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Elections in India – A Brief Analysis

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ABSTRACT

Election in India is often seen as a celebration of a democratic approach towards governance as well as the importance of a constitutionally driven society. Elections, thereby are an instrumentality that puts forward the idea that has been mentioned in the preamble that the power lies with 'we the people'. The 'people' gave themselves a democratic republic that not only safeguards their rights and person but also makes sure that such principles of justice and fairness are and always remain in practice, such is ensured by the charter known as the constitution of India. The bible of rights thus ensures that the power of governance remains with the people and the concept of free and fair elections is one of the means to ensure this. There have been quite a lot of landmark changes since independence in the election laws but the importance of a just, fair and free election cannot be overstated.

I. INTRODUCTION

In a democratic setup, an election is one of the few important tools in the hands of the people for it is 'we' who constitute the nation and it is 'we' who breathes life in it. Elections per se in India have attained the role of a periodic festival that lasts for a few days, brings in government holidays and gives us a sense of importance, for it is the only time when we feel the power where it belongs with us the 'people'. Time and again the importance of periodic free and fair elections has been discussed at great lengths and how a democratic government is the only way for a civilised society like ours. Since her independence, India has seen plenty of electoral events that have forever changed the shape of how we look at elections.

II. A FREE AND FAIR ELECTION – JUDICIAL PRECEDENTS

The judiciary has always been at crossroads with the other organs of the state. The constitution vests that the power of judicial scrutiny in the courts and to provide as the ultimate system of checks and balance. The concern of the Supreme Court in ensuring free and fair elections is visible in the decision of *Indira Nehru Gandhi v Raj Narain*.² the case was an appeal challenging the decision of the High Court of Allahabad setting aside the election of the then

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² 1975 Supp SCC 1

Prime Minister Mrs. Indira N. Gandhi. The article 329A of the constitution, introduced through the 39th amendment, intended to nullify the effect of the decision of the Allahabad High Court. The article had six clauses, that intended towards providing immunity to the Prime Ministers election as it reduced the jurisdiction of the courts to refrain from dealing the elections of the Prime minister and the Speaker of Lok Sabha. The clauses extended to declare the elections of such offices substantial regardless of any relevant judgement in that matter whatsoever. Agreeing to *clause 5* of the article, “any offer or cross-appeal relating to the election of the Prime Minister to Parliament pending before the Supreme Court ought to be disposed of on the presumption that the judgment under appeal was void, that the findings contained within the judgment had no existence within the eye of the law and that election pronounced void by the judgment ought to continue to be substantial in all regards.”³ *Clause 6* provided that article 329A “should have precedence over the rest of the Constitution.”⁴

The amendment was a direct attack on the basic structure of the constitution as it amplified the power and position of a constitutional office to such an extent that it ultimately became a threat to the constitutional spirit it draws its power from. The courts though chose activism and upheld the idea that free and fair elections was an essential part of the basic structure doctrine and bypassing the judicial scrutiny was a gross miscarriage of justice. The petition was decided at a point in time when an internal Emergency was in operation and the government in power was showing authoritarian tendency.

The question as to the jurisdiction of the Election Commission arose in *Mohinder Singh Gill v. Chief Election Commr.*⁵ In 1977, because of mob violence, the Election Commission cancelled the poll and ordered a repoll for an entire constituency. The Supreme court held that the order is saved by Article 324. If the parties are given a hearing, it is sufficient to meet the ends of natural justice. “*The power extends to the power to postpone the elections in any State or part of it if because of the disturbed condition it is impossible to conduct such elections*”.⁶ The exercise of such power is subject to Judicial Review. Subject to Judicial Review, “*this power also includes the power to regulate the use of loudspeakers in electioneering.*”⁷

In *Gujarat Assembly Election Matter, re*⁸, the holding of periodic free and fair elections by the Election Commission was considered to be a part and parcel of the Basic Structure of the

³ Ibid

⁴ Ibid

⁵ (1978) 1 SCC 405: AIR 1978 SC 851.

