SECTION 123(3) OF THE REPRESENTATION OF THE PEOPLE ACT, 1951: LEGAL RESTRICTION ON THE VOTE BANK POLITICS AND ITS IMPLEMENTATION

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ABSTRACT

To make the constitution a working document for any country we need good people. People who cherish constitutional values and morality, in every segment of and authorities under the Government. Parliament or State Legislatures are also not exception to this. Nowadays, the members of these Houses are representing the lesser standards than what is required for a democracy. Pending criminal cases, allegations of moral turpitude and grafting of public money, and other political allegations – are the common instances revolving around the members of Houses. However, for keeping thedemocracy alive the entry or mode of entry should be regulated. 'The Representation of The People Act, 1951' (*hereinafter referred to as 'RP Act'*) tries to regulate the same and it provides for the qualification and disqualification for the membership of the Houses along with corrupt practices and other offences in relation to the same. This paper is concerned with the corrupt practices and sectarian appeals in specific.

Keywords: Elections, Corrupt practices, freedom of expression, ballot.

INTRODUCTION:

A person having morality and ethical values shall be selected on his own merit, obtaining the positive votes and not by eliminating the other candidates based on their demerits. It is popularly said that, free and fair elections are the soul of any democracy; whereas elected members are the voice of people in their respective constituencies. Electoral process allows us to elect a better and popular voice. However, it is important to adhere to certain minimum societal and constitutional standards because there are certain acts which would vitiate the purity of elections and democracy in general due to their corrupting influences on the election results. These acts are termed as a 'corrupt practice'. The term 'corrupt practices' as used in reference to the RP Act does not only include the general meaning but also adulteration of the principles of good governance. Such practices could pollute the sanctity of democracy and in this particular case, the basic foundation of secularism of this country, upsetting the constructions of the governance. There are certain practices which have been categorically recognized as corrupt under Section 123 of the RP Act. Under the same provision, appeal to vote on the grounds of religion, race, caste etc. falls under the ambit of 'corrupt practices' as mentioned in clause (3).

The purity of elections can be maintained by the political parties by observing the norms and rules of electoral morality and by strictly not indulging into or allowing the members or supporters to indulge into, any corrupt practices or electoral offences by maintaining the high moral standards of the election campaigns.

Thus, the section positively prohibits any appeal to vote or refrain from voting on the basis of '*caste, religion, community or language*', by making it a corrupt practice as, such candidates would not only violate the principle of fair elections but also weaken the basic foundations cherished by both, our founding fathers and our sacred Constitution.

CRITICAL ANALYSIS:

LEGAL AND HISTORICAL PERSPECTIVE OF SEC 123(3)

The original RP Act, as it was in 1951 had a clear distinction between minor and major corrupt practices. Initially the Act contained *eight*-categories of major corrupt practices under Sec. 123, they were: (1) bribery, (2) undue influence, (3) bogus voting by

personation, (4) unauthorized removal of ballot paper from a polling station, (5) publication of a false statementrelating to a candidate, (6) free conveyance of voters, (7) incurring of election expenditure in excess of the prescribed limit and (8) seeking the assistance of government servants.

The provision for minor corrupt practices included - (1) personation at an election, (2) receipt of bribe, (3) filing of false return of election expenses and (4) 'systematic' appeal on grounds of 'caste, race, community or religion' was included in sec. 124(5) of the Act.

Nevertheless, in 1956, both the provisions were amended and the distinction of major and minor practices was removed. The amended provision, however, retained the word 'systematic' as it was previously mentioned in Sec. 124 (5). The provision also used the wordings as – "*such appeal made by the candidate, his agent or any other person*". As these wording would have extended the scope of the section by providing a wide web of restrictionsincluding the instances where any person who is not even distinctly related to the candidate orsomeone who is unauthorised, has made any sectarian or communal appeal in the name of thecandidate. Therefore, the act was again amended years in 1961.

