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Need for Regulation of Opinion/Exit Polls: A Contemporaneous and Juxtaposed Analysis

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INTRODUCTION

"The media's the most powerful entity on earth. They have the power to make the innocent guilty and to make the guilty innocent, and that's power. Because they control the minds of the masses."

—*Malcolm X*

The media is considered to be the fourth pillar of a democracy, alongside the Judicial, Executive, and Legislative wings.¹ Media plays a very important role of an instructive bridge between the state organs and the general public, acting as a link to many of the political and private processes for the masses, which otherwise would have been rather discreet in their nature. Information is the currency of democracy. The more neutral and accurate the information is, the healthier we can expect a democracy to be. Media being a crucial disseminator of this vital element of information, its consequences and potentialities need to be deliberated upon. This deliberation becomes especially important when the role of the media in the electoral process is examined, since elections are the heart of any democracy and a fair dissemination of information, news and views related to it is the soul. Because of the activities of the media being of wide range, this task can be best undertaken by tersely classifying the types of activities the media does before, during and after the elections.

Firstly, media acts as a medium for making voters more informed. It educates people in various ways—right from informing them about the polling dates, to making the public aware of the electoral process and the role that the citizenry have to play in the participative involvement in the democratic and republic governance of the society.²



Secondly, media acts as a transmitter of political propagandas and doctrines to a large number of people. By covering the election campaigns, promotional events, speeches and interviews, the media acts as an advertiser and as a disseminator of political agendas and propagandas. They make it possible for the politicians to reach out to a larger audience in a cheap and quick way.³ This role of the media as agenda and propaganda propagators can be, and needs to be delved into for a better understanding of how media generated material and content massively affects the electoral process.

This dissemination of propaganda by the media is: a) selective and, b) in context of the material and content they themselves originate. It is mainly the second process in the Indian context which is a point of deliberation here in this paper. In the second process, the media provides its own opinion on who ought to win, discusses public opinion, conducts opinion and exit polls, draws personality sketches of politicians, and

has observations on who seems to be winning and why.⁴ This has a huge impact on the electoral process, especially, considering the current age where media and advertising has a great influence on the decision making power of the masses.

Understanding this situation in the context of modern India, where due to rising literacy levels and purchasing power of the people, the country can be perceived to be highly influential and participative in the decision making process through the medium of news media and internet based social network. India is not only the largest democracy in the world, but is the only country having phase wise elections that further add to the conundrum. To succinctly but thoroughly understand and answer this question, first the position of the Election Commission of India, which is the organizing body, and secondly, the Judiciary, which through its pronouncements, proactively participates in reforming the arena of politics and elections, needs to be comprehended. Then, the impact of the media on the electoral process will be academically analysed and answered. Further, a juxtaposed analysis of other countries regulating the participation of the media in the electoral process will also be done with respect to the Indian context, and the possible reformations which will make the election process a healthier and less indoctrinated one will also be suggested in this paper.

INDIAN SITUATION ON REGULATION OF MEDIA WITH RESPECT TO ELECTIONS

The recent 2014 Lok Sabha elections brought under scrutiny the need, importance and influence of pre-election opinion polls and exit polls. More than the print media, the regulation of electronic media is of concern here.



A number of laws regulate, circumvent and dictate the printing and publishing process. On the other hand, electronic media has a wider ambit and is further growing, thus, making it difficult to contain and govern it from specific pre-ordained rules. When it comes to elections, the electronic media can be said to be playing a major part in informing as well as influencing the voters. Firstly, because of the ever increasing reach and reliance of the masses on it. Secondly, because of the participation it offers, thus, making the masses feel involved and giving them a sense of democratic liberty.

The Election Commission does recognise this fact, as can be discerned by the varied orders they have issued over the years to regulate electronic media. However, the pertinent question which arises here is that, whether it is or has it been enough.

