

# REGULATION OF ELECTION CAMPAIGN FINANCE IN INDIA: MAKING ELECTIONS TRULY FREE AND FAIR

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*The essence of any democratic system is the healthy functioning of political parties and, consequently, free and fair elections. Conducting fair elections requires not only a legal framework and a transparent electoral process, but an institutional structure regulating campaign finance which adequately ensures that governance caters to the welfare of general public and not special interests. This is true not only for India but for any other democratic country as well. This paper recognises the far reaching impact of campaign financing on future governance after elections. It argues that most of the vices prevalent in current campaign finance system of India can be dealt with by doing away with expenditure limits and by introducing contribution limits in its place. However, without transparency in conduct of the political parties and their candidates, these measures will not have much positive impact. Transparency, through the full disclosure of campaign financing policies and practices, provides the ability to verify that no malpractice has occurred and that regulatory frameworks are being effectively implemented. This paper, therefore, simultaneously argues for a systematic change in electoral law to promote transparency in the financing of election campaigns in India.*

## I. INTRODUCTION

During an election, candidates and political parties require funds to promote themselves and their vision of governance. The general presumption is that access to greater funds would translate into a more beneficial electoral outcome, since they would have access to greater number of voters.<sup>1</sup> However, there can be some negative externalities associated with the process of seeking

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<sup>1</sup> Transparency International, *Standards on Political Funding and Favours*, January 1, 2009, available at [http://www.transparency.org/whatwedo/pub/policy\\_position\\_no\\_01\\_2009\\_standards\\_on\\_political\\_funding\\_and\\_favours](http://www.transparency.org/whatwedo/pub/policy_position_no_01_2009_standards_on_political_funding_and_favours) (Last visited on February 3, 2014); See also Jhalak Kakkar, *On Regulating Campaign Finance*, June 22, 2013, available at [http://www.mylaw.net/Article/On\\_regulating\\_campaign\\_finance/#.Uu9HOT2SzME](http://www.mylaw.net/Article/On_regulating_campaign_finance/#.Uu9HOT2SzME) (Last visited on February 3, 2014).

more funds. *First*, those who are already in a position to exert influence due to their political placing can illegitimately pressurise funding sources.<sup>2</sup> *Second*, powerful private sources might work out an arrangement of *quid pro quo* with the candidate, which would result in elected candidates taking decisions for the welfare of special interests rather than welfare of the general public.<sup>3</sup> This broad framework throws light on the conceptual problems associated with the process of democratic elections. The need to regulate political finance flows from minimising such possibilities.<sup>4</sup> To elucidate simplistically, two important ways in which campaign spending matters is through its effect on voter turnout as it seems to successfully raise voters' awareness of the elections<sup>5</sup> and through its effect on election outcomes.<sup>6</sup>

Political equality is an essential feature of modern political discourse. Its importance is reflected by most democratic reforms being centred on this very postulate. Although the understanding of this concept can be diverse, political equality is generally qualified as a condition where "control over [decisions of governance] is shared so that preferences of no one citizen are weighed more heavily than the preferences of any other citizen".<sup>7</sup> In India, the rise in political corruption over the years has been eroding political equality from our democratic governance. Corruption has resulted in a significant loss of revenue to the state exchequer, with some estimates reporting that about 419 billion dollars in taxable income and profits have been laundered out of the country over the past decade.<sup>8</sup> One of the causes of corruption that has been identified

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<sup>2</sup> *Id.*

<sup>3</sup> Matthias Dahm & Nicolas Porteiro, *Side Effects of Campaign Finance Reform*, 6(5) J. EUROPEAN ECO. ASS. 1057-1077 (2008). See also David Austen Smith, *Interest Groups: Money, Information, and Influence* in PERSPECTIVES ON PUBLIC CHOICE: A HANDBOOK (1997). See generally GENE GROSSMANN & ELHANAN HELPMAN, SPECIAL INTEREST POLITICS (2001); TORSTEN PERSSON & GUIDO TABELLINI, POLITICAL ECONOMICS: EXPLAINING ECONOMIC POLICY (2002).

<sup>4</sup> See generally Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50(3) STANFORD LAW REVIEW 893-914 (1998) (Discussing the democratic paradox of campaign finance reform – that campaign finance reform rests on a central fear that political actors will convert economic advantage into political power and at the same time is premised on doubt about voters', or at least some voters', civic capabilities of exercising informed, careful, independent judgment. Since this paradox is unavoidable, we have not touched upon it while analysing the issues concerning campaign finance reform in India.)

<sup>5</sup> Burton Abrams & Russell Settle, *Campaign-Finance Reform: A Public Choice Perspective*, 120(3/4) PUBLIC CHOICE 379-400 (2004); John Matsusaka & Filip Palda, *Voter Turnout: How Much Can We Explain?*, 98 PUBLIC CHOICE 431-446 (1999).

<sup>6</sup> Burton Abrams & Russell Settle, *The Effect of Broadcasting on Political Campaign Spending*, 84 J. POL. ECO. 1095-1107 (1976); King Banaian & William Luksetich, *Campaign Spending in Congressional Elections*, 29 ECONOMIC INQUIRY 92-100 (1991); Alan Gerber, *Estimating the Effect of Campaign Spending on Senate Election Outcomes Using Instrumental Variables*, 92 AM. POL. SCI. REV. 401-411 (1998); Jonathan Nagler & Jan Leighley, *Presidential Campaign Expenditures: Evidence on Allocations and Effects*, 73 PUBLIC CHOICE 319-333 (1992).

<sup>7</sup> ROBERT DAHL & CHARLES LINDBLOM, POLITICS, ECONOMICS AND WELFARE 41 (1953).

<sup>8</sup> Harvard Institute of Politics, *Fighting Corruption in India*, available at <http://www.iop.harvard.edu/fighting-corruption-india> (Last visited on January 28, 2014).

is an ineffective election campaign finance regulatory system.<sup>9</sup> Flawed political party funding and election expenditure laws have driven parties and politicians to misuse the government's discretionary powers over resource allocation to raise funds for election campaigns and political parties.<sup>10</sup> The Report of the National Commission to Review the Working of the Constitution, 2001, has noted that the prevalent regime of election campaign financing "creates a high degree of compulsion for corruption in the public arena" and that "the sources of some of the election funds are believed to be unaccounted criminal money in return for protection, unaccounted funds from business groups, kickbacks or commissions on contracts, etc".<sup>11</sup> It also states that "electoral compulsions for funds become the foundation of the whole super structure of corruption".<sup>12</sup>

Corruption, undeterred by ineffective regulation of political campaign financing, has resulted in adoption of policies that disproportionately favour the electoral contributors at the cost of public welfare.<sup>13</sup> Therefore, there is a visible linkage between degradation of political equality and the way political campaigns are funded. The overarching impact of corruption on Indian polity has especially left a rather disparaging imprint on the system of election campaign finance in India, necessitating its effective regulation. Corruption is a manifestation of questionable political contributions made by those who want governance to cater to their special interests as opposed to general welfare. In that sense, our electoral law has been unable to preserve the fundamental idea of democracy of a vote being the voter's proxy for participation in governance.<sup>14</sup> A failure to protect this fundamental idea has reduced the mandate of 'free and fair' elections in India. There are two principles of fairness that should be endured while suggesting reforms in Indian electoral law to make elections truly free and fair. *First*, elections should be fair for the candidates who do not wish to utilise illegitimate means for funding their election campaign.<sup>15</sup> This is characterised by a level playing field in electoral campaigns to ensure that a

<sup>9</sup> The vast amount of money spent on lobbying each year suggests that the influence of activities other than election campaign contributions over policy decisions might also be considerable. Apart from the role of money in politics, the effect of lobbying activities has also received scholarly interest. See generally JOHN WRIGHT, *INTEREST GROUPS AND CONGRESS: LOBBYING, CONTRIBUTIONS, AND INFLUENCE* (1996); John de Figueiredo & Charles Cameron, *Endogenous Cost Lobbying: Theory and Evidence*, June, 2008, available at [https://faculty.fuqua.duke.edu/areas/strategy/Seminar\\_papers/EndogenousLobbying15Jun08UT.pdf](https://faculty.fuqua.duke.edu/areas/strategy/Seminar_papers/EndogenousLobbying15Jun08UT.pdf) (Last visited on February 3, 2014); KAY LEHMAN SCHLOZMAN & JOHN TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* (1986).

