

**STATUTORY RECOGNITION OF THE MODEL CODE OF CONDUCT:  
VIABILITY IN CONTEMPORARY SCENARIO**

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**1: Introduction**

“When one with honeyed words but evil mind persuades the mob, great woes befall the state.”

— Euripides, Orestes

It can be inferred from the above mentioned quote that interest of the electorate is a delicate subject, swaying the same invites disturbance to nonetheless, their own surroundings. Therefore interest of these stakeholders should be guided by a genuine campaign, without any deceit or fraud. Free and fair elections form the bedrock of democracy.<sup>2</sup> The Model Code of Conduct (‘Code’ or ‘MCC’) is a set of regulatory guidelines issued by the Election Commission of India to curtail the deceitful actions of political parties and candidates prior to elections; the implementation of the Code is to ensure free and fair elections.<sup>3</sup> On one side it provides equitable ground and equal opportunities to the parties and candidates to contest elections, as well as saves the electorate from getting enticed by undue offerings so made.

Although the Model Code of Conduct is implemented but in paucity of any existing inherent legal backing, it often fails at meeting its objectives. The major loophole in the Code is its lack of statutory recognition, due to which the Election Commission cannot enforce the code *per se*, against any misconduct. Instead, it has to find the relevant provisions within other statutes.<sup>4</sup> Time and again the loopholes are targeted and the malleable parameters of Code are violated either via money power, vote-buying and similar manipulating malpractices. Then there stands an imbalance between the damage caused and measures taken by the Election Commission against the misconduct, eventually creating, more or less, a biased playground for the parties and candidates.

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<sup>2</sup> Press Information Bureau, *Model Code of Conduct & Its Evolution* (Special Feature 6, 2014)

<sup>3</sup> Election Commission of India, *Manual on Model Code of Conduct* (Doc. 21 Ed. 1, 2019)

<sup>4</sup> Parliamentary Standing Committee on Personnel, Public Grievances, Law & Justice, *Electoral Reforms-Code of Conduct for Political Parties and Anti Defection Law* (Report No. 61, 2013) para 3.0

The call for statutory recognition to the existing *status quo* of the Code needs reconsideration as well. While issuing the code, the Election Commission is entrusted with inputs of information on relevant scenarios advancing in the country; thereby the inclusive nature of the Code saves it from becoming a rigid and exhaustive document. For example, in 2013 itself the Election Commission instructed its subordinates to incorporate 'regulation of social media content' in the Model Code of Conduct.<sup>5</sup> Furthermore, some existing statutes carry punitive potential corresponding to utmost every guideline of the MCC. Therefore, incorporation of the Code in Representation of People Act or providing it legal status would be nothing more than a futile effort resulting in its overlap with the provisions of other legislations.

In this article, the authors have provided a comprehensive analysis on the viability of providing statutory recognition to the Model Code of Conduct. The relevance of the same in tackling novel challenges to application of the Code. Since the election laws should be clear, comprehensive and transparent;<sup>6</sup> the Model Code of Conduct should be of such nature, that it reinforces such laws to meet the mentioned parameters.

## **2: Status Quo of Model Code of Conduct**

The Model Code of Conduct is a set of regulatory guidelines issued to the political parties and candidates by the Election Commission during the times of election.<sup>7</sup> The Code offers a moral obligation on the parties & candidates to introspect on their behaviour and overall conduct. The Code is mentioned neither in the Constitution of India nor in the Representation of People Act, 1951 or any other statute. Article 324 of the Constitution confers sovereign powers to the Election Commission and has entrusted it to act autonomously with regards to conducting free, fair and timely elections to the Parliament and State Legislatures and of the offices of President and Vice President.<sup>8</sup> Under the mentioned Article *per se*, Model Code of

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<sup>5</sup> Election Commission of India, *Instruction of the Commission with respect to use of Social Media in Election Campaigning*, (No. 491/SM/2013/Communication 2013) Pg. 3

<sup>6</sup> UN Report, *Women and Elections* (March 2015)

<sup>7</sup> Roshni Sinha, 'Model Code of Conduct and the 2019 General Elections' (PRS Legislative Research, 11 March 2019) <<https://www.prsindia.org/theprsblog/model-code-conduct-and-2019-general-elections>> accessed May 7, 2020

<sup>8</sup> Constitution of India 1950, Article 324(1) "The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice President held under this Constitution shall be vested in a Commission (referred to in this Constitution as the Election Commission)"

