

ABOUT TIME MODEL CODE OF CONDUCT BECOMES A LAW

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ABSTRACT

The Election Commission of India (ECI), the nation's 'impartial' election ombudsman has severely damaged its own credentials and has failed to fulfil its Constitutional mandate. The run-up to the 2019 General Elections has seen numerous dubious incidents, potentially violative of the Model Code of Conduct, and yet the Commission's response to these violations has remained woefully inadequate. The gravity of the situation can be understood from the fact that 66 former bureaucrats have written to the President, Shri Ram Nath Kovind, accusing the ECI of a "weak-kneed response," over violations of the MCC. This article shall highlight whether or not a need has arisen to give the Model Code of Conduct a statutory status.

KEYWORDS: Model Code of Conduct, Elections, Election Commission of India, Ethical Behaviour

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"A room for ambiguity is left due to the legal equivocacy of the Model Code of Conduct. The Election Commission appears to have become increasingly cautious and even diffident in the exercise of its constitutional powers."

Justice Dr. D. Y. Chandrachud rightly stated that, "Dissent is a symbol of a vibrant democracy." In a recent development, one of the Election Commissioners, Ashok Lavasa, wrote a letter to the Chief Election Commissioner recusing himself from the decision making process on the complaints of the alleged violations of the Model Code of Conduct (MCC) until his dissenting opinion is also included in the order passed. Despite this, the full commission rejected his demand on 21st May 2019.

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Conduct, and yet the Commission's response to these violations has remained woefully inadequate. The gravity of the situation can be understood from the fact that 66 former bureaucrats have written to the President, Shri Ram Nath Kovind, accusing the ECI of a "weak-kneed response," over violations of the MCC. This article shall highlight whether or not a need has arisen to give the Model Code of Conduct a statutory status.

The general view is that legislation gives birth to social change, however at times, social changes may be the genesis of new legislation. In the current scenario, due to the current political-societal happenstances, there has arisen a pressing need for such legislation. The Model Code of Conduct is a singular contribution by political parties to the cause of democracy in India. It ensures a level playing field in the arena of the elections, where a party in power cannot take any action in close proximity to the announcement of the election. As maintained in Union of India vs Harbans Singh Jalal, the object of the Model Code is that the desire to do good by the party in power should not be used on the eve of elections so as to accrue any benefit to them during the election period.

ECI'S POSITION

The Election Commission has also accepted the need to legalise it historically, as the Model Code is not a statutory document. Violation of any of its numerous provisions does not attract any punitive action. It is for that reason that the Election Commission has entertained the view that the provisions of the Model Code, in particular, Part VII dealing with ruling parties should be made part of the existing law. Accordingly, in the 1980s the Election Commission sent a proposal to the Union Government on electoral reforms. The

same was placed before the [Goswami Committee](#) for consideration, and upon the Committee's recommendation, the Government moved a proposal to amend the Representation of the People Act, 1951 for the purpose of inserting two new sections, namely, Sections 124 and 126A so as to convert some of the provisions of the Model Code into illegal practices punishable with imprisonment for a term extending up to two years or with fine or with both. The proposed amendment also sought to make the date of the notification of the election as the date of enforcement of Model Code, and not the date of announcement of the election. However, neither of the bills moved in the Parliament were ever passed.

Gradually the Commission changed its viewpoint and has now accepted that bringing the Model Code on the statute book would be a self-defeating measure, given the fact that during elections, any violation of Code warrants a quick decision and remedial measures, which may not be possible if matters are required to be taken to the Courts and become the subject of examination of the time consuming judicial process. The Commission has maintained this position due to a variety of reasons:

Firstly, it has chosen to do so because of the wide powers enshrined in Article 324 which have been further strengthened by the various judgments of the Supreme Court. In the [S. Subramaniam Balaji](#) case, the Hon'ble Supreme Court held that where enacted laws are either silent or do not have sufficient provisions to deal with any unforeseen circumstances during conduct of elections, the Election Commission is entitled to issue instructions exercising plenary power under Article 324 to ensure that the elections are conducted in a free and fair manner.

Secondly, they argue that most of the provisions of the Model Code in paragraphs - I, II, III, and IV are in relation to provisions contained in one of the three Statutes - Indian Penal Code, 1860, Code of Criminal Procedure, 1973 and Representations of People Act, 1951. Even the Election Commission of India is empowered under paragraph 16A of the Election Symbols (Reservation and Allotment) Order, 1968 to either suspend or withdraw the recognition of a party after giving that party a reasonable opportunity to defend itself in the event of violation of Model Code of Conduct thus there is no need for creation of a separate statute for the same.

