

Political Advertising: Legal Perspective

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Abstract—The preamble to the Constitution declares India to be a democratic republic. Democracy is the basic feature of the Indian Constitution. And Democracy is sustained by free and fair elections. Only free and fair elections to the various legislative bodies in the country can guarantee the growth of a democratic polity. It is the cherished privilege of a citizen to participate in the electoral processes which place persons in the seats of power. Political parties use various election techniques to convince and lure the minds of voters subliminally. And one of the techniques is political advertising. Political advertising includes any advertising displays, newspaper ads, billboards, signs, brochures, articles, tabloids, flyers, letters, radio or television presentations, digital or social media advertising, or other means of mass communication, used for the purpose of appealing, directly or indirectly, for votes or for financial or other support in any election campaign. These ads are designed by experts of political Campaign. Many countries restrict the use of broadcast media to broadcast political messaging. Many countries do not permit paid-for TV or radio advertising for fear that wealthy groups will gain control of airtime, making fair play impossible and distorting the political debate in the process. In India Campaigning is done through newspapers, television and radios. Media in recent lok Sabha elections has played a pivotal role in political advertising. Social media was also used. By ruling of The Cable Television Network Rules of 1994, political advertisements were prohibited. Question arises to what extent the political parties in India are allowed to go for political advertising. What is the control mechanism under Constitution or under any law? Whether there are specific laws to deal with political advertising. Political parties come with many promises through political advertising. What is the legal sanctity of those promises? Political parties resort to different strategies in political advertising. What is the legality of those strategies? What is the judicial response? All these concerns will be discussed in this present paper and accordingly suggestions will be given thereof.

Introduction

Political advertising has changed drastically over the last several decades. We saw a major change in how candidates reached their potential audiences. With the advent of radio, television and electronic media including social media, political parties won the trust of the people with direct approach. In India aggressive advertising paved the way for a landslide victory of the BJP.

The Election Commission of India (ECI) in 1999 to prohibit all political advertisements on electronic media prior to elections. That decision was challenged before the Andhra

Pradesh high court on the grounds that the ECI lacked the powers to ban political advertisements and that the ban violated the fundamental right to free speech under Article 19(1) (a) of the Constitution. The other big issue is the manner in which the ECI plans to regulate political advertising on the University of WhatsApp. WhatsApp is no longer a personal messaging service; it is a mass communication service. A party worker can communicate a political message to five groups, which each group containing 256 persons, in a matter of seconds. As per a recent Time story, Indian political parties are using WhatsApp for mass messaging, often with hate filled messages. How should the law classify these messages sent to 1,280 persons without any cost? Can it even be called an advertisement? Most likely not. In that case, it would be legal for political parties to simply send out messages on WhatsApp without any requirements for pre-censorship certificates. What then is the point of the ECI regulating political advertisements on other platforms?

Position in United Kingdom:

United Kingdom's system of governance is a blend of parliamentary form and monarchical system. Parliament is sovereign in U.K with the prime minister as head of the government and monarch, presently queen Elizabeth II, as head of the state. Elections play a major role in its political discourse. So far as the political advertising during the electoral process are concerned, it is banned from television and radio. The European court of Human Rights (ECHR) has held that the ban imposed by the UK was compatible with the Convention.¹ This prohibition extends not only to political candidates and parties, but also to any advertisement which aims to influence public opinion on a matter of public controversy.² It also maintains strict restrictions on printing and publishing by third parties during campaigns. Prior to the Political Parties, Elections and Referendums Act, 2000 (PPERA), no political party could accept more than £5 as they were regarded as election expense. In *Bowman v. United*

¹X and the Association of Z v. United Kingdom, App. No. 4515/70, 38 Eur. Comm'n H.R. Dec. & Rep. 86 (1971).

²Michael Karanicolos, Regulation of Paid Political Advertising: A Survey, Centre For Law And Democracy, March, 2012.

*Kingdom*³ the ECHR decided that the limit of £5 was contrary to the right of freedom of expression contained in Article 10 of the European Convention on Human Rights. As of now, Section 79 and Schedule 9 of PPERA allow every national party a spending limit of £30,000 per constituency in a general election for the House of Commons. The Broadcasting Act, 1990 incorporated the practice of broadcasters letting out airtime for party political broadcasts.⁴ Sections 36 and 107 of the Act provides for procurement of licenses to carry political broadcasts from the ITC and the rules to carry out the broadcasts within permissible limits.⁵

Position in United States:

