NOTES AND COMMENTS

RELIGION, GOVERNANCE AND CORRUPTION: AN ANALYSIS OF THE JUDICIAL REASONING IN THE ELECTION JUDGMENT

Abstract

This paper seeks to diagnose how legal reasoning can delude itself through its own discursive practices, failing to deal with the issues which it claims to address. It analyses the judicial discourse of the Supreme Court in *Abhiram Singh* decision (2017) which dealt with the issue of corruption through the use of identities in elections. The larger argument of this paper is that the majority judgment, despite its important pronouncement, failed itself by its own reasoning. The paper argues that one has to rescue the majority decision against itself or against its own reasoning in order to make sense of social context adjudication in the wake of the issue of corruption in elections.

I Introduction

ON JANUARY 2, 2017, a seven judge-bench of the Supreme Court delivered an important judgment which is significant for the future of the electoral campaigns in India. The case of *Abhiram Singh* v. *C.D. Commachen*[1] dealt with the interpretation of section 123(3) of the Representation of the People Act, 1951 (RPA). Section 123 (3) of RPA prohibits "the appeal by a candidate or his 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…for the furtherance of the prospects of the candidate or for prejudicially affecting the election of any candidate."[2] The section thus prohibits, among other things, religious speech and religious symbolism to enhance electoral prospects. In the present case, the issue before the court was whether "his" (which includes "her") is to be understood as relating only to the candidate and his rival's religious (or other) identity or, would it include the religion of the voter/ elector as well. In other words, would the prohibition of sectarian or corrupt appeal contemplated by section 123 (3) of the RPA extend to the voter's identity as well or, is it limited to candidate and his/her rival?

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1 Civil Appeal No. 37 of 1992 (decided on Jan. 2, 2017). All citations and references of the case in this paper are taken from the judgment downloaded from the Supreme Court website. *Available at*: http://judis.nic.in/supremecourt/imgs1.aspx?filename=44451.

2 The Representation of the People Act, 1951, s. 123(3).

Theoretically, the judgment adjudicates on both the prospects and limits of identity politics and its relationship with electoral gains for candidates. To what extent can religion, caste and other identities, prohibited by the election law, be employed during an electoral campaign? What is a corrupt electoral practice as per law? Does the electoral appeal prohibited by law contemplate prohibitions relating to the individual candidate and his identity or, is it a general prohibition against the use of identities? Given the significance of this decision for electoral politics in India, this paper seeks to decode the judgment through a closer scrutiny of the interpretive tools employed in the judicial discourse. Moreover, the discourse is fractured as the "decisive" decision was reached only by a thin majority of 4-3 judges. There are three separate majority judgments delivered by T.S. Thakur CJI, S.L. Bobde J and Madan Lokur J (speaking for himself and L. Nageshwar Rao J), and a detailed dissenting opinion of D.Y. Chandrachud, A.K. Goel, and U.U. Lalit, JJ (authored by Chandrachud J).

Section 123 (3) of the RPA aspires to define corruption or "corrupt practices" in a fundamentally distinct fashion. Corruption here is not the ordinarily understood notion of private use/ benefit of public resources but an adulteration of the principles of democratic governance. It is not the financial misuse or betrayal but the contamination of citizenship that is understood as corrupt speech in this particular provision. A "corrupt practice should be understood in the light of regime principles, those constitutive commitments that establish a polity's constitutional identity."[3] Section 123 (3) of the RPA designates as "corrupt practice" any use of identities for petty electoral gain because this constitutes a threat to the plurality of the society. Such corruption can contaminate the democratic framework and, in this case, secular foundations of society itself, thwarting the structures of governance.

The question then is what are the limits of the use of identity (in this context, religious identity) during electoral campaigns? Both the law and its interpretation require a clear understanding of the limits to speech or symbolism in elections. Needless to say, identities *per se* are not an anathema to electoral politics. Indeed, identities of caste, language, religion are important to ensure that political parties' commitments to the elimination of identity-based discrimination are respected and applauded. Therefore, it is not merely the "furtherance of the prospects of the election" but also the use of "corrupt practices" that is contemplated by section

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3 Gary Jeffery Jacobsohn, *The Wheel of Law: India's Secularism in Comparative Constitutional Context* 165 (Oxford University Press, Delhi, 2003).

