

Hate Speech and Election Laws in India with Special Reference to Casteist and Religious Hate Speech

highlights the legal framework and challenges surrounding hate speech during elections, emphasizing casteist and religious issues under India's electoral and constitutional laws.

Kezia Elizabeth Sunil ,

LLM (Student),
School of law,

Christ (Deemed to be University), Bengaluru, India

keziaelizabeth.sunil@law.christuiniversity.in

Abstract

India, a diverse nation with a rich tapestry of religions and castes, has witnessed a concerning rise in hate speech incidents during elections. This phenomenon, often targeting religious and caste minorities, poses a significant threat to the democratic principles of equality and inclusivity. While the Indian legal framework aims to ensure free and fair elections, its effectiveness in addressing hate speech has been a subject of debate. Hate speech, defined as speech that promotes hatred, violence, or discrimination against a particular group, can have devastating consequences. It can lead to physical violence, social ostracism, and psychological harm, particularly for marginalized communities. In the context of elections, hate speech can manipulate public opinion, polarize society, and undermine the democratic process. While the Indian Penal Code and the Representation of the People Act contain provisions to address hate speech, their application has been inconsistent and often fraught with challenges. One of the primary challenges in combating hate speech during elections is the difficulty in defining and proving its intent. While the law prohibits speech that promotes hatred or violence, it can be challenging to distinguish between legitimate criticism and harmful speech. Additionally, the rapid evolution of technology, particularly social media, has made it easier for individuals and groups to spread hate speech anonymously and at a large scale. This has made it difficult for law enforcement agencies to track and prosecute offenders. Furthermore, the political climate in India has often been characterized by polarization and intense competition between different parties. This can create an environment where political leaders and their supporters may be tempted to use divisive rhetoric to mobilize voters. While such rhetoric may be within the bounds of free speech, it can contribute to a climate of fear and intolerance. To address these challenges, it is essential to strengthen the legal framework and improve its enforcement. This includes amending existing laws to provide more comprehensive protection against hate speech, enhancing the capacity of law enforcement agencies to investigate and prosecute hate speech cases, and promoting awareness among voters about the dangers of hate speech and their rights to free and fair elections. Additionally, political parties should be encouraged to adopt codes of conduct that prohibit the use of hate speech. These codes can help to set standards for responsible political discourse and discourage the use of divisive rhetoric. Moreover, civil society organizations can play a crucial role in raising awareness about hate speech, monitoring election campaigns for instances of hate speech, and advocating for legal reforms.

Keywords: *Hate speech, Elections, Democracy, Legal framework, Indian Penal Code, Representation of the People Act, Polarization, Social media, Law enforcement.*

I. INTRODUCTION: CONCEPT OF HATE SPEECH

Freedom of expression is cherished in international human rights law. However, this freedom does not enjoy such a position of primacy among rights that it trumps equality rights. International law permits restrictions on hate speech, and two human rights instruments even require governments to prohibit hate speech. Freedom of expression is guaranteed in Article 19 of both the Universal Declaration of Human Rights (Universal Declaration)¹ and the International Covenant on Civil and Political Rights (Civil and Political Rights Covenant),² which sets out in more detail the rights outlined in the Universal Declaration. A speech which perceived to disparage a person or group of people based on their social or ethnic group, such as race, gender, age, ethnicity, nationality, religion, sexual orientation, gender identity, disability, language ability, ideology, social class, occupation, appearance (height, weight, skin color, etc.), mental capacity, and any other distinction that might be considered by some as a liability, considered as hate speech. Hate speech is a species of hate crimes. Hate/bias motivated crimes constitute greater wrongs because they violate more stringent obligations of morality, even if no greater harms are caused thereby. Hate speech affects the integrity and the dignity of an individual. Hate speech' is the outcome of the politics of divisiveness, it is the concentrated expression of the 'social common sense' prevailing in the society.