While there have been some increases in regulation of campaign finance in the United States, there is generally little regulation of political advertising content. The Bipartisan Campaign Reform Act of 2002 addressed the issue of "soft money" or money contributed through political action committees, raised the legal limits of hard money that could be raised for any candidate, and set limits on what funds could be spent on election broadcasts, but it did not mandate verifiability in political campaign advertising. As of this time, there is no pending legislation addressing this issue. In *Buckley v. Valeo*, the Supreme Court of the U.S. invalidated the provisions of Federal Campaign Act which dealt with ceiling limits on electoral expenditures and deemed it unconstitutional.⁶ The Buckley ruling settled that expenditures by a non-candidate that are "controlled by or coordinated with the candidate and his campaign" may be treated as indirect contributions subject to Federal Election Campaign Act's source and amount limitations.⁷ Section 214 of the Bipartisan Campaign Reform Act (BCRA) of 2002 extends the same rule to expenditures coordinated with a national, State, or local committee of a political party. In 2007, the Supreme Court of the United States held that an advertisement included express advocacy or its functional equivalent "if the ad is susceptible to no reasonable interpretation other than as an appeal to vote for or against a specific candidate."⁸ Section 201 of the BCRA provides for a mandatory disclosure of electioneering communications.⁹ It carves out an exception for independent expenditures and communications which solely promotes a debate or forum. The Supreme Court has time and again upheld the validity of this provision and in *Citizens United v.*

Federal Election Commission the Court held that disclosure is the least restrictive means.¹⁰

Position in Australia

The Commonwealth Electoral Act, 1918 of Australia mandates disclosure provisions for any "electoral advertisement, handbill, pamphlet, poster or notice" containing "electoral matter".¹¹ The Australian law also prescribes a 'Blackout Period' during which broadcasters must not display any material containing electoral matter which is intended or is likely to affect the voters.¹² The Broadcasters Services Act, 1992 provides that where any election matter is broadcasted during an election period by a broadcaster, that broadcaster must give all the parties contesting the election a reasonable opportunity to have election matter broadcasted during the election period.¹³ It further provides that for ensuring equal access, free broadcasting is not required.¹⁴

Position in India

Constitutional perspective

The constitution of India has guaranteed certain basic rights. These rights are fundamental in character and are found under the non-derogable part that is part III of the constitution. One of the fundamental rights is freedom of speech and expression. Article 19 (1) (a) of the Indian Constitution provides that all citizens shall have the right to freedom of speech and expression. Freedom of Speech and expression means the right to express one's own convictions and opinions freely by words of mouth, writing, printing, pictures or any other mode. It thus includes the expression of one's idea through any communicable medium or visible representation, such as gesture, signs, and the like. This expression connotes also publication and thus the freedom of press is included in this category. Free propagation of ideas is the necessary objective and this may be done on the platform or through the press. This propagation of ideas is secured by freedom of circulation. Liberty of circulation is essential to that freedom as the liberty of publication. Indeed, without circulation the publication would be of little value. The freedom of speech and expression includes liberty to propagate not one's views only. It also includes the right to propagate or publish the views of other people; otherwise this freedom would not include the freedom of press. However, this right is not an absolute or unfettered. There are some reasonable restrictions placed on the exercise of this right. Clause (2) of Article 19 of the Indian constitution enables the legislature to impose certain restrictions on free speech under following heads: security of the State, friendly relations with foreign States, public order, decency and

³App. No. 24839/94, 26 Eur. H.R. Rep. 1 (1998).

⁴Bernd-Peter Lange, David Ward, *The Media and Elections: A Handbook and Comparative Study*, at 149

⁵Section 36, Broadcasting Act, 1990

⁶2424 U.S. 1 (1976)

⁷Guidelines On Media Analysis During Election Observation Missions, European Commission For Democracy Through Law (Venice Commission), 27th October, 2005, at 54,

⁸FEC v. Wisconsin Right to Life, Inc., 127 S.Ct. 2652 (2007)

⁹Section 201 of BCRA, 2002

<http://www.law.cornell.edu/background/campaign_finance/bcra_txt.pdf, last visited, 7-06-2019

¹⁰No. 08-205, 558 U.S.310 (2010).

¹¹Section 328, Commonwealth Electoral Act, 1918

¹²Schedule 2, clause 3A, Commonwealth Electoral Act, 1918

¹³Schedule 2, clause 3(2), Equal Access

¹⁴Schedule 2, clause 3(3) of the Act.

morality, contempt of court, defamation, incitement to an offence, and sovereignty and integrity of India.

Political party as an institution also enjoys the freedom of speech and expression. They are free to disseminate their ideology and opinions. And political endorsement of ideas qualifies to be an “advertisement” which again is an important aspect of freedom of speech and expression.¹⁵ During election campaigns politicians or leaders of various political parties they make claims and a bunch of promises to gain the vote bank. Even in recent elections religion and national security were used as a tool to get the support of voters. In addition, hate speeches sparked a row yet there seemed no accountability for these speeches as well. Political advertisements can be understood as a form of commercial speech. As the issuer pays for the newspaper space for endorsing the ideology of a particular party, there remains little or no difference between political advertisements and commercial speech. Supreme Court in *Tata Press v MTNL* (AIR 1995 SC 2438), while holding that commercial speech was protected by Article 19(1) (a), the Court also held that “commercial speech” which is deceptive, unfair, misleading and untruthful would be hit by Article 19(2) of the Constitution and can be regulated or prohibited by the State. This makes it clear that disclosure requirement for political advertisements, which are designed to ensure that the advertisements are not deceptive, misleading or untruthful, would pass constitutional muster. This is not only the right of a speaker but also the right of a recipient (voter).