⁶ Digvijay Mote v. Union of India, (1993) 4 SCC 175.

⁷ Election Commission of India v. All India Anna DMR, 1994 Supp (2) SCC 689.

⁸ (2002) 8 SCC 237: AIR 2003 SC 87.

Constitution, the court held that the fixing of schedule for elections is in the exclusive domain of the Commission and not subject to any law of the Parliament. Parliament may make law for the conduct of elections, but the conducting of elections is the sole responsibility of the Commission. Abuse of power, however, is subject to Judicial Review.

The election commission is a deeply constitutional body that is responsible for the free and fair functioning of the whole election process. The Constitution under article 324 lays down a provision for a Chief Election Commissioner and other Commissioners as may be appointed by the President. The CEC draws its power from the constitution itself and thus it depends solely on its merit and rationale as to how they deal with the duty of putting forward a free and fair electoral practise devoid of any political or executive interference.

The Election Commissioners do not hold the same position as that of the Chief Election Commissioner. *“The latter is the creation of the Constitution and can be removed only by the manner provided in the proviso to clause (5) while the creation and the number of the former are determined by the President.”*⁹ Later in *T.N. Seshan v. Union of India*,¹⁰ the Supreme Court clarified that even so the CEC is only one of the members of the multi-membered Commission. He presides over the meetings but is merely first among equals.

Therefore, a law laying down the procedure for the multimember bench to take decisions unanimously, or by the majority, does not conflict with the powers and position of the CEC. The CEC also doesn't hold the position or status of a judge of the Supreme Court. These clarifications were given in the context of certain actions and the method of functioning of the then CEC, T.N. Seshan.

Conclusively, these clarifications by the court in T.N. Seshan's case has in some way lowered the position of the CEC as well as the Commission. *This is an example of a bad case leading to the laying down of a bad law.* It gives an impression that the will of the Commission can be manipulated by the government by employing any number of Election Commissioners, to achieve the majority of a judgement, thereby a possibility of misuse has been created. The Supreme Court's intention to resist any change in the democratic system of elections and safeguarding the concept of free and fair elections has in some way or the other taken a big hit (post-emergency) with cases like R.Y. Prabhoo and T.N. Seshan the court has in some way or the other taken a backfoot on the subject of 'free and fair election'.

⁹ S.S. Dhanoa v. Union of India, (1991) 3 SCC 567: AIR 1991 SC 1745.

¹⁰ (1995) 4 SCC 611.

III. MONEY AS A DECIDING FACTOR IN ELECTIONS

The modern-day electoral process is presumed to be quite extravagant and pompous and money power is deemed to be a very potent factor that decides the fame and fortune of a candidate. Furthermore, to materialize the election propaganda the use of money as a mode has become an essentiality and it is fair to say that it is the wealthiest that run the race, an example of modern-day capitalism in some sense. The readiness of money in crude form is often seen as being directly proportional to the vote bank of the candidate in question, so the more the funds the more the candidate's likeliness to win. The historical analysis of election laws shows that courts have adopted activism in interpreting the provisions of laws relating to election expenses and the contrary attempt by the political leadership to counter the effect of such activism by invoking the amending powers it possesses.¹¹

Section 77(1) of the RPA¹², 1951 every candidate is expected to keep an account solely for the amount spent on such elections by him or his agent on his behalf. **Section 77(3)** of the Act provides that the total of the amount mentioned in clause 1, shall not exceed such amount as may be prescribed.

Whether or not the expenditure by the candidate's ally and agents or people related to the candidate be considered for as an expenditure by the candidate himself was brought up in many petitions. The court earlier believed otherwise however, in *Kanwer Lai v Amarnath*¹³ the court examined the various aspects of the problem and concluded that "*the availability of disproportionately larger resources is also likely to lend itself to misuse or abuse to the political party or individual possessed of such resources, an undue advantage over other political parties or individuals.*"¹⁴

However, the amendment introduced in 1974 added an explanation¹⁵ to section 77 exempting

¹¹ Akhil Kumar, Election Laws and Corrupt Practice in India, International Journal of Multidisciplinary Approach and Studies, Volume 01, No.5, Sep - Oct 2014

¹² Representation of People's Act, 1951

¹³ AIR 1975 SC 308.

