

Model Code of Conduct Does Not Take Away the Right to Free Speech

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The Model Code of Conduct (MCC) is an extremely important and powerful instrument available to the Election Commission for the conduct of free and fair elections.

There was a time when the MCC was only directive in nature. There used to be frequent litigations about its legal enforceability. The first NDA Government headed by Shri Atal Bihari Vajpayee and the then Election Commission, agreed in principle to give a statutory support to the MCC. The Chief Election Commissioner at that time, Dr. M.S. Gill, and the Law Ministry, which I was looking after, entered into consent terms about the MCC. In a pending dispute in the Supreme Court, these consent terms were filed. The MCC drew statutory support from Article 324 of the Constitution under the terms. The Supreme Court enforced, accepted and approved the consent terms. Since then the MCC acquired more teeth.

Article 324

Article 324 of the Constitution gives to the Election Commission the power to take all necessary steps in order to ensure the conduct of free and fair elections. There are several areas which are occupied by statutes for the conduct of elections. There are provisions in the Constitution, the Representation of People's Act, 1951 and several other regulations and orders framed from time to time. The consistent interpretation of Article 324 by Supreme Court has been that Article 324 does not cover the space which is already occupied by legislation. Where there is an existing law, regulation or order, the same will prevail. However, Article 324 is the reservoir of all unoccupied space. Thus, any power exercised by the Election Commission under Article 324 cannot relate to areas which are covered by the legislation or regulation but will be confined to areas where legislation does not occupy any space. This principle will also apply with all force to the Model Code of Conduct which draws support from Article 324.

The Model Code of Conduct and the Right to Free Speech

There are several electoral offences which are specifically dealt with in law. Obviously, in all these areas, the law will prevail. The residuary areas will give full power to the MCC to operate. Of late, a tendency has developed amongst the political parties to excessively allege violation of the MCC by their opponents. The Congress Party as the 'Cry Baby' of this election, is leading the pack. Article 19(1)(a) confers to every citizen the Right to Free Speech. Article 19(1)(a) is an unamendable part of the Constitution. Neither Parliament nor the Supreme Court can in any way dilute the impact of Article 19(1)(a). The Right to Free Speech does not get suspended or diluted even during elections. Quite to the contrary, elections are the greatest celebration of Indian democracy. The sacrosanct Right of Free Speech has to be fully protected during this period. While submitting memorandums on violation of the MCC in relation to contents of a political speech, everyone has to bear in mind that the MCC has to be interpreted not as diluting free speech but is subject to the Right to Free Speech. The Right to Free Speech is only subject to the restrictions mentioned in

Article 19(2). The Election Commission, therefore, is under an obligation not to dilute or compress Right to Free Speech. It is entitled to enforce all such provisions, where there is a violation of the provisions of election law and all such speeches which can be interpreted either as violation of law or constitute as permissible restrictions mentioned in Article 19(2) of the Constitution. The MCC and the Right to Free Speech have to co-exist. The MCC cannot encroach the Right to Free Speech. The two have to exist harmoniously.

Let us take some recent illustrative cases. In the first, the Prime Minister appealed to first time voters that they must always keep in mind the sacrifice of the martyrs when they vote in an election. No party or candidate was mentioned. The second illustration is a comment made in relation to the Congress President contesting the election from Wayanad. A reference here is made to the demographic composition of the new constituency. If such speeches are considered by anyone as violative of the MCC, that may actually run the danger of the MCC's constitutionality in relation to free speech being called into question. To avoid such a situation, the memorialist must keep in mind that the Right to Free Speech has not been diluted by the MCC in any way. The third illustration relates to the Gandhi Family principle of restrictive free speech. They can call even an honest Prime Minister a 'Chor.' Others don't possess that right.