Although the Universal Declaration of Human Rights does not expressly prohibit advocacy of racial or religious hatred, the right to freedom of expression is subject to the restrictions found in the general limiting clause, Article 29³, as well as in Article 7⁴, which prohibits incitement to discrimination. The history of those provisions indicates that most of the drafters understood them to allow restrictions on the advocacy of hatred. Although the Universal Declaration does not contain an anti-hate speech clause, its equal protection provision arguably allows restrictions on hate speech.⁵ The paper focuses upon the problem of administrative bodies who

¹ Universal Declaration of Human Rights, Dec. 10, 1948, G. A. Res. 217 A (III), U.N. Doc. A/810, at 71(1948).

² International Covenant on Civil and Political Rights, U.N.G.A. Res.2200 A(XXI), Dec.16, 1966, 21 U.N. GAOR Supp. (No.16) at 52, U.N. Doc. A/6316(1966), 999 U.N.T.S. 171, entered into force March23, 1976.

³ Article 29 of UDHR.

⁴ Article 7 of UDHR.

⁵ Akhil R. Amar, "The case of the Missing Amendments: R.A.V. v. City of St. Paul", 106 *Harv. L. Rev.* 124, 151-6 (1992).

are getting failed to regulate hate speech during the election campaign and also if they are, then the candidates are not getting harsh sanctions, which lead to create vote banks on the basis of cast, religion and sex.

II. THE CONSTITUTION OF INDIA AND HATE SPEECH

The Constitution of India, the precursor of the new Indian renaissance, became effective on January 26, 1950. Before the advent of the new Constitution, India was governed under the Government of India Act, 1935. India was then a part of the British Empire; sovereignty of the British Crown prevailed over the country. The Act conferred only a very limited right of self-government on the Indians. The right to vote was not available to all Indians. India got independence in 1947, and even prior to that in 1946, a Constitutional Assembly for drafting a constitution for the free India, had been established, which finalized its work on 26 November 1949.⁶ Indian Constitution is a lengthy, elaborate and detailed document. Some of the important reasons for that, which are relevant for our purposes are worth mentioning here, i.e. there exist various communities and groups in India. To remove mutual distrust among them, it was felt necessary to include in the Constitution detailed provisions on Fundamental Rights, safeguards to minorities, Scheduled Tribes, Scheduled Castes and Backward Classes.⁷ The Preamble of our Constitution declares our country as Sovereign Socialist Secular Democratic Republic.⁸ Democracy is a power struggle. The participants in this struggle have to be able to express themselves, to present themselves to the electorate, to create a distinct profile for themselves, and to make the electorate familiar with their political program. That's one reason why democracy needs freedom of expression. The participants in the power struggle also have to be able to organize and associate in a group that is free from government control, because this allows them to gather strength and have a more influential voice. So, they need the freedom of association and the separation of state and society. And for the same reasons they have to be able to meet and demonstrate. So, they also need the freedom of assembly. If they want to organize, associate and assemble, it's because they want to convince new people to join them. And they can't do that without free speech.⁹ But there is no such thing as absolute or unrestricted freedom of speech. The hate speech cannot be permitted on the name of such freedom. So, some restrictions are necessary on the free speech right so that it may be prevented from being abused. But, before we come to the restrictions on the right of free speech, it is necessary to deal with the freedom of speech in a broader perspective.

III. FREEDOM OF SPEECH AND EXPRESSION

Our Constitution by way of Article 19(1) which provides for freedom of thought and expression underpins a free and harmonious society. It helps to cultivate the virtue of tolerance. It is said that the freedom of speech is the matrix, the indispensable condition of nearly every other form of freedom. It is the wellspring of civilization and without its liberty of thought would shrivel.¹⁰ Article 19(1) (a)¹¹ of the Indian Constitution guarantee to the citizens of India freedom of 'speech and expression'. This freedom is necessary not only to promote certain basic rights of the citizens but also certain democratic values in, and the oneness and unity of, the country.¹² Freedom of speech is the bulwark of democratic government. This freedom is essential for the proper functioning of the democratic process. The freedom of speech and expression is regarded as the first condition of liberty. It occupies a preferred position in the hierarchy of liberties giving succor and protection to all other liberties. It has been truly said that it is the mother of all other liberties.¹³