Conduct is brought into force. Former Chief Election Commissioner S.Y. Quraishi said that, "the federal institution has to conduct the world's largest elections and more than that world's largest management programme of any kind". The words 'superintendence, direction and control' are of wide amplitude. These words are enough to include all powers necessary for the smooth and effective conduct of elections so that the will of the people may be expressed.<sup>9</sup> Adding to its autonomous character, the Commission has to act independent of any political or executive influence. However, the present status of the MCC does not allow involvement of any other institution initially, other than the Election Commission. The *prima facie* case is dealt by the Election Commission itself, thereafter if the aggrieved perceives the directions of Commission uneven; he/she has the right to challenge the same at the High Court of respective state, at this stage corresponding provisions of enabling legislations are introduced. Thus there is no statutory recognition of the Code in the first place. The attribute of Model Code of Conduct is not limited to maintenance of free and fair elections; since elections are a quest of power, wherein absence of such Code shall allow some contestants to act *ultra vires* vis-à-vis electoral practices. Additionally, the governance ahead by the elected representative is subject to their conduct during the elections. Therefore, the Election Commission vide its power under Part XV of the Indian Constitution has to conduct the colossal nature of elections, characterizing India as the world's largest democracy.<sup>10</sup>

#### **A. Historical background of MCC**

The origin of Model Code of Conduct can be traced back to the Kerala assembly elections in 1960. A Code of Conduct in the form of instructions regarding election meetings & processions, speeches & slogans was issued to political parties for their observance. In the 1962 general elections to the Lok Sabha the Election Commission circulated the code to all recognised political parties and the code proved effective in conducting election campaigns in a peaceful & systematic manner which was by and large followed by all the political parties, thereafter continued to be followed in subsequent elections. In 1974 during general elections in some state assemblies the Election Commission issued the code to the political parties in those states and also suggested to constitute a committee to monitor cases of violation of the code. In 1979 the Election Commission in consultation with political parties further elaborated the code and brought within its purview – restrictions on the 'Party in power' so as to prevent abuse of power to get advantage over other candidates.

<sup>9</sup> *Election Commission of India v. Ashok Kumar*, [2000] 8 SCC 216

<sup>10</sup> M.P. Jain, *Indian Constitutional Law* (8th ed., LexisNexis 2018) 1142

During 1991 general elections the code was brought together and was reissued in its present form and then in February, 2013 the Election Commission added an additional Part VIII in the code to regulate the issues of 'election manifestos' of political parties in pursuant to the judgement of Supreme Court in the case of *S. Subramaniam Balaji v. State of Tamil Nadu & Others*.<sup>11</sup> Therefore the advent of Model Code of Conduct is an important milestone and achievement of the Election Commission of India.<sup>12</sup>

## **B. Date of Enforcement of the Model Code of Conduct**

The Code becomes operative on the onset of announcement of the election schedule by the Election Commission. This announcement is made in a major press conference a few weeks prior to the inception of the formal election process. Likewise in the 2019 general elections the Model Code of Conduct was brought into effect on 10th March, 2019.<sup>13</sup> The dispute over 'date of enforcement' of the Code was conclusively settled by the judgement of a Division Bench of Punjab & Haryana High Court in the case of *Harbans Singh Jalal v. Union of India*<sup>14</sup> in which it was held that the Model Code of Conduct comes into operation right from the time and day, the election schedule is announced by the Election Commission.

The Code remains effective till the results of the respective election poll is announced or when the commission is done & dusted with counting of votes i.e. as per the above mentioned reference 23rd May, 2019.<sup>15</sup> Therefore, the political parties and candidates are expected to abide by the given Code of Conduct during the above mentioned period.

In respect of the above mentioned period, the enforcement of the Code is in two-folds or in two phases. The first phase starts from the announcement of election schedule by the Commission till 48-hours prior to the polling in that particular constituency; the second phase is the 48-hour period itself. In the second phase, the contestants are banned from any sorts of campaigning, sale of liquor is also revoked along with imposition of section 144 CrPC in order to prevent outbreak of any illicit activity or disturbance.<sup>16</sup>

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<sup>11</sup> (2013) 9 Supreme Court Cases 659, SLP(C) No. 21455 of 2008

<sup>12</sup> Sri G. Rajagopalan, 'Role of Election Commission in Upholding Democracy' (2007) 3 LW (JS) 55

<sup>13</sup> Election Commission of India, *Announcement of Schedule for General Elections to Lok Sabha and Legislative Assemblies in Andhra Pradesh, Arunachal Pradesh, Odisha & Sikkim* (No. ECI/PN /24/2019, 2019)

<sup>14</sup> [1997] SCC OnLine P&H 766

<sup>15</sup> Express Web Desk, 'Election Results 2019: Vote counting date, time, key constituencies' *The Indian Express* (New Delhi, 23 March 2019) <<https://indianexpress.com/elections/lok-sabha-election-result-2019-date-counting-timings-key-constituencies-bjp-nda-congress-sp-bsp-tmc-modi-mayawati-rahul-mamata-varanasi-amethi-rae-bareilly-bhopal-5738578/>> accessed 08 May 2020

<sup>16</sup> Code of Criminal Procedure, section 144 "Power to issue order in urgent cases of nuisance of apprehended danger."