<sup>10</sup> *Id.*

<sup>11</sup> M. N. Venkatachaliah, *Report of the National Commission to Review the Working of the Constitution*, March 31, 2002, available at <http://lawmin.nic.in/ncrwc/finalreport/v1ch4.htm> (Last visited on February 3, 2014).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Anupam Saraph, *An Agenda for Reform of the Election System in India*, XLVI (12) EPW 19 (2012).

<sup>15</sup> Rajendra Kondepoti, *Reforming the Campaign Financing Regime in India*, XLVI (52) EPW 70 (2011).

particular candidate is not put in a specially advantageous or disadvantageous position due to the choices made while funding the election campaign. *Second*, elections should result in a fair outcome for citizens, i.e., elected candidates should take decisions for general welfare, and not that of special interest groups they may be beholden to.<sup>16</sup>

Apart from free and fair elections, regulation of political campaign finance can also be approached through the prism of freedom of speech and expression. Freedom of expression in India constitutes a ‘basic’ human right<sup>17</sup> and has also been termed as a ‘preferred’ right.<sup>18</sup> Therefore, a democratic political society and its government, which rests on the consent of the people and the contribution of their ideas to public questions,<sup>19</sup> can exist meaningfully only where free discussion takes place. Furthermore, since elections in a representative democracy present a contest between competing ideologies, public discussion becomes a political duty.<sup>20</sup> In this paper, we will explore election campaign finance for a candidate as a manifestation of freedom of speech and expression, since candidates require funds to effectively engage with their electorate.

This paper, while making arguments for strengthening the regulation of election campaign finance in India, explores in Part II the rationale for such regulation in the background of a surge in electoral competition that has necessitated a need for more accountability. The paper then analyses the prevailing laws and regulations in India in the sphere of election campaign finance under three broad heads – funding regulations in Part III, expenditure regulations in part IV and finally transparency and disclosure regulations in Part V. In these three parts we analyse the shortcomings of the current system and propose changes that can effectively make elections in India truly free and fair. In a nutshell, Indian electoral laws provide for limits on the expenditure incurred by a candidate and do not put any limits on how much an individual can contribute to the coffers of political parties and candidates. In Part VI, we take inferences from this discussion and tie the threads together to reach at the central argument of this paper – to make elections in India truly free and fair, expenditure limits should be removed and campaign contribution limits should be introduced.

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<sup>16</sup> *Id.*

<sup>17</sup> *L.I.C. v. Manubhai*, (1992) 3 SCC 637: AIR 1993 SC 171.

<sup>18</sup> *Odyssey Communications (P) Ltd. v. Lokvidayan Sanghatana*, (1988) 3 SCC 410: AIR 1988 SC 1642.

<sup>19</sup> *Milk Wagon Drivers v. Meadowmoor Dairies*, 312 US 1941 287.

<sup>20</sup> *Whitney v. California*, 274 US 1927 357.

## II. CONTEMPORARY NEED FOR REGULATION OF ELECTION CAMPAIGN FINANCE

In the paradigm of democratic machinery, it is the people who are the final sovereigns and political parties facilitate the channelling of people's thoughts, needs and aspirations. Liberty of thought and expression is the basis of freedom of expression, which is an important component of democratic governance.<sup>21</sup> Thus, the mandate of an electorate is expressed through an election, which in order to be true to its people, needs to be fair. This in turn calls for sound machinery for campaign finance.

In the introduction section of this paper, we explored the institutional causes that necessitate regulation of election campaign finance. The focus there was on inherent systems of our democracy and how they present a need for regulation of campaign finance. Continuing from that analysis, this part of the paper tries to establish a contemporary need for regulation of election campaign finance. We explore the effect that increased electoral competition has had on the system of election campaign finance in India, where such competition must necessarily serve as a catalyst for reform. Further, we also discuss the effect of money power on political equality.

### A. INCREASE IN ELECTORAL COMPETITION

All political parties find their genesis in a particular ideal or an ideology, which they seek to espouse by using the electoral process. They compete for access to political power, generate democratic governance and shape public policies, reflecting a variety of demands by interest groups.<sup>22</sup> Open participation in democratic elections enables candidates to represent the interests of their respective constituencies that political parties embody as a whole. In their many forms, political parties do not only contest elections, but also mobilise and organize the social forces that energise democracy on a continuing basis.<sup>23</sup> Hence, a democracy needs strong and sustainable political parties with the capacity to represent citizens and provide policy choices that demonstrate their ability to govern for the public good.<sup>24</sup> This necessitates the need for them to be substantially funded so that they can proliferate the very ideology they espouse.

Indian democracy involves several political parties that base their identities in different philosophies, which are reflective of the immense diversity existing in the Indian subcontinent. This diversity of thought persisting in

<sup>21</sup> MADHUBHUSHI SRIDHAR, *RIGHT TO INFORMATION 4-5* (2006).

<sup>22</sup> REGINALD AUSTIN, *FUNDING OF POLITICAL PARTIES AND ELECTION CAMPAIGN HANDBOOK SERIES 2-3* (2003).

<sup>23</sup> Michael Johnston, *Political Parties and Democracy in Theoretical and Practical Perspectives*, NATIONAL DEMOCRATIC INSTITUTE FOR INTERNATIONAL AFFAIRS 5 (2005).

<sup>24</sup> *Id.*

the Indian subcontinent has bred colossal electoral competition in the post-colonial era, and especially since the meteoric rise of many socialist parties such as the *Bahujan Samaj Party*, *Samajwadi Party*, *Rashtriya Janta Dal* and *Janta Dal United* among others in the 1980s, 1990s and early 2000s.<sup>25</sup> Incidentally, the hegemonic dominance of the Congress Party also ended around the same time.<sup>26</sup> The Congress era of dominance was characterized by preordained results in elections where a win of the Congress party in centre as well as state elections was indubitable.<sup>27</sup> This notion has undergone enormous change in the 20<sup>th</sup> century, and such increase in competition can be evidenced from the fact that while in the country's first general elections that took place in 1952, a mere 55 parties contested them; in 2009, the number has gone up to 370,<sup>28</sup> which is also expected to be surpassed in the upcoming 2014 elections.

This increase in competition among the parties has necessitated the need to establish an elaborate system of regulation for election finance. This era has also marked a change in the function of the Election Commission. From being a mere overseer of elections, it has become an active facilitator at a time when the role of money-power has led to political uncertainty.<sup>29</sup> There however exist a lack of a level playing field for these parties to carry out their campaigns in a background where electoral competition has itself increased manifolds. Though the lack of a level playing field has been attributed to equivocation among the echelons of Indian politics, the real reason remains a huge void in domestic law pertaining to campaign financing that has not been remedied by the legislators.

The influence of money in politics is by no means a new happening. This was also reported in the Nehruvian era of governance,<sup>30</sup> although its influence today has increased manifolds. The want for proper regulation of electoral funding need not be over emphasised in India where the world's biggest elections are due in 2014.<sup>31</sup> For instance, the general elections in 2009 were

<sup>25</sup> See Prakash Sarangi, *The Party System in India*, 1 TEACHING SOUTH ASIA J. 129 (2001).

<sup>26</sup> See Pradeep Chhibber, *Party Decline in a Mature System: The Congress Party of India*, 1 TAIWAN J. DEMOCRACY 49 (2001).