123(3). This point is made explicitly by the Supreme Court in *Ramesh Y. Prabhoo* v. *Prabhakar K. Kunte*:[4]

> It cannot be doubted that a speech with a secular stance alleging discrimination against any particular religion and promising removal of imbalance cannot be treated as an appeal on the ground of religion as its thrust is for promoting secularism.

This clarifies that the idea of banning the invocation of identities during the electoral campaigns and sanitizing electoral settings is unconstitutional and undesirable for emancipatory politics in pluralist societies. An ameliorative or emancipatory use of caste, religious or linguistic identity, for instance, would strengthen the democratic foundations and constitutional aspirations and the plural and syncretic ethos of the Indian polity. Upendra Baxi describes this search for limits of permissible speech as a part of governance-oriented secularism (hereafter, GOS).[5] GOS seeks "to codify the limits of political parties that craftily appeal to religion as a resource for the acquisition, exercise and management of political power…[It] remain[s] focussed on the preservation of the integrity of secular governance structures and processes."[6]

This is what section 123 (3) of the RPA does by prescribing limits in order to check electoral corruption. In this backdrop, this paper seeks to closely analyze the case to examine how, if at all, the three majority opinions are in conversation with one another and with the dissent. What are the logics and ill-logics of these opinions? In a decision which otherwise runs into 113 pages, what are the silences, the *unsaid amidst the said*, within the larger political understanding of secularism that the case seeks to protect? The paper also analyzes the dissenting opinion, its popular appeal as well as pitfalls. The overall argument of the paper is that both the judgment and discourse of *Abhiram Singh* fail to live up

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4 (1996) 1 SCC 130, para 16 (per J.S. Verma J). This case is popularly known as the *Hindutva* case as the Supreme Court in this case adjudicated on the contentious question of whether the appeal of *Hindutva* would constitute prohibited speech under s. 123(3) of the RPA. The court decided the question in the negative arguing that *Hindutva* or Hinduism does not constitute any religious appeal as these are at best "a way of life" and not religion.

5 See Upendra Baxi, "Savarkar and the Supreme Court?- Comment on R. Sen's *Legalizing Religion"* East-West Centre, Monograph Series (Washington D.C., Mar., 2007).

6 Upendra Baxi, "Understanding Constitutional Secularism in 'Faraway Places': Some Remarks on Gary Jacobsohn's The Wheel of Law" 1 *Indian Journal of Constitutional Law* 240 (2007).

to the expectations which one has from the highest court of the country when it is called upon to adjudicate upon such an important electoral issue of contemporary significance.

II Legal and historical context of section 123(3) of the RPA

The RPA was enacted in 1951. It originally distinguished between major and minor corrupt practices. The provision prohibiting identity-based electoral appeals (originally section 124(5) formed a part of 'minor' corrupt practices) defined the following as a corrupt practice:

> Section 124 (5): The systematic appeal to vote or refrain from voting on grounds of caste, race, community or religion or the use of, or appeal to, religious and national symbols, such as, the national flag and the national emblem, for the furtherance of the prospects of a candidate's election.

Clearly, this provision required a "systematic appeal" for procuring electoral gains. A *systematic* appeal must be understood in opposition to an isolated identity-based appeal which is the law at present. The first major amendment to the RPA took place by the amendment Act of 1956 which removed the distinction between minor and major corrupt practices. The amended provision retained the requirement of "systematic" appeal but the provision contemplated that such appeal may be made by the candidate, his agent or by "any other person."[7] This broad formulation would have spread a wide web of prohibitions, to even include instances where someone unauthorized by or unconnected to the candidate indulged in sectarian or communal appeal. This broad frame was constricted by another amendment within two years in 1958. This amendment Act inserted the words "with the consent of a candidate or his election agent" after "any other person" in order to restrict the scope of prohibited appeal.