Amid the ongoing pandemic of Covid-19, local body elections in the State of Andhra Pradesh got postponed leaving the Model Code of Conduct imposed, this further led to stalling of development works. The same was challenged before the Apex Court, and the court directed the Andhra Pradesh Election Commission to lift the Code & reimpose it four weeks prior to when the poll dates were notified.<sup>17</sup>

### C. Present Content of Model Code of Conduct

The Code consists of eight parts dealing with general conduct, meetings, processions, polling day, polling booths, observers, party in power, and election manifestos.<sup>18</sup> The below mentioned are broad guidelines issued by the Election Commission in the name of Model Code of Conduct.<sup>19</sup>

#### (i) General conduct

- The political parties & candidates are prohibited to perform activities in which: (a) Caste & Communal feelings are being used to secure votes, (b) Candidates are criticised on the basis of unverified reports, (c) Voters are being influenced by bribing or intimidating them, and (d) Protest are organised against the opinions of individuals by way of demonstrations or picketing outside their houses.
- Criticism of other parties when made shall be confined to their policies and programmes, past record and work and not to their private life.

#### (ii) Meetings

- The information regarding venue & time of any proposed meeting of the parties or candidates shall be provided to the local police authorities well in time so as to enable the police to prepare for necessary security arrangements.
- The parties also should ascertain in advance whether any prohibitory order is in force in the place where the meeting is proposed and should also obtain permission for the use of loudspeakers or any other facility.

<sup>17</sup> *State of Andhra Pradesh v. Andhra Pradesh State Election Commission* WP(S)(Civil) No(s). 437/2020

<sup>18</sup> Roshni Sinha, ‘Model Code of Conduct and the 2019 General Elections’ (PRS Legislative Research, 11 March 2019) <<https://www.prsindia.org/theprsblog/model-code-conduct-and-2019-general-elections>> accessed May 7, 2020

<sup>19</sup> Election Commission of India, *Model Code of Conduct for the Guidance of Political Parties and Candidates* <<https://eci.gov.in/mcc/>> accessed on 14 May 2020

(iii) Processions

- The party or candidate organising the procession shall decide beforehand the route of the procession and the time & place of its termination and normally there should be no deviation from it.
- If two or more candidates have plan processions on the same route, its organisers must make contact in advance so as to ensure that their processions do not clash or cause hindrance to the traffic.
- The carrying and burning of any effigies in public of members of other political parties is not allowed.

(iv) Polling day

All authorised party workers at polling booths shall:

- Be given identity badges which should not contain the party name, symbol or name of the candidate;
- Cooperate with the officers on election duty to ensure peaceful & orderly polling;
- Refrain from distributing liquor on the polling day & forty eight hours prior to it.

(v) Polling booths

Except voters only those with a valid pass from the Election Commission, will be allowed to enter polling booths.

(vi) Observers

The candidates can report any specific complaint or any problem regarding the conduct of elections to the observers appointed by the Election Commission.

(vii) Party in power

The party in power at the centre or the state shall ensure that they have not used their official position for the purpose of election campaigning and in particular:

- Ministers shall not combine their official visits with their campaigning work & should not use official machinery for the purpose of election campaigning.

- Advertising at the cost of the public exchequer and using official mass media of the Government for publicity of achievements to improve their prospects should be avoided.
- Ministers and other authorities shall not approve any financial grants, or any promise of construction of roads and for provision of drinking water, etc.
- Public spaces and Rest houses shall not be monopolised by the party in power and shall be available for the use of other parties & candidates.

*(viii) Election manifestos*

Added in 2013, the election manifestos should not contain anything which is against the provisions of the Constitution and the parties should avoid making promises that exert an undue influence on voters, and it is expected from them to indicate the ways & means also to achieve promises.

**D. Model Code of Conduct vis-a-vis Enabling Laws**

The MCC has been there for over half a century and as it is not a legally enforceable document *per se*; its observance is left to political parties and candidates.<sup>20</sup> The Commission usually uses the ingredient of ‘moral obligation’ to get political parties and candidates to follow the code. If the elections were a sports match; the Election Commission becomes facilitator-cum-umpire that shows the yellow card to mark a foul, but the game resumes again.<sup>21</sup> However, most provisions of the MCC have enabling laws in statutes such as the Indian Penal Code (‘IPC’), 1860; Representation of the People Act (‘RPA’), 1951 and Code of Criminal Procedure, 1973. The often violations of the MCC are listed as ‘corrupt practices’ & ‘electoral offences’ in the IPC, 1860 & the RP Act, 1951.<sup>22</sup> However, mere acknowledgement by the parties to the corresponding provisions makes them follow the MCC guidelines.