Justifications for Free Speech: Subtle plurality of values govern the practice of freedom of speech. A principle of freedom of speech asserts some range of protection for speech that goes beyond limitations on government interference with other activities. While a minimal principle of liberty maintains that government should not inhibit communications that pose no legitimate threat of harm, a distinctive principle of freedom of speech posits more robust constraints. What legitimately counts as 'harm' is an important and controversial aspect of political theory, but here the term is meant in an inclusive, nonrestrictive sense. A principle of free speech could establish more stringent constraints than minimal principle of liberty either by barring certain possible reasons for prohibition or by establishing a special value for speech. The latter way is the easier to understand. If some human activities have special value, a good government will need stronger reasons to prohibit them than to prohibit other activities. There is no single unifying justification for a principle of free speech. The reasons for free speech are based on complex and somewhat overlapping elements, no basic division or multiple categorizations can be wholly satisfactory. The analysis of free speech justification distinguishes between consequentialist and non-consequentialist reasons. This familiar way of distinguishing reasons for action is useful here, because it differentiates claimed reasons that are to be viewed in light of factual evidence and claimed reasons that rest more purely on normative claims. A practice has value from a consequentialist point of view if it contributes to some desirable state of affairs. Thus, to say that free speech contributes to honest government is to advance a consequentialist reason for free speech. A non-consequentialist reason is one which claims that something about a particular practice is right or wrong independent of the consequences.¹⁴

⁶ M P Jain, Indian Constitutional Law, 5th ed. (Wadhwa Nagpur, 2008) 8-9.

⁷ *Id.* at p.10.

⁸ Preamble, the Constitution of India, 1950.

⁹ Filip Spagnoli, "Human Rights Quote (135): Democracy and Free Speech", available at <http://filipspagnoli.wordpress.com/2009/06/19/human-rights-quote-135-democracy-and-free-speech/>, last accessed on 26th February 2022.

¹⁰ Maqbool Fida Husain v. Raj Kumar Pandey, 2008 Cri L J 4107.

¹¹ *Supra* note 3, Article 19(1) (a).

¹² *Supra* note 1 at p. 981.

¹³ Report of the Second Press Comm., Vol. 1, 34-35, see *id.* at p 986.

¹⁴ Kent Greenawalt, "Free Speech Justifications", in M.P. Singh (ed.), *Comparative Constitutional Law* (1989) 159-66.

IV. JUDICIAL APPROACH

Expression through press: In India, freedom of press is implied from the freedom of speech and expression guaranteed by Article 19(1)(a). There is no specific provision ensuring freedom of the press as such. The freedom of the press is regarded as a 'species of which freedom of expression is a genus'.¹⁵ The Supreme Court has reiterated that though freedom of the press is not expressly guaranteed as a Fundamental Right, it is implicit in the freedom of speech and expression. Freedom of the press has always been a cherished right in all democratic countries and the press has rightly been described as the fourth estate. The democratic credentials of a state are judged by the extent of freedom the press enjoys in that state.¹⁶

In *Sakal Papers v. Union of India*¹⁷, an Act and a government order thereunder sought to regulate the number of pages according to the price charged, prescribed the number of supplements to be published, and regulate the size and area of advertisements in relation to other matter contained in a newspaper. The Court agreed that newspaper have two aspects – dissemination of news and views and commercial. The two aspects are different, former falls under Article 19(1)(a) read with Article 19(2), and the latter falls under Article 19(1)(g) and can be regulated under Article 19(6). However, the state cannot seek to place restrictions on business by directly and immediately curtailing any other freedom of the citizen guaranteed by the Constitution and which is not susceptible of abridgement on the same grounds as are set out in Article 19(6). Therefore, the right of freedom of speech cannot be taken away with the object of placing restrictions on the business activities of a citizen.' The grounds on which the two freedoms – of speech and of trade and commerce – can be curtailed are different. The freedom of speech cannot be curtailed 'in the interests of the general public', but the freedom to carry on business can be.

