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RIGHT NOT TO BE MISLED: IDENTIFYING A CONSTITUTIONAL BASIS TO FIX ACCOUNTABILITY FOR ELECTION PROMISES

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Abstract

Broken promises have been a perennial feature in elections in India, aided further by an absolute legal vacuum as far as regulation of election manifestos by political parties are concerned. This essay examines this undesirable state of affairs and argues that political processes alone cannot ensure accountability for broken campaign promises, thus necessitating the need for legal regulation. Drawing upon the interplay between the rights under Articles 19(1)(a) and 21 of the Constitution, it is argued in this essay that voters enjoy a fundamental right to make a well-informed choice. Misleading promises, it is argued, cannot be allowed to vitiate the voting choice of a voter by supplying false information and thus defeating this very right. Such a constitutional framework can be used as the foundation to make election manifestos and promises legally binding. This approach would help in promoting accountability in the electoral space, and go a long way towards ensuring that the trust reposed by the voters is not taken for granted by political parties.

Introduction

Elections in India have witnessed tremendous change over the years with professional strategists being tasked with the onerous responsibility of finetuning campaign strategy and door-to-door canvassing being replaced by publicity blitz on social media. Still, one thing has remained common in elections, both past and present: the disturbing tendency of political parties to make tall promises in their manifestos, and in most cases, not fulfilling them once voted to power. In 2015, the Supreme Court dismissed an appeal from a decision of the Delhi High Court that had held that election manifestos and its contents were not legally binding.¹ This stance effectively

¹ *Mithilesh Kumar Pandey v. Election Commission of India*, 2014 SCC OnLine Del 4771; upheld by the Supreme Court in *Mithilesh Kumar Pandey v. Election Commission of India*, Petition for Special Leave to Appeal (Case No. 9767/2015) decided on 28 September 2015.

creates an absolute legal vacuum as far as election promises are concerned, and gives a free hand to political parties to manipulate the decision-making process of the voter.

This essay seeks to question this undesirable *status quo* and initiate discussion on how accountability can be fixed for the promises that parties make to the electorate, a topic that has received surprisingly little legal attention.² It is argued that a strong constitutional basis, rooted in the right to make a well-informed choice under Articles 19(1)(a) and 21 of the Constitution, exists for making election promises binding, even though certain safeguards are necessary. In Part 2 of this essay, the dangers of leaving the “political market” unregulated are assessed by showing how an absence of accountability for campaign promises can result in the fairness of the electoral and political processes being questioned. In Part 3, the constitutional basis for holding parties accountable for such promises is analysed by arguing that a voter has the right to exercise a well-informed and meaningful choice. Part 4 contains the concluding remarks.

The Need to Regulate the “Political Market”

The traditional, *laissez-faire* argument for letting the political forces act unhindered proceeds on the basis that voters have the option of defeating a candidate or voting a government out of office, as the case may be, if election promises have not been fulfilled.³ As is apparent, the basic assumption underlying this argument is the belief that voting choices are subject to voter satisfaction regarding the fulfilment (or otherwise) of election promises. This assumption may hold true in some cases, as theoretical models have shown that politicians who have a positive track record of fulfilling poll pledges, enjoy a good reputation and are more likely to be believed by their constituents as far as future campaign promises are concerned.⁴ However, a major problem arises when this option becomes ineffectual, that is, when the negative perception of non-fulfilment of promises cuts across party lines and applies throughout the entire political

² In an ideal scenario, any reference to campaign promises should have included all promises made to the electorate on the campaign trail, irrespective of whether or not those promises are mentioned in a formal manifesto. If this were not the case, it would be extremely easy for political parties to escape accountability by disseminating misleading promises by word of mouth or other means, but not specifying them in the manifesto. However, such a broad definition would imply that an isolated promise made by even a local politician would bind the party if voted to power. Therefore, a pragmatic middle path needs to be adopted. As a result, for the purposes of this paper, any reference to “campaign promises” or “poll pledges” includes not only all manifesto promises (since they are “officially” endorsed by the party) but also promises that are made by the upper echelons of the party hierarchy, or repeated by numerous political leaders on the campaign trail, or widely disseminated by party functionaries by other means (since it may be implied that such promises have been acceded to by the party leadership, unless specifically denied or objected to). The issue of whether or not a promise that does not appear in the manifesto satisfies the above-mentioned criteria may be construed to be a question of fact.

³ Stephen D. Sencer, ‘Read My Lips: Examining the Legal Implications of Knowingly False Campaign Promises’ (1991) 90(2) Michigan Law Review 428, 430.

spectrum.⁵ In such cases, it is possible that the need for fulfilling election promises is relegated to the back burner, which results in lack of development and increasing voter dissatisfaction with the electoral process.

This pattern of disenchantment with campaign promises can be seen in India as well. For instance, in the recently concluded Legislative Assembly elections in Bihar in 2020, voters in three villages boycotted the election as campaign promises of construction of a bridge had not been fulfilled for a very long time.⁶ This trend was also seen in parts of Uttar Pradesh, Madhya Pradesh and Rajasthan during the Lok Sabha elections in 2019.⁷ Instead of voting against a particular candidate or party, the voters refused to even exercise their franchise, thus showing their disenchantment with the entire political process as such. In addition, scholars argue that Indian voters often use the None-of-the-Above (NOTA) option as a means to register their protest against the ills plaguing the political system in general rather than solely using it as a tool to express their discontent with the candidates contesting the election.⁸ Empirical studies have shown that although the proportion of NOTA votes has consistently remained low, the number of NOTA votes exceeded the winning margins in as many as 24 out of 543 constituencies in the 2014 Lok Sabha elections, thus showing the ability of NOTA votes to influence election results at the constituency level.⁴ Yet, such symbolic protests are largely ineffective in making the political class wake up from its deep slumber.⁵

Some analysts have contended, however, that voters are seldom swayed by manifesto promises, thus signifying the apparent irrelevance of election manifestos and its contents.⁶ This argument is in line with judicial reasoning on this topic as well. In *ANZ Grindlays Bank*, for example, it was observed by the Delhi High Court that it is common knowledge among voters and political parties that manifestos will often contain promises that are unachievable and cannot be fulfilled.⁷ Similarly, Lord Denning felt that not all voters are affected by the promises made in the manifesto, and some do not even care to read it.⁸ While this argument might sound appealing, it fails when applied to the ground reality, considering the fact that it grossly underestimates the

⁴ ibid 29.

