 710.

⁵⁷ *Sharma v. Sri Krishna*, A.I.R. 1959 S.C. 395.

⁵⁸ 360 U.S. 684; *see also* 1 H.M. SEERVAI, *supra* note 30 at 710.

⁵⁹ INDIA CONST. art. 19, § 2; Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

⁶⁰ *BASU*, *supra* note 11 at 2157; *see also* *Janath Mosque v. Vakhon Joseph*, A.I.R. 1955 T.C. 227 (FB).

⁶¹ *Prabhu Dutt (Smt) v. Union of India*, A.I.R. 1983 S.C. 6; *see also* *SWARUP & SINGHVI*, *supra* note 12 at 835.

It seems rather farfetched to include Exit Polls under the heading of Sovereignty, Public order, and Security of State (all related grounds). Defamation too may not be appropriate enough ground, as the exit polls project facts, which in most cases are the truth and truth is the best defence to allegations of defamation. The Court's commitment to freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression.⁶² To fulfil the said test a material relation which is direct and proximate⁶³ and not remote must be established⁶⁴ and in this case as illustrated above it does not.

Adding a new ground through amendment specific to exit polls is amusing as it would result in the “*statutise-ation of the Constitution, a document which lays down basic principles and not nuanced modalities*”.⁶⁵

Mr Soli Sorabjee⁶⁶ while objecting to the Commission's proposal for a ban on the publication and telecast of opinion and exit polls during elections back in 2004 argued that, “*the proposed restrictions in the form of prohibition of publication or opinion or exit polls are clearly outside the permissible heads under Article 19(2) and, consequently, the proposed legislation would be clearly in breach of Article 19(1) and, hence, unconstitutional.*”⁶⁷

⁶² S. Rangarajan v. P. Jagjivan Ram & Ors., (1989) 2 SCC 574

⁶³ M.R.F. Ltd. v. Inspector Kerala Government, (1998) 8 S.C.C. 227.

⁶⁴ Superintendent District Jail v. Lohia A.I.R. 1960 S.C. 633.

⁶⁵ Debating Freedom or Fairness, *supra* note 8.

⁶⁶ Former Attorney-General for India from 1998 to 2004.

⁶⁷ THE HINDU, available at <http://www.hindu.com/2004/04/10/stories/2004041005910100.htm> (last visited Sept. 2, 2013).

CONCLUSION

“*I disapprove of what you say but I will defend to death your right to say it.*”⁶⁸ –this is the core of our argument defending exit polls. It is safe to conclude that there are no lawful methods by which exit polls may be banned completely.

As identified and elucidated in the course of this paper, right to speech is primary and an exception ought to be construed purposefully. This epitomizes the spirit that pervades the Indian Constitution, a document rich in moderation.⁶⁹

It follows that if the ban on the conduct and publication of exit polls data goes unchecked, then other information can also be brought under the radar of the same. A frightening development of the above maybe observed in the discussions of the motion for consideration of the Representation of the People (Amendment) Bill, 2009 when many Members of *Lok Sabha* wanted a ban on opinion polls too. Opinion polls have undeniable free speech elements; by ensuring more periodic feedback than that provided by the ballot alone and also by encouraging public debate on governance and coalescing public opinion.⁷⁰ The Election Commission has even written to the Centre to explore the possibility of bringing in the ban, if necessary by means of an ordinance.⁷¹ The possibility of restriction in the future on editorial pieces or opinions made via the Media, which may influence the voter’s decision, is not farfetched.

The then Attorney General, Soli J Sorabjee when asked to opine on the Election Commission's proposal for an Ordinance to ban publication of opinion and exit polls during the period of election in the year 2004, submitted a report in support of the Media’s

⁶⁸ EVELYN BEATRICE HALL, *THE FRIENDS OF VOLTAIRE* (1906)

⁶⁹ Debating Freedom or Fairness, *supra* note 8.

⁷⁰ Debating Freedom or Fairness, *supra* note 8.

⁷¹ J. Venkatesan, Parties seek ban on opinion polls from the date of notification, *THE HINDU* Apr. 8, 2004, available at <http://www.hindu.com/2004/04/08/stories/2004040807240100.htm> (last visited Aug. 30, 2013).

fundamental right to free speech.⁷² “A citizen may or may not vote for a particular party or its candidate or may not vote at all depending upon his assessment of the weight to be attached to the opinion and exit polls. It needs to be emphasized that there is more than one opinion and exit poll and the citizen can decide which of them is credible and reliable for making his informed electoral choice just as he or she will assess the weight to be attached to the editorials and articles projecting different views in several newspapers”.⁷³

The media however is allowed to run rampant unchecked. The public, on which the media runs, acts a check on its powers. Every individual and every institution in our society enjoys a certain reservoir of goodwill. There is, however, a limit to the amount of goodwill that any individual or institution enjoys. If the media abuses its power, say to distort the results of an exit poll, which the public finds out, it inflicts harm upon itself. That is, it depletes its goodwill. A person or institution such as the media must use its reservoir of goodwill judiciously in order not to run out of it.⁷⁴ Self-regulation by media houses is the best and most legally compliant method to keep itself in check.⁷⁵ These regulations could include:-

1. Exit polls conducted for public consumption should be impartial and non-partisan.

⁷² No Ordinance to ban exit polls: Sorabjee, THE TIMES OF INDIA, Apr 9, 2004, available at http://articles.timesofindia.indiatimes.com/2004-04-09/india/28324946_1_exit-polls-parties-general-soli-j-sorabjee (last visited Aug. 30, 2013).