Recently, Yogi Adityanath, Uttar Pradesh chief minister at an election rally in Meerut said “If the Congress, Samajwadi Party and BahujanSamaj Party have faith in ‘Ali’, we have faith in ‘Bajrang Bali’ (Hindu deity), the followers of Bajrang Bali will not tolerate them.”¹⁶

Moreover, a contempt petition was filed against the president of congress party Rahul Gandhi for his false remarks. During the election campaign, Rahul Gandhi has reportedly said that the apex court had accepted that there was corruption in the Rafale fighter jets deal and that Modi gave away Rs 30,000

crore to industrialist Anil Ambani. However, Apex court denied this allegation.¹⁷

Leaders of political parties shadowed the main issues like GDP, or overall development of the country instead used national security or ultra-nationalism to fulfill their political goals without having due regard to the welfare of people or country at large. This comes under the purview of reasonable restriction of integrity of nation. There is a need to make them accountable for their lies, be it through electronic media or print media (including election manifestos), and for those hate speeches which are against the democratic set-up of the country.

Statutory Framework:

Presently in India, there is no law which specifically governs the regulation or prohibition of the political advertisements. However, several aspects of current statutory regime regulating elections have impact on the political advertisements.

- Section 10A of the Representation of People’s Act 1951: Disqualification for failure to lodge account of election expenses: It provides that if the election commission is satisfied that a person has failed to lodge an account of election expenses within required time and manner and has no good reason for failure to do so, such person shall be disqualified for three years from the date of order. The requirement of lodging such accounts requires the candidates to disclose the advertisement expenditure as well. The provision does not directly deal with political advertising. However, placing restrictions on election expenses contributes in checking excessive political advertising.
- Section 171H: Illegal Payments in Connection with an Election

Whoever, without any authority authorizes expenses on account of holding any public meeting or upon an advertisement, circular, etc, for the purpose of promoting or procuring the election of such candidate, shall be punished with fine up to five hundred rupees. This restriction on election expenses without the authority of the candidate also involves “advertisement”. Therefore, advertisements have to be routed through the candidate. This is to ensure that any expenses on political advertisements are directly counted as candidate’s election expenses.

- Section 127A: Restrictions on the printing of pamphlets, posters, etc.—

It imposes certain disclosure requirements on printing pamphlets, posters etc. These should bear names and addresses of the printer and the publisher. In order to enforce the requirement, it also mandates a declaration as to the

¹⁵Supreme Court In *Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd.* (AIR 1995 SC 2438) is an authority for proposition that right to issue advertisement even if of commercial nature is covered by Article 19(1)(a). It can be restricted only on any ground given in Article 19(2). Commercial speech is no doubt a commercial transaction, nevertheless, it is dissemination of information regarding product for the benefit of public at large. In democratic setup, flow of commercial information is indispensable. Economic system, in democracy, would suffer handicapped without freedom of commercial speech. Article 19(1)(a) of the Constitution protects right of individual to listen, read and receive the commercial speech in advertisements even if it so issued by business for promotion of trade and business. The protection of Article 19(1)(a) of the Constitution is available both to the speaker as well as the recipient of the speech.

¹⁶<https://gulfnnews.com/world/asia/india/hate-speeches-put-india-election-commissions-role-under-the-scanner-1.63527258>, last visited 10-06-2019

¹⁷<https://thewire.in/law/false-claims-politicians-boris-johnson-rahul-gandhi>, last visited 10-06-2019

identity of the publisher thereof, signed by him and attested by two persons to whom he is personally known. Furthermore, the printer is also obligated to send one copy of the document along with one copy of the declaration to the mentioned authorities. The section imposes duties of disclosure on both candidates/agents and printers/publishers. It does not expressly mention newspapers and only mentions specific stationery that the candidates use for election campaign. However, as per the instructions of the Commission issued on 08.06.2010¹⁸ and 16.10.2007¹⁹, printing "other documents" for the purpose of section 127A includes any paid content published. Failure on part of any party to make such disclosures invites punishment with imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both. However, it does not qualify as a ground for disqualification.

The disclosure provisions are not sufficient to tackle the practices of paid news and disguised political advertising. This is because the provision itself is not sufficient to cover advertisements in newspapers or electronic media. Specific disclosure norms with respect to advertisements in newspaper and electronic media are required for clarity and certainty.