In *Indian Express Newspapers (Bombay) Pvt. Ltd. V. Union of India*¹⁸, several newspapers filed writ petitions challenging the constitutional validity of the notifications issued by the Centre imposing from March 1, 1981, specified rates of customs duty and auxiliary duty on newsprint imported by different categories of newspapers. The Court stated 'what may, however, have to be observed in levying a tax on newspaper industry is that it should not be an overburden on newspapers which constitute the Fourth Estate of the country. Nor should it single out newspaper industry for harsh treatment. A wise administrator should realize that the imposition of a tax like the customs duty on newsprint is an imposition on knowledge and would virtually amount to a burden on a man for being literate.' Underlining the importance of the freedom of the press in democratic society, the Court has stated that in today's free world, freedom of press is the heart of social and political intercourse. The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgments. With a view to checking malpractices interfering with the flow of information, democratic constitutions all the world over make provisions guaranteeing the freedom of speech and expression and laying down the limits of interference with it. It is therefore, the primary duty of all the national courts to uphold the said freedom and invalidate all laws or administrative actions which interfere with it contrary to the constitutional mandate.

Advertisements: In *Tata Press Ltd. v. MTNL*,¹⁹ the Supreme Court has Concluded that 'commercial speech' cannot be denied the protection of Article 19(1)(a) merely because the same is issued by businessmen. 'Commercial speech' is a part of freedom of speech guaranteed under Article 19(1)(a). The public at large has a right to receive the 'commercial speech'. Article 19(1)(a) protects the rights of an individual 'to listen, read and receive' the 'commercial speech'. The protection of Article 19(1)(a) is available both to the speaker as well as the recipient of the speech.

Demonstration: In *Kameshwar Pd. v. State of Bihar*,²⁰ a rule made by the Bihar Government prohibited government servants from participating in any demonstration or strike in connection with any matter pertaining to their conditions of service. The rule was challenged. The Supreme Court said that a government servant does not, by accepting government service, lose his Fundamental Rights under Article 19. A demonstration, held the Court, is a visible manifestation of the feelings or sentiments of an individual or a group. It is thus a communication of one's ideas to others and is in effect a form of speech or expression, because speech need not be vocal since signs made by a dumb person would also be a form of speech and expression. The government's justification of the rule as being in the interests of 'public order' was not accepted and the Court declared the rule bad as it banned every type of demonstration howsoever innocent, and did not confine itself to those forms of demonstrations only which might lead to a breach of public tranquility, or would fall under the other limiting criteria specified in Article 19(2). However, the rule was not held bad in so far as it prohibited a strike, for there was no Fundamental Right to resort to strike.

Bandh: In *Bharat Kumar K. Palicha v. State of Kerala*,²¹ a full Bench of the Kerala High Court has declared "Bandhs" organized by political parties from time to time as unconstitutional being violative of the Fundamental Rights of the people. The Court refused to accept it as an exercise of the freedom of speech and expression by the concerned party calling for the bandh. When a bandh is called, people are expected not to travel, not to carry on their trade, not to attend to their work. A threat is held out either expressly or impliedly that any attempt to go against the call for bandh may result in physical injury. A call for bandh is clearly different from a call for general strike or hartal. There is destruction of public property during a bandh. The High Court has directed that a call for a bandh by any association, organization or political party and enforcing of that call by it, is illegal and unconstitutional. The Supreme Court in *Communist Party of India v. Bharat Kumar*,²² has dismissed an appeal against the above-mentioned High Court decision. The Supreme Court refused to interfere with the High Court decision. The Court has accepted the distinction drawn by the High Court between a 'bandh' and a strike. A bandh interferes with the exercise of the Fundamental Freedoms of other citizens, in addition to causing national loss in many ways, the Fundamental Right of an individual, or of a section of the people.

Right to travel abroad: In *Maneka Gandhi v. Union of India*,²³ J. Bhagwati, stated that "... There may be many such cases where the restriction imposed is apparently only on the right to go abroad but the direct and inevitable consequence is to interfere

¹⁵ *Sakal Papers v. Union of India*, AIR 1962 SC305: (1962) 3SCR 842.