Election Orders

Article 324 of the Indian Constitution has entrusted the Election Commission with wide powers in pursuance of its sacred and solemn duty of conducting free and fair elections to Parliament and State Legislatures.⁵ It can issue guidelines and orders to independent channels, such as the media where the matter pertains to elections. The fundamental purpose of such a power constitutionally vested within the Commission is to make sure that it can conduct elections freely and fairly. This fairness also includes the duty to make sure that the choices and opinions of the voters are not unfairly influenced or biased. The Election Commission has recently made several efforts to carry out this mandate in the form of guidelines and orders.

The first prominent order pertaining to media coverage of the election was issued by the Election Commission in the year 1996. Order 491/96/MCS⁶ dealt with facilities to be provided to media persons for coverage of the process of elections. This order recognized the significance of televisions as a medium of coverage of elections with

widespread impacts. For reasons such as dissemination of information, news and political awareness, a model code of conduct was established by this order of 1996. The order contemplated activities such as debates, opinion polls by non-political organisations and a voting pattern analysis among other things. A "balanced and fair over a period of time" methodology was adopted for news by electronic media.

In 1998, Order No. ECI/PN/98/05 dealt with the manner in which the political parties could use government owned electronic media to promote and facilitate political news and views. The order was rather short and primarily focused on airtime regulation.



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These orders and notifications were primary in their nature, considering the time period in which they were issued. Electronic media was not very penetrative, and did not have a large viewership base. Social media had not even taken form. Media houses were predominantly involved in print media and had not forayed much into electronic media. Election campaigning was predominantly an activity which involved rallying, use of limited electronic media, print media, and even at times a door-to-door publicity campaign. All this changed with the advent of social media, the spectacular rise of electronic media and the general change of the perception of people along with their lifestyle.

A very crucial phenomenon, which is part of the pre-election media buzz, is the phenomena of Opinion and Exit Polls. In Order No. ECI/MCS /98/01, the Election Commission issued guidelines for publication and dissemination of the results of Opinion Polls/Exit Polls. The order contemplated the legal provisions for such polls in the Canadian and Italian laws, providing them as a basis for a sound reasoning that such polls have the power to influence the choice of the voters and should be regulated. The order set out clear-cut guidelines for the conducting opinion polls and electoral polls. Point 14(ii) of the guideline states that opinion polls cannot be conducted anywhere between 2 days prior to the first day of the elections until half an hour after closing of polls in all states and union territories.⁷ For exit polls, the guidelines stated that the results of such polls cannot be released or published in any manner whatsoever from the day when the polling starts until half an hour after the polling has closed in all states and union territories.⁸ This order was a *mutatis mutandis*, i.e., one which shall be applicable to future elections as well.

The Election Commission, through an order dated 2009, formulated a regulation regarding Opinion and Exit Polls. In order No. ECI/PN/54/2009 of 2009, the Election Commission specified the time period within which results of such polls could not be published. As per the guidelines, in the case of a single phase election, results of opinion/exit polls carried out at any time, cannot be published, publicized or disseminated in any manner, for a period of 48 hours ending with the hour that is fixed for conclusion of the poll.

The 2009 general elections followed the 1998 guidelines. Accordingly, the results of the opinion/exit polls carried out at any time, could not be published, publicized or disseminated in any manner 48 hours before the hour fixed for conclusion of the poll in the first phase of the election, till the conclusion of the poll in the last phase of the election.

Through these election orders, it can be discerned that the Election Commission has been consistent in its approach towards the issuance of orders to the media in conducting opinion and exit polls, but there seems to be a moderate tone to these orders as the Election Commission has rarely, if at all, been pro-active to check how diligently these orders and guidelines have been followed. Also, with the coming up of social media, and that too in a gargantuan way, the Election Commission seems to have failed in contemplating its impact and influence on the voters in an indirect way.

Supreme Court on Election Commission Orders

Where the Election Commission orders were coming as a way forward, towards the sound and strong regulation of opinion and exit polls, it can be said that the Supreme Court took a back seat in a civil writ petition filed before it against the Election Commission order of 1998 and 1999⁹.