However, in 1961, the Act was amended again. The amendment was passed with the purpose of establishing secular democracy and adoption of fair modality along with controlling the communal and separatist tendencies for the elections. The Clause note appended to the amendment of the RP (Amendment) Act, 1961 for Sec.123, 125, 139 and 141 states the same.[3]Moreover, It parted away with the word, "Systematic" and substituted the grounds appearing in Sec. 123(3) as 'caste, race, community or religion' with 'religion, race, caste, community orlanguage'.

Later also, the scope of ambit of corrupt practices under the Act kept on increasing. Other practices such as creating enmity and hatred between different classes, glorification or propagation of Sati and booth capturing were added under the title of 'corrupt practices' by amending the Act in 1961, 1988 and in 1989 respectively. However, the paper is not directly concerned with them.

Therefore, it can be said that, Sec. 123(3) was enacted in order to eliminate the appeal which found to be disruptive in an electoral process, that run opposite to the basic tenets of ourconstitution and the socio-political order of the country. Whereas, to pay respect towards

the believes, practices, races etc. is another of the basic postulates of our constitution and thus, thebalance is to be maintained. As it was rightly stated in the case of "***Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra & Ors"***[1] that, *"Under the guise of protecting your own religion, culture or creed you cannot embark on personal attacks on those of others or whip up low hard instincts and animosities or irrational fears between groups to secure electoral victories."*

NATURE OF SEC 123(3): RECOUNTING THE PRACTICE THROUGH LENSES OF TRULY-CRIMINAL, NON-CRIMINAL AND QUASI-CRIMINAL:

Since a long time, religion has played fundamental role in human conduct. It is claimed that, religion has helped in development of personality, structuring social life of mankind. Doubtlessly, it played a very dominant role in political process as well. However, the modern practices suggests that, in today's World, religion should have a secondary and minimum play and should only be limited to personal life. This statement gains much importance in countries with huge diversity and religious plurality, like India. Religion and State in general, should bekept, necessarily, at a safe distance from each other. Similar notion was put-forth by Justice H.M. Beg in the case of *Ziyauddin Bukhari* that, *"Primitive man does practically nothing without making it wear a religious garb because his understanding of physical world, of humannature and of social needs and realities is limited. He surrounds customary modes of action with an aura of superstitious reverence. However, in a modern and secular State, religion playsvery minor role in political process. 'Secularism' allows citizens to profess, practice and propagate the religion of their choice, subject to certain limitations."* He further stated that *"topermit such propaganda would be not merely to permit undignified personal attacks on candidates concerned but also to assault on what sustains the basic structure of democratic State."* It is thus, important to maintain the high standard of elections and strict observance of S. 123(3) of RP Act. It can be seen from the examples mentioned in Part-IV of this paper that,the mandate of law is being violated. But before moving to that, let us first understand the nature of the provision For that, dissenting view in ***"Abhiram Singh v. C.D. Commachen (Dead)"***[5] is important (the judicial outcome of this case was discussed in next Part of this paper). The viewemployed the strict and literal interpretation for Sec.123(3) of RP Act and construed that, the word '*his*' refers to the '*candidate or his rival*' and not to the elector. The rationale for such aninterpretation was comparison of Sec.123(3) with a criminal

[1] A.I.R. 1975 S.C. 1778 (India).

statute. It is well-settled principle that, criminal statutes must be interpreted strictly. However, the Court was of the opinion that,under Sec. 123(3) r.w. Sec.100 of the RP Act - the guilty person for practicing corrupt activities, can be debarred up to 6 years and can also debarred from voting during the same period. The Court was of the opinion, that these consequences are harsh and impose a disability, but are not strictly criminal in its nature, thus they have a '*quasi-criminal*' character. These provisionstherefore require strict interpretation. In such cases, if the dissent is to be adopted, every-time dealing with the case, the Court has to adopt such possible stand which inflicts minimum harm.