Moreover, the EC is of the belief that making the MCC legally binding would be problematic; stating that elections must be completed within a relatively short time (close to 45 days), and judicial proceedings typically take longer, therefore making it infeasible to make the Code enforceable by law.

However, these arguments stand vitiated in the present political environment of the nation. The General Elections of 2019 have seen a plethora of examples seemingly violative of the Model Code of Conduct with no punitive action on the ECI's part. Such inaction often leads to distrust among the citizens in whose interest the Commission is mandated to work. The notification of the EC is losing its significance amidst a growing disgruntlement amongst the voters. The ECI asked Yogi Adityanath to be "more careful" after he referred to the Indian army as "[ModijikiSena](#)" and also seemingly found no violation of the MCC in Modi's announcement of the DRDO's Shakti ASAT mission under the criteria that the announcement was not made on a public broadcasting network. Modi's recent appeal that young voters ought to "dedicate" their votes to those who conducted the airstrikes in Balakot has only led the ECI to [seek a report](#) from poll officials, rather than a significant pushback from the Commission. The politicians are also taking it for granted and making a mockery out of it. It is imperative that the Code ought to be given legal enforceability because violations occur at great regularity and yet the Commission has rarely taken recourse to its powers. It has only issued non-effective warnings and reprimands to parties, and is yet to take any stringent action.

NEED TO LEGALLY ENFORCE THE MCC

As far as the first argument is concerned, nobody in a democracy should have absolute and plenary powers but the ECI has sweeping powers under Article 324. Under this Article, it acts as the executive, and thus sometimes its instructions/orders appear to be encroaching upon the legislative power of the Parliament. In 2013, the [Standing Committee on Personnel, Public Grievances, Law and Justice](#), stressed upon the Government that such instructions/orders issued by Election Commission of India may be suitably incorporated in the Representation of People Act, 1951 or rules framed thereunder.

The Election Commission claims to have powers to punish political parties by the exercise of the plenary powers enumerated under Article 324 of Constitution, and particularly after the amendment of its own order made on 18th February 1994. Thus it is strongly suggested that it is expedient to enact a law for giving statutory backing to the Code leaving no vacuum for ECI to exercise its power which is residuary in nature. The Committee recommended that provisions of Model Code of Conduct may be formed a part of Representation of People Act, 1951 or rules framed thereunder for free and fair elections in the country.

Countering the second and third argument, it is true that various provisions akin to the MCC are there in Indian Penal Code and Representation of People's Act, but in order to enforce such provisions, one has to make recourse to the judiciary for their enforcement. Given the long drawn out procedure of the Indian judicial system, any necessary judicial pronouncement would only be rendered after the duration of the elections and would hence be of little relevance. This is instanced by the fact that two FIRs against [Varun Gandhi](#) were lodged at Barkhera police station for allegedly delivering inflammatory speeches in 2009 and the case so instituted, is pending till date.

Thus, in the matters of complaints pertaining to violations of the MCC, something similar to Fast Track Courts or an administrative tribunal are required to be set up to dispose of the complaints within a maximum period of 1 month. The committee may consist of the Chief Election Commissioner (*Ex-Officio*), 2 Election Commissioners and 2 retired Supreme Court judges nominated by the Chief Justice of India in consultation with the Collegium. Its decision would be open to public scrutiny, unlike *status quo* wherein the dissent is not made part of the order passed.

FUTURE AHEAD

The oft quoted [Lord Hewart](#) said, "Not only must Justice be done; it must also be seen to be done." While the ECI's performance over the years has warranted faith in the polling process, the body needs to reconsider its manner of decision-making, which has been largely ad-hoc. While these decisions have been largely fair, this ad hoc manner of functioning can take the EC in a direction antithetical to the surging democratic tide. A long-term strategy based on a conscious policy is the need of the hour, where the growth of democratic aspirations goes together with rule enforcement.

Enactment of the Model Code of Conduct into a statute, thereby granting it validity, and the formation of the aforementioned tribunal would instill within itself, the confidence of the electorate of the world's largest democracy and form a stepping stone to restoring its credibility and impartiality. The choice is simple, either the nation can wait until the Code loses its significance or make the election process deeply democratic by legalising it.

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