¹⁶ *Printers (Mysore) Ltd. v. Assistant Commercial Tax Officer* (1994)2 SCC 434.

¹⁷ Supra note 35.

¹⁸ AIR 1986 SC 515: (1985) 1 SCC641.

¹⁹ AIR 1995 SC 2438, 2446: (1995)5 SCC 139.

²⁰ AIR 1962 SC 1166.

²¹ AIR 1997 Ker 291.

²² AIR 1998 SC 184.

²³ Supra note 21.

with the freedom of speech and expression or the right to carry on a profession. A musician may want to go abroad to sing, a dancer to dance, a visiting professor to teach and a scholar to participate in a conference or seminar. If in such a case his passport is detained or impounded, it would directly interfere with his freedom of speech and expression.... Examples can be multiplied, but the point of the matter is that though the right to go abroad is not a Fundamental Right, the denial of the right to go abroad may, in truth and in effect, restrict freedom of speech and expression or freedom to carry on a profession....”

V. ELECTION LAWS AND HATE SPEECH

Elections are the barometer of democracy and contestants are the lifeline of elections. In India, the responsibility of conducting the elections to the office of the President and the Vice-President and both the Houses of Parliament and State Legislatures has been vested in the Election Commission under Article 324 of the Constitution of India.²⁴ India is a constitutional democracy with a parliamentary system of government, and at the heart of the system is a commitment to hold regular, free and fair elections. These elections determine the composition of the government, the membership of the two houses of parliament, the state and union territory legislative assemblies, and the Presidency and vice-presidency. The country has of course a strong democratic tradition of electoral politics, but democracy goes beyond periodic elections, despite their seminal importance in ensuring free and fair choice.

For democracy to survive, rule of law must prevail, and it is necessary that the best available men should be chosen as people's representatives for proper governance of the country. This can be best achieved through men of high moral and ethical values who win the elections on a positive vote obtained on their own merit and not by the negative vote of process of elimination based on comparative demerits of the candidates.²⁵ However, now a days, in the activities of political parties, trade union and even of student groups, there is no hesitation of inflict harm on innocent human beings.²⁶ The politics, never aseptic at the best of times, anywhere, has in India become the investment with the highest returns, and therefore, associated with the survival of the dirtiest. It has been taken over by the rural majority whose rustic virtues of nepotism and bossism are anathema to the western-type urban democracy's principles of universalism, professionalism and impartiality. So, booth capturing, lying, cheating, forging, abducting, and murdering during elections and creaming off funds when holding office, have become political attractions.²⁷ On the other hand it is an essential condition for the success of democracy that people maintain their allegiance towards the democratic institutions based on the rule of law. The more the elections are free and fair, the stronger the allegiance the people will have towards democratic institutions.²⁸ Publication of statements is an extensively adopted mode of election campaign. The simple form of a statement is a mere appeal to the electors to vote in favor of a candidate. The election promises of the candidate, the policy and programmes of the political party, the qualification and merits of the candidate, etc. are communicated to the electors by way of publishing handbills, pamphlets, booklets, posters, etc. advertisements through newspapers and periodicals, press statements and election speeches are the other means of communication. Now the problem arises when hate speeches, in particular religious and casteist hate speeches, are used in the election campaign for the purpose of securing votes in the election. As that have the tendency to arouse hatred and enmity between different communities and classes, so the Election laws²⁹ in India contains the provisions which prohibits that kind of speeches and further that may lead to the disqualification of the candidate to election.

Corrupt Practices: Though the electorate may be classified on the basis of caste, religion, class etc., caste considerations are of prime importance. After the debacle of Congress in the 1989 general elections, the caste's political hold has declined. In the 1989 Lok Sabha elections the caste bagged three seats which is in the forefront of the anti-Mandal struggle. 1957 witnessed struggle between Shri Krishna Sinha and Anugrah Narain Sinha for leadership of the Congress legislature party in Bihar State. That struggle intensified caste-struggle in the State. Before that contest, caste rivalry at the political level was conducted in less visible ways. Now the struggle assumed a vocal and externally visible proportions.³⁰