No doubt that the RP Act contains provisions which provide for punishment and penalsanctions. However, Sec.123(3) is related and limited to - disqualification only and not punishment. Irrespective of seriousness it cannot be is comparable to a criminal provision, because doing so is against the legislative intent. However, the dissent referred the case of '***Bipin Chandra Patel v. State of Gujarat***'[6]. In this case, court disallowed any broad purposiveinterpretation. Relying on this, the dissent followed the restrictive interpretation of Sec.123(3).

An expansive interpretation given to criminal enactment runs the danger of expandingthe authoritarian domain of State. It is, therefore, contended that one must be careful and not rush to characterize the existing Sec.123(3) as a criminal provision. Unnecessarily restricted interpretation would thwart the rationale of the provision, which is to make governance ethical and just. Moreover, the idea of quasi-criminal law as a justification for restrictive interpretationis an extremely problematic juristic technique used in the dissent to arrive at its conclusion. This is because it jeopardizes the concept of quasi-criminal offences in criminal law. The concept of quasi-criminal offence is not adequately developed in the criminal jurisprudence asyet.

However, Courts in England in some cases, created a distinction between 'quasi' and 'truly' criminal offences. According to English Courts, the 'quasi-criminal' offences is an expression attributed to those regulatory offences which do not have imprisonment as a form of sanction. Therefore, for effective implementation of the regulatory laws for which punishment is not prescribed, however, there may be fine as a form of sanction, the courts havecreated such a distinction. This distinction is applied in England to interpret quasi-criminal offences as one of strict liability in order to strictly attain the regulatory purpose of

the law. However, "where an offence carries a penalty of imprisonment, it is more likely to be considered 'truly criminal' and so less likely to be interpreted as an offence of strict liability." This is the context in which the English courts have discussed the notion of quasi-criminal offences.

What is at stake here is democratic and ethical election practices which are to be promoted. Therefore, restricting the meaning of the provision by resorting to the reasoning of quasi-criminal offences is both erroneous and out of context. Moreover, suggesting that ethicalpractices in electoral campaign can be diluted as the provisions are quasi-criminal is torestrictthe idea of governance-oriented secularism, which is what unfortunately the dissent ends up doing. One can only hope that the argument of quasi-criminal provisions as employed by the dissent should not become a precedent for the dilution of ethical principles by interpreting themin a restrictive manner.

Nevertheless, the dissent finds its best articulation when it discusses the role of identities in public space in the electoral context. This is where the dissent receives its appeal and persuades many. It says, Sec.123(3) doesn't prohibit discussion but appeal to vote on the prohibited grounds. Discussion of matters pertaining to grounds, which are of concern to the voters is not an appeal on those grounds. After an extensive discussion on the importance of caste, religion, race, language in the public sphere and the constitutional context, the dissentingopinion went on to suggest that there are sound constitutional reasons which militate against section 123(3) being read to include a reference to the religion, etc. of the voter. Hence, it is not proper for the court to choose a particular theory based on purposive interpretation, when that principle of interpretation does not necessarily lead to one inference or result alone. However, here is a glitch because, dissent presumes that inclusion of the appeal to voter withinSec.123(3) would mean a ban on the discussion of identities from the public discourse. But thisis not the consequence of the inclusion of the voter/elector within section 123(3).

The Dissent, though tried to give the appealing reasons, it suffers from flaws. However,the base on which the dome of reasons was build, was a truly constitutional i.e. seriousness toward the secular nature of Constitution. This being the case, the attempt must be made on thelegislative part to change the nature of the provision concerned and to take the provision seriously. The nature of the provision should be shifted to truly-criminal or

quasi-criminal. However, the same cannot be done by expanding the language or re-writing the legislative intent by Courts.

EXTENT OF IMPLEMENTATION: A CONTEXTUAL ANALYSIS

In recent past, the provision concerned is proving to be 'toothless tiger', as there were instances in which the politicians who are making the campaigning during elections, made statements which are legally impermissible but got unpunished. This part intends to do the contextual analysis of the same. However, let us understand the prevailing legal matrix.

It would be sufficient to consider two judgments of the Supreme Court, which will make picture amply clear. (1)*"**Kultar Singh v. Mukhtiar Singh**"*[9] *and (2)* "***Abhiram Singh's Case***".

