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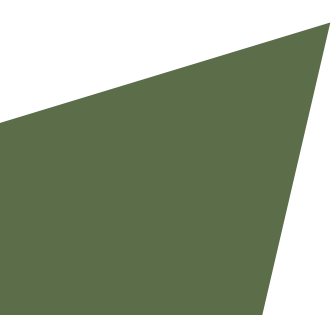
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Election Laws of India & Hate speech: An Analysis

Prithivi Raj

ABSTRACT

This paper examines right to freedom of speech & expression during elections in the country. It goes beyond legal texts and judgements and beyond the legal concept hate speech in an attempt to understand the general concept hate speech. And it does so use a range of well-known methods of conceptual analysis that are distinctive of analytic philosophy. One must be free to speak against the government or a person with detailed proof. This is how the democracy works. Stopping a person to speak is indirectly killing the democracy. The author had tried to touch the corner stone of Right to freedom of speech & expression under Hate speech in elections.

INTRODUCTION

Free and fair election is a basic and essential feature in a democracy. The right to freedom of speech and expression is greatly in conflict with the reasonable restrictions during the election as vigorous exercise of this right may tantamount to its violations and hence the right ends up being curtailed. Representation of Peoples' Act 1951 (herein after referred as ROP Act) contains provisions that disqualify the candidature of the candidate and criminalise speeches that fall under the category of corrupt practices and electoral offences respectively. The provision for conduct of elections is provided in the Articles 324 to 329 of the Indian Constitution along with the Representation of People's Act, 1951; and other rules contained in Conduct of Election Rules, 1961. Clause 3A of Section 123 of the ROP Act deals with the former while Section 125 deals with the latter issue.

ELECTORAL CORRUPT PRACTICES VIS-A-VIS HATE SPEECH

Section 123(3A)¹ was brought forth in 1961 amendment to the ROP Act in order to complement Section 153A of IPC with a specific purpose of putting a check upon violation of freedom of speech during the elections. The apex court in *Ziyauddin Bukhari*² has said the following:

"It is evident that, if such ROP Act propaganda was permitted here, it would injure the interests of members of religious minority groups more than those of others. It is forbidden in this country in order to preserve the spirit of equality, fraternity, and amity between rivals even during elections. Indeed, such prohibitions are necessary in the interests of elementary public peace and order".

Consent of the candidate being paramount for speech to amount as a corrupt practice, sub section 3A of the Section 123 criminalises such speech if it is made by the candidate himself or by his agent on prior consent of the candidate. If such speech is made before the candidate has filed his candidature, it would not amount to an offence under the said section. Implied consent can be construed to if the candidate is present while such speech is being delivered.³ For ensuring a landslide victory in the election, candidate often exercise their right to speech in a manner that is first targets the opposite political party but later such candidate resorts to deplorable speech that ends up promoting hatred among classes of citizens on the lines of religion, caste or descent. Hence, the perspective of the audience or the likely effect of speech on the voters is something that is a determining factor while holding a speech as hate speech.⁴

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¹ Section 123(3A), Representation Of People's Act, 1951.

² *Ziyauddin Bukhari v. Brijmohan Mehra*, (1976) 2 SCC 17.

³ *Ramakant Mayekar v. Smt Celine D'Silva*, 1996 SCC (1) 399.

⁴ *Ziyauddin Bukhari v. Brijmohan Mehra*, (1976) 2 SCC 17.