Seeking Votes in the Name of Caste: There are different modes of securing votes through appeal to caste or religion. The most ordinary form is to seek votes for a candidate from electors belonging to the same caste or religion. In such a situation the candidate ignores all other considerations and requests the electorate to cast their votes looking only at his religion or caste. It is to be noted that this mode of campaign would thwart the very foundation of the secular democratic process.³¹ One of the dangers which we face for our democratic system arises out of electoral corruptions which political parties, candidates or the government in power may practice. Appeal on the ground of religion, race, caste, community and the use of or appeal to national symbols constitutes corrupt practice. However, the mere mention of the caste of the candidate during the election campaign does not constitute corrupt practice.³² In *Habib Bhai v. Pyarelal*, the candidate, Pyarelal, mentioned the name of his caste in a poster published in connection with the election campaign. The Court approved the practice and held that a person had a right to do so. The Court further pointed out that not a single person had come forward to say that the mere description of the caste in the pamphlet was understood by any ordinary person as an appeal on the ground of caste.³³ This view is highly erroneous as the matter has to be decided by a Court not on the basis of the understanding or even the impact of the appeal on the electorate. It is submitted that the motive of the person who discloses the caste should be taken as the basis for determining the corrupt practice. Since caste name may be added as surname the very name of the candidate may proclaim his caste. If the name of the person entered in the official records contains the caste name as surname there is no need to prohibit the publication of the caste name. However, if the name in the records does not contain the caste name, the addition of caste name in connection with election campaign should be proscribed. Here the motive behind the adding of caste name

²⁴ R.V.S. Peri Sastry, "Election: A Code of Conduct for Contestants", Journal of Parliamentary Information, 37, 1991 (June) 153.

²⁵ V S Rama Devi and S K Mendiratta, Election Laws, Practice and Procedure, 2nd Edn. (LexisNexis 'Butterworths', 2007).

²⁶ Dr. V. D. Sebastian, "Dignity and Worth of the Human Person in Indian Legal Thought", Journal of Indian Legal Thought, 3(2005) 79.

²⁷ J.M. Lyngdoh, "Election Laws and Criminalization of Politics", Delhi Law Review, 19, (1997) 2.

²⁸ B.L. Fadia, Indian Government and Politics, 5th Edition, (Sahitya Bhawan Publications, Agra, 2004) 684.

²⁹ The Representation of People Act, 1951.

³⁰ Ravindra Kumar Verma, "Caste and Bihar" Politics, Economic and Political Weekly, 26, (1991) 1142-43.

³¹ K.C. Sunny, Corrupt Practices in Election Law, (Eastern Book Company, Lucknow, 1996) 99.

³² Ibid.

³³ AIR 1964 MP 62.

is to seek votes by making use of the caste factor. Hence it could be treated as an appeal on the ground of caste. Other modes of disclosure of the caste should also be treated as corrupt practice if the motive is to canvass votes by playing the communal card.³⁴