⁷³ Ban on opinion, exit polls unconstitutional: Soli Sorabjee, THE HINDU, Apr. 10, 2004, available at <http://www.hindu.com/2004/04/10/stories/2004041005910100.htm> (last visited Aug. 30, 2013).

⁷⁴ Burns W. Roper, *Early Election Calls: The Larger Dangers*, in *Early Calls of Election Results and Exit*, available at <http://www.jstor.org/stable/2748928> (last visited Aug. 19, 2013).

⁷⁵ In Germany, while it is not illegal, the polling organizations voluntarily restrict polling immediately prior to elections (Marsh 1984): Vicki G. Morwitz and Carol Pluzinski, *Do Polls Reflect Opinions or Do Opinions Reflect Polls? The Impact of Political Polling on Voters' Expectations, Preferences, and Behavior* 23 No. 1 J. CONSUMER RESEARCH 53-67 (Jun., 1996), available at <http://www.jstor.org/stable/2489665> (last visited Aug. 19, 2013).

2. Methods should be transparent, public, and well-documented. These goals can be achieved by publicly describing the methods prior to conducting the exit poll and by adhering to the standards of minimal disclosure delineated in this document.
3. Data collectors must adopt study designs for their exit polls that are suitable for producing accurate and reliable results and that follow specific procedural and technical standards stipulated in this document.
4. When reporting results from exit polls, data collectors and analysts must be careful to keep their interpretations and statements fully consistent with the data. Speculation and commentary should not be labelled as data-based reporting. Limitations and weaknesses in the design of an exit poll, its execution, and the results must be noted in all reports and analysis. Results should be released to the public and other interested parties through the general media and simultaneously made accessible to all.
5. The identity of respondents in exit polls must be protected.⁷⁶

However, the only way the legislature may rightly interfere while still maintaining some semblance of constitutional values, is to mandate certain information to be provided to the Public while releasing exit poll data. During the discussion on the motion for consideration of the Representation of the People (Amendment) Bill, 2009 most arguments favouring a ban on the Media's conduct and dissemination of exit polls result was that, "*A major part of the Press has surrendered themselves either to the industrialists or to some ruling party*".⁷⁷ In order to avoid partisan influences and to make the whole process more transparent, along with the publication of exit poll data the law can insist the following data to be released by

⁷⁶ WAPOR GUIDELINES FOR EXIT POLLS AND ELECTION FORECASTS.

⁷⁷ SHRI KALYAN BANERJEE (SREERAMPUR): Discussion on the motion for consideration of the Representation of the People (Amendment) Bill, 2009, as passed by Rajya Sabha, *available at* <http://www.indiankanoon.org/doc/454661/> (last visited Aug. 19, 2013).

media houses- the name of the sponsor of the survey; the name of the person or organization that conducted the survey; the date on which, or the period during which, the survey was conducted; the population from which the sample of respondents was drawn; the number of people who were contacted to participate in the survey; and if applicable, the margin of error in respect of the data obtained.⁷⁸

There are ancillary advantages to exit polls, in fact, it has been advocated that Exit polling may actually promote and guarantee honest elections,⁷⁹ due to the presence of reporters near the polling booth which may discourage any “*government impropriety in collecting and counting ballots*”.⁸⁰ In fact, a survey conducted by major networks concluded that there is a much larger chance of government fraud than that of the media fabricating poll data to influence elections. This is so, owing to the fact that there are several news organizations conducting exit poll data, whereas the government has a monopoly on the tabulation of official returns.⁸¹

Constitutional support for exit polls, either as freedom of speech of the media and the citizens or the citizen’s right to know are concepts known and utilized by the Indian Judiciary. Extending the same to protect exit polls is but natural and logical.

Although there may be many identifiable faults in exit polling and publication of such data, these are curable defects, as illustrated above. All that remains is a challenge to s.126A, and

⁷⁸ Article 19 Global Campaign for Free Expression, *Comparative study of laws and Regulations Restricting the Publication of Electoral Opinion Polls*, available at <http://www.article19.org/data/files/pdfs/publications/opinion-polls-paper.pdf> (Last visited Sept 28, 2013)

⁷⁹ Exit Polls, *supra* note 38.

⁸⁰ Exit Polls, *supra* note 38. (*the possibility of government fraud is greater than the possibility that the media might fabricate poll data to influence elections or to cast doubt on official returns because several news organizations now vie to gather exit poll data, whereas the government has a monopoly on the tabulation of official returns. The major networks, the Associated Press, the New York Times, and other newspapers have all taken exit surveys*); see also *Daily Herald Co. v. Munro*, 747 F.2d 1251 (8th Cir. 1984).

⁸¹ Exit Polls, *supra* note 38.

one may expect with reasonable certainty that the fourth estate as well as the citizen will not go unprotected.