<sup>27</sup> See Rajni Kothari, *The Congress 'System' in India*, 4 ASIAN SURVEY 1163 (1964) (Discussing the pre-eminence of the Congress party in the post independence age, Kothari narrated that the influence of the Congress over the voters rested on its inheritance of the freedom struggle in which it played a crucial role. Therefore it internalized different ideologies and outlooks that found representation even in the elections where the results reflected a continuum of historical support and trust).

<sup>28</sup> See Milan Vaishnav, *Five Trends Shaping India's Electoral Landscape*, TIMES OF INDIA September 15, 2013.

<sup>29</sup> See generally Election Commission of India, *Elections in India: Major Events & New Initiatives*, available at [http://eci.nic.in/eci\\_main/eci\\_publications/books/miscell/elections-india.pdf](http://eci.nic.in/eci_main/eci_publications/books/miscell/elections-india.pdf) (Last visited on October 25, 2013).

<sup>30</sup> See J. Prabash, *India: Mounting Influence of Money Power in Elections and Crisis of Representation*, 1 ASIA PACIFIC J. SOC. SCI. 86 (2010).

<sup>31</sup> Reuters, *India Announces Warm-Up for World's Biggest Election*, October 4, 2013, available at <http://in.reuters.com/article/2013/10/04/>

about enrolling 713.77 million voters and setting up 8.34 lakh polling stations.<sup>32</sup> The sheer magnitude of elections in India would entail proper strategizing on part of the parties, which would include raising of funds, organization of rallies and deployment of the party cadre across the country to further the interests of the political party which makes appropriate funding imperative. Thus, where parties are catering to copious interests of Indian society, across different outlooks, the competitiveness created by the “ethnification of party system”<sup>33</sup> further makes the issue of election campaign finance vital, more than ever.<sup>34</sup>

## B. FINANCIAL ACCOUNTABILITY

The desirability of transparency in a democracy stems from the need to hold government officials, whether elected or appointed, accountable to the citizens for their actions and decisions. Transparency requires that such decisions be open to public scrutiny and that the public also have a right to access such information.<sup>35</sup> The Law Commission of India in 1999, affirmed in its report that, “If democracy and accountability constitute the core of our constitutional system, then the same principles must also apply to and bind the political parties that are integral to a parliamentary democracy”.<sup>36</sup> Thus many advocates of campaign finance reform in India have postulated that greater financial accountability of political parties would serve as a panacea to the problem of corruption and disparate funding. In this background, an informed citizenry is the most basic prerequisite for a vibrant democracy and no democratic government can survive for long by divorcing accountability as its postulate. People can play an important role in a democracy only if it is a transparent government and where there is full access in regard to its functioning.<sup>37</sup>

It has been argued that money sluicing in high volume through political process distracts candidates from engagement with the voters as they

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<sup>32</sup> Election Commission of India, *Overview of the General Election 2009: Some Highlights*, available at [http://eci.nic.in/eci\\_main/press/GE-HIGHLIGHTS.pdf](http://eci.nic.in/eci_main/press/GE-HIGHLIGHTS.pdf) (Last visited on October 25, 2013).

<sup>33</sup> Prabash, *supra* note 30.

<sup>34</sup> The emergence of many political parties such as the BahujanSamaj Party and the Samajwadi Party in Uttar Pradesh was rooted in principles of socialism where they sought to uphold the rights of the Other Backward Classes (OBCs) and promised to undo the injustices committed upon them over centuries. This virtually created such an electorate where caste politics started playing a greater role than ever before. Similarly parties such as the Shiromani Akali Dal championed the cause of the Sikhs in Punjab and ever since the Bharatiya Janta Party’s establishment in 1980, many have labelled it as a ‘Hindu Nationalist’ party thereby contributing to the ‘ethnification’ of politics in India.

<sup>35</sup> Democracy Web, *Accountability and Transparency: Essential Principles*, available at <http://www.democracyweb.org/accountability/principles.php> (Last visited on February 2, 2014).

<sup>36</sup> LAW COMMISSION OF INDIA, *Reform of the Electoral Laws*, 170th Report, Part III, ¶3.1.2.1, May 29, 1999.

<sup>37</sup> *People’s Union for Civil Liberties v. Union of India*, (2003) 4 SCC 399: AIR 2003 SC 2363.

pursue an even larger campaign budget.<sup>38</sup> It underwrites negative political advertising at odds with ideals of deliberative democracy, allows independent organizations to dominate the political debate to the detriment of the candidates and the political parties and enables candidates to escape accountability for the tone and message of their campaigns.<sup>39</sup> Therefore, an effective campaign finance mechanism must ensure that a right balance is struck between money sluicing and spending. Neither the parties nor the candidates must be unreasonably burdened by the law in their pursuit for funds, for an unreasonable burden may prompt them to evade the law and nor should they have a free dispensation of their contributions so that they are yet accountable to the State.

### III. ELECTION CAMPAIGN FINANCE REGULATION: FUNDING REGULATIONS

The law regulating elections and electoral campaigns in India is contained primarily in the Representation of the People Act, 1951 ('RP Act') and the Conduct of Elections Rules, 1961 ('Rules') promulgated under the Act. The Act regulates the activities of both individual candidates as well as political parties. The Companies Act, 2013 regulates corporate contributions to individual candidates and political parties.<sup>40</sup> These provisions have been retained from the Companies Act, 1956.<sup>41</sup> The Foreign Contributions (Regulation) Act, 2010 regulates contributions from foreign sources to candidates, political parties and organizations of a political nature that are not political parties.<sup>42</sup> The Income Tax Act, 1961 provides for the tax deductibility of contributions made to political parties.<sup>43</sup>

#### A. NO LIMITS ON CAMPAIGN CONTRIBUTIONS BY AN INDIVIDUAL

Presently in India, individuals can contribute to parties and candidates without any limits. However, there are limits imposed on companies beyond which they cannot contribute to political finance. Moreover, political donations by individuals and companies to political parties are hundred percent tax deductible in India.<sup>44</sup> There is an absolute prohibition on foreign contributions, by individuals or companies or otherwise, to any candidate or political party in India.<sup>45</sup>

<sup>38</sup> Robert Bauer, *The Varieties of Corruption and the Problem of Appearance*, 125(1) HARVARD L. R. 91 (2012).

<sup>39</sup> *Id.*

<sup>40</sup> Companies Act, 2013, § 182.

<sup>41</sup> Companies Act, 1956, § 293A.

<sup>42</sup> Foreign Contribution (Regulation) Act, 2010, §3.

<sup>43</sup> Income Tax Act, 1961, §§ 80GGC, 80GGB.

<sup>44</sup> *Id.*

<sup>45</sup> Foreign Contribution (Regulation) Act, 2010, §3.

§29B of the RP Act entitles political parties to accept any amount of contribution voluntarily offered to it by any person. It is to be noted that the RP Act does not contain any provision regulating individual contribution to candidates and therefore there is no monetary ceiling on an individual's contributions to a candidate or a political party. In the following paragraphs, we will establish a claim to introduce limits on contributions that can be made by individuals to political parties and candidates.<sup>46</sup>

## *B. CONTRIBUTION LIMITS AND FREEDOM OF SPEECH AND EXPRESSION*

Freedom of speech and expression is recognized as one of the most basic postulates in a democracy. The rights enumerated in Article 19(1) are those basic rights, which are recognized as natural rights inherent in the status of a citizen.<sup>47</sup> Freedom of speech lays at the foundation of all democratic organizations, for without free speech no public education, so essential for the proper functioning of the process of popular government, is possible.<sup>48</sup> Thus, communication of a candidate with his electorate is but a manifestation of this very right, which when extended to campaign finance, in turn facilitates such expression. The idea of money being a limb of political speech emerged in the 1970s. This idea was a debate between the constitutionality of expenditure limits and contribution limits. Although there is a paucity of established jurisprudence in the Indian sweep, the law relating to campaign expenditure as freedom of expression is highly synthesized in the United States. Modern campaign finance law in this realm begins with the decision of the United States Supreme Court in *Buckley v. Valeo* ('Buckley')<sup>49</sup> that held that campaign finance regulation directly implicates fundamental principles that are enshrined in the First Amendment.