⁵ Even if large sections of population in a constituency boycott elections, the election of the representative is not threatened in the absence of a legally specified minimum voter turnout for an election to be regarded as valid. In such cases, while the moral legitimacy of the process may be questioned, its legal validity is beyond doubt.

⁶ Swapan Dasgupta, 'The manifesto and its total irrelevance in elections' (*NDTV*, 19 March 2014) <<https://www.ndtv.com/elections-news/op-ed-the-manifesto-and-its-total-irrelevance-in-elections-554366>> accessed 10 January 2021.

⁷ *ANZ Grindlays Bank Plc. v. The Commissioner, Municipal Corporation of Delhi* 1995 SCC OnLine Del 376 [107].

⁸ *Bromley London Borough Council v. Greater London Council* [1983] 1 A.C. 768.

impact that campaign promises have on voting choice.

Firstly, it may be true that a vast majority of voters do not read the party manifestos, especially in a country like India. However, this does not imply that they are not aware of its contents since individual leaders and candidates often end up parroting those very promises to the electorate. Additionally, the increased use of social media ensures that voters are bombarded with a vast amount of information relating to election promises without having made any conscious effort to read the manifesto.⁹

Secondly, and more importantly, the supposed irrelevance of manifestos, and by implication, campaign promises, rests on a fundamental assumption that voting behaviour is not affected by poll pledges at all. Apart from anecdotal accounts, it is notoriously difficult to ascertain what influences the voting choice of an individual voter. In fact, controlled experiments on voter behaviour seem to run counter to this assumption. Studies on voting patterns show that the choice of whom to vote for is significantly shaped by campaign promises.¹⁰ Interestingly, political support for a candidate increases with a rise in the value of promises made (that is, as the promises become more attractive and benevolent) up to a certain point.¹¹ Beyond that threshold, political support dips as voters realise that excessively extravagant promises are not achievable and thus, not credible.¹⁷

If these results hold good, a further question would arise as to the ability of voters to differentiate between credible promises and mere puffery, which itself would vary among different individuals. While empirical studies do not directly deal with the question of how poll promises affect voting behaviour in India, surveys from other jurisdictions identify a link between the two. For instance, electoral surveys in Philippines have shown that voters tend to vote in favour of those who made promises that resonated with the voter's own policy preferences, thus undeniably showing that poll pledges affect voting choice.¹²

⁹ For assessing the impact of social media on elections in India, see Sangeeta Mahapatra, 'India online: How social media will impact the 2019 Indian General Election' (*South Asia@LSE Blog*, 11 January 2019) <<https://blogs.lse.ac.uk/southasia/2019/01/11/long-read-india-online-how-social-media-will-impact-the-2019indian-general-election/>> accessed 10 January 2021.

¹⁰ Luca Corazzini, Sebastian Kube, Michael Andre Marechal and Antonio Nicolo, 'Elections and Deceptions: An Experimental Study on the Behavioral Effects of Democracy' (2014) 58(3) *American Journal of Political Science* 579, 585-586.

¹¹ *ibid.* ¹⁷

ibid.

¹² Cesi Cruz, Philip Keefer, Julien Labonne and Francesco Trebbi, 'Making Policies Matter: Voter Responses to Campaign Promises' (2018) NBER Working Paper No. 24785, 1.

While it would be foolhardy to extrapolate laboratory results to the actual ground reality, especially in a diverse country like India, it would be equally dangerous to suggest that poll promises are absolutely irrelevant in the absence of strong evidence supporting such a stance. In fact, while the Supreme Court has refused to make election manifestos legally binding, it has accepted, in principle, that promises of doles and freebies during campaigns do have an effect upon voters and can put the fairness of the electoral process in danger.¹³

Even if we assume, for the sake of argument, that non-fulfilment of campaign promises is not widespread, or that voters do not vote on the basis of poll pledges at all, there is still a plausible ground to argue that poll promises should be regulated. In such a scenario, an analogy can be drawn between misleading electoral promises and false advertising. This comparison is possible simply because a political party would intend to “sell” its “product” to the voters in the “political market” by showcasing the policies that they would adopt if voted to power, much like companies advertise the possible benefits a consumer receives by buying its product. In the case of misleading advertising, the laissez-faire argument proceeds on the basis that consumers would choose not to buy a product in future, if it does not conform with the description shown in the advertisement.¹⁴ However, false information offered through deceptive advertisements can potentially induce consumers to make incorrect choices, thus showing the need for some sort of regulation.¹⁵

It is worth noting that proof need not always be offered on the point of whether a consumer in fact relied upon the false advertisement in making the choice of buying that product. Rather, it would be sufficient to show that the advertisement had the potential to mislead the consumer and affect his or her choice.¹⁶ As is the case with voting choices, this flexible standard is indeed a regulatory response to the practical difficulty of ascertaining whether the choice made by the consumer was dictated by the advertisement, and if so, to what extent.¹⁷ If this legal position is applied to the electoral scene, it becomes clear that election promises need to be regulated since they can potentially affect the voting choice of a voter, irrespective of whether or not it actually

¹³ *S. Subramaniam Balaji v. Government of Tamil Nadu* (2013) 9 SCC 659 [85].