¹⁴ About the evil consequence of the mobilization of money by political parties through donations the court observed:

'It is obvious that pre-election donations would be likely to operate as post-election promises resulting ultimately in the casualty of the interest of the common man, not so much ostensibly in the legislative process as in the implementation of laws and administrative or policy decisions. The small man's chance is the essence of Indian democracy and that would be stultified if large contributions from rich and affluent individuals or groups are not divorced from the electoral process.'

¹⁵ Explanation 1. —For the removal of doubts, it is hereby declared that—

(a) the expenditure incurred by leaders of a political party on account of travel by air or by any other means of transport for propagating programme of the political party shall not be deemed to be the expenditure in connection with the election incurred or authorised by a candidate of that political party or his election agent for the purposes of this sub-section;

(b) any expenditure incurred in respect of any arrangements made, facilities provided or any other act or thing

the expenditure incurred or authorized by a political party or any other association or body of persons or any individual (other than the candidate or his election agent) from the purview of the expenditure incurred or authorized under the section.

In *Gadak Y.K. v Balaseh Vikhe Patil*,¹⁶ the court emphasized the need to amend the Representation of the People Act, 1951, to repeal the explanation to section 77, pointing out that the spirit of the provision suffered violation through the escape route provided by the explanation. In *Gajanan Krishnaji Bapat v Dattaji Raghobaji Mejjhe*,¹⁷ A.S. Anand, J, emphasized the need to prescribe by “*Rules the requirements of maintaining true and correct accounts of the receipts and expenditure by political parties by disclosing the sources of receipt as well*”¹⁸. Although no positive step was taken by the political leaders of the country. In *Common Cause v Union of India*,¹⁹ the Supreme Court had shown activism in preventing the vice of money power in the election by way of interpreting section 77 of the Representation of the People Act in the background of legal provision relating to the receipt of donations by political parties.

The judicial approach towards the law relating to election expenses establishes the commitment of the judiciary in maintaining the purity and sanctity of elections. The Supreme Court bench of Justice Chelameswar and Justice Abdul Nazeer pronounced judgment in a writ petition filed by NGO Lok Prahari, seeking disclosure of the sources of income of candidates contesting elections at the time of filing nomination. The court observed, that such an act of using money as a means to drive an election is a “*phenomenon inconsistent with the principle of the Rule of Law and a universally accepted Code of Conduct expected in a Constitutional democracy*”.²⁰

IV. THE CODE OF CONDUCT

The code of conduct or the model code is guidance or pathway laid for the political candidates and parties to the election that provides norms and rules that ought to be followed to which the parties consent to abide by and the principles embodied in the said code and also binds them to respect and observe it in its letter and spirit.

The Election Commission ensures the conducting of free, fair and peaceful elections under

done by any person in the service of the Government and belonging to any of the classes mentioned in clause (7) of section 123 in the discharge or purported discharge of his official duty as mentioned in the proviso to that clause shall not be deemed to be expenditure in connection with the election incurred or authorised by a candidate or by his election agent for the purposes of this sub-section.

¹⁶ AIR 1994 SC 678, 691.

¹⁷ AIR 1995 SC 2284 at 2300.

¹⁸ Ibid.

¹⁹ AIR 1996 SC 3081.

²⁰ Lok Prahari v. Union of India & Others, Writ Petition (C) No. 784 of 2015.