Democratic equality is sorely challenged when a candidate uses his wealth, which reflects neither the size nor the intensity of his popular support to become a serious contender.<sup>50</sup> However, this is not to disregard the prodigious importance money also enjoys in holding competitive elections, something that was acknowledged in *Buckley* itself. Further, *Buckley* also noted that contribution limits and expenditure limits invoke different degrees of First Amendment protection. As mentioned in the previous section of this paper, the principle of political equality has to be in harmony with campaign finance

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<sup>46</sup> See generally Thomas Stratmann & Francisco Aparicio Castillo, *Competition Policy for Elections: Do Campaign Contribution Limits Matter?*, 127(1) PUBLIC CHOICE 177-206 (2006) (Discussing that contribution limits increase competitiveness of election).

<sup>47</sup> *State of West Bengal v. Subodh Gopal Bose*, AIR 1954 SC 92.

<sup>48</sup> *Romesh Thappar v. State of Madras*, AIR 1950 SC 124.

<sup>49</sup> 424 U.S. 1 (1976).

<sup>50</sup> *Id.*

reforms. Therefore the doctrine of one person, one vote<sup>51</sup> can only be used judiciously where the model employed ensures that each voter has an equal weight in the voting process and therefore has an equal opportunity in influencing the outcome of the elections. The Court in *Buckley* explained that with limits on the size of campaign contributions, differences in resources will simply reflect differences in the size and intensity of support for candidates and that there is nothing “invidious, improper, or unhealthy” in that.<sup>52</sup> Contribution limits also advance the compelling need of the state to counter corruption since they go into the source of the funds rather than just monitoring their expenditure.

The United States Supreme Court revisited this question in *Nixon v. Shrink Missouri Government PAC*,<sup>53</sup> where the validity of a Missouri regulation limiting contributions to amounts ranging from 275 dollars to 1075 dollars was being challenged. Missouri was asserting claims similar to those in *Buckley*, that contribution limits serve governmental interest in avoiding “real and perceived corruption of the electoral process”. In upholding these limits, the Court held that the risk of corruption is much greater when money flows into the coffers of the political party and thus a contributor’s free speech interest is less compelling since “contributions merely index for candidate support and not the contributor’s independent political view”.<sup>54</sup>

### C. CONTRIBUTION LIMITS AND PREVENTION OF CORRUPTION

Contribution limits advance the compelling interest of the state in preventing corruption and the appearance of corruption.<sup>55</sup> Given the nexus that exists between myriad corporate houses and incumbents as well as aspirants, it is donations from dubious sources that constitute the root of vices related to money power in politics. §77 of the RP Act only accounts for candidates keeping a record of all election expenditure without in any way referring to its source. Contributions limits will bring into focus the source of political finance rather than how much of it has been expended. This will reduce the risk of corruption since money flowing into party coffers would now be monitored, as opposed to money flowing out under the present system of expenditure limits.

Although the model of contribution limits is alien to the Indian electoral system, the Central Vigilance Commission has recommended

<sup>51</sup> *Reynolds v. Sims*, 377 U.S. 1964 533.

<sup>52</sup> Richard Briffault, *The Return of Spending Limits: Campaign Finance After Randall v. Sorrell*, 32 FORDHAM URBAN LAW JOURNAL 136 (2004).

<sup>53</sup> 528 U.S. 2000 377.

<sup>54</sup> *Id.*

<sup>55</sup> Briffault, *supra* note 52.

introduction of the same in its National Anti-Corruption Strategy.<sup>56</sup> The Commission is of the opinion that any anti-corruption strategy that aims to reduce political and administrative corruption must replace expenditure ceilings with contribution limits – the central argument of this paper. Not only will a model of contribution limits give greater meaning to §29C of the Act that prescribes for a submission of report of all contributions received before the Election Commission of India, but it will inevitably strengthen the structural integrity discussed in *Randall v. Sorrell*<sup>57</sup> ('Randall') and in the latter section of this paper.

#### D. CONTRIBUTION LIMITS INCREASE ELECTORAL COMPETITIVENESS

Further, it must also be noted that studies have revealed that contribution limits have in fact increased the competitiveness in elections since incumbents no longer stand at an advantage. For instance, a study conducted by the Brennan Centre of Justice and Dr. Thomas Stratman found that contribution limits led to more competitive elections in as many as 26 States in the United States.<sup>58</sup> In fact the authors concluded that the lower the limit, the more competitive the election.<sup>59</sup> More importantly, lower contribution limits were found to reduce the incumbents' considerable financial fundraising advantage.<sup>60</sup>

### IV. ELECTION CAMPAIGN FINANCE REGULATION: EXPENDITURE REGULATIONS

#### A. LIMITS ON EXPENDITURES MADE BY A CANDIDATE

Under the Indian electoral law, the total campaign expenditure incurred by a candidate must not exceed the amounts specified for each state wise parliamentary and assembly constituency in the Rule 90 of the Conduct of Elections Rules, 1961. Presently, the law in India allows expenditure up to seventy lakh rupees in parliamentary constituencies and up to twenty eight lakh rupees in state assembly constituencies.<sup>61</sup> Under the Act, the "incurring

<sup>56</sup> See Central Vigilance Commission, *Draft National Anti Corruption Strategy*, available at <http://cvc.nic.in/NationalAntiCorruptionStrategydraft.pdf> (Last visited on October 25, 2013).

<sup>57</sup> *Randall v. Sorrell*, 548 U.S. 230 (2006).

<sup>58</sup> Follow the Money, *Elections and Public Financing*, available at [http://www.followthemoney.org/press/Reports/Elections\\_and\\_Public\\_Financing.pdf](http://www.followthemoney.org/press/Reports/Elections_and_Public_Financing.pdf) (Last visited October 25, 2013).

<sup>59</sup> *Id.*

<sup>60</sup> Brennan Center For Justice, *Electoral Competition and Low Contribution Limits*, May 4, 2009, available at <http://www.brennancenter.org/publication/electoral-competition-and-low-contribution-limits> (Last visited October 25, 2013).

<sup>61</sup> Election Commission of India, *Amendment of Rule 90 of Conduct of Elections Rules, 1961*, available at [http://eci.nic.in/eci\\_main1/current/ImpIns1\\_06032014.pdf](http://eci.nic.in/eci_main1/current/ImpIns1_06032014.pdf) (Last visited on March

or authorizing of expenditure in contravention” of the expenditure limits under §77 is a corrupt practice for which the civil penalty is disqualification from contesting elections for the next six years.<sup>62</sup> In the following paragraphs, we will establish a claim to remove limits on expenditures made by a candidate from our electoral laws.

## B. SUPREME COURT ON LIMITS ON EXPENDITURES MADE BY A CANDIDATE

In *Kanwar Lal Gupta v. Amar Nath Chawla*, the Supreme Court considered whether the expenditure incurred by a candidate included expenditure incurred by a political party or friends or supporters who had sponsored the candidate.<sup>63</sup> The court held:

“When the political party sponsoring a candidate incurs expenditure in connection with his election, as distinguished from expenditure on general propaganda, and the candidate knowingly takes advantage of it, or participates in the programme or activity or fails to disavow the expenditure or consents to or acquiesces in it, it would be reasonable to infer, [ ] that he impliedly authorised the political party to incur such expenditure”.<sup>64</sup>

Therefore, a party spending on behalf of the candidate had to declare the expenses entailed during the period between filing of nomination and declaration of results in order to ascertain whether the expenditure limit was surpassed.<sup>65</sup> The impetus of this judgment was to increase the scope of §77 of the Act whereby contributions from all sources would be accounted for, and to negate the pernicious effect of black money. Unfortunately, however, the effect of this judgment remained ephemeral since the Amendment Act 58 of 1974 added an explanation to §77 after which the expenditure incurred by the party or anyone else in connection with the candidate was to be kept outside the purview of §77 and only election expenditure that was incurred or authorized by the candidate was to be included for the purposes of expenditure ceiling. Thus, this provision nullified the Supreme Court’s ruling in *Kanwarlal*. Not only did this amendment reflect political complicity in circumventing the election expenditure limit, but this provision also ceased to be even a fig leaf to hide the reality.<sup>66</sup>

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6, 2014).