¹⁴ Charles J Walsh and Marc S Klein, ‘From Dog Food to Prescription Drug Advertising: Litigating False Scientific Establishment Claims under the Lanham Act’ (1992) 22(2) *Seton Hall Law Review* 389, 399.

¹⁵ *ibid* 398-400. Note that in India, false or misleading advertising does not receive protection under Article 19(1)(a) of the Constitution under the garb of commercial speech. See, *Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd.* (1995) 5 SCC 139 [17]. The same is also made punishable under Section 89 of the Consumer Protection Act, 2019.

¹⁶ *Havells India Ltd. v. Amritanshu Khaitan* 2015 SCC OnLine Del 8115.

¹⁷ Robert Pitofsky, ‘Beyond Nader: Consumer Protection and the Regulation of Advertising’ (1977) 90(4) *Harvard Law Review* 661, 677. ²⁴ Armand Derfner and J. Gerald Hebert, ‘Voting is Speech’ (2016) 34(2) *Yale Law & Policy Review* 471, 489. ²⁵ Sencer (n 3) 432-433. ²⁶ *ibid*.

does so. Similarly, the argument that regulation of poll pledges is justified only when their non-fulfilment is widespread would be akin to contending that false advertisements should be allowed unless it is proved that the tendency of manufacturers or suppliers to deceive has reached alarming proportions. In such a scenario, the person making the choice, be it the voter or the consumer, would have to pay a huge price before regulation is even attempted.

There is an even more serious objection to the *laissez-faire* model of the “political market”. As with all other market forces, the “political market” also throws up unintended results in the absence of complete and perfect information. It is imperative for the voters in an election to carefully analyse the information that is prevalent in the “marketplace of ideas” to arrive at a well-informed choice and reveal one’s preference for a party or a candidate.²⁴ When a voter bases his or her choice on a campaign promise that the political party does not intend to fulfil, he or she is essentially relying on false information, which only goes on to show that the choice is not well-informed.²⁵ On the other hand, if voters do not believe any election promises, it raises a serious question mark on the political process and public debate as such.²⁶ Further, in such a case where voting choice is absolutely independent of campaign promises, it is apparent that elections would not be fought on any meaningful positive platform for change, since voters would be well aware that the entire campaign narrative is designed to fool them. In the face of such voter indifference, the danger of voting based on extraneous factors cannot be ruled out.¹⁸

Taking the economic analogy of the “market” further, scholars have pointed out other disadvantages of not regulating election promises. It has been argued that as a result of non-fulfilment of promises, the credibility of not only the individual candidate but also that of the entire political class, is lowered in the eyes of the voter.¹⁹ Subsequently, the costs of lying by a candidate are uniformly distributed and borne by the political class as a whole, with the consequence that the individual candidate does not have to bear the entire cost of lying.²⁰ This advantage gives an incentive to politicians to make misleading promises, leading to the “overproduction” of falsehood on the campaign trail, and thus, continuing the vicious cycle.³⁰ For example, analysts have pointed out that most of the promises and goals listed in the election manifestos of the two major national political parties in the 2019 Lok Sabha elections, the Indian

¹⁸ Besides caste or religious loyalties, such factors may include bribery during campaigns, or even voter intimidation.

¹⁹ Sencer (n 3) 434.

²⁰ *ibid.* ³⁰ *ibid.* ³¹ A. K. Bhattacharya, ‘Rosy promises, lack of credibility: Why manifestos are becoming irrelevant’ (*Business Standard*, 10 April 2019) <https://www.business-standard.com/article/opinion/why-manifestos-lose-credibility119040901459_1.html> accessed 10 January 2021.

National Congress (INC) and the Bharatiya Janata Party (BJP), are either fiscally unachievable or unsustainable, and no mention is made of the plans of how to finance them.³¹ This is a further example of how the lack of accountability for election promises leads to a situation where politicians are incentivised to make tall claims and eventually undermine the trust placed by the electorate.

As the above-mentioned arguments show, voters are not totally ignorant of the contents of election manifestos, and it is illogical to assume that they are never swayed by campaign promises. Further, as has been discussed, an unregulated “political market” can result in unintended consequences, thus showing that there is a pressing need to regulate election manifestos and their contents. Unfortunately, in the present legal scenario, there is a severe dearth of suitable options to hold politicians accountable. While all failed legal efforts by various petitioners would not be discussed here, the viability of identifying a constitutional basis to enforce campaign promises is explored in the next part of this essay.³²

A Constitutional Basis to Make Election Promises Binding

The Right to Know

The role of public participation in democratic governance has been the focal point of debate since a very long time. According to one school of thought, the idea of citizenship in a representative democracy is confined to the exercise of voting rights in elections that are held periodically, and hence, does not extend to continuous participation in democratic decision making.²¹ This idea is vehemently opposed by those who argue that well-informed public participation is an integral aspect of democratic government, for which effective access to information becomes essential.²² In the context of the United States, for example, James Madison believed that informed public opinion and consultation played a pivotal role even between successive and periodic polls.²³

Thankfully, the Indian Supreme Court has clearly shown its preference for the latter position. In a continuous line of cases, it has held that the right to receive information flowed directly from freedom of speech under Article 19(1)(a).²⁴ Further, in *Secretary, Ministry of Information &*

²¹ Barry Sullivan, ‘FOIA and the First Amendment: Representative Democracy and the People’s Elusive Right to Know’ (2012) 72(1) Maryland Law Review 1, 59-60.

