

Electoral Process on the Horns of a Dilemma

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By R.D. Jain

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The Election Commission of India had refused to hold elections in Gujarat saying that the circumstances in Gujarat are not conducive for holding fair and free elections on account of the communal riots. Article 324 of the Constitution of India is the repository of powers of the Election Commission.

It would be useful to understand the meaning of the term "election" for comprehending the scope of powers of the Election Commission. The term "election" was first interpreted in 1952 in a wide as well as in a narrow sense. In a narrow sense, it is used to mean the final selection of a candidate which may embrace the result of the poll when there is polling or a particular candidate being returned unopposed when there is no poll. In the wide sense, the word is used to connote the entire process culminating in a candidate being declared elected.¹ In Article 324 the term "conduct of election" encompasses within it the wide meaning of the term "election". The superintendence, direction and control of the conduct of elections referred to in Article 324(1) of the Constitution have been entrusted to the "Commission". The words "superintendence, direction and control" are wide enough to include all powers necessary for the smooth conduct of elections. A direction may mean an order issued to a particular individual or a precept which many may have to follow. It may be a specific or a general order. One has to remember that the source of power is the Constitution, the highest law of the land, which is the repository and source of all legal powers and any power granted by the Constitution for a specific purpose should be construed liberally so that the object for which the power is granted is effectively achieved.² Thus, the power of the Election Commission of India is circumscribed by Article 324 which entrusts only the powers of superintendence, control and direction for the "elections". However, exercise of power to "supervise, control and direct" is meaningful and relevant only if the elections take place. If the elections do not take place at all, there is hardly any scope for the Election Commission of India to step in and to issue directions. The recent decision of the Election Commission of India has to be viewed in this background.

The functionary responsible for conducting elections is expected to conduct, supervise and control, free, fair and peaceful elections to the Legislative Assembly and such functionaries are required to adopt a realistic, pragmatic and flexible approach to ensure that the country shall be governed in its true secular, socialist, democratic perspective. Under Section 15 of the RP Act, on a recommendation being made by the Election Commission the Governor shall notify the date or dates calling upon all assembly constituencies in the State to elect members in accordance with the provisions of the Act. After this notification the Election Commission shall fix the calendar of election specifying the dates of nomination, scrutiny, withdrawal etc. Thus, the essential functions of the Election Commission start after the Governor has notified the date of election. In view of the various provisions of the Constitution of India and Sections 15 and 30 of the Representation of the People Act, 1951, there can be little doubt that there should be close consultation between the Election Commission and the Union of India in the matter of fixing the election programme. The fixation of the date of poll would depend upon a variety of circumstances, all of which have to be taken into account by the Election Commission acting in consultation with the Government of India, which would have the necessary material in this behalf.³ The fact that it is the Government which has the major role in taking the decision is evident from the scheme envisaged for conducting elections. The Election Commission has no infrastructural facilities for collection of data which may facilitate the Commission to arrive at any conclusion. Information can be gathered and inquiry can be held by the Commission through the Government only. Section 30 of the RP Act lays down the powers of the Commission for appointment of dates for nominations etc.

It is again the Government which on request of the Commission makes public servants available for conducting elections. Thus, the Election Commission cannot on its own take a decision without taking into confidence the Government of India and the State Government.

Role of the Election Commission in the process of election Article 324 of the Constitution empowers the Election Commission to lay down the policy to decide administrative matters of importance and also adjudicate electoral disputes. Therefore, besides administrative functions it may be called upon to perform quasi-judicial duties also. The Constitution-makers preferred to remain silent as to the manner in which the Election Commission will transact its business, presumably because they thought it unnecessary and perhaps even improper to provide for the same having regard to the level of personnel it had in mind to man the Commission.⁴

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However, Article 324 does not enable the Election Commission to exercise untrammelled powers. It must trace its power either from the Constitution or from the law made under Article 327 or Article 328. Otherwise it would become an imperium in imperio which means no one is under our constitutional order.⁵

Section 15 of the Representation of the People Act, 1951 also lays down a similar procedure for issuing a notification for general election in a State Legislative Assembly. The Election Commission can recommend to the Governor the date or dates when the elections may be held. When a recommendatory body makes any recommendation the functionary to whom the recommendation is made is not obliged to accept it. The Governor for reasons stated under Section 15 may disagree with the recommendations. In case of such disagreement the matter shall be referred back to the Election Commission. By this process, an agreed date may be worked out. In case an agreed date is not reached, a situation of confrontation between the Governor and the Election Commission would arise. However, the decision of the Governor may prevail as the recommendation of the recommendatory body can be ignored.⁶ The State Legislature may attain the object by enacting law and the Commission may be required to act in conformity with those provisions. The Gujarat situation of confrontation could have been avoided had the Commission acted within the framework of its constitutional powers.