This petition was filed against the orders of the Election Commission by which they regulated the dissemination and publication of Opinion and Exit Polls. The Court held and ruled that the Commission Guidelines 'exceeded the power of superintendence, direction and control granted to it by Article 324 of the [Indian] Constitution. Thus, the guidelines were considered to be against the freedom of speech and expression enshrined in the Constitution, which also forms a basis for the functioning of the media. A similar petition in the case of *D.K. Thakur v. Union of India*¹⁰ is pending before the Supreme Court.

Also, in a recommendation from the Attorney General, he opined that such orders by the Election Commission are violative of the fundamental freedom of speech and expression provisions enshrined in Article 19(1)(a).¹¹

Therefore, currently India lacks any statutory provision, governmental guidelines or Supreme Court order which regulates the media when it comes to elections. This is rather worrisome as we can see that most of the countries have strong regulations when it comes to opinion and exit polls.

The Rise of Social Media

Though with Order No. 491/SM/2013/Communication¹², the Commission did touch upon the aspect of social media, thus, acknowledging its role.

However, a mere acknowledgment seemed a little insouciant considering the magnitude of social media's importance and the role it plays in the everyday sphere and public activity today. The order concerned itself only with one aspect of the whole picture, i.e., how should the candidates use social media as a tool for election campaigning. Social media is an effective platform for campaigning and reaching out to the people, but the way it reaches them should also be taken into consideration. There are myriad regulations or guidelines to control how the news, views and opinions should be presented online to the viewers. Election Commission, through the above mentioned orders, categorized social media into 5 categories. These are¹³:


- a) Collaborative projects (e.g., Wikipedia)
- b) Blogs and microblogs (e.g., Twitter)
- c) Content communities (e.g., YouTube)
- d) Social networking sites (e.g., Facebook)

e) Virtual game-worlds (e.g., Apps)

To further the argument of social media's huge impact on the recently held Lok Sabha election, and elections in general in today's age, we need to delve into some of the intricacies of how social media functions with respect to elections and the kind of influence it has on the decision making capabilities of the voters.

India's Internet penetration rate, according to Internet Live Stats, grew an unprecedented 14 percent from last year and is currently estimated to be at 243 million or roughly 19 percent of India's population.¹⁴ This clearly shows how Indians are continuously adapting themselves to the phenomenon of social media as a platform for exchanging ideas and formulating opinions. One reason why social media acts as an impactful medium of communication and influence is because it actively involves its users.¹⁵ There is no passivity which exists in watching television or listening to the radio. Also, it does not have the redundancy which at times creeps in, in print media.

Coming back to the politics-social media nexus, Twitter in its blog wrote about how Indian Politics is resorting to social media:

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"To put this in perspective, in the 2009 elections, there was just a single active politician with 6,000 Twitter followers. This Lok Sabha Election, Twitter became the medium of choice for people to engage in and consume political content. Take any metric: original content generated, engagement by political leaders, user engagement with content, news breaks, influence on political discourse or capacity to set media agenda' it happened on Twitter".¹⁶

Facebook saw a similar surge in political content from the day of the announcement of the elections. Data suggests that from the day elections were announced, to the day polling ended, 29 million people in India made 227 million interactions (posts, comments, shares, and likes) regarding the Indian Elections on Facebook. These numbers are staggering. This was the first time that there was such a wide scale use of technology prevalent in the elections. It is not that social media is limited to the upper strata of people of the society but has also seeped into the lower-middle income group families as well. People are actively hooked on to social media platforms with the help of their mobile phones. Facebook adapted its "I'm a voter" App. for India as well. The App. constantly reminds people to vote. Miranda Neubauer, TINtech President, wrote that the App. appears to have some way in getting people to the polls.¹⁷ A study published in the journal Nature, found that in 2010, 340,000 additional people voted after seeing the notification about their friends voting in their Facebook newsfeed, and that in 2012 over 9 million people said they voted, amounting to 8.6 percent of the U.S. Facebook population.¹⁸