The chart underneath illustrates the part of such corresponding provisions of IPC, RPA and CrPC that carry a punitive and penal force.

<sup>20</sup> Vikramaditya Jha, ‘Moral or Model Code of Conduct? The Election Commission’s Powers to Ensure Free and Fair Polls’ (*Bar & Bench*, 13 April 2019) <<https://www.barandbench.com/columns/moral-or-model-code-of-conduct-the-election-commissions-powers-to-ensure-free-and-fair-polls>> accessed 8 May 2020

<sup>21</sup> Parliamentary Standing Committee on Personnel, Public Grievances, Law & Justice, *Electoral Reforms-Code of Conduct for Political Parties and Anti Defection Law* (Report No. 61, 2013) para 3.1-3.2

<sup>22</sup> Election Commission of India, *Manual on Model Code of Conduct* (Doc. 21 Ed. 1, 2019)

Table 2.4.1

<b>Malpractices under MCC</b>	<b>Corresponding Statutory Provisions</b>
Involvement in activities which aggravate existing differences or cause mutual hatred or tension between different castes & communities, religion or linguistic;	Section 123 (3A) of the RPA, 1951
Appeal to caste or communal feeling for securing votes and use of places of worship as forum for election propaganda;	Section 123 (3) of the RPA, 1951 & Section 171C, IPC
Bribing of Voters;	Section 123 (1) of the RPA,1951 & Section 171B of the IPC
Intimidation of Voters;	Section 135A (c) of the RPA, 1951
Impersonation of Voters;	Section 171D of the IPC
Canvassing within 100 meters of polling stations;	Section 130 of the RPA, 1951.
Holding of public meetings during period of forty-eight hours ending with hour fixed for the conclusion of poll;	Section 126 (1) of the RPA,1951
Transport and Conveyance of voters to and from polling stations;	Section 123(5) & Section 133 of the RPA, 1951
Create obstruction in or break up meetings and procession organized by other parties;	Section 339 IPC & Section 127 of the RPA, 1951
Serving or distributing liquor on polling day & during the 48 hours prior to it.	Section 135 (c) of the RPA,1951
Preventive measure against unlawful activities (riots, clashes or violating Section 126(1) of RPA) and maintain law & order during elections.	Section 144 of CrPC, 1973

It can be inferred from the table, that most activities that are violative of the MCC are already penalised in the corresponding penal sections of respective statutes. On clearing the air, it can be noticed that providing such provisions of MCC a statutory status under the RPA would only be counter-productive. The Election Commission is of a similar view. According to the Commission, elections are conducted over a stretch of forty-five days; and the Model Code of Conduct is imposed simultaneously only to that period. The real essence of MCC is in its quick redressal system, if lengthy court procedures are adopted to deal with violations of the Code then it would destroy the prime significance of its imposition.<sup>23</sup> In addition to this the Election Commission is empowered under para 16A of the Election Symbols (Reservation and Allotment) Order, 1968 to derecognize a political party (National or State), if in its own discretion, it is satisfied to do so.<sup>24</sup>

Corresponding Provisions of Enabling Laws vis-a-vis MCC

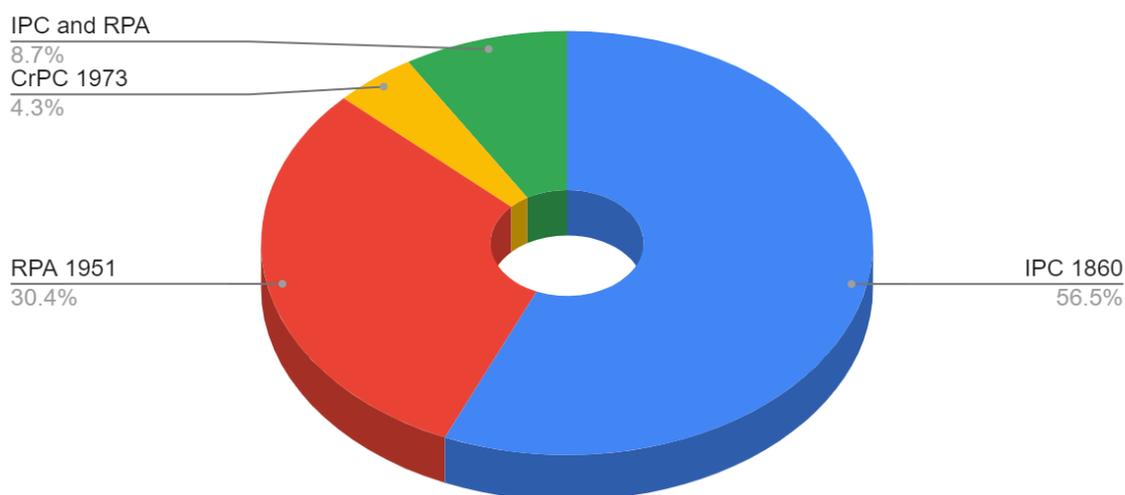


Figure 2.4.2

<sup>23</sup>Press Information Bureau, *Model Code of Conduct & Its Evolution* (Special. Feature 6, 2014) <<https://pib.gov.in/newsite/feacontent.aspx?relid=104399>> accessed on 12 May 2020