<sup>62</sup> Representation of the People Act, 1951, § 123(6).

<sup>63</sup> *Kanwar Lal Gupta v. Amar Nath Chawla*, (1975) 3 SCC 646.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Gadakh Yashwantrao Kankarrao v. Balasaheb Vikhe Patil*, (1994) 1 SCC 682: AIR 1994 SC 678.

The amendment was a subject of severe criticism from all corners of the society. In the 170<sup>th</sup> Report on “Reform of the Electoral Laws” published in 1999, the Law Commission recorded its disapproval of the amendment and recommended that the provision be deleted. Even though the validity of Explanation 1 to §77 of the Act was upheld by the Supreme Court in *P. Nalla Thampy Terah v. Union of India*,<sup>67</sup> the Court had also strongly criticised the amendment in *C. Narayanaswamy v. C.K. Jaffer Sharief*.<sup>68</sup> In *Gadakh Yashwantrao Kankarrao v. Balasaheb Vikhe Patil*, the Court noted that the “spirit of the provision [§77] suffers violation through the escape route” of Explanation 1 to §77.<sup>69</sup>

Due to the sustained criticism, Explanation 1 to §77 of the Act was amended in 2003 to significantly water down the scope of the loophole provided by it. Post the amendment, expenditures incurred by the political party or third persons in connection with the campaign of a candidate are considered as expenditures incurred by the candidate himself and are thus included for the purposes of expenditure ceiling. However, expenditure by the party or third persons on promoting the party’s program as long as it does not promote a particular candidate directly, will not be considered for the purposes of the expenditure ceiling and can, therefore, remain potentially unlimited.

### C. PROBLEMS WITH LIMITS ON EXPENDITURES MADE BY A CANDIDATE

It is believed that expenditure limits are violated mainly because the actual cost of running an election campaign is often much greater than the prescribed spending limit.<sup>70</sup> Gowda and Sridharan, experts in the field of election financing, have concluded specifically for India that the expenditure ceilings invite evasion.<sup>71</sup> It is their assertion that the low expenditure limits have induced dishonesty, a very unhealthy development for any democracy.<sup>72</sup> They contend that ever since 2003, when party and candidate expenditures in support of candidates were brought under the expenditure ceiling, candidates have been under pressure to resort to incomplete and inaccurate expenditure statements

<sup>67</sup> 1985 Supp SCC 189; AIR 1985 SC 1133 (Even though the constitutional validity of Explanation 1 was upheld, the Court expressed that the petitioner is not unjustified in criticising the provision contained in Explanation 1 as diluting the principle of free and fair elections, which is the cornerstone of any democratic polity).

<sup>68</sup> *C. Narayanaswamy v. C.K. Jaffer Sharief*, 1994 Supp (3) SCC 170; 1994 (3) SCALE 674 (The Court in very strong words said that Explanation 1 encourages corrupt under hand methods and that if the call for purity of elections is not to be reduced to a lip service, then the explanation must be removed from the statute by the Parliament).

<sup>69</sup> *Gadakh Yashwantrao Kankarrao v. Balasaheb Vikhe Patil*, (1994) 1 SCC 682.

<sup>70</sup> Ministry of Law & Justice, *Background Paper on Electoral Reforms*, December, 2010, 11, available at [lawmin.nic.in/legislative/ereforms/bgp.doc](http://lawmin.nic.in/legislative/ereforms/bgp.doc) (Last visited on February 3, 2014).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

thereby under-reporting actual party and independent supporter spending on their campaigns.<sup>73</sup> Similarly, parties are under pressure to falsely declare that spending in support of candidates was meant for general party propaganda.<sup>74</sup> It is an open secret of Indian politics that all candidates standing in an election flout the expenditure limits provided by law, a fact resonated by former Prime Minister Atal Bihari Vajpayee when he testified to a parliamentary committee that “every legislator starts his career with the lie of the false election return he files”.<sup>75</sup>

In the National Election Study 2009, out of the 5,113 respondents who admitted to knowledge of attempts from candidates to buy votes, 65% said they knew people who accepted vote buying goodies such as money, food, liquor etc.<sup>76</sup> Apart from showing the prevalence of electoral malpractices in the country, the survey also throws light on a very disturbing fact – expenditures by candidates beyond what they record in official accounts, as the money to engage in such electoral malpractices cannot be sustained in the low expenditure limits that exist.

The economic theory of regulation as applied to political campaign regulations also suggests that such regulations serve the interests of legislators or other interest groups rather than some vaguely defined ‘public interest’.<sup>77</sup> Attempts to restrict election expenditures by imposing a limit on them constrains spending below its equilibrium level, causing the marginal benefit of campaign spending to exceed its marginal cost.<sup>78</sup> In layman’s terms, due to the expenditure ceilings, the electoral benefit from expenditure beyond the legal limits far outweighs the cost of such expenditure. Thus, limit on electoral expenditure leads candidates to seek alternative ways to spend money on campaigns.<sup>79</sup> While some of these alternative ways abide by the letter, if not the intent, of the law; others are forced to go even beyond the letter of law.<sup>80</sup>

<sup>73</sup> M. V. Rajeev Gowda & E. Sridharan, *Reforming India’s Party Financing and Election Expenditure Laws*, 11(2) ELECTION LAW JOURNAL 226, 236 (2012).

<sup>74</sup> *Id.*

<sup>75</sup> *Gangland Battles: Why Politics is Not a Career for the Meritorious Young*, THE TELEGRAPH July 26, 2008, available at [http://www.telegraphindia.com/1080726/jsp/opinion/story\\_9602998.jsp](http://www.telegraphindia.com/1080726/jsp/opinion/story_9602998.jsp) (Last visited on November 1, 2013).

<sup>76</sup> Lokniti, *National Election Study 2009: Findings of the Survey*, 2009, available at [http://www.lokniti.org/nes2009-finding\\_of\\_the\\_survey.pdf](http://www.lokniti.org/nes2009-finding_of_the_survey.pdf) (Last visited on November 1, 2013).

<sup>77</sup> Burton Abrams and Russel Settle, *The Economic Theory of Regulation and Public Financing of Elections*, 86(2) JOURNAL OF POLITICAL ECONOMY 245-257 (1978); Bruce Bender, *An Analysis of Congressional Voting on Legislation Limiting Congressional Campaign Expenditures*, 96 JOURNAL OF POLITICAL ECONOMY 1005-1021 (1988).

<sup>78</sup> Abrams & Settle, *supra* note 5.

<sup>79</sup> *Id.*

<sup>80</sup> Daniel Gingerich, *Dividing the Dirty Dollar: The Allocation and Impact of Illicit Campaign Funds in a Gubernatorial Contest in Brazil*, August 6, 2010, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1654429](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1654429) (Last visited on February 3, 2014) (Discussing the targeting and impact of off-the-books campaign funds in Brazil and emphasising that much of the money used in campaigns is unreported to electoral authorities).