The Internet and Mobile Association of India estimates that a well-executed social media campaign can swing 3-4 percent of votes.¹⁹ Such is the impact and the magnitude of the influence of social media in the election process, which with time will only grow by leaps and bounds. Unlike traditional campaigning, which compulsorily needs to come to a close 48 hours before the polls, the Election Commission is not vigilant enough to legislate and enforce silence on social media networks as it would be tantamount to stifling the voice of the people. This means that any development, even in the hours of polling can potentially influence voter behaviour as the information will spread like wild fire. Additionally, this also means that savvy



candidates can harness the power of social media to unleash a guerrilla campaign on their opponents without giving them the time to respond. We may see some candidates take a hit and run strategy.

The nexus of opinion polls and social media proves to be further dangerous. Earlier, opinion poll results were only talked about and released via television or print media, but with social networking websites coming up, this discussion has become fiercely active and continuous, unlike a one-time affair. Even though the results on opinion polls were released many days prior to the allotted no-release time frame, the voter can still at times with passive voluntariness, come across these polls, thus, influencing his/her choices to a great degree. A viewer on YouTube can check old videos of opinion polls with active discussions taking place on it at present, which is bound to influence his/her choices in some way or the other.

Curtailing the mobility to surf, social network websites might amount to curtailment of fundamental rights but a proper regulation, and that too an optimally timed one, can be in furtherance of the ideals on which the Election Commission proudly bases itself upon.

CONCERNS AND NEED FOR REGULATION

The concerns which crop up with respect to the growing role of social media in the sphere of electoral process and voter behaviour can be broadly categorized into two folds:

- i) Due to the way social media influences the mind-set and behaviour of the voters; strong regulatory measures have become the need of the hour. There is a need for regulating websites, albeit temporarily, during the election period so that the voting is fair and not ill-influenced. This also raises the question of the trade-off between the right of the voters to have information and the duty of the Commission to conduct elections in an atmosphere of zero-bias. The recently concluded elections should not be taken as a benchmark, let alone as an example, but as an indicator of how social media will probably be the leading medium of interaction and deliberation for the citizenry in the future, therefore, a need for strong regulatory mechanism will be nothing but following the old idiomatic saying that 'Prevention is better than cure'.
- ii) The need to have corrective-penal laws to tackle the burgeoning reach of social and electronic media in disseminating news, views and opinions which might be counter-productive and violate the mandates formulated by the Election Commission in conducting free and fair elections. Under this, the Representation of People (Second Amendment Bill), 2008 will also be deliberated upon, as one of its core issues was the regulation of opinion and exit polls.



These issues will further be needed to be juxtaposed with similar laws in other countries and their stand on opinion and exit polls and their regulation of telecommunicating mediums

A JUXTAPOSE ANALYSIS

Widely conducted Opinion and Exit Polls and the Electronic and Social media has one particular thing in common and that is the large amount of people that are involved in them. Therefore, one way to delve into a better understanding of how such mass reactions take place is to understand it through the lens of effects such as bandwagon effect and underdog effect. To put it succinctly, the bandwagon effect is said to be of situations where information about majority opinion, widely dispersed in the community, causes some people to alter their opinion to accord with the majority view.²⁰ Such decision can be said to be a conscious decision to conform to societal decisions and to what people perceive to be the political norm, or it could be a subconscious decision to be caused by prevailing social attitude and contexts.²¹ Similarly, consciously adopting a minority opinion by going against the political norm is an underdog effect.²²

In a research study undertaken by McAllistor and Studlar with the British elections as their base, they have acknowledged such effects and confirmed that they do influence voting patterns. During the 1980s there was a fierce battle between the Alliance party and the Labour party to come into power. It was observed that Alliance party followers are more attentive to opinion polls as compared to Labour party followers. It was observed that over the course of three elections people who were exposed to such opinion or exit polls, the impact on their final voting choice has differed over the course of the three elections. Out of this the Bandwagon effect was the most prominent effect, influencing voter behaviour. That is, when people see a particular party winning in opinion polls, they tend to vote for that party on the actual day of polling.