In Kultar Singh's Case, the Court was faced with the challenge of interpreting the word 'Panth' used in the pamphlet which, according to the respondent, was intends to appeal tothe voter, to vote in favour of appellant whereas, the 'Panth' was meant to be Sikh religion and thus a corrupt practice. The Court held that, the appellant's party, through the impugned pamphlet intended to seek the creation of the 'Punjabi Suba' and thus, if voters returned the appellant, the ideal of the Punjabi Suba attained. Court's observation in this case is very interesting one. It was observed that, when an appeal is made to voters to vote for a candidate on ground of his religion or that of voters; or saying that, though the rival candidate may belong to the same religion, was not true to religious tenets – is a corrupt practice under Sec. 123(3) of RPA. However, interestingly enough, the Court also observed that, in the instant case, plea for 'Punjabi Suba' was a political issue and a political party is justified in holdinga divergent opinion; moreover, in the context of the pamphlet, the word 'Panth' does not mean Sikh religion and thus, the submission that, by distributing this poster, the appellant appealed to his voters to vote for him because of his religion, was rejected.

In Abhiram Singh's Case, the Court was engaged with the interpretation of word *"his"* as is used in the provision. Before going to judgment, let us consider one more fact. In 1995, the Supreme Court while approving the use of 'Hindutva' during election campaigns, interpreted the word 'his' in Section 123(3) of RPA to restrict the prohibition only to the candidate's religion. It allowed for appealing to the voter on the grounds of their

religion, caste and community. In any event, appealing for votes in the name of the Hindu religion of the voters is an offence under Sec 123(3), irrespective of whether the speaker also spoke about the religion of the candidate in the course of the same appeal.

This proposition has been reversed now, in 2017 Judgment. The Seven-Judge Bench dealt with the question – whether a candidate at an election, could appeal for votes on the basis of the religion of the voter, and still not invite the disqualification clause of the RPA, 1951. This question divided the bench in 4:3 ratio. The majority answered in negative. Whereas the minority answered in affirmative. The majority was of the opinion that, the word'his', as it appears in the provision, must be construed to include the - religion, race, caste, community or language - of the voters as well. The minority, however, was of the opinion that, the word 'his' should be so construed to mean (i) the religion of the candidate only - if the appeal is to vote in his *favour*, or (ii) the religion of his rival candidate - if the appeal is to vote *against* him. The appeal on grounds of 'religion, race, caste, community or language' is not a corrupt practice if none o the two ingredients are satisfied.

The prevailing opinion is that, an appeal to voters on the basis of either the candidate's or the voter's religion, to vote in favour of the candidate's party or not to votein favour of a rival party, constitutes a corrupt practice.

Secondly, the leader cannot take shelter of the plea that he did not appeal on the basis of *his own* religion, or that of the particular candidate, or even against that of the rival candidate/s. In the wake of the Supreme Court's verdict in *Abhiram Singh*, an appeal – on the basis of the voters' religion – to vote against a rival political party will equally be violative of the provision, irrespective of whether the speaker makes a reference to his own religion or that of the candidate's. In wake of all these facts and legal matrix, the inactiveness of the Election Commission of India is worrisome.

STRENGTHENING CONSTITUTIONAL RESTRICTION ON VOTE BANK POLITICS

The concept of Secular Democracy - promised under the Indian Constitution, for purityof elections is mandatory in order for a Democracy to thrive and succeed. It is a must for the Election and other legislative bodies to be kept free and away from unhealthy corrupt practicesand influence of unhealthy appeals based on religion race, caste, community or

language that could have devastating effect on a country and its constitution. The influence of caste and religion which has led to communalism of politics is nothing but a new form of 'divide and rule'. Thus, communalism of politics is a major concern for the security of people from the forces within and from forces outside the country. The communalism and caste-based politics has crossed all barriers which can result into an unknown alarmingly dangerous situation.