We can find justification in removing expenditure limits in political campaigns on the touchstone of protecting freedom of speech and expression as well. As discussed before, in the US, Buckley held that campaign finance regulation directly implicates fundamental principles that are enshrined in the First Amendment. This case concerned the constitutionality of the Federal Election Commission Act, 1971 that required political committees of political parties in the US to disclose the sources of their contributions, while limiting the amount that could be contributed as well as spent as expenditure. The Court held that the expenditure entailed during campaigns involves direct communication with the voters and therefore expenditure ceilings “impose direct and substantial restraints on the quantity of political speech”.<sup>81</sup> While carrying this reasoning forward, the Court also came upon the conclusion that the candidates need to pool in many resources and amass wealth to ensure that their message is communicated to their electorate. It noted that restricting this ability of the candidate to communicate also hampers the quality of expression, thus mandating a strict scrutiny of any law impairing this First Amendment right.

In distinguishing the nature of contribution limits from expenditure limits, the Court held that since a contribution does not entail exercise of political speech, it rather “serves as a general expression of support for the candidate and his views but does not communicate the underlying basis for the support”.<sup>82</sup> Importantly, Buckley observed that the “actuality and appearance of corruption resulting from large financial contributions was a sufficient compelling interest to warrant infringements on First Amendment liberties”.<sup>83</sup> The Court while holding so also ruled that in justifying any expenditure limit, a compelling state interest requires to be established and thus contribution limits need not stand the same test of judicial scrutiny because “the transformation of contributions into political debate involves speech by someone other than the contributor”.<sup>84</sup> Hence, the verdict in Buckley was the first of its kind where restrictions on expenditure were deemed to be unconstitutional as opposed to reasonable restrictions on contributions that only limited the ability of a person to ‘support’ his candidate.

Though the law in Buckley has stood the test of time, it has never the less been transformed by the Courts in the US. More recently, in 2006, the US Supreme Court in the case of Randall has justified the unconstitutionality of expenditure limits on the additional grounds of there being a need to protect the “structural integrity of the democratic process”, one that is different from the solely protecting one’s First Amendment rights. In 1997, the Vermont legislature passed a legislation known as “Act 64” that imposed expenditure limits on the amount a candidate for state office can spend during a primary

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<sup>81</sup> Buckley v. Valeo, 424 US 1 (1976).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

plus general election cycle that lasted for two years. This Act also contained contribution limits, which were the lowest in any state in the United States, and while revisiting Buckley, the Court in Randall held that the certain provisions of Act 64 were ‘too restrictive’ as they impaired the ability of “challengers to run competitive elections and threatened individual voter’s right to association”.<sup>85</sup> Further, in another recent case, *First National Bank v. Bellotti*,<sup>86</sup> the US Supreme Court evaluated the constitutional basis of a criminal statute that prohibited corporate expenditure made to influence the outcome of a referendum. It was held that where corporations wanted to spend money to air their point of view, the concerned statute burdened them from doing so. The corporations argued for ‘core’ First Amendment values and in doing so, mandated ‘exacting scrutiny’ of the statute that limited their speech, following which the Court struck the statute down as unconstitutional stating that the statute “unduly infringed upon the corporations’ protected free speech in expressing its political point of view”.<sup>87</sup>

In India though, we follow the model of expenditure limits where §77 of the RP Act prescribes that every candidate must keep an independent account for all the election related expenditure and that these expenses must not exceed the amount that has been prescribed. Currently, for a Lok Sabha seat, the expenditure limit stands at seventy lakh rupees.<sup>88</sup> The argument, against these limits is that in addition to inhibiting speech, they also do not go to the source of corruption since contributions are not restricted in India and thus we propose contribution limits as an alternative.

## V. ELECTION CAMPAIGN FINANCE REGULATION: TRANSPARENCY AND DISCLOSURE REGULATIONS

Through Part III and Part IV of this paper, we have established that to make elections in India truly free and fair, we need to introduce caps on how much an individual can contribute to the funding of political parties and candidates and at the same time remove the existing limits on how much a candidate can spend in his election campaign. However, without transparency in conduct of the political parties and their candidates, these measures will have no sensible positive impact. Transparency in their conduct will make it possible to verify that no malpractice has occurred and that regulatory frameworks are being effectively implemented. Therefore, in this part of the paper, we will evaluate the existing regulations regarding electoral transparency in India. Due to the ineffectiveness and inefficiency of these regulations, we will establish

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<sup>85</sup> *Id.*

<sup>86</sup> *First National Bank v. Bellotti*, 435 U.S. 765 (1978).

<sup>87</sup> *Id.*

<sup>88</sup> Election Commission of India, *supra* note 61.

claims for a systematic change in electoral law to promote transparency in the financing of election campaigns in India.

### A. DISCLOSURE OF ASSETS AND LIABILITIES OF A CANDIDATE

The Election Commission *vide* its order dated March 13, 2003 mandated that each political candidate has to file an affidavit containing information regarding “his assets and liabilities”.<sup>89</sup> Therefore, since 2003 there has been a fair amount of transparency about the financial background of the candidates standing in an election. However, the Commission has also recommended that the law be suitably amended so that the affidavit filed by a candidate also includes the annual declared income of the candidate.<sup>90</sup> There is considerable merit in the recommendation of the Commission, as this will further improve transparency in elections. Particularly, this will help throw light on any unusual monetary gains made by a candidate. It has been noted by the Election Commission of India that “there have been many cases where the candidates are alleged to have given grossly undervalued information, mainly about their assets”.<sup>91</sup> Therefore, through a follow up action, these declarations should be audited by a special authority created specifically for this purpose.<sup>92</sup>

### B. DISCLOSURE OF ELECTORAL EXPENSES OF A CANDIDATE

Under § 77(1) of the Act, “every candidate at an election must either himself or through his election agent, keep a separate and correct account of all expenditure in connection with the election incurred or authorized by him or by his election agent during the campaign period”. This account should have details such as the date on which the expenditure was incurred or authorised, the nature and amount of the expenditure, the name and address of the payee, etc.<sup>93</sup> A voucher is to be maintained for each expenditure incurred which is to be lodged along with the account.<sup>94</sup>

§78 of the Act makes it mandatory for every contesting candidate at an election to lodge with the district election officer election officer an account of his election expenses which shall be a true copy of the account kept by him or by his election within thirty days from the date of election. The Rules

<sup>89</sup> Election Commission of India, *Order No.3/ER/2003/JS-II*, March 27, 2003, available at [http://eci.nic.in/eci\\_main/ElectoralLaws/OrdersNotifications/Order\\_Assests\\_Affidavits.pdf](http://eci.nic.in/eci_main/ElectoralLaws/OrdersNotifications/Order_Assests_Affidavits.pdf) (Last visited on November 1, 2013).

<sup>90</sup> Ministry of Law & Justice, *supra* note 70.

<sup>91</sup> *Id.*

<sup>92</sup> Venkatachaliah, *supra* note 11.

<sup>93</sup> Conduct of Elections Rules, 1961, Reg 86(1).

<sup>94</sup> Conduct of Elections Rules, 1961, Reg 86(2).

also have provisions for public inspection of the accounts lodged by the candidates. The District Election Officer is required to affix a notice on the notice board, within two days of receiving the accounts, giving information such as the name of the candidate, the date on which the accounts were lodged and the time and place at which such accounts can be inspected by the public.<sup>95</sup>

Furthermore, Regulation 89 of the Rules also provides a mechanism of civil penalty for failure to lodge account of election expenses in the time and manner specified. On expiry of the time period for lodging accounts of election expenses, the District Election Officer files a report with the Election Commission stating the name of the candidate, the date on which the account of election expenses was lodged and whether in his opinion such account was lodged within the time and manner specified by the Act and Conduct of Election Rules, 1961.<sup>96</sup> Upon consideration of the report,<sup>97</sup> the Election Commission can order disqualification of a candidate from becoming a Member of Parliament, Member of Legislative Assembly or Member of Legislative Council if the contesting candidate has failed, without good reason, to lodge the account of election expenses within the time and manner specified.<sup>98</sup>

Under §10A of the Act, the Election Commission may disqualify a candidate for three years for failure to lodge the account of election expenses as per the requirement of the law. Since the period of disqualification may end by the time of the next general election to that House, this period should be increased to five years so that the disqualified person does not become a candidate at least at the next general election to the House concerned. The Election Commission has also made this demand, since the three year disqualification period serves no effective purpose other than debarring the person in the odd bye-election that may be held during the three year period.<sup>99</sup>

In 2011, Umlesh Yadav was disqualified by the Election Commission of India due to which she lost her seat in the Legislative Assembly and was further barred from contesting elections for a period of three years.<sup>100</sup> It was found that she had suppressed an expenditure of Rs. 21,500 in her official accounts.<sup>101</sup> While a lot of losing candidates had been disqualified in the past, this was the first time the Commission had disqualified a sitting legislator with

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<sup>95</sup> Conduct of Elections Rules, 1961, Reg(s) 87, 88.