In 1961, the RPA was again amended. The 1961 amendment was passed with the objective to "curb communal and separatist tendencies in the country" as well as to "widen the scope of corrupt practice" under section 123(3) of the RPA.[8] These objectives, as discussed later in the paper, became important in

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7 S. 123(3) of the Act (as amended in 1956) read as follows: "The systematic appeal by a candidate or his agent or *by any other person* to vote or refrain from voting on grounds of caste, race, community or religion or the use of, or appeal to, religious symbols…for the furtherance of the prospects of that candidate's election" (emphasis added).

8 *Abhiram Singh, supra* note 1, para 21 (per Lokur J).

the purposive interpretation of the majority (which provided a broader interpretation to section 123(3)). The amended section is as follows:[9]

> Section 123 (3): The appeal by a candidate or his agent or by any other person with the consent of a candidate 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.

Some of the important textual changes that were brought about by the 1961 amendment Act included: the removal of the word "systematic" from the section, thereby enlarging the scope of the prohibition; in the list of prohibited identities in the section, "language" was added (this again broadened the scope of the section by disallowing soliciting votes on linguistic ground for the "furtherance of prospects of election of that candidate"). The candidate was prohibited for seeking votes "for any person" on the grounds mentioned in the section. Further, the pronoun "his" was added to prohibit the candidate from soliciting votes "on the ground of his religion, race, caste, community or language."

In a catena of previous decisions of the apex court,[10] the word "his" was interpreted to be candidate-centric only (to the exclusion of the voter). However, a contrary view was taken by the apex court in some other cases.[11] Unfortunately, these varying decisions were not in conversation with each other. This led to two different lines of cases interpreting the same section of the RPA differently. The restricted interpretation reduced the scope of the section to only include "positive speech", seeking votes by exhorting the *candidate's* identity (religious or any other), or "negative speech" imploring the voters not to vote for the *candidate's rival* due to his/ her identity. By reading the prohibition as limited to the individual candidate or his rival's identity only, this line of cases rejected

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9 S. 123(3) of the RPA as it reads today (emphasis added).

10 *Jagdev Singh Sidhanti* v. *Pratap Singh Daulta* (1964) 6 SCR 750; *Kanti Prasad Yagnik* v. *Purshottamdas Patel* (1969) 1 SCC 455; *Ramesh Y. Prabhoo* v. *Kashinath Kunte*, *supra* note 4.

11 *Kultar Singh* v. *Mukhtiar Singh,* AIR 1965 SC 141; *S.R. Bommai* v. *Union of India* (1994) 3 SCC 1, para 149. P.B. Sawant J noted "it is clear that appealing to any religion or seeking votes in the name of any religion is prohibited by the two provisions."

the possibility of prohibiting electoral speech on the ground of elector's/ voter's religion.

This issue has been settled with *Abhiram Singh*. The majority, in a broad and purposive interpretation, has given an expansive reading to the provision, thus prohibiting any appeal directed at the elector's (religious or other) identity. The dissenting opinion, on the other hand, adopting strict and literal interpretation, decided that "his" cannot be extended to voter's/ elector's religious identity. The following sections of the paper analyze the reasoning of the four separate opinions delivered by the court in this case.

III Follies and charms of the dissenting opinion

The extensive dissenting opinion of the court has received favourable response in some academic writings.[12] Chandrachud J, along with A.K. Goel and U.U. Lalit JJ, explained the controversy arising out of the issue of interpretation of the word "his" in previous judgments. In this context, the dissent explained how previously the five-judge constitutional bench in the case of *Narayan Singh* v. *Sunderlal Patwa*[13] was unsure if the word 'his' in the section applies to the voters/ electors or is limited to the candidates? This is why the issue was referred to seven judge bench and the "reference to seven Judges is limited to the interpretation of Section 123(3)."[14]

After laying down the constitutional context of the RPA,[15] the dissenting opinion resorts to literal and strict interpretation of section 123(3) of the RPA. Therefore, it interpreted "his" both literally and strictly as referring to the candidate or his rival and *not* to the elector. The rationale for such an interpretation was based on the comparison of section 123(3) with a criminal

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12 See for instance, Gautam Bhatia "Of Missed Opportunities and Unproven Assumptions: The Supreme Court's Election Judgment", *available at*: https://indconlawphil.wordpress.com/2017/01/02/of-missed-opportunities-and-unproven-assumptions-the-supreme-courts-election-judgment/ (last visited on Feb. 30, 2017).