²² *ibid* 60.

²³ *ibid* 34-35.

²⁴ *State of Uttar Pradesh v. Raj Narain* AIR 1975 SC 865 [74]; *S. P. Gupta v. Union of India* AIR 1982 SC 149; *The Secretary, Ministry of Information & Broadcasting, Government of India v. Cricket Association of Bengal* AIR 1995 SC 1236 [43].

Broadcasting, the Court observed that meaningful public participation was contingent upon the people being well-informed about the topics on which their views, in turn, are sought.²⁵ This observation is relevant for our discussion not only because it can be directly applied to voting decisions where the electorate is called upon to express their views,²⁶ but also because it paved the way for the expansion of the “right to know” from a constricted understanding of access to information from public authorities alone.

In *Association for Democratic Reforms*, the right of the voter to know about the antecedents of a candidate was held to fall under Article 19(1)(a).²⁷ It must be noted that the Supreme Court was not enforcing a “right to know” from public authorities, but rather a “right to know” from private individuals who aspired to be elected and hold public office. Following from its earlier decisions, the Court, in a later case, highlighted the necessity of the voter being informed on issues on which he was expected to express his opinion, in the absence of which the voting right itself was rendered futile.²⁸ To sum up, the “right to know”, apart from being an independent right in itself, is also key to creating and sustaining informed public opinion in a democratic polity.

Coupling “Choice” with the Right to Know

At first sight, it might appear that privacy is absolutely incompatible with the electoral process, which by its very nature and the outcome it leads to is a “public” construct. However, on closer analysis, the voting choice of an individual can be harmonised with the rather individualistic notion of privacy. The concept of secret voting is itself designed to reserve a “private space” within the vast political realm for the voter to take an independent decision without social pressure.²⁹ The voter is, therefore, given the freedom to make a choice without being constrained or hindered by considerations of whether that choice is approved or supported by others.³⁰ Although in a slightly different context, secret voting was recognised by the Supreme Court as the tool that ensures that the voter is not forced to disclose his or her choice before any authority, which, in turn, guarantees that the choice can be made without fear in the first place.³¹ The idea of secrecy of the ballot being an essential feature of free and fair elections is also derived from

²⁵ *The Secretary, Ministry of Information & Broadcasting, Government of India* (n 36) [82].

²⁶ See *People’s Union for Civil Liberties v. Union of India* (2013) 10 SCC 1 [28]. The Supreme Court observed that casting of a vote is an instance of the voter exercising his or her freedom under Article 19(1)(a).

²⁷ *Union of India v. Association for Democratic Reforms* (2002) 5 SCC 294 [38].

²⁸ *People’s Union for Civil Liberties v. Union of India* (2003) 4 SCC 399 [26].

²⁹ Annabelle Lever, ‘Privacy and Democracy: What the Secret Ballot Reveals’ (2015) 11(2) *Law, Culture and the Humanities* 164, 174.

³⁰ *ibid* 175.

³¹ *S. Raghbir Singh Gill v. S. Gurcharan Singh Tohra* AIR 1980 SC 1362 [13].⁴⁴ *People’s Union for Civil Liberties* (n 38) [56].

this point.⁴⁴ As has been acknowledged by the Supreme Court in *Puttaswamy*, the entire notion of privacy revolves around the right to make a choice in personal matters.³² Consequently, privacy can be seen as a concept that enables people to protect their opinions and choices from being trampled upon by societal pressure.³³ It is indeed difficult to imagine how voting choice can be treated in the same manner as strictly “personal” choices like bodily autonomy or sexual preferences. Yet, the concept of privacy has today expanded to include a variety of rights within its fold. In Alan Westin’s scheme of classification of privacy into four states, “anonymity” refers to a state where the individual acts or communicates in a public space with the expectation that he or she cannot be personally identified and is thus free from the constraints of social expectations or intrusion by the State.³⁴ The need for “public privacy”, according to Westin, is what drives people to seek refuge in this state of “anonymity”.³⁵ Similarly, according to Finn, Wright and Friedewald’s classification, privacy extends to one’s preferences that are expressed in the public space, including political preferences.³⁶ Thus, it can be argued that the *freedom of choice* of a voter of whom to vote for, in a setting where the secrecy of ballot is scrupulously maintained, should be protected under the fundamental right to privacy.³⁷

The “right to know”, as outlined earlier, is inextricably linked with the element of choice in the electoral framework. The primary reason for mandating the disclosure of the antecedents of a candidate is to ensure that the voter has the necessary information in order to form an opinion as to his or her preference for a candidate.³⁸ This guarantees that the choice made by the voter is an intelligent and well-informed one.⁵² By implication, when the voter does not have access to true information, it vitiates the *choice* that he or she has to necessarily make while voting.

As acknowledged by Justice Chandrachud in *Puttaswamy*, the idea of privacy, by carving out a “private space” for the individual and protecting individualistic choices, allows one the freedom to think and to believe in what one considers to be correct.³⁹ In other words, privacy includes within it the right to formulate an opinion. Further, fulfilling the rights under Article 19 is contingent upon the precondition that the individual has the right to take decisions on what his or

³² *Justice K. S. Puttaswamy (Retd.) v. Union of India* (2017) 10 SCC 1 [297].

³³ *ibid.*

³⁴ Bert-Jaap Koops, Bryce Clayton Newell, Tjerk Timan, Ivan Skorvanek, Tomislav Chokrevski and Masa Galic, ‘A Typology of Privacy’ (2017) 38(2) *University of Pennsylvania Journal of International Law* 483, 497.

³⁵ *ibid.*

³⁶ *ibid* 502.