<sup>96</sup> Conduct of Elections Rules, 1961, Reg 89(1).

<sup>97</sup> Conduct of Elections Rules, 1961, Reg 89(4).

<sup>98</sup> Representation of the People Act, 1951, §10A; Conduct of Elections Rules, 1961, Reg(s) 89(5)-(8).

<sup>99</sup> Ministry of Law & Justice, *supra* note 70, 26.

<sup>100</sup> Election Commission of India, *In re: Account of Election Expenses of Smt. Umlesh Yadav*, October 20, 2011, available at [http://eci.nic.in/eci\\_main/recent/Disqualification\\_case\\_Umkesh\\_Yadav.pdf](http://eci.nic.in/eci_main/recent/Disqualification_case_Umkesh_Yadav.pdf) (Last visited on November 1, 2013).

<sup>101</sup> *Id.*

an active term.<sup>102</sup> Even though the Act has been in operation for six decades now, only in 2011 was the first sitting legislator disqualified for excessive expenditure, even though rampant falsification of expenditure accounts is an open secret in India, as seen in previous sections of the paper. This hard fact calls for stricter oversight by the Election Commission and efficient enforcement of the electoral laws relating to disclosures of expenditures.

Furthermore, it has been noted that since election accounts are filed after the election is over, there is a dearth of enthusiasm in the election officers to properly follow up with the disclosures and verify the accounts.<sup>103</sup> Moreover, there is a need to make expenditure disclosure provisions more stringent to impress upon the candidates the importance of maintenance of proper account. Therefore, the candidates should be required to lodge account in two phases – tentatively planned expenditure account, to be submitted at regular intervals before elections, and final expenditure account, to be submitted just after the elections. Such a change will bring about regular checks throughout the campaign period and not just after it has ended. It will also make it more difficult to falsify the expenditure accounts than it is now.

Under the Act, mere non-disclosure of expenditure is not a corrupt practice. Under the section, it is the incurring or authorizing of expenditure in contravention of the prescribed amount under § 77 which is considered as a ‘corrupt practice’. Failure to maintain true and correct accounts of the expenditure incurred in election campaigning does not fall within the ambit of corrupt practices under § 123 and one is, consequently, not liable to the ramifications under the section.<sup>104</sup> However, where an account has not been correctly and truly maintained and the suppressed or undervalued expenditure when considered at correct value, leads to contravention of the prescribed limits, it will attract provisions of “corrupt practices”.<sup>105</sup> Even then, the law should treat non-disclosure of election expenditure as a corrupt practice, even if the suppression or undervaluation has not been done to contravene the prescribed expenditure limits.

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<sup>102</sup> ‘Paid News’ Claims First Political Scalp as EC Disqualifies MLA, THE HINDU, October 21, 2011, available at <http://www.thehindu.com/news/national/paid-news-claims-first-political-scalp-as-ec-disqualifies-mla/article2556366.ece> (Last visited on November 1, 2013).

<sup>103</sup> Devesh Kapur & Milan Vaishnav, *Quid Pro Quo: Builders, Politicians, and Election Finance in India*, December 7, 2011, available at <http://www.cgdev.org/publication/quid-pro-quo-builders-politicians-and-election-finance-india-working-paper-276-updated> (Last visited on March 6, 2014) 5.

<sup>104</sup> L. R. Shivaramagowda v. T. M. Chandrashekar, (1999) 1 SCC 666.

<sup>105</sup> Magraj Patodia v. R. K. Birla, (1970) 2 SCC 888; AIR 1971 SC 1295.

### C. *DISCLOSURE OF CONTRIBUTIONS RECEIVED BY A CANDIDATE*

Under the Indian electoral law, the candidates are not required to keep records of financial contributions received by them or to file them with the Income Tax Authority.<sup>106</sup> There is no provision mandating the candidates to publicly disclose the sources of their funding. This feature in our electoral system of unreported contributions to an individual candidate is the key reason behind high levels of corruption characterised by various *quid pro quo* arrangements between politicians and those who finance their election campaigns. In the prevailing system, there is absolutely no transparency with regard to the financial contributors behind a particular candidate. An electoral system must be fair to the voters in the sense that it should not incentivise the policy makers to adopt policies that disproportionately benefit those who have contributed to their political campaign and thereby possibly affecting governance of the country adversely.<sup>107</sup> Since a candidate is not required to disclose sources of his campaign funds, it becomes very difficult to keep a check on such *quid pro quo* arrangement between him and his contributors. Moreover, disclosure of campaign contributors is important for a voter to ascertain whether the candidate's position on a particular issue is due to its virtues and not due to the influence of those who have financially contributed towards his election campaign.

Therefore, there is an imminent need to put in place a regulatory mechanism which mandates candidates to file a report to the Election Commission about their campaign's financial contributors – individuals and companies. Moreover, information about contributors behind a candidate should be publicly available and the onus of making this information available should be borne by the candidate. Furthermore, it should be made legally binding on a candidate to add disclaimers about his apparent funding from a source with vested interest when he is campaigning on such an issue. Without implementation of these measures, elections cannot be free and fair in its true sense.

### D. *DISCLOSURE OF ELECTORAL EXPENSES INCURRED BY A POLITICAL PARTY*

Under the present electoral system, political parties are not legally required to maintain accounts of expenditures incurred by them in propagating the party's agenda.<sup>108</sup> As with expenses incurred by a candidate on his campaign, there is also a need for transparency with regard to expenditures

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<sup>106</sup> Kondepati, *supra* note 15, 71.

<sup>107</sup> *Id.*, 71.

<sup>108</sup> PRS, *Draft Discussion Paper: Regulation of Campaign Finance*, August 12, 2008 available at [http://www.prsindia.org/uploads/media/conference/Campaign\\_finance\\_draft\\_discussion\\_paper.pdf](http://www.prsindia.org/uploads/media/conference/Campaign_finance_draft_discussion_paper.pdf) (Last visited on November 1, 2013).

incurred by a political party.<sup>109</sup> Political parties should be required to publish detailed reports of expenditures incurred by them with classification of such expenditures under broad political issues that are prevalent at the time. Besides bringing transparency as to the working of the political party, this will allow the voters to decide how serious the political party is about a particular issue.

The 2004 report of the Election Commission argued that political parties should be required to publish their accounts, or at least an abridged version, annually for information and scrutiny of the general public and all concerned, for which purpose the maintenance of such accounts and their auditing is crucial.<sup>110</sup> Even though the Election and Other Related Laws (Amendment) Bill, 2002 sought to introduce § 29D in the Act in this regard, it was ultimately discarded.<sup>111</sup> In 2001 the National Commission to Review the Working of the Constitution recommended that “audited political party accounts like the accounts of a public limited company should be published yearly with full disclosures under predetermined account heads”.<sup>112</sup> Similar recommendations have also been made by the Law Commission.<sup>113</sup>

### *E. DISCLOSURE OF CONTRIBUTIONS RECEIVED BY A POLITICAL PARTY*

§ 29C(1) of the Act mandates every political party to file their tax returns with a separate report on contributions received above Rupees twenty thousand from individuals or companies. Such a report has to be submitted before the due date for submitting a tax return in that year.<sup>114</sup> In case of failure to submit the report in time, the political party would be deprived of tax relief un-

<sup>109</sup> See generally Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100(3) COLUMBIA LAW REV. 620-666 (2000) (Discussing the role of political parties, due to the close connection between parties and candidates, in linking private donors to key participants in the legislative process and other such party practices that raise the spectre of corruption in the constitutional sense).