A similar observation was made by Rajeeva Karandikar, Director of Chennai Mathematical Institute. He works with the Centre for Studies in Developing Societies for collecting election data and analysis of the same. Even he observes, in one of the surveys conducted by the CSDS, that there is a general tendency among people to side with the winner.²³



In order for this finding to have significance in the external, 'real' world, people must pay attention to opinion polls in the first place.²⁴ But Catherine Marsh claims in her authoritative research paper²⁵ that people do end up noticing and paying attention to opinion polls and this would further increase with technological advancements and people increasingly spending more time being connected with the media. Social Media, in today's world, bridges this gap. If people do miss out on the results of Opinion Polls televised nationally, they can always check video networking websites like YouTube to go through them again and again.

Mr Karandikar proposes that there is a feedback loop nowadays, with such an omnipresent electronic and social media. That is, if all the surveys end up pointing in a certain direction, people's votes do get influenced. Therefore if a party ends up doing independent polls and manages to get a large viewership of the people or undiluted media attention, then it does end up producing bias indirectly in the minds of the voters. In his book *The Broken Compass*, Peter Hitchens asserts that opinion polls are actually a device for influencing public opinion.²⁶ Thus, there are a host of such well documented and researched publications establishing a case against opinion and exit polls.

Regulation of such polls in many countries is a rather strict affair. When such

opinion polls are put on video channels and social networking websites, they gain a timeless audience, which in turn is influential on voting patterns. One thing about such channels and websites is that they can be regulated with the provisions present in law and a robust and strict mechanism is put in place. Videos can be blocked or removed from the channels for a specified time, which might start a few days before the elections start up till the end of elections. Similarly, content on official websites can be monitored by the ECI to ensure that such polls and opinions are not there which undermine the authenticity and fairness of the whole election process. Such mechanism may sound far-fetched and undemocratic, but such extreme measures once in five years can be said to be a reasonable trade-off towards an unbiased and democratic voting environment and system.

Another problem which can be seen to exist in such polls in India is their methodology. There seems to be no objective methodology in such polls. Methodology becomes important in situation where national parties, themselves, may conduct independent opinion polls, thus, influencing the voters. A thorough regulation here is the need of the hour. A regulation in methodology is not only highly plausible but also minimally controversial. Therefore, it is a rather easy first step forward to bring about a reform when such polls are concerned.



This regulation, fore mostly, should be independent and imposed by the Press Council of India (PCI) itself. The regulation ideally should have that each published poll reveals, in public domain, the detailed methodology of sample selection, the sample size, the socio-economic profile of the sample, the dates when sampling was done, the names of the core team members who supervised the survey and the methodology used to convert vote estimates to seat conversion.²⁷

In light of this it is of relative importance to understand the telecommunication and media laws existing in other parts of the globe with respect to elections and the whole electoral process. An understanding of how other countries regulate their media during elections hours will not only help us provide a plausible solution but will also help us to find out the loopholes currently existing in the current system.

Stance on and Extent of Regulation in other countries-An analysis

Most countries have their own laws pertaining to opinion polls and exit polls and a few have no legislative regulations which govern these polls. The United States is one among those that do not possess any legal restrictions concerning exit or opinion polls and it is believed that such restriction shall not withstand the constitutional challenge in the US.²⁸ In most of the developed nations, the argument against such restrictions is that these limitations may hamper their Right to freedom of expression which is provided under Article 19 of *Universal Declaration of Human Right*, providing media the right to impart information and ideas to the citizens.²⁹

United Kingdom

Presently there are no legislative prohibitions or control over opinion polls or pre-election polls. The conduct of the media is controlled by the internal guidelines prepared by the media houses. After the 1992 fiasco, where most of the opinion polls were proved to be otherwise, the major opinion polls showed the labour party leading however the results turned out to be in favour of the conservative party,³⁰ the British Broadcasting Corporation (BBC) drafted their own internal guidelines on reporting opinion polls after that ignominy, which eventually has turned out to be