It is clear from the incidences happening in our surrounding that, we as a society, havedamaged our democracy and it is rather better to correct the position at this stage itself. It is thedamage-control stage. Reputed and key position holding political leaders making such sever statements, which are capable of disturbing the democratic fabric and getting away unpunishedis unacceptable.

However, the inefficiency and unwillingness of ECI has been pointed out from time-to-time. During 2019 Lok-Sabha elections, Supreme Court questioned the ECI, as to what steps were taken, regarding few star-campaigners for different political parties in UP who allegedly made hate-speech, one of whom was the sitting CM of the State. He used the word '*hara virus*' with reference to Indian Union Muslim League, and used the name of '*Bajarang Bali*' during campaigning. Given the show-cause notice, the CM admitted use of such terms. In consequences of the events, ECI came-up with the order. Interestingly, vide same order, ECI barred the CM from campaigning only for 72 hours. Similar is the case with BSP leader Mayawati who faced the ban for 48 hours.[14] Maneka Gandhi, who was the Union Minister forWomen & Child Development, was also barred from campaigning for 48 hours.

The fact that, the mere 48 hours or 72 hours' bar won't be sufficient. It is also important to note that, the power of ECI is very limited. It can issue show-notice and seek the reply in that behalf but it cannot de-recognize a party. This makes the ECI toothless.[16] To deal with this, we need the strong law and a structural change. The point of law was discussed in part IIIof the paper. Now let us consider the structural change required.

The obvious solution that follows from the above stated difficulties in enforcing the provisions of RP Act is that there is an imminent need for composition of an independent adjudicatory body that will decide upon matters relating to elections of members to the Houseof Parliament and State Legislatures.

The Supreme Court recently in 2020 while seized of the matter pertaining to disqualification under Xth Schedule took note of this fact in ***"Keisham Meghachandra Singh vs. The Hon'ble Speaker Manipur Legislative Assembly & Ors."***[17] It observed as follows: "Parliament may seriously consider amending the Constitution to substitute the Speaker of theLok Sabha and Legislative Assemblies as arbiter of disputes concerning disqualification whicharise under the Tenth Schedule with a permanent Tribunal headed by a retired Supreme CourtJudge or a retired Chief Justice of a High Court, or some other outside independent mechanismto ensure that such disputes are decided both swiftly and impartially, thus giving real teeth to the provisions contained in the Tenth Schedule, which are so vital in the proper functioning ofour democracy.

It must be also noted that under the original RP Act, there was a provision for election tribunal but it had various structural defects and its functioning caused more problems than itsabolition. It was abolished in the year 1966 on the basis of report on general election 1962 submitted by Election Commission. As noted above if the election commissions feel itself ill-equipped to enforce the provisions of act it would be better to establish a completely new independent adjudicatory body to deals with disqualification of Members of Parliament and State legislature at national level. For the sake of convenient, all the matters such as deception, corrupt practices, election offences, etc. could be decided by the single body with uniform standard.

CONCLUSION

It has been very rightly said that "The ballot has more power than the bullet", which onlyemphasizes how critical free and fair elections, devoid of corrupt practices are, for a smooth democracy. While S.123(3) of the Act makes a clear provision enlisting the instances that would account for "corrupt practices" during elections, it entails only disqualification for the occurrence of the same and no form of punishment. As suggested by J. Chandrachud in his dissenting opinion in the *Abhiram Singh* judgement, if the aforementioned corrupt practice, does ever to be read as a quasi-criminal activity, a concept which has not been explored and established in India, then the transcending boundary and the consequent punishment has to belaid down by the legislation, the judiciary does not have the power to rewrite the law and changeits nature, irrespective of its dire need. Moreover, the establishment of a unique and independent body to adjudicate matters in this regard would

pave the way for efficacious and honest elections, it would further enable speedy disposal of such matters, as their obvious nature demands. The body must also lay down uniform standards, that would give much neededclarity to this subject matter. Lastly, it is crucial to have a responsible representative who sharesthe secular values of our constitution because running a diverse country like ours, without it, would be impossible.