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Regulating Political Advertising: Legal Control on Election Communication in India

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A healthy political party system and impartial elections follow the foundation of any republic. A transparent electoral process and a legal framework are necessary for conducting fair elections, but so is an institutional framework. The Frameworks that control campaign advertisements and sufficiently guarantee that the welfare of the country, not special interests, is aided by governance. In a society where informed self-government and vigorous, habitual debate are the twin objectives of the First Amendment, modern political advertising seems to pose a challenge. Conventional free speech principles maintain that political speech ought to be unrestricted by the government, especially when it is discussed about elections. Still, several observers argue that political advertising undermines the concept of self-government by producing content that, at best, is superficial and at worst, misrepresents and distorts important issues. This article examines the existing procedures that, by controlling the style of political advertising, aim to improve political discourse. To ensure fair and transparent elections, it is crucial to have legal controls on political advertising. In India, the Election Commission plays a pivotal role in regulating election communications and ensuring that political advertisements adhere to certain guidelines given by the Model Code of Conduct. The Election Commission of India has implemented various regulations i.e. the Representation of Peoples Act¹ to maintain electoral process integrity. By implementing these legal controls on election communications, India aims to uphold democratic values and ensure a free and fair electoral process. It provides a framework within which political parties can engage with voters while adhering to ethical standards.

¹ Representation of Peoples Act 1951

Keywords: *political campaign, model code of conduct, election communication, regulation, political advertising.*

INTRODUCTION

Perception is fundamental to politics, and it is impossible to overestimate the role that commercials play in shaping public opinion by supplanting objective reality. Party-funded advertisements and 'government advertisements', which are supported by public funds, are the two categories of advertisements in India today that directly reference politics. While the latter is currently governed by the Apex Court's 2015 ruling in the Common Cause Case², the former is directly political and is permitted to remain so.³ Marketing displays, tabloid ads, commercials, signs, flyers, articles, flyers, letters, radio or TV presentations and other forms of promotions are used to directly or indirectly solicit votes, money or other support or opposition during an election campaign are all considered forms of political advertising.⁴

In this Common Cause case⁵, the Supreme Court outlined five guiding principles for future regulation of government advertisements. These were:

1. Advertising campaigns had to be tied to government duties;
2. Materials had to be presented fairly, objectively, and in a way that met the campaign's goals;
3. They could not be used to further a party's political agenda;
4. Campaigns had to be justified and carried out effectively and economically;

² *Common Cause v Union of India* (2018) 5 SCC 1

³ Prashant Bhushan and Anurag Tiwary, 'A Case for Regulating Government Advertisements' (*The Wire*, 21 February 2022) <<https://thewire.in/government/government-advertisements-regulation-public-money-misuse>> accessed 28 October 2023

⁴ 'Political Advertising Guide' (*Public Disclosure Commission*) <<https://www.pdc.wa.gov/rules-enforcement/guidelines-restrictions/political-advertising-guide>> accessed 28 October 2023

⁵ *Common Cause v Union of India* (2018) 5 SCC 1

5. Ads had to abide by financial regulations and procedures as well as legal requirements. The government advertisements' informative quotient was considered by the court.

Thus, this decision attempted to find a middle ground between the need for government ads and the need to prohibit any misuse of public funds. However, since the decision, governments have discovered new means of releasing advertisements that are capricious and driven by hatred, that defy Supreme Court decisions, and that promote the interests of ruling governments and celebrities over those of the public or provide any useful information. Therefore, this has effectively made the 2015 ruling absurd.

Evolution of Political Advertisement: A notable improvement in India is the political advertising landscape. While the advertisement's content may lack altered suggestively, there has undoubtedly been a shift to experiment with the technological paradise. It is compelling enough to use the new developments. From massive billboards and loudspeakers to fully functional IT departments on Internet-based applications like WhatsApp and Twitter, the evolution has primarily been driven by the changes in the media. The goal is still to reach as many people as possible, but thanks to technology, the parties can target specific demographics with tailored advertisements.

Following demonetization, the Prime Minister of India Mr. Narendra Modi spoke in 2017 about the need for new reforms and greater transparency in the political financing system⁶. Since then, three significant modifications to the frameworks governing political financing have been noted:

1. Political parties now take in money from overseas;
2. Any business may donate any size;
3. Money can be anonymously donated by any individual or group of individuals.