³⁷ This is in addition to the protection that is already granted to the voter when he or she expresses his or her voting preference under Article 19(1)(a). See *People’s Union for Civil Liberties* (n 40) [97].

³⁸ *People’s Union for Civil Liberties* (n 40) [94]. ⁵² *ibid.*

³⁹ *K. S. Puttaswamy* (n 45) [298].

her preferences are.⁴⁰ This is natural, because in the absence of the preliminary right to freedom of thought or the liberty to formulate one's views, the question of outward expression of views as protected under Article 19(1)(a) does not even arise. Thus, one strand of the argument goes: the preliminary right to choose and formulate one's preferences under Article 21 is essential to the expression of those views under Article 19(1)(a).

On the other hand, another facet of Article 19(1)(a), i.e., the right to know, is an essential prerequisite in order to make the right to choose under Article 21 meaningful. For instance, a voter can only be expected to make a rational choice as to his or her voting preference after being made aware of the antecedents of a candidate.⁴¹ Thus, in the absence of a "right to know" under Article 19(1)(a), the right to choose under Article 21 is rendered illusory. If these arguments hold good, two conclusions can be reached. Firstly, as seen above, the right to choose and formulate one's preferences under Article 21 is essential to the expression of those views under Article 19(1)(a). Secondly, the right to know under Article 19(1)(a) is a prerequisite in order to ensure that the right to choose under Article 21 is not vitiated. This tangled web attests to the interlinkage between various rights, a concept that has become firmly entrenched in Indian rights jurisprudence.⁴² It is, thus, apparent that the various rights discussed above must not be read in isolation, but one can make a generalisation that the *right to exercise a well-informed choice* is inherently protected by a combined reading of Articles 19(1)(a) and 21. This conclusion, as has been highlighted, allows both the freedom of choice on one hand, and right to receive information on the other, to be given effect to, while recognising their inherent interlinkage.

Till now, as has been discussed above, the jurisprudence in India on the concept of informed voting has revolved around the right to know under Article 19(1)(a). As this paper demonstrates, the inability to make an informed voting choice is also a violation of the right to privacy under Article 21 as recognised in *Puttaswamy*. As highlighted above, there exists a fundamental interlinkage between the right to make a free choice and the right to access the means required to make the exercise of such a choice meaningful. An example may be that although the right to reproductive autonomy is protected under the right to privacy, scholars argue that the right to

⁴⁰ *ibid.*

⁴¹ *Resurgence India v. Election Commission of India* (2014) 14 SCC 189 [20]-[22].

⁴² *Maneka Gandhi v. Union of India* AIR 1978 SC 597. Although not very relevant for our discussion, the Supreme Court in another case included the right to know within the broad scope of Article 21, besides it being a part of Article 19(1)(a), thus showing how a single right can fall under multiple interconnected heads. This conclusion reached by the Court, however, was not accompanied by any extensive reasoning or discussion on that particular point, even though the Court acknowledged that access to information was necessary for a participatory role to be played by the people in a democratic system. See *Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers, Bombay* AIR 1989 SC 190 [34].

make a free choice on such matters is severely restricted due to the lack of safe abortion facilities for a vast segment of the female population in India.⁴³ This lack of access results in a potential violation of one's right to make a choice under Article 21.⁴⁴ If this argument is applied to the electoral arena, it would be clear that the right to make a choice under Article 21 is violated or at least unfairly restricted when the voter does not possess the correct information required to make the exercise of voting choice meaningful and well informed. Simply put, the argument centred on the right to privacy showcases that misleading information, including false campaign promises, not only violates Article 19(1)(a), as has already been established in Indian jurisprudence, but also the right to make a free choice as an undeniable facet of Article 21.

The question arises as to how misleading election promises affect the right of a voter to make a well-informed choice. It is apparent that false poll pledges have the effect of reducing the amount of true information that is available to the voters by distorting the truth and filling the campaign space with half-truths and lies.⁴⁵ In such a scenario, the assumption that voters make intelligent choices based on correct information available to them itself becomes implausible.⁴⁶ Misinformation, as the Supreme Court rightly pointed out, stands on the same pedestal as lack of information, both of which create an uninformed electorate.⁴⁷ As has been discussed earlier, the very purpose for which disclosure of the antecedents of a candidate is demanded is to ensure that voters make a well-informed choice.⁴⁸ Assuming that voters are also guided by campaign promises in deciding which way to vote,⁴⁹ it is imperative for them to know whether those promises are credible or not.⁵⁰ One can equate making false promises with no intent to fulfil them with the situation of a candidate who files a false affidavit as to his or her antecedents, since both of them serve the same purpose of deception. Yet, the irony is that, while the latter is regulated by law,⁵¹ the former is not. It is evident that deceptive campaign promises constitute false

⁴³ Severyna Magill, 'The Right to Privacy and Access to Abortion in a Post-Puttaswamy World' (2020) 3(2) University of Oxford Human Rights Hub Journal 160, 171.

⁴⁴ *ibid.*

⁴⁵ Sencer (n 3) 432-433.

⁴⁶ *ibid.*

⁴⁷ *Association for Democratic Reforms* (n 39) [38].

⁴⁸ *People's Union for Civil Liberties* (n 40) [94].

⁴⁹ The arguments relating to the reasonableness of this assumption have already been discussed in Part 2 of this essay.

⁵⁰ One may also argue that credibility of election promises can be a far more important consideration in deciding for whom to vote, than information about certain aspects of the antecedents of a candidate, say, for example, educational qualifications. In fact, Justice Venkatarama Reddi dissented with the majority on this issue in *People's Union for Civil Liberties*, by holding that educational qualifications of a candidate did not constitute essential information that the voter ought to know as a matter of right, and thus, did not require compulsory disclosure. See *People's Union for Civil Liberties* (n 40) [122].