<sup>24</sup>The Election Symbols (Reservation and Allotment) Order 1968, para 16A “Notwithstanding anything in this Order, if the Commission is satisfied on information in its possession that a political party, recognised either as a National party or as a State party under the provisions of this Order, has failed or has refused or is refusing or has shown or is showing defiance by its conduct or otherwise (a) to observe the provisions of the ‘Model Code of Conduct for Guidance of Political Parties and Candidates’ as issued by the Commission in January, 1991 or as amended by it from time to time, or (b) to follow or carry out the lawful directions and instructions of the Commission given from time to time with a view to furthering the conduct of free, fair and peaceful elections or safeguarding the interests of the general public and the electorate in particular, the Commission may, after taking into account all the available facts and circumstances of the case and after giving the party reasonable opportunity of showing cause in relation to the action proposed to be taken against it, either suspend, subject to such terms as the Commission may deem appropriate, or withdraw the recognition of such party as the National Party or, as the case may be, the State Party.”

The pie chart attached above (i.e. Figure 2.4.2) displays the composition of the relevant statutes sharing provisions of Model Code of Conduct. As we may notice the majority of the portion is acquired by IPC (i.e. 56.5%) followed by RPA (i.e. 30.4%) ; then there are some provisions as noted in Figure 2.4.1 which coincide with relevant sections of both the statutes (i.e. 8.7%), further followed by only one provision from CrPC (i.e. 4.3%).

In the case of *Abhiram Singh v. C.D. Commachen*<sup>25</sup> The Apex Court observed interference of religion or religious beliefs while appealing the masses to vote shall be a 'corrupt practice' as under section 123(3-A), Representation of People Act (RPA) 1951. The Court also adopted broad, purposeful and contextual interpretation with regards to interpreting Section 123(3) of RPA.

Further in *K.K. Ramachandran Master v. M.V. Sreyamakumar and Ors*<sup>26</sup>, the division bench of Supreme Court observed that the hiring and securing of vehicles whether on payment or otherwise for the free conveyance of any elector to and from any polling station with the consent of a candidate or his election agent is a 'corrupt practice' under section 123(5) of the Representation of People Act, 1951 and is punishable under section 133 of the Representation of People Act, 1951.

In another case of *A.C. Shanmugam and Another v. Union of India and others*<sup>27</sup>, the division bench enunciated inclusiveness of acts of 'bribery' during elections is an electoral offence under section 171B of the Indian Penal Code. This penal provision prevents any candidate from violating 'general conduct' of the MCC, thereby contributing to free and fair elections.

In *Kamta Prasad Choubey v. State of Chhattisgarh and others*<sup>28</sup> before the Chhattisgarh High Court, it was emphasised that the Election Commission of India can restrict the serving or distribution of liquor during 48 hours prior to the date of polling for a State assembly election under section 135-C of the Representation of People Act, 1951 as well as on the day of counting of votes under Article 324 of the Constitution. The precedent was set by this judgement, violation of the above orders would be violation of part IV of MCC guidelines.

<sup>25</sup> (2017) 2 Supreme Court Cases 629

<sup>26</sup> (2010) 7 Supreme Court Cases 428

<sup>27</sup> 2019 SCC OnLine Mad 1408 : (2019) 5 Mad LJ 129

<sup>28</sup> 2003 SCC OnLine Chh 10 : AIR 2004 Chh 37 : (2004) 19 AIC 868 (Chhatt) : 2004 CgLT 18

The above precedents are set forth on the instances, where courts were to decide over cases of violation of sections of enabling statutes as well as contravening the MCC guidelines. The delivery of just and fair decision by the courts, comparatively, takes more time to decide over cases than quick directives issues by the Election Commission. Since the sovereign authority to conduct elections and oversee the affairs surrounding it is vested in the Commission, conferring judiciary the power to take decisions on the first place shall be more of an act of judicial overreach in the executive sphere.

### **3: Challenges Faced by Election Commission While Enforcing MCC in Contemporary Times**

The Model Code of Conduct is a small but unique document.<sup>29</sup> The framers of the Constitution while noting Article 324 vested the Election Commission with vast autonomy in discharging its function.<sup>30</sup> They left scope for the exercise of the residuary power by the Commission in its own right as a creature of the Constitution in the infinite variety of situations that may emerge from time to time in our large democracy.<sup>31</sup> The rationale established the Commission with a dynamic and flexible attribute. The following are some essential novel challenges which subsequently led to advancement of Election Commission with the scope of Model Code of Conduct and ensuring free and fair elections in every possible manner.