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effective.³¹ These guidelines help the media corporations to maintain the impartiality and fairness in the elections and also does not influences the views of the voters, which is also maintained in the Section 6 of Ofcom Broadcasting Code which provides for detailed regulations regarding impartiality by the media houses during elections and referendum periods.³² The self-imposed guidelines by the BBC includes-

- Not leading a programme or bulletin with the results of a pre-election poll;
- Not including the results of an election survey in a headline;
- Not relying on the interpretation given to a poll's result by the publication or organization which commissioned it;
- Always reporting the expected margin of error, and where the gap between the two leading contenders is within the combined margin of error, saying so; and
- Providing the methodology used, number of surveyors etc.
- Always reporting the dates of the poll, and who commissioned and carried out the poll.³³

No opinion poll may be broadcasted on the day of the election until the polls close or, in the case of a European election, all the polls have closed across the European Union.

Exit polls are controlled by the Representation of Peoples Act, 2002 which includes Section 66A in the original 1983 Act.³⁴ The Section provides for prohibition on publication of exit polls and states that no person shall report any forecast as to the result of the elections or views of the voters after they cast their respective votes before the polling closes and this section applies to both parliamentary and local elections. Furthermore, the publication of exit polls is also prohibited during voting for European Parliamentary elections. The punishment prescribed for the violation of this law is six months imprisonment. The exit polls are only allowed to



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be presented after the polling is completed in all the polling stations. In June 2004, The Times narrowly escaped legal action as they published the opinion polls during the European Parliamentary Elections, though the Electoral Commission decided not to take further actions against them.³⁵

Canada

The media actions during the elections in Canada are regulated by Canada Elections Act, 2000.³⁶ Prior to this act, many bills had been introduced in the Canadian Parliament but they failed to be converted into an Act. In 1979, the Comité des sondages of the Regroupement québécois des sciences sociales suggested that all the technicalities of the polls or surveys must be broadcasted simultaneously so that the voters may themselves judge the quality of the survey. A ban on opinion polls before one week of elections was also proposed by the committee though it was never accepted.³⁷ In February, 1992 Lortie Commission or Federal Royal Commission on Electoral Reforms and Party Financing suggested for the following regulations-

- The publication or announcement of opinion polls be prohibited from midnight the day preceding election day until the close of all polls on election day;
- Any news organization that sponsors, purchases or acquires any opinion poll, and

is the first to publish or announce its results in Canada during an election campaign, be required to include technical information on the methodology used in the poll;

- Any such news organization be required to make available to any person within 24 hours of publication and for the cost of duplication, a full report on the results of the questions published, including technical information and the results on which the publication or announcement is based.³⁸

Post these attempts, the Parliament finally passed an act which supplied for the regulation of pre elections and post-election polls. Section 328 and 329 of Canada Elections Act, 2000 provides a ban on the transmission of surveys during the blackout period in the elections. The act prohibits the transmission of exit polls before the polls are closed in every district or



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polling booth across the territory where elections are held. The act provides certain guidelines that need to be followed by the agency transmitting the surveys—

- 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;
- If applicable, the margin of error in respect of the data obtained.

Initially a 72 hour ban was placed on displaying the opinion polls before the election date, but later it was struck down by the Canadian Supreme Court on the grounds of violation of freedom of speech and expression as provided by the Canadian Charter of Rights and Freedoms and therefore, it was held as unconstitutional.³⁹ Therefore, at present, media houses are not permitted to show opinion and exit polls on the date of election till the time the elections are over in the concerned territory.

France

In 2002, the French Parliament passed a new law prohibiting the publication or display of opinion polls for the duration of 24 hours before the date of elections. Initially in 1977 under Article 11 of the *Loi 77-808 du 19 Juillet 1977*, the duration for this ban on publication was seven days prior to the voting day and exit polls were completely banned. The same was violated by many newspaper agencies in 1997 and the matter approached to the doors of the highest court in France the *Cour de cassation*. The court invalidated the existing law banning seven days of publication and by relying on Article 10 of European Convention of Human Rights and established the freedom of speech and expression and specifically the electorate right's to receive information.