It is an essential postulate of democracy and a part of the basic structure of the Constitution, that the elections should be free and fair. In order to guarantee free and fair elections it would be appropriate for the Commission to hold the elections.⁷

The functioning of the Election Commission either in consultation with the Government of India or the State Government is a prerequisite. While programming the dates of poll the Commission considers the ground situation in the State and the assurance of the Government of India or the State Government in relation to the law and order situation of the area and on the question whether the atmosphere is conducive to the holding of free and fair election. Such assurance being offered to the Commission, there can be no question of postponement of the election by the Election Commission. The State Government and the Election Commission should also not ignore the need to ensure that the country is governed in its true secular, socialist, democratic perspective by elected representatives. In the present case the Election Commission, by taking a decision on its own has swerved from its object in getting the election conducted to secure functioning of democratic government in the State. Thus, the Election Commission, as a functionary, concerned with the conduct, supervision and control of free, fair and peaceful elections in the State has failed to adopt a realistic approach.⁸

Ancillary powers of the Election Commission to postpone election It may not be correct to say that the Election Commission has no discretion in the matter of extending the time for the completion of election. Section 153 of the Representation of the People Act fully empowers the Election Commission to make appropriate changes in the dates of poll. The Election Commission issues the notification under Section 30 of the Representation of the People Act appointing the various dates mentioned therein for the purpose specified in the process of holding of elections. This power carries with it the further power of alteration of the dates of poll. In cases where there is eruption of violence or communal riots during the process of election, such powers can be exercised by the Election Commission in individual cases based on the merits of that particular case. However, no such omnibus powers can be exercised by the Election Commission to postpone the holding of elections.

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Article 324 is geared to the accomplishment of free and fair elections expeditiously. It can also not be forgotten that in all such cases opinion of the Government should also predominate. Thus, in spite of the power of postponement of elections having found to be existing in the Election Commission, it cannot be denied that the Election Commissioner is expected to use the discretion wisely and not rashly.

Howsoever wide the powers of Article 324 may be, the powers of the Commission under Article 324 are meant to supplement rather than supplant the law in the matter of superintendence, direction and control as provided by Article 324 and therefore, that power does not prevail over the Acts passed by Parliament. In this context the provisions contained in Section 15 of the Representation of the People Act vest the power of notifying the date of commencement of election in the Governor. If the Governor is prepared to notify the date of election, the recommendatory body which the Election Commission is, cannot refuse to recommend the date of election under any pretext. The plenary powers of the Election Commission under Article 324 are of recommendatory value. The Governor can still issue the notification under Section 15 if the recommendation of the Election Commission is not in conformity with the political scenario of the State concerned. In such a contingency, if the Governor considers the elections to be imminent, it would be supplanting the provisions of Section 15 of the Representation of the People Act and the powers of the Election Commission under Article 324 cannot be stretched so far.⁹

The powers of superintendence, direction and control would include such powers which though not specifically provided are necessarily to be exercised for effectively accomplishing the task of holding the elections. When the term "election" is used, it would mean and include the entire process from the issue of notification under Section 15 of the Representation of the People Act up to declaration of result. But the role of the Election Commission starts after the date of election has been notified by the Governor.¹⁰ If the Election Commission fails to make recommendation, then such failure on the part of the Election Commission is subject to judicial review. However, the jurisdiction of the courts would not extend to issue

of directions to the Election Commission for the conduct of polls from particular dates independently of the perception by the Commission, as their feasibility and practicability consistent with what may be needed to ensure the purity of the election process is again within the domain of the Commission.¹¹ The assessment of the Election Commission as to the state of law and order and the nature and adequacy of the machinery to deal with the situation so as to ensure free and fair elections must prima facie prevail but there may be limitations of resources and situations of the kind which should be resolved by mutual discussion and should not be blown up into public confrontation. Even when the Election Commission finds the law and order situation difficult, it can only require sufficient number of security forces to be deployed, but postponement of elections is hardly a remedy for that. It would be better if a mechanism is devised to settle such disputes which may arise between the Election Commission and the State Government or the Central Government.¹²

The decision of the Election Commission to postpone elections trenches upon the areas which are within the domain of other constitutional organs. Under Article 174(1) the Governor is required to summon the House of the Legislature of the State to meet at such time and place as he thinks fit, but 6 months should not intervene between its last sitting in one session and the date appointed for its first sitting in the next session. If the elections are postponed, compliance of the provisions of Article 174(1) of the Constitution of India would become impossible. The Election Commission is under a constitutional duty to conduct the election at the earliest on completion of the term of the Legislative Assembly on dissolution or otherwise. If there is any impediment in conducting free and fair elections it can draw upon all the requisite resources of the Union and the State within its command to ensure free and fair election. Any man-made attempt to obstruct free and fair election is antithesis to democratic norms.¹³