Article 324 of the Constitution of India. It is also ensured that official machinery for electoral purposes is not misused. Further in cases of violation, appropriate measures are taken. That is what the general rule suggests. For decades now, especially since the sharp rise of political parties that espouse sharp religious sentiments, electoral politics has been coloured by communalism.²¹

Under consideration by the Supreme Court of India are several petitions that raised and interpreted this issue and over which appeals and reviews were filed. A three-judge bench of the Supreme Court of India in 1996, held Shiv Sena supremo, Bal Thackeray guilty of a corrupt electoral practise under section 123(3) and 123(3A) of the Representation of People's Act. The three speeches made by Thackeray in support of the then-mayor of Mumbai, Ramesh Prabhoo, themselves leave very little to the doubt or imagination.²² An example of such misuse is a poster portraying the UP BJP president Keshav Prasad Maurya, as *Lord Krishna* and then Chief Minister of UP Akhilesh Yadav as *Kaurava*. Such picturization is not only a gross violation of electoral ethics but also the use of religion for the motive of milking political gains.

The ECI has a sufficient backup of Laws to conduct free and fair elections throughout India and these are only a few examples of how religion has been used as a tool for winning elections. Political giants like Modi and Mrs Gandhi have time in time used the instrumentality as their own. The interference of the political parties with the functioning of the ECI has led to its dilution.

Corrupt practices and Section 123(3)

Provision of law relating to the corrupt practice of appeal on the ground of religion, caste, etc. is a peculiar feature of Indian election law.²³ In *Z.B. Bukhari v B.R. Mehra*²⁴ the court examined the role of religion in the modern world.²⁵

²¹ Misuse and manipulation of religion and religious symbols for political ends.

²² Teesta Setalvad, Human Rights Under the Modi Regime, K.G.Kannabiran Memorial Lecture, People's Union for Civil Liberties - T.N. & Puducherry (PUCL)

²³ Akhil Kumar, Election Laws and Corrupt Practice in India, International Journal of Multidisciplinary Approach and Studies, Volume 01, No.5, Sep - Oct 2014

²⁴ AIR 1975 SC 1788 at 1800.

²⁵ Primitive man does practically nothing without making it wear a religious garb because his understanding of physical world, of human nature, and of social needs and realities is limited. He surrounds customary modes of action with an aura of superstitious reverence. He is fearful of departures from these lest he is visited by Divine wrath. Modern man, with his greater range of scientific knowledge and better understanding of his own needs as well as of the nature of the Universe, attempts to confine religion to its proper sphere—that where he reaches a satisfying relationship between himself and the Divinity he believes in so as to get an inner strength and a solace which enable him to overcome psychological crises or fears when confronted with disturbing or disrupting events, such as a Death, or their prospects. He does permit his religion which should be essentially his individual affair to invade what are properly the spheres of law, politics, ethics, aesthetics, economics and technology.

(A) Corrupt Practices and Religion

The approach of the Supreme Court to the issue of whether the use of the term ‘*Hindutva*’ or ‘*Hinduism*’ in an election speech could be treated as an appeal on the ground of religion had generated some controversy. Though the decision of the court in *R.Y. Prabhuo*²⁶ created an impression, at least among some sections of society, that the Supreme Court had taken a lenient approach towards misusing religion for electoral gains, a critical analysis of the decision establishes a contrary view. The commitment of the court to preventing the misuse of religion for electoral gains is evident from the very fact that the appellant’s election was set aside on the ground of committing the corrupt practices of appeal on the ground of religion and promoting enmity and hatred between different classes of citizens. However, the court took the view that mere reference to any religion in an election speech would not come within the purview of corrupt practice.

(B) Abiram Singh versus CD Commachen Case

The Supreme Court of India in 2017 affirmed that politicians cannot seek votes based on caste, creed or religion, the court did so by revisiting its earlier judgments with special reference to the 1996 judgement that called *Hindutva* and *Hinduism* the same and a ‘way of life’. Whether a religious leader’s appeal to his followers to vote for a particular political party would amount to electoral malpractice under section 123 of the Representation of people’s Act.

Section 123(3A) says: “*The promotion of, or attempt to promote, feelings of enmity or hatred between different classes of the citizens of India on grounds of religion, race, caste, community, or language, by a candidate or his agent or any other person with the consent of a candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate.*”²⁷

The Supreme Court’s judgement in *Abiram Singh v CD Commachen*²⁸ widened the ban on sect-based appeals by political leaders and can be seen as a welcoming step towards the constitutional idea of Free and Fair Elections. Appeals to vote on the basis of religion, caste, community, race and language have been banned in some form or the other by the RPA 1951, the true scope of the same can be seen clearly in the 2017 judgement.