#### **A. Involvement of Social Media**

The introduction of social media in terms of elections has proved to be an effective tool. A 2013 study by IRIS Knowledge Foundation suggested that the social media usage has become sufficiently widespread in order to influence the 2014 Lok Sabha elections and the consequent government formation.<sup>32</sup> The anticipation turned out to be true as the Bharatiya Janata Party won with a great majority of 282 seats.<sup>33</sup> Turning a blind eye on Social Media and analytics would have been termed as a failure of the Election Commission of India, saving that Election Commission took the step of incorporating guidelines-cum-instructions

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<sup>29</sup> Election Commission of India, *Manual on Model Code of Conduct* (Doc. 21 Ed. 1, 2019)

<sup>30</sup> *Mohinder Singh Gill & Anr. v. Chief Election Commissioner*, New Delhi & Oth. (1978) 1 Supreme Court Cases 405

<sup>31</sup> *Ibid*

<sup>32</sup> IRIS Knowledge Foundation, 'Social Media & Lok Sabha Elections' (March 2013)

<<https://cms.iamai.in/Content/ResearchPapers/670023f4-e2e3-4ec5-9d97-18a4ec5aeeb5.pdf>> accessed 8 May 2020

<sup>33</sup> Election Commission of India, *List of Successful Candidates* (2014)

for social media earlier in 2013.<sup>34</sup> In contemporary times, social media has set a record of its use and misuse. On the brighter side, it has been a boon to the Commission in spreading important voter information and general awareness regarding awareness; which also helps boost the overall voter turnout. On the other hand, several misinformation spread on very many platforms caused voters' sway of interest. Meanwhile, it should be duly noted that any kind of post on social media platforms approaches people in a similar manner as if it were communicated to them via public speeches. On interpreting the Representation of People act, 1951 the bench took a liberal interpretation to incorporate misuse of social media under section 123(3) of the act.<sup>35</sup> The same was to ensure that no candidate uses such advanced technology of present times to instigate communal, fissiparous and separatist tendencies.<sup>36</sup> The Social Media Cell of District Media Certification and Monitoring set up by the Commission brought the tweet of a candidate to limelight. The alleged tweet included children being used to cite slogans in favour of the concerned party. This act was violative of the Model Code of Conduct as under 'Engagement of Child Labour in the Election Related Activities'.<sup>37</sup> Following which the Commission warned them against adopting such practice in future. In addition to this, the Internet & Mobile Association of India (IAMAI) submitted a 'Voluntary Code of Ethics for the 2019 General Elections' to the Election Commission.<sup>38</sup> In pursuance of which the social media platforms acted self-regulatory in a manner similar to the parties and candidates conducted themselves to the MCC. The Code of Ethics encouraged participation of the social media platforms in ensuring free and fair elections. The influence of social media posts vary as per their content. The content *per se* is the distinguishable element of any alleged post to reckon whether or not it violates MCC. A post may incite communal violence whereas another may maliciously manipulate the minds of electors. Deciding over the issue, calls for a quick response as it reaches the masses within minutes; therefore providing statutory backup to the Model Code of Conduct in this regard shall only delay the proceedings. Thus the Commission is best suited for matters concerned.

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<sup>34</sup> Election Commission of India, *Instruction of the Commission with respect to use of Social Media in Election Campaigning*, (No. 491/SM/2013/Communication 2013)

<sup>35</sup> *Abhiram Singh v. C.D. Commachen* (2017) 2 SCC 629

<sup>36</sup> *ibid*

<sup>37</sup> Election Commission of India, *Engagement of Child Labour in the Election Related Activities* (letter no. 464/INST/2017-EPS, 2017) <[https://cvigil.eci.gov.in/uploads/references/374279/374279\\_9174\\_1557317422\\_complaint.pdf](https://cvigil.eci.gov.in/uploads/references/374279/374279_9174_1557317422_complaint.pdf)> accessed 9 May 2020

<sup>38</sup> Press Information Bureau, *Social Media Platforms Present "Voluntary Code of Ethics for the 2019 General Election" to the Election Commission of India* (2019) <<https://pib.gov.in/newsite/PrintRelease.aspx?relid=189494>> accessed on 10 May 2020

## B. Involvement of Paid News and Advertisements

Media is generally acknowledged as the fourth pillar of democracy as it discharges a very onerous duty of keeping people acknowledged and informed.<sup>39</sup> It is perceived to be free from any external influence, making it independent and autonomous. However, complexities have developed overtime relating to its false involvement during elections, hampering the idea of free and fair election.