Moreover, the News Broadcasting Standards Authority (NBSA) has issued some guidelines in 2014 according to which the news channels are required to disclose any political affiliations, either towards a candidate or a party.²⁰ Further, unless they publicly endorse or support a particular party or candidate, news broadcasters have a duty to be impartial. However, these guidelines are not adequate solutions as they are mere guidelines and not binding in nature. Apart from this a separate body has been established, Media Certification and Monitoring Committee (MCMC), to see if there is any political advertisement on radio, television or FM channel in favour of any candidate without proper permission.

Judicial response:

There has been much less judicial activism as to the regulation of the political advertisements. In the landmark case of *Secretary, Ministry of Information & Broadcasting Vs. M/s. Gemini TV Pvt. Ltd. & Others*²¹ the Supreme Court ordered that all the political advertisements proposed to be issued on TV channels or cable networks shall be pre-certified by designated certification committee. In *Traffic Dr.K.R.Ramaswamyvs The Chief Secretary*²² Honble Court has held that Government advertisement materials should avoid photographs of political leaders and if it is felt essential for

effective government messaging, only the photographs of the President/Prime Minister should be used. *SubramaniamBalaji v. Government of Tamil Nadu*²³ it was held, "it is not within the domain of this Court to legislate what kind of promises can or cannot be made in the election manifesto". An election manifesto is also an important part of electoral process and thus is a powerful medium of disseminating political ideas. However, the promises made in the manifesto are as meaningless as are in other advertisements. Even judiciary has refused to recognize them as a legal document. Supreme Court in *Ashwini Kumar Upadhyay V. Union of India &Anr*²⁴ observed that a poll manifesto does not have a statutory backing and hence its enforceability is not within the purview of the courts.

Therefore, the law on this issue is vacuum and judiciary has not been an active player in regulating the same. Time has come now to make the political parties accountable for their promises which they make to gain the vote bank.

Conclusion

Since Constitution of India and other laws has given the space for political advertising but same is not been used in tune with the spirit of the Constitution and those laws .Pressure tactics on media mostly by ruling party is a serious concern. Experts of political advertising through Media influence to change the minds of people are obvious. There is no law to deal with political promises and judiciary has not been an active player in regulating the same. Time has come now to make the political parties accountable for their promises which they make to gain the vote bank.

What is also currently not clear is whether the pre-censorship regime is limited to paid advertisements and not content posted by political parties on their social media accounts. Is the ECI going to certify every social media post, be it video or content, on these platforms? There does not appear to be any rational basis for this distinction. If political parties cannot be trusted with mass communications, why trust them to broadcast content on their own pages or channels that are hosted by social media platforms?

Even presuming the ECI wants to have some kind of regulation targeted at WhatsApp, how does it plan to regulate an end-to-end encrypted platform? The bad actors in the political ecosystem start spreading fake news in the 48 hours prior to elections when campaigning is supposed to stop. These are not hypothetical questions and the ECI has been grappling with similar issues in the past. Let us not forget that rumors on WhatsApp led to the Muzaffarnagar riots in 2013. Those riots are suspected to have polarized western Uttar Pradesh and partly contributed to the BJP's sweep of

¹⁸Vide No. 491/Media/2012 dated 08.06.2010

¹⁹Vide No. 3/09/207/JS-I dated 16.10.2007.

²⁰Norms and Guidelines issued by NBSA on 3rd March, 2014 & 24th March, 2014.

²¹N. SLP (Civil) N. 679/204, dated 13 April, 2004.

²²W.P. No. 12507 of 2018, reported by <https://indiankanon.org/doc/195424461/>, last visited 12-06-2019

²³(2013) 9 SCC 659

²⁴WRIT PETITION (CIVIL) NO.95 OF 2018, available at https://www.sci.gov.in/supremecourt/2018/4452/4452_2018_Judgement_25-Sep-2018.pdf

Lok Sabha seats in that region. ECI is not able to crack the whip in these cases.

Suggestions

- As political advertising has great impact on voters to vote resulting to form new government which in turn will determine the future of the country necessarily should have a full-fledged law to deal with political advertising.
- Political promises should be made Justiciable under law.
- Judiciary should be active player in regulating the same to make the political parties accountable for their promises which they make to gain the votes.
- Pressure tactics on media should be eliminated either under law or by judicial intervention.
- The pre-censorship regime should not be limited to paid advertisements and but also to content posted by political parties on their social media accounts.
- If political parties cannot be trusted with mass communications, why trust them to broadcast content on their own pages or channels that are hosted by social media platforms? The ECI needs to take actions to ensure parity of treatment between political advertising on social media and traditional media.
- The ECI should devise a plan to regulate political advertising on the University of WhatsApp and other kinds of social media.