VI. DISTINCTION BETWEEN CORRUPT PRACTICES AND ELECTORAL OFFENCES

In *Gadakh Yashwantrao Kankarrao v. E V alias Balasaheb Vikhe Patil*³⁵, it was stated that to ensure that elections are held in a free and fair manner enabling men of high moral and ethical values to win, the law has laid down certain rules of electoral morality and prohibited certain acts of commission and omission which sully the purity of elections and have corrupting influence and vitiating effect on the outcome of elections. Some of these acts have been branded as 'corrupt practices', while the others have been termed as 'electoral offences'. Distinction between them³⁶- (i) 'Corrupt practices' at elections are presently specified in Section 123³⁷ of the Representation of the People Act. 'Electoral offences' on the other hand, are laid down both in the Indian Penal Code³⁸, and in the Representation of the People Act³⁹. Whereas the electoral offences under the IPC are criminal acts of general nature, relatable to all elections held under any law to any elective body in the country, the corrupt practices and electoral offences under the 1951 Act are specifically relatable only to elections held under that Act to Parliament and State legislatures, and not to other elections including the elections to the offices of the President and Vice-President of India. (ii) the fundamental distinction between these two classes of prohibited acts is that when a corrupt practice is committed by a candidate, or by someone else with his consent, it has the effect of vitiating the whole election and will result in the election of the candidate being declared void, the commission of an electoral offence does not have such fatal bearing on the election result. In the former, the whole constituency suffers inasmuch as the candidate loses his seat and the constituency goes without representation in the legislature, till another election is held to replace the unseated member; in the latter, only the persons committing the electoral offences suffer for their criminal liability. (iii) any grievance relating to the commission of a corrupt practice can be agitated only after the election is over and only in the election petition filed in accordance with the provisions of Article 329(b)⁴⁰ of the Constitution of India, 1950, and Part VI of the 1951 Act; but the commission of an electoral offence can be taken cognizance of as soon as it is committed and the process of law set in motion immediately thereafter, in the same manner in which any other criminal activity is investigated and tried under the provisions of the Criminal Procedure Code, 1973. (iv) committing a corrupt practice entails only certain civil disabilities, like, disqualification for voting and for contesting elections for certain period; but any electoral offence if committed will be visited with criminal liability and may result in imprisonment or with fine or with both, apart from attracting the civil disabilities of voting and contesting elections in the case of certain specified electoral offences.

VII. RELEVANT PROVISIONS OF THE ACT OF 1951, DEALING WITH THE CORRUPT PRACTICES AND ELECTORAL OFFENCES

The Representation of the People Act, 1951, is the basic law, governing electoral process in India. Section 4(d) and 5(c)⁴¹ of the Act; provides that the candidate must be an elector for a parliamentary constituency in India in the case of Lok Sabha Elections and an elector for the assembly constituency in the state, in the case of election to Vidhan Sabhas. Unfortunately, our Parliament has refrained from stipulating any other additional qualification for candidature in the hope that political sponsoring candidate would nominate only the persons of established integrity, honesty and wisdom but no objective criterion as a matter of fact exists for gauging, whether a citizen offering as a candidate for election possesses requisite qualification or not.⁴²

Section 123: Section 123 of the Representation of the People Act, 1951, defines corrupt practices. The portion of the Section that is relevant for our consideration is as follows: Clause(3) of Section 123, specifies that the appeal by a candidate or his agent or by any other person with the consent of a candidates or his election agent or by any other person with the consent of a candidates or his election agent to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language or the use of, or appeal to religious symbols or the use of, or appeal to, national symbols, such as the national flag or the national emblem, for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate: Provided that no symbol allotted under this Act to a candidate shall be deemed to be a religious symbol or a national symbol for the purposes of this clause.

In *Prabhakar Rane v. Asnotikar Vasant kamalakar and Anr*⁴³, it was observed that for the purpose of the Section 123(3), mere placing of advertisements in the newspaper by itself cannot be said to be an act of corrupt practice. Advertisements are part and parcel of election campaigning. To bring this act within the purview of Section 123(3) of the Act, something much more is required. These appeals or advertisements should be not only to vote or refrain from voting for any person but also appeal should be on the ground of his religion, race, caste, community or language and thereby to further the prospects of the election of that candidate will be bright or it will prejudicially affect election of other candidates.

Do the provisions of Section 123 of the Representation of the People Act give effect to a constitutional policy?

In answering this question, it is necessary to inquire, first, whether under the Constitution, in order to be valid, legislative and other governmental actions must be capable of justification on a nonreligious basis. The preamble to the Constitution declares India to be a 'secular' state. Also, provisions in the fundamental right, especially Article 15, prohibit the state from discriminating on the

³⁴ Supra note 8 at p. 100.

³⁵ AIR 1994 SC 678.

³⁶ Supra note 2 at p. 907.

³⁷ Supra note 6.

³⁸ Ch. IXA, the Indian Penal Code, 1860.

³⁹ Supra note 6, Ch. III of Part VII,

⁴⁰ The Constitution of India, 1950, Article 329 (b) provides that no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature.

⁴¹ Supra note 6, Sections 4(d) & 5(c).