⁵¹ The act of filing of a false affidavit relating to the information that is to be mandatorily disclosed by the candidate, including his or her antecedents, is made punishable under Section 125A of the Representation of the People Act, 1951.

information, and any choice based on such information can never be said to be well-informed. Therefore, misleading poll pledges directly violate the right of a voter to exercise a well-informed choice. As a result, any act or omission relating to the electoral process that interferes with the exercise of this right should be declared ultra vires and unconstitutional.⁵²

In other words, only those election promises should be allowed which are intended to be fulfilled by those who make them. However, this proposition presents a practical difficulty: it is almost impossible for a voter to separate grain from chaff and accurately determine beforehand which promises are credible and are made with an intent to fulfil, and which are not. In order to counter this difficulty, it must be assumed that whatever promises are made are meant to be fulfilled, since making false promises amounts to spreading false information, which in turn, negates the right of a voter to make a well-informed choice and thus, deserves to be outlawed. If the duty of disclosure only extends to disclosing the financial resources required to implement a poll promise, it is possible that parties would make promises that are financially sustainable but which they do not have any intention to implement. In such a scenario, voters would once again be forced to make a choice based on false information, thus negating the right to make a well-informed choice. Therefore, the burden must lie not on the shoulders of the voter to ascertain the viability of poll promises, but upon the parties which make those promises to fulfil them. This can ensure that the voters would at least be certain that the poll promises upon which he or she may or may not rely while voting, constitute true information.

Even if one's constitutional right is violated, one may ask as to how the remedy of fulfilling campaign promises is attracted. It is well known that judicial hesitation in the regulation of the electoral process stems heavily from the assumption that the political process can produce better outcomes than Court-mandated directions.⁶⁷ However, as extensively discussed in Part 2 of this paper, the political process is woefully inadequate to regulate the fulfilment of poll pledges, thus nullifying the above assumption. It is true that the Indian Supreme Court has not shied away from crafting new remedies when Fundamental Rights have been violated.⁵³ Yet, in this scenario, awarding damages as the preferred mode of judicial remedy is fraught with danger. Apart from the problem of quantifying the extent of damages, granting damages to individual petitioners

⁵² This proposition is consistent with judicial precedent as well. For instance, the Supreme Court disallowed the practice of leaving blank spaces in affidavits by the candidates, on the ground that it rendered the right of a voter to receive information about the candidate, absolutely ineffective. See *Resurgence India* (n 55). ⁶⁷ Sencer (n 3) 440.

⁵³ *Khatri (II) v. State of Bihar* (1981) 1 SCC 627, 630; *Rudul Sah v. State of Bihar* (1983) 4 SCC 141; *Nilabati Behera v. State of Orissa*, AIR 1993 SC 1960 ⁶⁹ Sencer (n 3) 456.

would imply diversion of public funds towards satisfying individual claims arising out of non-fulfilment of a promise that had been made to the public at large. Further, the number of such claims would possibly snowball out of control.⁵⁴ Since the affected group consists of the entire citizenry, awarding damages to the entire group would be meaningless. The only potential solution is to direct specific performance of the poll promises made, since specific performance is often preferred when no other remedy is suitable in the peculiar facts and circumstances of the case.⁵⁵ Although the dissimilarities between contract law and constitutional law are stark, one may borrow from contractual principles by deeming poll promises to have been made enforceable when the contingent event of the party assuming office is satisfied. This complicated approach is the only resort, since the alternative is leaving those affected without any remedy at all.

In other words, the onus should lie on the ruling dispensation to fulfil its campaign promises once elected, unless it can show that exceptional situations make it impossible to do so.⁵⁶ The undeniable inference flowing from this long discussion is that election promises and manifestos must be made legally binding, and that there is a strong constitutional basis to do so.

Looking at Politics as it is

Making election manifestos binding stumbles into a further, rather artificial, roadblock. While election promises made by a candidate can be statutorily regulated under Section 123 of the Representation of People Act (“RPA”), 1951, those made by a political party are immune from such regulation.⁵⁷ Courts have sought to justify this dichotomy by arguing that RPA distinguishes between an individual candidate and the party to the effect that the power of parties to make promises cannot be curtailed under the existing legal framework.⁵⁸ This artificial distinction, arising from an extremely myopic vision of electoral laws, does not conform with politics as it is practised in India.

The stranglehold of party discipline, lack of intra-party democracy and the threat of anti-defection provisions being applied if the elected representative refuses to toe the party line in India, all attest to the political reality that the directions of the party leadership must be followed even if

⁵⁴ *ibid.*

⁵⁵ *Abdul Rahim v. Ma Budima*, AIR 1933 Rang 149, 150.

⁵⁶ Examples of such exceptional situations are discussed below in Part 3.4 of this essay, although the instances listed must not be taken to be an exhaustive list.

⁵⁷ *S. Subramaniam Balaji* (n 19) [61.1]-[61.2].

⁵⁸ *ibid.*

they do not align with the preferences of those who voted for an individual representative.⁵⁹ In the face of total party dominance over the concerned individual both before and after the election, seeking to distinguish between the party and the candidate who is bound by the strict rules of party discipline, makes little sense. Further, the entire aim of making campaign promises binding is to protect and enforce the right of a voter to exercise a wellinformed choice,⁶⁰ and it is beyond doubt that “information” in the nature of poll pledges on the campaign trail is not only “produced” by the candidates, but also by the parties.