The Press Council of India defines it as 'any news or analysis appearing in any media (Print or Electronic) for a price in cash or kind as consideration.'<sup>40</sup> The syndrome of 'paid news' can be understood as partisanship in the media; this malpractice is done by favouring particular individuals or organisations or corporate entities by what is essentially a 'paid advertisement' disguised as 'news'.<sup>41</sup> The content of such news surreptitiously creates an untrue image of the personality of any candidate and his/her respective performance in the past; this helps receiving benefit as the interest of the voter is swayed before he casts his vote, in a mala fide manner. This is a very well designed attack on democracy leading to various issues such as communalism and hate-politics. The Election Commission as well as the Press Council of India becomes a toothless tiger as it cannot take cognizance over such matters propagated by surrogates. Therefore, this activity is infamously known as 'surrogate advertisement'.

In contemporary times surrogate advertisements have found their space recurring time and again in one form or another. They appear in the form of news items sponsored unofficially by the candidates to escape provisions of law, without disclosing any expenditure on the same.<sup>42</sup> It was enunciated in the case of *Public Interest Foundation v. Union of India*<sup>43</sup> that 'what cannot be done directly ought not to be done indirectly'. The same rule shall be applied to such media platforms that present a mala fide and fabricated report on any particular candidate or political party. The root of such malpractices can be traced back in the labyrinth of the employment model of journalists; the centralisation of power at the top brass

<sup>39</sup> *Sanjoy Narayan, Editor-in-Chief, Hindustan Times and Oth. v. High Court of Allahabad* (2011) 13 Supreme Court Cases 155, 156 [3]

<sup>40</sup> Press Council of India, *Report on Paid News* (30 July, 2010) Pg. No. 4

<sup>41</sup> PTI, 'Paid News syndrome needs to be removed: experts' *The Hindu* (Bangalore, 03 November 2016)

<<https://www.thehindu.com/news/national/Paid-News-syndrome-needs-to-be-removed-experts/article15774589.ece>>

accessed on 05 May 2020

<sup>42</sup> Parliamentary Standing Committee on Personnel, Public Grievances, Law & Justice, *Electoral Reforms-Code of Conduct for Political Parties and Anti Defection Law* (Report No. 61, 2013) para 11.0

<sup>43</sup> (2019) 3 Supreme Court Cases 224 [96]

of media houses curtailed the independence of journalists.<sup>44</sup> The bitter truth has dug deep roots in hampering the autonomous character of journalism and during the time of elections, specifically when Model Code of Conduct is imposed this becomes an equivalent influencer to prejudice minds with uneven facts. Thus, many stakeholders against this malpractice agree to incorporate it as an offence under Representation of People Act.<sup>45</sup> After all, the media is entrusted to present those representatives of people. There is a need for empowered regulators and stricter punitive provisions as current statutory regulators have failed to take cognizance of the matter and lack adequate penalising authority.<sup>46</sup>

The absence of any appropriate policy to tackle the novel issue calls for an immediate amendment in the Representation of People Act; thereby saving the spirit of free and fair elections from such undemocratic behaviour of the fourth pillar. Therefore, providing statutory and legal recognition against paid media syndrome during the time of elections and a couple months preceding it, is a need for the hour.

### C. Involvement of Opinion Polls and Political Surveys

The phenomenon of Opinion polls can be understood as dissemination of survey-results by non-political entities prior to elections, in order to record the electorate's interest. There are many challenges in conducting election surveys that measure voter preferences correctly and when the results of these surveys are used to make seat predictions the margin of error can be large.<sup>47</sup> Election Commission's stance on opinion or exit poll says:

such dissemination, particularly on the eve of polls or when the polling process is still in progress, has the potential to influence the electors when they are in the mental process of making up their minds to vote or not to vote for a certain political party or a candidate.<sup>48</sup>

The results of such polls carry an influential tendency vis-a-vis bandwagon effect i.e. people with infirm political stance or of some other opinion tend to follow the majority's opinion as displayed in the polls.

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<sup>44</sup> Law Commission of India, *Electoral Reforms* (Report No. 255, 2015) paras 7.2-7.3

<sup>45</sup> Ibid para 7.5

<sup>46</sup> Alok, 'Paid News in the Spotlight' (PRS Legislative Research, 3 June 2013) <<https://www.prsindia.org/hi/theprsblog/paid-news-spotlight>> accessed on 11 May 2020

<sup>47</sup> Rai P, "Fallibility of Opinion Polls in India" (2014) 49 *Economic and Political Weekly* 13 <<https://www.jstor.org/stable/24480214?seq=1>> accessed May 14, 2020

<sup>48</sup> Gupta UN, *Indian Parliamentary Democracy* (Atlantic Publishers and Distributors 2003) 376

Section 126(1)(b) of RPA prohibits display to the public of any election matter by means of 'cinematograph, television or other similar apparatus'. The provision is exclusive of opinion polls dissemination via print media. Therefore, the Law Commission in its report suggested regulation of opinion polls by including it in section 126(1)(b) to prevent any dissemination via print media.<sup>49</sup> Ever since data has become the new oil, its utility for campaigning purposes has widened after the 2016 US Presidential Election campaign<sup>50</sup> and similar trends are expected to be followed worldwide including in Indian elections.