⁴² N.S. Gehlot, Elections and Electro Administration in India, (Deep and Deep Publication, New Delhi, 1992) Page no: 97-98.

⁴³ AIR 2002 Kant 377, 2002(6) Kar LJ 336.

ground of religion. Although it may be possible for government to support religion generally, for instance by a programme of financial assistance that benefits all religions, it may be difficult for its actions to have a religious basis that does not partake of one religion more than others. Finally, the guarantee of religious freedom in Article 25 perhaps can be construed to require that the actions of government be capable of nonreligious justification.⁴⁴ If the action of legislators and other government officials must be capable of nonreligious justification and also non-religiously motivated, what about the actions of the voters who elect the government officials? Must their votes be capable of nonreligious justification and non-religiously motivated? In answering this question, it is necessary to look to the fundamental postulates of the Constitution and the relative importance they attach, on the one hand, to keeping government free from religious influences and, on the other hand, to maintaining an area of freedom in which a variety of beliefs, including religious belief, may be allowed to find expression. Surely it is not constitutionally required that every act that may have an influence on government be no religiously motivated. In the background of this discussion is the question whether the Constitution embodies a policy of extending secular values throughout the whole of society, or only a policy of making sure that government functions on a nonreligious basis. Section 123 of the Representation of the People Act, by prohibiting appeals to voters on religious grounds, seeks to prevent voting on a religious basis. If this assumption is incorrect, then these statutory provisions may be constitutionally questionable in that they tend to deprive voters of a freedom to which they are entitled.⁴⁵

VIII. CONCLUSION AND SUGGESTIONS

As we know that after the independence, we have established a democratic and secular State. Democracy has wider moral implications than mere majoritarianism. A crude view of democracy gives a distorted picture. A real democracy is one in which the exercise of the power of the many is conditional on respect for the rights of the few. Pluralism is the soul of democracy. The right to dissent is the hallmark of a democracy. In real democracy the dissenter must feel at home and ought not to be nervously looking over his shoulder fearing captivity or bodily harm or economic and social sanctions for his unconventional or critical views. Freedom of speech has no meaning if there is no freedom after speech. The reality of democracy is to be measured by the extent of freedom and accommodation it extends. Human personality can bloom fully and humanism can take deep roots and have its efflorescence only in a climate where all display an attitude of tolerance and a spirit of moderation.⁴⁶ At the same time the hate speeches, like, communal or religious or castiest speeches cannot be permitted on the name of freedom of speech. However, much depends on the **circumstances**, the **context** and the **manner** of speech. Islamophobia in front of a crowded mosque is obviously not the same thing as Islamophobia in an obscure publication. An important distinction here: all this is about hate, not about speech that is merely offensive, insulting, ridiculing etc. The distinction, however, can be blurred. What is hateful and what is merely offensive is a matter of personal conviction, it differs between groups and it changes over time. Some groups may be more sensitive than others. If one decides **to** legislate the matter, this can complicate things. Moreover, what to someone can be seen as hate – for example homophobia – may be a central tenet of someone else's religion and therefore protected by the freedom of religion.⁴⁷ The Hon'ble Supreme Court had observed in *Abdul Hussain Mir v. Shamsul Huda*⁴⁸, that 'religious appeal or communal appetite is stronger in a bigoted and backward population than in an enlightened or indifferent or other area with a long tradition of peaceful co-existence of variegated religious groups or cosmopolitan people. It all depends on the socio-political pathology or sensibility of each province or constituency.

⁴⁴ John H. Mansfield, "Religious Speech under Indian Law" in M.P. Singh, (ed.), Comparative Constitutional Law, (1989) 223.

⁴⁵ Id., p. 224.

⁴⁶ Maqbool Fida Husain v. Raj Kumar Pandey, 2008 Cri L J 4107.

⁴⁷ Filip Spangoli "Limiting Free Speech (3): Hate Speech", available at <<http://filipspagnoli.wordpress.com/2008/07/23/limiting-free-speech-3-hate-speech/>>, accessed on 2nd March 2022.

⁴⁸ AIR 1975 SC 1612.