As for the distinction between the candidate and the party under the RPA, the Supreme Court has often gone beyond the boundaries of that statute when fundamental rights of voters were at stake.⁶¹ Further, in a recent judgment, the Supreme Court called upon parties to disclose reasons to the people as to why they had selected candidates with a tainted past to contest the election.⁶² This decision can be taken as an authority to argue that political parties are also under an obligation to disclose information that allows the voter to make an informed choice.

Another technical issue of far-reaching importance revolves around the question of equating the ruling party with the government. While it is common knowledge that the proposed policies and programmes of the ruling party are expected to have a profound impact on the policies adopted by the government, one can argue that the government should not be held legally liable for the promises made by the ruling party made before an election. However, a potential counter-argument can be identified if one critically looks at the philosophy underlying antidefection law under the Tenth Schedule to the Constitution. Judicial opinion in India is consistent with the notion that a voter performs two distinct functions while casting a vote: firstly, he or she votes for an individual candidate and secondly, he or she expresses preference for a political party to potentially form the government.⁶³ Consequently, an elected representative is expected to show loyalty towards the party, using whose label or brand the election was won by him or her.⁶⁴ On critical analysis, it seems that the promise made to the electorate by an individual in his or her capacity as a private citizen running for elected office that he would support the policies and actions of a particular party, is backed by the threat of disqualification and made legally binding

⁵⁹ Malavika Prasad and Gaurav Mukherjee, ‘Reinvigorating Bicameralism in India’ (2020) 3(2) University of Oxford Human Rights Hub Journal 96, 108-109.

⁶⁰ It is worth noting that while casting a vote in favour of a candidate put up by a party, the voter not only exercises a choice for the candidate, but also for the party symbol.

⁶¹ See, e.g., *Association for Democratic Reforms* (n 39).

⁶² *Rambabu Singh Thakur v. Sunil Arora* (2020) 3 SCC 733.

⁶³ *Kihoto Hollohan v. Zachilhu* 1992 Supp (2) SCC 651 [46].

⁶⁴ *ibid* [47].

on the same individual in his or her capacity as an elected representative on winning the election. If this same logic is applied in the case of political parties, it would follow that the promises made by the party would become enforceable once the party is in a position to form the government after winning the election.

Even otherwise, the strict divide between the ruling party and the government of the day appears to be untenable in constitutional theory. One strand of thought in American jurisprudence has equated the State with the party in power, and considers the party system as merely being an instrumentality of the State.⁶⁵ Judicial opinion in USA, by acknowledging the close nexus between the ruling party and the State due to the former having control over the apparatus of the latter, has not entirely dismissed concerns of the actions of the State being construed as actions of the “parties-in-state’s clothing”.⁶⁶ Quite importantly, judicial interference in ensuring ballot access, rules to be followed in parties’ primaries and even nominations by parties, has largely hinged on the necessity of safeguarding a meaningful and effective voting right of the citizen.⁸³ On similar lines, Tarunabh Khaitan has argued that parties possess a public character and deserve to be regulated to a certain degree, given the fact that they effectively direct State policy.⁶⁷ As a result, public duties such as publicising the stand of the party on policy questions or governance issues, must be placed on political parties.⁶⁸ One can argue that although the Indian Constitution is silent on the question of political parties, the decision of the Supreme Court requiring parties to justify why candidates with criminal cases against them were nominated could be seen as a measure in pursuance of enforcing such public duties.⁶⁹ Although a legal fiction must necessarily be created to equate the ruling party with the government of the day, it appears that such a construct could be defended both in terms of theoretical propositions as well as pragmatic concerns.

Curing the Defects

The question naturally arises as to what the contours of judicial review in enforcing poll promises ought to be. One can possibly find a solution by assessing how courts have sought to enforce socio-economic rights in jurisdictions like India and South Africa. While a complete overview of

⁶⁵ Nathaniel Persily and Bruce E. Cain, ‘The Legal Status of Political Parties: A Reassessment of Competing Paradigms’ (2000) 100(3) Columbia Law Review 775, 780.

⁶⁶ Mark E. Rush, ‘Voters’ Rights and the Legal Status of American Political Parties’ (1993) 9(3) Journal of Law and Politics 487, 510-513. ⁸³ *ibid* 494.

⁶⁷ Tarunabh Khaitan, ‘Political Parties in Constitutional Theory’ (2020) 73 Current Legal Problems 89, 106-107.

⁶⁸ *ibid* 109.

⁶⁹ *Rambabu Singh Thakur* (n 78).

judicial opinion in this field is beyond the scope of this paper, it would be sufficient to state that Courts have often not shied away from directing the State to provide for the fulfilment of socio-economic rights in the face of persistent inaction and indifference on the part of the government.⁷⁰ This is despite the fact that much like the fulfilment of poll promises, fulfilling such rights very often involves questions of policy and budgetary allocations.⁸⁸ As evident in the Right to Food case, for instance, the Indian Supreme Court has gone into the minutest of details in order to make the fulfilment of basic socio-economic rights in the area of food security a reality.⁷¹ There is no reason why such a proactive and enhanced standard of judicial review should not be applied in the area of enforcement of poll pledges. Quite importantly, however, certain electoral promises may involve the achievement of long-term goals, the results of which may not be immediately visible or are difficult to ascertain by the courts. In such cases as well, the Courts can borrow from the doctrine of progressive realisation as established in socio-economic rights jurisprudence, in order to hold the government accountable in cases of complete inaction and ensure that steps are taken to progressively, if not immediately, achieve the implementation of such campaign promises.⁷²

One could perhaps argue that the analogy drawn between socio-economic rights and election promises is distant and remote. However, this comparison with the judicial enforcement of socio-economic rights is apt due to two reasons. Firstly, similar to the right to cast an informed vote, socio-economic rights are now being widely seen as a sub-species of political rights, including the right of political participation in a democracy.⁷³ This is because the fulfilment of basic socio-economic rights is seen as a mechanism for the weaker and vulnerable sections of society to protect their rightful interests and engage in political participation.⁷⁴ Secondly, similar to judicial interference in the political process, the costs of providing a remedy, irrespective of whether they are economic, political etc., become an influential factor in crafting a remedy in the field of socio-economic rights.⁷⁵ More often than not, this leads to a situation wherein the enforcement and even

⁷⁰ See generally, Natasha G Menell, 'Judicial Enforcement of Socioeconomic Rights: A Comparison between Transformative Projects in India and South Africa' (2016) 49(3) Cornell International Law Journal 723. ⁸⁸ *ibid* 727.