#### **4: Policy Alternatives and Suggestions**

On referring several recommendations by committees set up on electoral reforms, MCC and other proximate subject matters, below mentioned are some possible policy alternatives and suggestions that may help evolving the Code.

##### **A. Regulation of spread of misinformation**

###### *(i) Regulation of election expenditure*

Item no. VII(iv) of the MCC requires the party in power to refrain from utilising funds to issue advertisements at the cost of public exchequer. The loophole remains unmentioned as any such spending prior to imposition of MCC (i.e. from the date of announcement of elections) is entirely unregulated. Likewise in 2004 general elections, the Election Commission of India recommended a ban on expenditure 'in any manner' of the achievements of the incumbent government from six months prior to the date of expiry of the term of the House to prevent any misuse of public funds.<sup>51</sup> More or less it is an effective way to curb false information being spread via surrogate advertising and paid media, thus adoption of such a policy shall benefit the electoral affairs in general as well as provide a safe space for every contestant in the election.

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<sup>49</sup> Law Commission of India, *Electoral Reforms* (Report No. 255, 2015) para 8.27.1

<sup>50</sup> Nanjala Nyabola, 'Cambridge Analytica and the End of Election' *Aljazeera* (Africa, 18 January 2020) Opinion <<http://www.aljazeera.com/indepth/opinion/cambridge-analytica-elections-200112201424047.html>> accessed on 10 May 2020

<sup>51</sup> Law Commission of India, *Electoral Reforms* (Report No. 255, 2015) para 14.2

*(ii) Independent content oversight board*

Facebook has created a 20 member 'independent content oversight board' to moderate the content and decide over deletion of objectionable ones;<sup>52</sup> the Election Commission should seek active cooperation of the board during imposition of MCC. Such a move is highly recommended in order to improve the democratic standards and good governance.

**B. Fast track courts**

Election petitions regarding violation of MCC lie before the High Courts of respective states causing delay in proceeding. Since politicians have a prime hand in governance, their acts must be given rapid but accurate adjudication. That being said, fast-track courts must be established to dispose of election disputes within a stipulated time period. The 2013 committee report substantiates the suggestion as well.<sup>53</sup>

**C. Eco Friendly Elections**

Plastic pollutants have become a considerable pollutant, thus a matter of great concern. While manifesting policies on sanitation along with other campaign related activities, parties and candidates incur hefty expenditure on advertising the same on plastic based materials for ex, PVC Banners & Posters. The current requirement to curb usage of plastic is limited to mere warning against its excess use.<sup>54</sup> Taking that into account, the Election Commission may ask contestants to furnish expenditure on plastic materials utilized amid election campaigns and limit the amount used accordingly. Exceeding such a limit shall attract penalty.

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<sup>52</sup> 'NLSIU VC Sudhir Krishnaswamy on independent content oversight board announced by Facebook to decide on deletion of controversial posts' *Bar & Bench* (13 April 2019) <<https://www.barandbench.com/news/nlsiu-vc-sudhir-krishnaswamy-on-independent-content-oversight-board-announced-by-facebook-to-decide-on-deletion-of-controversial-posts>> accessed 8 May 2020

<sup>53</sup> Parliamentary Standing Committee on Personnel, Public Grievances, Law & Justice, *Electoral Reforms-Code of Conduct for Political Parties and Anti Defection Law* (Report No. 61, 2013) para 10.0

<sup>54</sup> Election Commission of India, *Manual on Model Code of Conduct* (Doc. 21 Ed. 1, 2019) 22.9

## **5: Conclusion**

In this brief communication, we discussed a disputed subject matter ‘whether the Model Code of Conduct should be given statutory recognition?’ as it plays an indispensable role during the elections. Despite the advanced protocols of the ECI, the demand for regulation of social media posts, surrogate advertisements and dissemination of opinion polls cannot go undermined. On a deeper perusal of the study, it can be inferred that polling in contemporary arrangement of various vices called for a stricter Model Code of Conduct and an even empowered Election Commission. However, granting MCC statutory recognition shall be an abortive decision as it would only increase pendency in cases relating to violation of the Code. The corresponding provisions of enabling laws along with supreme power conferred to the Election Commission under the Constitution create a firm ground of inspection and oversight; hence to eliminate any further counter-productiveness it would be wise to let the Model Code of Conduct in the hands of the Election Commission. It is only a matter of anticipation in this progressive and ever changing era, that the appropriate authority shall take appropriate measures to conduct free, fair and timely elections.