⁶ M.V. Rajeev Gowda and Varun Santhosh, 'A Proposal for Public Funding of Elections and Political Parties in India' (*Ideas For India*, 21 April 2017) <<http://www.ideasforindia.in/topics/governance/a-proposal-for-public-funding-of-elections-and-political-parties-in-india.html>> accessed 28 October 2023

Modi's 2014 Campaign⁷: One such politically successful campaign took place in 2014, when the BJP's most astute leader in the coming generation, Narendra Modi, won with an overwhelming majority. He reinterpreted the idea of rallies by combining publicizing specialists, event managing campaigns, and technical background that helped in achieving maximum impact. The presentations were comparable to those made at business meetings. It wouldn't be incorrect to argue that Modi's 2014 campaign is one of the most notable instances of mass mobilization in election history, given its 3D rallies, events, Chai Pe Charcha, interviews, and state visits.⁸ Modi tried to make a connection with young people living in cities, make amends for his past and become a nationally recognized regional brand name.

Unlike the BJP, he was able to forge a deeper and more enduring identity. His speech touched on the surface level of awareness regarding economic growth and prosperity. The goal of staying connected is present, but if the conditions are not fulfilled, advertising can also become counterproductive. A great campaign inspires people to take charge and show a deeper interest in politics and state governance.⁹

ELECTION COMMISSION OF INDIA: ENFORCING TRANSPARENCY AND FAIRNESS

Regulatory Body for Election: The primary goal of the Election Commission of India (ECI) was to advance democracy in the country, as mandated by the Indian Constitution and established in 1950¹⁰. The corporate office is located in New Delhi. The President of India appoints these to six-year terms, and the only way to remove them from office requires legislative impeachment.¹¹ The Indian Constitution established the Commission as a sovereign, permanent body that ensures that elections are fair and free throughout the country. The commission in India is in

⁷ Christophe Jaffrelot, 'The Modi-Centric BJP 2014 Election Campaign: New Techniques and Old Tactics' (2015) 23(2) Contemporary South Asia <<https://doi.org/10.1080/09584935.2015.1027662>> accessed 28 October 2023

⁸ Soumya Sehgal, 'Political Advertising in India: A Tale of Communication, Competition & Coercion' (*Agency Reporter*, 18 February 2019) <<https://www.agencyreporter.com/political-advertising-in-india/>> accessed 28 October 2023

⁹ *Ibid*

¹⁰ Mayengbam Nandakishwor Singh et al., 'Election Commission, Electoral Democracy and Constitutionalizing of Elections in India' (2021) 67(2) Indian Journal of Public Administration <<https://doi.org/10.1177/00195561211022579>> accessed 10 November 2023

¹¹ *Ibid*

charge of setting up the Lok Sabha elections.¹² The Election Commission is a shared entity between the Indian Central government and the state-level governments. It is important to note that the commission stays out of the state's panchayat and municipal elections. As a result, distinct State-level Commissions are established under the Constitution. Article 324¹³ of the Indian Constitution lists the measures intended to safeguard and guarantee the Election Commission's impartial and autonomous functioning.

Election in Advertising Guideline: Each phase of the election process for the nationwide legislature, state-run and the positions of the President and Vice President is overseen and managed under the control of the ECI. Campaigns that include political fund-raising are monitored, political parties are registered and categorized at the Federal and State levels, and the electoral roll is prepared, updated, and maintained under its supervision. In addition, it manages polling place operations, media relations, vote tallying and results announcement. In election-related matters, for example, where the law is unclear, the ECI is authoritative and decisive; however, it is subject to challenge in legal proceedings.¹⁴

Transparency in Election Communication: The following measures are mandated by the Commission and are imposed on parties to maintain transparency in Election communication, set under the Model Code of Conduct¹⁵:

- To supervise the entire electoral process for president and vice president for each state's legislature and parliament.
- To announce the election dates for the timely holding of elections.
- To assign polling places, how to assign voters to them, where to put counting centers, what measures to make in these places, and other such related issues
- To create the voter registration list and provide Electronic Photo Identity Cards (EPICs).

¹² 'Election Commission of India - Know Article 324 for UPSC' (BYJUS) <<https://byjus.com/free-ias-prep/election-commission-of-india/>> accessed 10 November 2023

¹³ Constitution of India 1950

¹⁴ 'Election Commission of India' (Britannica, 18 October 2023) <<https://www.britannica.com/topic/Election-Commission-of-India>> accessed 10 November 2023

¹⁵ 'Model Code of Conduct' (Election Commission of India) <<https://old.eci.gov.in/mcc/>> accessed 10 November 2023

- To recognize political parties, give them election symbols, and resolve disagreements about them.
- To impose caps on the amount of money that each political party may spend on a candidate's campaign and to keep an eye on them.
- To guide the disqualification of current members of the House and State Legislatures following an election.¹⁶
- To release a Code of Conduct for parties and candidates and prevent influenced practices and abuse of arbitrary power by those in positions of authority.