<sup>110</sup> Election Commission of India, *Proposed Electoral Reforms*, July 30, 2004, available at [http://eci.nic.in/eci\\_main/PROPOSED\\_ELECTORAL\\_REFORMS.pdf](http://eci.nic.in/eci_main/PROPOSED_ELECTORAL_REFORMS.pdf) (Last visited on February 3, 2014).

<sup>111</sup> Ministry of Law & Justice, *supra* note 70, 29.

<sup>112</sup> *Id.*

<sup>113</sup> LAW COMMISSION OF INDIA, *supra* note 36, Part IV, Chapter II, ¶4.2.6. (The Commission recommended steps be taken to amend the Act to require the maintenance, audit and publication of accounts by political parties. To enforce compliance, the Commission recommended the following penalties: (i) a political party which does not comply shall be liable to pay a penalty of Rs. 10,000/- for each day of non-compliance and so long as the non-compliance continues; (ii) If such default continues beyond the period of 60 days, the Election Commission may de-recognise the political party after affording a reasonable opportunity to show cause; (iii) If the Election Commission finds on verification, undertaken whether *suo motu* or on information received, that the statement of accounts filed is false in any particular, the Election Commission shall levy such penalty upon the political party, as it may deem appropriate besides initiating criminal prosecution as provided under law).

<sup>114</sup> Representation of the People Act, 1951, § 29C(3).

der the Income Tax Act.<sup>115</sup> In clear violation of the law, political parties in India began to file their required annual returns under §29C(1) only after a Supreme Court order in 1996, even though they took benefit of being exempt from taxation since 1979.<sup>116</sup> Even then, since the income tax returns are confidential, the returns filed by political parties were kept confidential. However, in 2008, the Central Information Commission allowed disclosure of these return under the Right to Information Act, 2005.<sup>117</sup>

Even after the developments of 2008, much is left to be desired in the sphere of transparency with regard to contributions received by political parties. The political parties should be required to publish their detailed accounts annually for information and scrutiny by the general public and these accounts should be extensively audited by auditors under the supervision of Comptroller and Auditor General of India. Moreover, these accounts should also report identities of all recurring contributors, even if their contribution is below Rupees twenty thousand.

## VI. CONCLUSION: TYING THE THREADS TOGETHER

The Indian regime of campaign finance regulations is plagued with many limitations and has historically failed to achieve its goals of keeping the elections fair for both, candidates and the citizens. Ensuring a level playing field for candidates who wish to contest elections in a legitimate manner is of utmost contemporary importance. Equally, we must also ensure that governance is protected from strong influence of special interests which are antithetical to welfare of the society. Political parties are the linkage between governance and the people and therefore the welfare of the people is critically dependent on the virtuousness of the political parties. Thus, how we regulate political parties and their financing, for better or for worse, is likely to define the success of our democracy. With the rise in electoral competition, our country has witnessed a sustained growth in campaign spending and consequently a vigorous hunt for funds by the political parties, even from illegitimate sources. The often blurred link between election financing and criminalisation of politics also throws light on the need for making election finance in India clean. Citizens in the 21<sup>st</sup> century have come to value integrity in politics not only for its instrumental value, but for its intrinsic value as well. Integrity and accountability as qualities have become much more than just a few check boxes for political evaluations; the informed citizenry of today is demanding these qualities for clear politics in the country with open hands.

<sup>115</sup> Representation of the People Act, 1951, § 29C(4).

<sup>116</sup> Gowda & Sridharan, *supra* note 73, 231.

<sup>117</sup> Central Information Commission, Ms. Anumeha, C/o Association for Democratic Reforms v. Chief Commissioner of Income Tax-XI, New Delhi & Ors., April 29, 2008, available at <http://cic.gov.in/CIC-Orders/AT-29042008-01.pdf> (Last visited on November 1, 2013).

We have aimed to demonstrate through this paper that facilitation of ideas supported by campaign finance is a manifestation of a candidate's right to communicate with the electorate- a part of his freedom of expression. In this sense, expenditure ceiling unreasonably restricts political speech by limiting funds expendable by a candidate, thereby putting restraints on the candidate's freedom of expression. Further, strict expenditure limits have also given reason to the legislators to evade them and rely on suspicious sources of income who finance political parties to gain political favour. We have also shown that contribution limits make the elections more competitive. By reducing the incumbent's considerable fund raising advantage, contribution limits also make the elections fairer for all the candidates. In an electoral regime where there are no expenditure limits on the candidates, but there are limits on campaign contributions, we have shown that political equality will not be harmed and indeed be strengthened. The differences in funding between different political candidates would signify only the differences in popular support they and their political ideas enjoy, because political support is shown by the electorate also by political finance contributions. In that sense, while a candidate's freedom of expression will be protected since he will be allowed to spend as much as he wants on his campaign, there will be a level playing field in the election area because of the healthy competition in fund raising due to contribution limits. Because large amount of funding could not be extracted from one particular source, there will be a significant reduction in *quid pro quo* arrangements. At the same time, there would be a sharp decrease in incentives to not report expenditures truthfully, since expenditures will not be limited. We have envisaged an end whereby the value of each vote is not impaired, while at the same time also ensuring that the ability of the candidate to garner votes remains pre-eminent even under a system of campaign contribution restrictions.

For a model of campaign contribution limits as opposed to expenditure limits to work, it is critical to have simultaneous facilitation by transparency laws. This paper shows that the law and practices in India in this sphere are highly deficient, thereby inhibiting the cause of clean politics. Various functionaries have terribly failed to efficiently enforce the existing transparency and disclosure regulations which can bring about much needed political transparency. The law still does not provide for disclosure of sources of funding received by a candidate and therefore there is absolutely no transparency with regard to the financial contributors behind a particular candidate. It is of immense importance in the model of contributions limits rather than expenditure limits to require candidates to disclose their funding sources so that *quid pro quo* arrangements can be detected. Moreover, there is a need for transparency with regard to expenditures incurred by the political parties as under the present regulations they are not legally required to maintain accounts of expenditures incurred by them. The paper has shown that the current system of lodging expenditure accounts after the elections are over makes it difficult to keep a check on the expenditures undertaken by candidates. We therefore propose that it be

required of the candidates to file accounts at period intervals before elections so that better oversight can be exercised over their expenses during election time. Moreover, candidates should also be required to publicly declare their annual income in the interests of transparency. While the current law does not treat mere non-disclosure of expenditure when it is within the limits prescribed as a corrupt practice, we have argued against it to impress upon the candidates the importance attached to this. Implementation of these measures is critical to make elections in India free and fair.

In conclusion, for making the elections in India truly free and fair, a systematic wave of reforms in the election campaign financing laws is required. Expenditure limits, which are inducing dishonesty in our political sphere, should be done away with. At the same time, campaign contribution limits should be introduced to foster a healthy competition among candidates to garner funding. While the existing transparency and disclosure regulations need to be made much more stringent, candidates should be required to publicly disclose identities of their contributors and political parties should be mandated to publish their expenditure accounts. In any democracy, reforms cannot be *ad hoc*. Rather, rushing through reforms is arguably undemocratic. The model proposed by us requires radical changes to be brought about in the way politics is conducted in the country. But if we take the time to impress upon all the stakeholders the merits of this model, there is indeed a definite scope of consensus building around it because the proposed reforms will make elections free and fair for the electorate and the political class as well.