The Election Commission of India is not supposed to suggest imposition of President's Rule. This would again be trenching upon the powers of another constitutional head, namely, the President of India who decides under Article 356 of the Constitution of India on the basis of the report of the Governor, whether a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution. Compliance of Article 174 enjoining the legislature to meet at least twice in a year requiring further that 6 months shall not intervene between its last sitting in one session and the first sitting in the next session can be probabilised, only if the Election Commission of India works in harmony with the Government of the State in accordance with Article 174 of the Constitution of India. The balance of power will thereby be maintained and overlapping of power will also be avoided. Since constitutional functionaries transgressed their constitutional periphery, jurisdiction of the Supreme Court was invoked to resolve the constitutional enigma. But here was a case in which such an emergent situation did not exist and the reference has been necessitated unnecessarily. In fact the constitutional machinery should itself have acted in a manner that such eventuality would not have arisen.

The exercise of powers by the President under Article 356 in the event of the elections being delayed may injuriously affect the rights of several persons. It may infringe not only the individual rights of the members of the Legislative Assembly, but also the constitutional right of the State to insist that the federal basis of the political structure set up by the Constitution shall not be violated by an unconstitutional assault under Article 356(1) of the Constitution. Under our constitutional set-up, usurption of the right of the State executive to function as such by non-performance of the duty by the Election Commission of India should be avoided. Now supposing the elections are not held within 6 months, there can be no session of the Assembly as provided under Article 174(1) of the Constitution of India. If the session of the Assembly is improbable, the Governor may either recommend President's Rule or may not take any step in the matter. Though the President may not exercise the powers himself and may not dissolve the Assembly but that will result in erosion of constitutional norms. Again after the dissolution of the State Assembly the provisions of Article 356(4) of the Constitution of India will require approval of Parliament. Now if Parliament refuses to approve the action, a complex situation would arise making the Constitution itself unworkable. In these circumstances the riddle has to be solved in a manner as to force each constitutional functionary to work within the powers conferred on it by the Constitution. The situation is not less explosive than what was witnessed by the country at the time of confrontation between the U.P. Legislature and the Allahabad High Court. It would be apt to recall the observations made by the Supreme Court at that time to the effect that circumstances should not have taken the turn that they did and that the reference to this Court by the President should not have been rendered necessary.¹⁴

It is hoped that what has happened will never happen again and the constitutional powers will remain workable if the different organs of the State behave wisely and courageously. Without exhausting the various steps, some of the suggestions can be as under:

1. In the matter of taking a decision as to the time when the elections are to commence, the Election Commission of India should take a decision in concurrence and with the consent of the State Government in the case of elections of the State Legislature and the Central Government in the case of elections of Parliament.
2. None of the constitutional functionaries should act in a manner as to impinge upon the areas of another constitutional organ while discharging functions under the Constitution and no situation should be created for inhibiting the action of any constitutional body in the matter. Thus, the Election Commission of India should not act in a manner as to disable any other constitutional functionary to follow the mandatory provisions of the Constitution.
3. In case of real difficulties when free and fair election is not possible, and the Election Commission of India does not

agree with the State Government or the Central Government, it should refer the matter to the President instead of taking the decision itself, so as to avoid any confrontation between the various organs of the State.

*Â Â LLM, Senior Advocate, Madhya Pradesh High Court, Gwalior Return to Text

- N.P. Ponnuswami v. Returning Officer, AIR 1952 SC 64 Return to Text
- Kanhiya Lal Omar v. R.K. Trivedi, (1985) 4 SCC 628 Return to Text
- Bhim Singh v. Election Commr. of India, (1996) 4 SCC 188 Return to Text
- T.N. Seshan, Chief Election Commr. v. Union of India, (1995) 4 SCC 611 Return to Text
- Election Commission of India v. State Bank of India Staff Assn., 1995 Supp (2) SCC 13 Return to Text
- Neelima Misra v. Harinder Kaur Paintal, (1990) 2 SCC 746 Return to Text
- Union of India v. Assn. for Democratic Reforms, (2002) 5 SCC 294 Return to Text
- Bhim Singh v. Election Commr. of India, (1996) 4 SCC 188 Return to Text
- A.C. Jose v. Sivan Pillai, (1984) 2 SCC 656 Return to Text
- Election Commission of India v. Ashok Kumar, (2000) 8 SCC 216 Return to Text
- Bharat Prasad Gupta v. State of W.B., 1995 Supp (3) SCC 639 Return to Text
- Election Commission of India v. State of T.N., 1995 Supp (3) SCC 379 Return to Text
- Special Reference No. 1 of 2002, In re, (Gujarat Assembly Election matter), (2002) 8 SCC 237 Return to Text
- Under Article 143 of the Constitution of India, In re, AIR 1965 SC 745 Return to Text