Enforcement challenges faced by Regulatory bodies: The Election Commission has numerous difficulties because of factors like the growing population, the use of technology, political corruption, mistrust between political parties etc.

The Electronic Voting Machine (EVM) tampering controversy surrounded ECI¹⁷. ECI even went so far as to challenge the critics to tamper with an EVM machine to demonstrate their point. ECI also collaborated with VVPAT which involves showing a slip to the voter through a tiny glass pane to certify their vote. Checking for duplicate electoral records and counterfeit EPIC cards is a significant difficulty as well. It is impractical for Election Commission staff to visit every single residence and inspect due to the large population. The Election Commission has numerous difficulties because of factors like the growing population, the use of technology, political corruption, mistrust between political parties, etc. Checking for duplicate electoral records and counterfeit EPIC cards is a significant difficulty as well. It is impractical for Election Commission staff to visit every single residence and inspect due to the large population.¹⁸

¹⁶ Election Commission of India - Know Article 324 for UPSC (n 12)

¹⁷ Scott Wolchok et al., 'Security Analysis of India's Electronic Voting Machines' (Proceedings of the 17th ACM conference on Computer and communications security, ACM, 2010)
<<https://dl.acm.org/doi/10.1145/1866307.1866309>> accessed 10 November 2023

¹⁸ Abhishek Kumar Garg, 'Issues and Challenges Faced by Election Commission in Conducting Elections (Abhipedia)' <<https://abhipedia.abhimanu.com/Article/IAS/Njg2MDkEEQOVV/Issues-and-Challenges-faced-by-Election-commission-in-conducting-elections-Indian-Polity>> accessed 10 November 2023

LAWS GOVERNING POLITICAL ADVERTISEMENT IN INDIA

Representation of Peoples Act: The Electoral System of the nation is outlined under Part XV of the Constitution, specifically Articles 324 to 329.¹⁹ The Legislature is authorized under the Constitution to pass rules and regulations about any issue of elections to the State Legislature and the Parliament.²⁰

The First Representation Act in the country was put into effect by the government in 1950 to regulate elections. This Act establishes the following:

- The electoral qualifications of voters.
- Direct elections to decide the allocation of seats in the Legislative Assemblies and the Lok Sabha.
- The process of creating electoral districts for the House of People and other assemblies.
- To determine the size of the constituencies by forming a Delimitation Commission. The President may modify the constituencies after the Commission has been consulted as necessary.
- Registering for more than one constituency is prohibited. They could be disqualified and forbidden from voting if it is found that they are not of sound mind or are not an Indian citizen.

The following are guidelines regarding political advertisements:²¹

- Political advertisements are forbidden for 48 hours, commencing from the hour that the poll in a particular polling area closes. The law states that no one may use cinematography, television, or any other similar device to show any election matter to the public during this time.

¹⁹ Constitution of India 1950, art 324

²⁰ 'Representation of People Act, 1951 - UPSC Polity' (BYJUS) <<https://byjus.com/free-ias-prep/important-provisions-of-the-representation-of-people-act-1951/>> accessed 10 November 2023

²¹'Election Commission of India - Know Article 324 for UPSC' (BYJUS) <<https://byjus.com/free-ias-prep/election-commission-of-india/>> accessed 10 November 2023

- When using signs, posters, or other similar displays for political advertising in any public area, the applicable local law provisions must be properly followed.
- Equal access to public ad space for election-related commercial space for all political parties and candidates throughout the election period.
- Political advertising cannot be conducted on private property without the owner's voluntary consent.
- The ban on advertising that showcases the achievements of the ruling party or government will deplete public coffers. Advertisers among others who disobey these rules risk fines or jail time under the law.²²

Model Code of Conduct: The Model Code is a set of regulations that have changed over 60 years. Before, during, and after the election, political parties, their agitators, and their candidates must follow these guidelines. A court of law does not recognize the MCC as a moral code. The Chief Commissioner, also called Election Commissioner is authorized under Article 324²³ to demand any party or candidate who has been the target of a complaint. Both the ruling parties and the opposition parties are required to adhere to these standards. These complaints are usually ignored even though this is an essential first step in decreasing these infractions. There are corresponding provisions in this Act of 1951²⁴, the Penal Code of 1860²⁵, and the Code of Criminal Procedure of 1973²⁶ that can be used to lawfully administer certain MCC provisions.