In the case, the speaker pleaded in election campaign on the basis of his religion, stating that his adversary was not a true follower of Islam. Supreme Court held that the language used by the speaker when measured against the given circumstance was evident enough to bring to its notice that such pleading or appeal was reckless and uncontrolled and was given to motivate hostile feelings between diverse classes present in the country.⁵ The Apex court while deciding the case of *Ebrahim Suleiman Sait*⁶ held that if the likely effect of the speech is such that it promotes enmity between various classes present in this diverse nation, then it would attract the provisions of sub section 3A. It was alleged by the appellants that provocative speech was given against a political party and not towards any class of citizens as is the case under the provision. Although in the present case, the court did not find such proposition to be true as against the provisions of the said section. *“It seems to us that the speech sought to criticise the wrong policy of the Muslim League (Opposition) in aligning with parties that were allegedly responsible for atrocities against the Muslims and not just to emphasise the atrocities. In our opinion it cannot be said that the speech falls within the mischief of Section 123(3A) of the Act; we have reached this conclusion keeping in mind the well-established principle that the allegation of corrupt practice must be proved beyond reasonable doubt”*. The Apex court held in *Ramesh Yeshwant Prabhu*⁷ that just by referring to a religion during a speech would not attract the provisions under section 123. The words in conflict should be read in the background or the circumstances surrounding the complete speech and not in a theoretical or text book manner. Considering this matter in the recent judgment of *Pravasi Bhalai Sangathan v. Union of India*⁸, the Supreme Court has held that the words used during speech and effects resulting thereon must be judged as per the standards of an ordinary prudent man, having a reasonable understanding, strong mind and courage to take in views not as per expectation. These are not to be judged keeping in mind the weak- and feeble-minded men who cannot take even the slightest form of dissenting opinions. In *Ziyauddin Bukhari*⁹, the Apex Court took its stand in favour of the ‘likely effects test’. In relation to this, the Court held that one has to determine the outcome of speeches made by the candidate or by his agent in election period keeping in mind the average voter’s mind and feelings in each and every case concerned with allegations of electoral corrupt practices. Sub-section 3A deals with the provision to tackle the problem of promotion of feeling of hatred or enmity amongst various classes of citizens. In a particular case, *Rao Deshmukh*¹⁰ where the appeal was filed contending that if during

⁵ V.S. Rama Devi and S.K. Mendiratta, *How India Votes: Election Laws, Practice And Procedure*, Lexis Nexis, (2014), p. 957.

⁶ *Ebrahim Suleiman Sait v. M.C. Muhammad*, 1980 SCR (1)1148, para 2.

⁷ *Dr. Ramesh Yeshwant Prabhu v. Prabhakar Kashinath Kunte*, (1996) 1 SCC 130.

⁸ 11 SCC 477, para 10.

⁹ *Ziyauddin Bukhari v. Brijmohan Mehra*, (1976) 2 SCC 17.

¹⁰ *Das Rao Deshmukh v. Kamal Kishore Nanasabekdam*, 1995 SCC (5) 123.

election campaigning any appeal is made for ‘Hindutwva’ it does not mean that appeal is directed only towards one particular community. The judicial interpretation of such speeches is that usage of ‘Hindutwva’ or ‘Hindus’ does not refer to people on the basis of religion. The Court even went to the extent of saying that there cannot be a fixed meaning to this word and it cannot be just restricted to periphery of religion. It is a way of life, which has been linked to ‘Indianisation’ and the speech has to be judged in its entirety and not just limiting the scope to use of this word in order to see whether such speech is segregating people on the pretext of religion.¹¹ The use of Hindutwva during speeches was again considered in *Manohar Joshi*¹² case where candidate relied on usage of this word as a basis for establishment of a Hindu state. The Apex Court held that this cannot be said to be violative of Section 123(3A) as this is not dividing people but is just a glimpse of hope. In 2017, a final decision on this particular issue was reached by in the case of *Abhiram Singh*¹³ wherein it was held that no appeal on the basis of religion would be permitted as elections are a secular function that was exercised in consonance with the various diversities prevailing in the country. The highest court of the land has settled the proposition in *Ebrahim Suleiman Sait*¹⁴ that truth cannot be used as a defence in the case relating to speeches that promote hatred in the society. Even if the statements are based on facts, it would not save such statements from the provisions under the ROP Act. The relevant test is that whether such statements promoted enmity amongst the society or not. If it does so create, then it is of no importance that the statements uttered were based on facts or not. It also becomes irrelevant when such statements were made out quite some time ago.