The present law in France requires the media house or any other agency projecting opinion polls to provide for details of the poll's methodology and the exit polls remain prohibited.⁴⁰



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Council of Europe

The Committee of Ministers of the Council of Europe adopted Recommendation No. R (99) 15 on Measures Concerning Media Coverage of Election Campaigns in 1999 noting the importance of the media in modern societies and the need for independence of media during the elections was discussed and the committee suggested the guidelines that the media needs to follow during the projection of opinion and exit polls.⁴¹ Regarding exit polls, the committee suggested that no media house should publish exit polls till the completion of elections in the country. With reference to opinion polls, the committee suggested the following-

Regulatory or self-regulatory frameworks should ensure that the media, when disseminating results of opinion polls, provides the public with sufficient information to make a judgment on the value of the polls. Such information could, in particular:

- Name the political party or other organisation or person which commissioned and paid for the poll;
- Identify the organisation conducting the poll and the methodology employed;
- Indicate the sample and margin of error of the poll;
- Indicate the date and/or period when the poll was conducted.

All other matters concerning the way in which the media presents the results of opinion polls should be decided by the media itself. Any restriction on member States forbidding the publication/broadcasting of opinion polls (on voting intentions) on voting day or a number of days before the election should comply with Article 10 of the European Convention on Human Rights [freedom of expression], as interpreted by the European Court of Human Rights.

Italy

Italy is one of Europe's most restrictive regimes, where the prohibition on publication for opinion polls is fifteen days prior to polling through the Article 8 under law 28/2000. Previously, the duration was much more than fifteen days. Media agencies projecting the polls before fifteen days need to comply with certain measures issued by the Election Commission such as the polling date, method, sample size among others and the same



information will be displayed on the website of Department of Information and Press.⁴²

Countries like Singapore, Peru, Italy, among others, practice severe restrictions on the publication of pre and post-election surveys. The ban for opinion polls is imposed for seven days or more before the election date. Russia and Algeria provide for three to five days of ban, whereas, a 24 hour ban is justified for impartial elections and the same is practiced by most nations.⁴³ The recent example of regulation of exit and opinion polls is Ecuador, which reformed its electoral laws. The government passed the law which prohibits media to surface any type of information or opinions during the 48 hours leading up to elections.⁴⁴

Thus, it can be observed that in most countries there has been a tough conflict between media's freedom of speech and expression and the Election Commission's mandating powers. In most occasions, the former has emerged victorious but not without getting regulated. The situation in all of the above mentioned countries, and where India seems to be lacking, could be surmised to be:

- 1) Highly and intricately regulated;
- 2) Inciting criminal charge and Penal in nature, if violated. Britain and Germany

have made it a criminal offence to release exit poll figures before polling stations have closed, while New Zealand has banned them altogether.

- 3) A complete and strict ban during the election days. This particular vehemence is mutually dependent on the seriousness of the penalty, which has been mentioned in above.
- 4) Requiring the agencies to provide objective methodologies.

Juxtaposing the stance of other countries towards this election commission-media tiff, Indian laws appear to be rather perfunctory and incomprehensive. In case of violation of the guidelines, the penalties which can be imposed on the violator are vague, which in turn makes it appear lenient.



SOLUTIONS

When juxtaposed to the situation in other countries, it can be clearly discernible that Election Laws regulating opinion and exit polls should be much more detailed and intricate. They should not merely be guidelines but there should be a detailed procedure laid down by the Commission, deviation from which could attract not only legal but penal action as well. Until and unless, such laws don't have provision for imprisonment or a serious ban on the media agency in case of a violation, strict adherence to the guidelines is not possible.