Publication of Advertisements: Governments frequently release a variety of ads, some of which highlight their accomplishments. These commercials are frequently screened around key events, most notably before the national and state elections, which sparks the Model Code debate. Technically, it is impossible to block these kinds of ads.

²² Hemant Goyal, 'India: Advertising and Marketing Advertising Law' (*Global Jurix*) <<https://www.globaljurix.com/our-publications/advertising-and-marketing-law-india.pdf>> accessed 10 November 2023

²³ Constitution of India 1950

²⁴ Representation of Peoples Act 1951

²⁵ Indian Penal Code 1860

²⁶ Code on Criminal Procedure 1973

Following careful consideration, the Commission has mandated that:

1. A general advertisement regarding notable occasions may be advertised. This advertisement is not allowed to feature a minister or any political figure.
2. No commercial that mentions or suggests the regions consisted of in the constituencies scheduled for pre-election can be issued during the period notified.
3. Made it explicit that the districts hosting the byelection should not support any new initiatives.²⁷

Campaigning: Political Parties and Candidates use election campaigns to publicize their positions and to promote the electorate for Election Day. Therefore, they use a range of devices, such as cars, flags, loudspeakers, temporary offices and voice or SMS messages in bulk. The Election Commission has established guidelines known as the code of conduct that restricts the use of these instruments.²⁸ The Code prohibits advertisements concerning ethnicity, faith, or language after elections are announced.²⁹

Legal Restrictions on Election Campaigns: Currently, there is no unified legislation or any statutory authority in India that regulates advertisements. The Advertising Standards Council of India (ASCI), a non-judicial organization, oversees and grants permits to the entire advertisements in India. Advertisers are responsible for making advertisements that apply to state and central-level advertising laws in the absence of uniform legislation. Self-Regulation of Advertising is the function of the Advertising Standards Council. Founded in 1985, it is a voluntary autonomous council whose goals are to uphold ethical advertising practices and increase public trust in commercials.

²⁷ Satya Muley, 'Assembly Elections 2022: Understanding Enforcement of the Model Code of Conduct' *Bar and Bench* (28 February 2022) <<https://www.barandbench.com/columns/assembly-elections-2022-understanding-enforcement-of-the-model-code-of-conduct>> accessed 10 November 2023

²⁸ Constitution of India 1950, art 324

²⁹ *Ibid*

Its objectives are:

- The verification of accuracy and sincerity of the statements and promises made in the commercials.
- To guarantee that advertisements do not violate widely acknowledged norms of public decency.
- To prevent a generalization of advertising to promote goods that are thought to be harmful to people or society.
- To make sure that commercials follow the rules of widely accepted competitive behaviour in business while maintaining the integrity of competition to inform consumers about their options.

Debate over Freedom of Speech versus Regulation - A Case Study: The Delhi High Court has ruled that the Constitution's Article 19(1)(g)³⁰ and Article 19(1)(a)³¹ prohibit the display of political advertisements in public areas while the Model Code of Conduct is in effect before elections is not violated. Justice Sanjeev Sachdeva made a ruling in response to a petition from companies (Petitioners) that provided advertising space in the city.³²

Later after contesting in an election, the petitioners were granted a license that gave the city's advertising rights, which was valid approximately only for ten years. The focus of this complaint was correspondence from the Commission and the Delhi Metro Corporation, which limited their capacity to display or post any political advertisements in a space taken over for commercial advertising while the Code of Conduct was applicable. The candidate contended that political parties were entitled to run their ads on websites that have been permitted to do business, as had been stated by the Election Commission on numerous occasions.

The Court decided that the limitations and guidelines only applied to political advertisements made while the Code of Conduct was in effect and that the Petitioners' freedom to engage in

³⁰ Constitution of India 1950, art 19(1)(g)

³¹ Constitution of India 1950, art 19(1)(a)

³² *Pioneer Publicity Corporate Private Ltd. v South Delhi Municipal Civ WP 495/2021*

any kind of business or trade was unquestionably unrestricted. In light of the objective that the directives aimed to accomplish, namely unrestricted, impartial, and transparent voting, the Court concluded that these restrictions passed the test of rational constraints under Article 19(6)³³ of the Constitution and were not unreasonable.³⁴

The Court also cited Article 324³⁵ of the Indian Constitution, which, among other things, granted the Commission the power to supervise, manage, and carry out elections for the State and the central. The Court found that the petition lacked merit in light of the previously mentioned information. Since Delhi had adopted the Model Code, the Court granted the Petitioners a 24-hour window in which to take down the political advertisements that violated the Election Commission's orders.