CONSTITUTIONALITY OF SECTION 123(3A) VIS-À-VIS ARTICLES 19(1)(A) AND 25

The apex court for the first had taken in consideration the validity of Section 123(3A) in the case of *Ramesh Yeshwant Prabhoo*¹⁵, finding it to be consistent with the Right to freedom of Speech and expression it held that this section falls within the ambit of reasonable restrictions, namely ‘public order’ and also ‘incitement to an offence’. The detriment effect on public order is caused due to the various clauses present under the said section. Promoting enmity or hatred is clearly

¹¹ V.S. Rama Devi and S.K. Mendiratta, *How India Votes: Election Laws, Practice And Procedure*, Lexis Nexis, (2014), pp. 976-978.

¹² *Manohar Joshi v. Nitin Bhaurao Patil*, (1996) 1 SCC 169.

¹³ *Abhiram Singh v. C.D. Comachen*, C.A. No. 37/1992.

¹⁴ *Ebrahim Suleiman Sait v. M.C. Muhammad*, 1980 SCR (1)1148, para 4.

¹⁵ *Dr. Ramesh Yeshwant Prabhoo v. Prabhakar Kashinath Kunte*, (1996) 1 SCC 130.

barred as per the said section and any such activity has a detrimental effect on the society and creates further divide among the communities.

SECTION 125 OF ROP ACT: ELECTORAL OFFENCES

Section 125¹⁶ of the act deals with the provision that deals with the issue of promotion of enmity between the classes during the election process. It provides a punishment that includes imprisonment up to three years, or fine or both if any person involved in the election promotes or even attempts to promote enmity on the grounds of religion, race, caste, community or on linguistic basis.¹⁷

ELECTORAL HATE SPEECH VERSUS PENAL HATE SPEECH

There is a difference of element between the provisions dealing with Hate Speech contained under section 123 and 125. It may on the face appear to be same, but are different in the consequences resulting on its enforcement. The latter creates criminal consequences for the person violating further making it more viable than the former since cognizance for it can be taken under Criminal Procedure while for the former it can be taken place only after announcement of the election results.¹⁸

The Supreme Court, in *Ebrahim*¹⁹ case as well as in another case has brought forth the element that makes both the sections different from each other in certain aspects. *“To attract 123(3A) the act must be done by the candidate or his agent or any other person with the consent of the candidate or his agent and for the furtherance of the election of that candidate or for prejudicially affecting the election of any candidate, but under section 125 any person is punishable who is guilty of such an act and the motive behind the act is not stated to be an ingredient of the offence”*.²⁰

¹⁶ Section 125 “Promoting enmity between classes in connection with election”—Any person who in connection with an election under this Act promotes or attempts to promote on grounds of religion, race, caste, community or language, feelings of enmity or hatred, between different classes of the citizens of India shall be punishable, with imprisonment for a term which may extend to three years, or with fine, or with both.

¹⁷ *Ibid.*

¹⁸ *Ebrahim Suleiman Sait v. M.C. Muhammad*, 1980 SCR (1)1148, para 6.

¹⁹ *Ibid.*

²⁰ *Ziyauddin Bukhari v. Brijmohan Mehra*, (1976) 2 SCC 17.

CONCLUSION

It has been on many occasions observed that candidates give speeches that have been coloured with religious spirits which tend to create an atmosphere of divide amongst the voters much before they file their candidature, hence are saved from the clutches of these provisions. It is therefore in the best interests for a modern Indian democracy that activities of candidates a year prior to their nomination should be taken in cue for adjudging their conduct.²¹ There are varying opinions and if one is discontent with the government in power and its policies or if one speaks about the country not rising up to the expectations of the women or calling out the nation as chauvinist, does not in any way acts against the idea of a nation. Berating certain features or some peculiarities by indulging in positive criticism cannot tantamount to sedition. India has struggled long for its freedom and if one does not have the right to criticise in a free country then there won't be any distinction between the colonial time and the 21st century.

²¹ *Harjit Singh Mann v. Umrao Singh*, AIR 1980 SC 701.