⁷¹ *People's Union for Civil Liberties v. Union of India*, Writ Petition (Civil) No. 196 of 2001.

⁷² International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, art. 2(1); 'The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights' (8 January 1987) UN Doc E/CN.4/1987/17, [21]-[24]. The doctrine of progressive realisation of socioeconomic rights is well entrenched in South African rights jurisprudence. See, e.g., the decision of the South African Constitutional Court in *Mazibuko v. City of Johannesburg*, 2010 (4) SA 1 (CC) [67].

⁷³ David Bilchitz, 'Are Socio-Economic Rights a Form of Political Rights?' (2015) 31(1) South African Journal on Human Rights 86, 107-111.

⁷⁴ *92 ibid*.

⁷⁵ Margaux J. Hall and David C. Weiss, 'Human Rights and Remedial Equilibration: Equilibrating Socio Economic Rights' (2011) 36(2) Brooklyn Journal of International Law 453, 461-462.

the content of the right in question is shaped by the cost benefit analysis in securing a remedy, thus distorting to some extent the simplistic notion that a remedy follows whenever a right is infringed.⁷⁶

In order to make the legal position flexible and functional, the law must permit the non-fulfilment of campaign promises in certain exceptional situations. For instance, one can envisage a situation where the underlying facts and circumstances have so drastically changed since the promise was made, that it would be unwise to force the ruling dispensation to fulfil its poll pledges. In such circumstances, Courts should be receptive to the need to balance public interest on one hand, with the breach of trust of the voters on the other, although any such judicial scrutiny must be extremely strict and geared towards enforcing the fulfilment of promises made.⁷⁷

Similarly, parties other than the ruling party are often forced to make campaign promises based on insufficient information due to lack of access to official governmental data.⁷⁸ In the face of such limitations, it is difficult for them to offer a viable policy alternative, and the need might arise to reassess, once elected, whether and how the promise is to be fulfilled.⁷⁹ In such situations, the Court must call upon the ruling dispensation to show how access to official information has changed the underlying scenario such that the previous campaign promise is no longer a proper course of action to follow. Further, when a post-poll coalition government is formed, it is natural that the promises made by all parties in the ruling coalition cannot be fulfilled, although the parties should at least be called upon to justify as to why such fulfilment has become impossible.

As with any approach in general, certain incurable defects are inherent in making poll pledges binding. Firstly, poll promises may involve enactment or amendment of legislation. In such cases, judicial enforcement of such pledges will become impossible since the Courts cannot compel the legislature to enact a specific legislation.⁸⁰ Secondly, political parties in India have a disturbing tendency to make vague promises and not specify measurable goals in their manifestos.⁸¹ Therefore, an objective assessment of which promises have been fulfilled and to what extent, is

⁷⁶ *ibid.*

⁷⁷ This test is inspired from a similar exception to Governmental liability under the doctrine of promissory estoppel. See *Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh* (1979) 2 SCC 409 [24].

⁷⁸ Dasgupta (n 11).

⁷⁹ *ibid.* The need for a dispassionate reassessment of election promises as to their viability, after getting elected, was emphatically approved by Lord Denning. See *Bromley London Borough Council* (n 13).

⁸⁰ *Supreme Court Employees' Welfare Association v. Union of India* (1989) 4 SCC 187 [51].

⁸¹ Vipul Prasad, 'Why poll manifestos in India should be measurable, accountable' (*Moneycontrol*, 2 April 2019) <<https://www.moneycontrol.com/news/india/why-poll-manifestos-in-india-should-be-measurable-accountable3745821.html>> accessed 10 January 2021.

precluded in the first place.⁸² These additional problems need further thought, and cannot be resolved merely by making poll promises enforceable.

Conclusion

In this essay, an attempt has been made to locate a constitutional basis to make election promises legally binding. A cursory look at the working of the “political market” shows that the lack of regulation of manifestos and their contents has a serious adverse impact on the electoral process, which can, quite dangerously, lead to questions being raised over the efficacy of the democratic framework itself. Therefore, it has been argued in this essay that there is a pressing need to ensure that parties are legally compelled to keep their word since the normal political processes are often insufficient and imperfect in achieving this goal. Based on a combined reading of Articles 19(1)(a) and 21, this essay has tried to fill this legal vacuum by identifying the right of a voter to make an informed choice during voting. This observation, coupled with the view that misleading promises interfere with the exercise of this right through propagation of false information, leads to the inference that the basis for making such poll pledges binding can, in fact, be located in the Constitution itself.

It must be admitted that the approach that has been outlined in the essay is meant only to serve as a broad framework to ensure accountability in the electoral arena. As a result, many grey areas and shortcomings exist which, it is hoped, would be resolved through harmonisation between conflicting perspectives. Yet, one thing is certain: instead of allowing political parties to break the trust of the electorate with impunity, the time has come to make them answerable before both the court of law and the court of the people. The idea of a democratic India is inconsistent with the notion that once the votes have been counted, campaign promises do not count.

⁸² *ibid.*