CONCLUSION & ANALYSIS

The most popular method of Political Communication, which is crucial to our democratic system, is Political Campaigning. Political Campaigning means reaching out to voters and promoting their involvement in elections through a range of media channels. The change in political communication from news to advertising has resulted in the public being exposed to more of these campaigns during each election cycle. As a result, more people are utilizing media outlets such as newspapers, television, radio and so forth.³⁶ This is the case because, in the ideal scenario, Politics would involve having beliefs that deal with a particular issue or involve influencing a particular constituency or group of people. The Media is the fourth pillar of democracy and its viewpoints generate interest in fixing those issues.

³³ Constitution of India 1950, art 19(6)

³⁴ Aditi, 'Restriction on Displaying Political Advertisements during Model Code of Conduct Does Not Violate Article 19(1)(a), Article 19(1)(g): Delhi HC' *Bar and Bench* (17 January 2020) <<https://www.barandbench.com/news/litigation/restriction-on-political-advertisements-during-model-code-of-conduct-delhi-hc>> accessed 10 November 2023

³⁵ Constitution of India 1950

³⁶ Sehgal (n 8)

This Article lists at least five different issues with government advertisements that require immediate attention:

1. The Practice of State Governments running ads outside of their borders: The Delhi government can justify using public funds to support ads in other states. In addition to being capricious and failing to represent maximizing value for taxpayers, this misappropriation of public funds flagrantly flouts the 2015 ruling.

2. The Printing of Advertorials or Official Advertisements: Publicized government ads are inherently deceptive and false, and as such, they are no more than sponsored content.

3. Political Commercials that are broadcasted before, during or after Elections: Preventing government advertisements from being published before elections is an anti-democratic practice and disadvantages other political parties. It has been observed that in their last year of office, governments increase their advertising budgets disproportionately³⁷; in contrast, the Union government spends a lot more public money in states that are about to hold elections than it does in states that are not.

4. The Committee on Content Regulation of Government Advertisements (CCRGA): The committee is therefore vulnerable to bias. Interests in politics may affect the commission's suggestions and results, generating worries regarding its integrity and fairness.

5. The Custom of using Pictures of Elected Officials in Official Advertising: The court first ruled in 2015 that only the Prime Minister's picture could be used in government ads.³⁸ Later, the ruling was changed to permit photos of ministers and chief ministers as well.³⁹

We should all be concerned about governments abusing their 'Power of the Purse'. A far more serious issue and a blatant indication of democratic backsliding is the absence of

³⁷ Sandeep Verma, 'Government Advertising: Exploring International Best Practices on Regulating Partisan Publicity by Incumbent Governments' (2014) SSRN

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2435870> accessed 10 November 2023

³⁸ *Common Cause v Union of India* (2018) 5 SCC 1

³⁹ Bhushan (n 3)

accountability and the inability to prevent such misuse. Government ads must be controlled not only because they annually embezzle thousands of crores of rupees from public coffers but also because they have a significant impact on our electoral democracy. It's time to review the 2015 ruling so that the irregularities can be fixed right away.⁴⁰

Ensuring fair competition for candidates seeking office is imperative in the modern era. Furthermore, we must ensure that special interests that are antagonistic to society's overall well-being do not exert a sizable influence over governance. In conclusion, to guarantee that the elections are genuinely free and fair, a comprehensive set of amendments to the laws governing election campaign financing is required. Restrictions on political contributions ought to be instituted to foster constructive competition among contenders for monetary backing. Even if the current transparency and disclosure laws need to be significantly strengthened, parties should be obligated to publish their spending, and other candidates should be mandated to publicly reveal their contributors. Any democracy cannot implement ad hoc reforms. Rather, it is possible to view hastily implemented reforms as anti-democratic.⁴¹

In Conclusion, regulating Political Advertising is crucial for maintaining the integrity of Elections in India. The Election Commission's efforts in enforcing legal controls on Election Communications help create an environment where voters can make informed decisions based on accurate information rather than misleading propaganda.

⁴⁰ *Ibid*

⁴¹ Sidhant Chandalia and Anirudh Lekhi, 'Regulation of Election Campaign Finance in India: Making Elections Truly Free and Fair' (2013) 6(3) NUJS Law Review <<http://nujlawreview.org/2016/12/05/1660>> accessed 10 November 2023