An instance of a clear-cut violation was witnessed in the recently concluded general election, as well, where NDTV released its Opinion Poll results on 14th of April. Assuming that NDTV and its publications are national in character and the 1st phase of the elections had begun from 7th of April, it was a clear case of violation of guidelines.⁴⁵ Such instances not only flounder law but also deeply affect the voter's behaviour, as we have discussed above. Sadly, due to the lackadaisical mechanism prevailing in India when it comes to Election such instances go unnoticed.

A solution to such problems can also be succinctly found in the Representation of the People (Second Amendment) Bill of 2008. The Bill seeks to amend the Representation of the People Act, 1950 and the Representation of the People Act, 1951. Out of many key election issues, the bill also contemplates on Opinion and Exit Bills. The bill aims to give a statutory backing to the Election Commission guideline on Opinion and Exit Polls. The Bill empowers the Election Commission to notify a period during which the conduct of exit polls and publicity of the results shall be prohibited.⁴⁶ For general elections, the period may begin when polls open and end half an hour after the polls close in all states and Union Territories. During bye-elections, the ban extends from the start of polls until half an hour after the closing of all polls. One of the most important things which this bill is aiming at is that it seeks to criminally penalize the offenders and contraveners with imprisonment up to 2 year or fine or both. Even companies cannot escape the liability and they shall be dealt with accordingly.⁴⁷ It remains to be seen when this bill passes in the parliament, and with what changes and effects.

When it comes to Social Media, such publication fetters are hard to put. But as we have marked earlier, that how social media will increasingly play a role in elections in the future, the Election Commission should



contemplate its role in utmost seriousness. Video Channels and blogging websites are easier to monitor than social networking websites, and they also can be fettered easily if required. People who operate on social networking platforms like Facebook, twitter usually rely on the first hand information released on video websites and blogs of respective media agencies for information and news. Therefore by curtailment or proper regulation of these websites which carry first-hand information, the commission can minimise, if not eradicate, the violation caused by media agencies by their opinion and exit polls and other similar polls. A strong case for violation of fundamental right to speech and expression might be made out of it, but it must be remembered that a) equally important constitutional ideals are at stake when elections take place, and b) it is merely a temporary-precautionary measure of utmost necessity.

CONCLUSION

To conclude, we saw in a detailed analysis that whereas opinion and exit polls are a representative of the people's mind-sets, their views and are in furtherance of the democratic ideals of the constitution, unregulated and unfettered they may jeopardize other constitutional ideals on which the country proudly bases itself upon. That is, a free, fair and unbiased manner of choosing representatives for themselves. Countless studies and surveys have established that media opinions and polls do have an influential impact on the voting patterns and choices of people, therefore, a strong regulation is needed to make sure that people's choices are not influenced by deceit or indirectly.

This can be brought about by analysing the methods used by other countries in regulating the media intrusion in their electoral process. What can be objectively surmised by a juxtaposed analysis is that India needs a detailed and intricate regulation, and not necessarily a very strong one. Also, the Commission should have the power to strictly penalise the agencies which violate the guidelines and the established procedure. The Supreme Court, contrary to its previous rulings, should also agree to the Election Commission's point of view on this matter. The Commission despite the ruling reiterates its point that the past experience shows that in many cases, the result of elections have been vastly different from the results predicted on the basis of the Exit Polls, thus, turning out to be disinformation in many cases. Therefore, such a measure would be in the interest of fair elections, especially, in a case of the six prominent parties agreeing to such measures and regulations.⁴⁸



Such a regulation can be best brought with a statutory backing, which is being contemplated in the Representation of the People (Amendment) Bill of 2008, as discussed above. Not only a statutory compliance but also the Supreme Court must assist the Commission in realising this. The argument that free speech should not be thwarted in any manner is an acceptable one but election in a country like India is a special affair. Not only because of the sheer involvement of billions of people, maximum in the world, but elections form the very basis of the high democratic ideals on which the governance and the constitution of the country bases itself, and it becomes very important to minimise or, if possible, to zero down any biasedness or influence on the choice of the voters.

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