Like any other landmark judgement in the history of India that talks about any constitutional ethos, this one too has a majority and a minority opinion. The majority opinion being that

²⁶ 1996 AIR 1113, 1996 SCC (1) 130

²⁷ Section 123(3A) in The Representation of the People Act, 1951

²⁸ Civil Appeal No. 37 of 1992 (decided on Jan. 2, 2017)

Election campaigns should be as pure as they can be, in the form of an appeal to the citizens to vote for the best-positioned candidate and to ensure that the interests of all are protected and not a particular sect. The minority opinion is more connected to the long history of oppression in India, the divisions of the society that needs to be corrected by the state.

(C) The Hindutva Judgement

In *Ramesh Yeshwant Prabhoo v Prabhakar Kashinath Kunte*²⁹, J. Verma's analogy of describing 'Hindutva' as a way of life of the Indian people, and suggesting that the same doesn't amount to any enmity or tolerance towards other religions was even then a very controversial judgement because of the political affiliations the word Hindutva carried out then and carries out even today. In the judgement the word "his" in Section 123(3) was interpreted narrowly; only if the candidate appealed based on his affiliation with a caste would it amount to a "corrupt practice". Which is not a very sound analogy to draw. In the Abiram judgement, "the court has set aside the said interpretation of the law and held that Prabhoo is no longer a good Law. While the parties did not challenge the constitutional validity of section 123(3), the debate raised one final question whether the contents of appeals during an election campaign be regulated by law?"³⁰

Even if these calls or appeals are not per se for violence or religious appeasements but the same pose a question as to the secular nature of India as mentioned in the constitution. The idea of being an Indian is far wide and diverse than we could decipher. "The premise is that we are all some combination of our caste, tribal, religious and linguistic identity, co-existing uneasily under one common government inherited from a coloniser. Perhaps that is true."³¹

The Constitution provides for the *doctrine of colourable legislation* based on the maxim that what cannot be done directly cannot also be done indirectly. The appointing and nomination of religious 'Gurus' to contest an election violates the intent of section 123(3) of the RPA, 1951 without even literally violating it. The cult following and the force of religion on us Indians is much more than in any other country, for that matter. The informal use of religious attires and clothing along with the unchecked use of election language is the biggest lacunae as of today. The ruling government has left no stones unturned to violate this section to its fullest, from questioning the caste of the opposition candidates to using statements like 'If Cong, SP have faith in Ali, we have Bajrang Bali'.

²⁹ Supra note 24.

³⁰ Alok P Kumar, Sectarian Appeal Judgment — Interpreting Representation of the People Act to its Intended Effect, Economic and Political Weekly, Vol. 52, Issue No. 1, 07 Jan, 2017

³¹ Ibid

Section 123(3) is the direct result of the secular fabric of the constitution mentioned in the preamble as it is presumed that an elected representative, represents the general public and not the political party or the religion he adheres to. Under this pretext that India is a Democratic republic one would think that the accountability of an elected member would be towards the *rule of law* rather, today it has shifted to a very sorry state of the party above all concept.

V. CONCLUSION

The governance of a country defines and decides the status of the citizens for it through these elected representatives that we enjoy our freedoms and rights. Elections are an important mode to assert civil liberties, ensure justice and maintain law and order. The conduct of free and fair elections is the sine qua non of democracy and it ensures the constitutional spirit and good governance is always upheld at all costs. In a country as diverse as India, with an uneven spread of population with different socio-economic positions and political opinions, an election is the only tool to uphold equality and not uniformity. The recent rise of majoritarian politics and the diminishing federal distinction has ruptured the structure which forms a part of our democratic setup read with the basic constitutional spirit of 'power lies with the people'. It is in these trying times that the importance of free and fair elections be considered and constitutional values be upheld.