13 (2003) 9 SCC 300.

14 *Abhiram Singh, supra* note 1, para 2 (per Chandrachud J). Later in the paper, it will be discussed whether the limited nature of the reference precluded the court from discussing the contentious issue of *Hindutva* as an appeal that has communal or religious hue which may be impermissible under the RPA.

15 Art. 102 (1)(e) of the Constitution of India mandates that a person would be disqualified from being a member of either house of the Parliament if s/he has been disqualified under the provisions of any *law made by the Parliament*. Art. 191(1)(e) provides a similar provision with respect to the state legislatures. The RPA is an instance of "law made by the Parliament."

statute, which must be interpreted strictly: section 123(3) read with section 100 of the RPA may disqualify the person guilty of corrupt practices for up to six years. There is also a debarment from voting during the same period. Chandrachud J observed that these stringent consequences have a quasi-criminal character. This quasi-criminal character, according to him, requires strict statutory interpretation. Placing its reliance on previous precedents and the English common law, the dissent approves the view that "if two possible and reasonable constructions can be put upon a penal provision, the Court must lean towards that construction which exempts the subject from penalty rather than the one which imposes penalty."[16]

No doubt that the RPA contains provisions which provide for punishment and penal sanctions.[17] However, section 123(3) is related to disqualification and not punishment. In the view of the dissenting judge, such disqualification from holding an office is so serious that it is comparable to a criminal law provision, even if it is not strictly criminal law. This is drawn from the reasoning of the Supreme Court in the case of *Bipin Chandra Patel* v. *State of Gujarat*[18] which was approvingly cited by the court.[19] Following this judicial precedent and the rule of statutory construction, the dissent followed the restrictive interpretation of section 123(3). This statutory interpretation disallowed any broad purposive interpretation. The meaning of the law, since it is quasi-criminal in character, must remain restricted within the confines of the literal meanings of the words used in the provisions of the statute.

How does one understand section 123(3) as having a quasi-criminal character? Can this section which does not prescribe any punishment be described as criminal law or quasi-criminal law? Can disqualification from the office be interpreted as akin to a penal provision? One of the cardinal principles of criminal law mandates strict interpretation of penal provisions to ensure that due process guarantees of the accused are safeguarded and there is no retroactive application of the law. An expansive interpretation given to criminal

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16 *Abhiram Singh, supra* note 1, para 11 (per Chandrachud J, citing *Tolaram Relumal* v. *State of Bombay* (1951) 1 SCR 158).

17 The 1961 amendment which amended s. 123 (3) also added s. 123 (3A). This sub-section deals with promotion of enmity during electoral campaign.

18 (2003) 3 SCR 533.

19 The court observed in *Bipin Chandra Patel* case that "a law leading to disqualification to hold an office should be clear and unambiguous like a penal law. In the event a statute is not clear, recourse to strict interpretation must be made for construction thereof." *Supra* note 1, para 12 (per Chandrachud J).

enactment runs the danger of expanding the authoritarian domain of state. It is, therefore, contended that one must be careful and not rush to characterize section 123(3) as a criminal law provision. Too restricted an interpretation would thwart the rationale of the provision, which is to make governance ethical and just.

Further, and more specifically, the idea of quasi-criminal law as a justification for restrictive interpretation is 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 as yet. However, courts in England in some cases, created a distinction between "quasi" and "truly" criminal offences. Jacqueline Martin and Tony Story in their book on criminal law explain the distinction created by courts in England between "truly criminal" and "quasi-criminal". The "quasi-criminal" offences is an expression attributed to those regulatory offences which do not have imprisonment as a form of sanction.[20] Therefore, for effective implementation of the regulatory laws for which punishment is not prescribed (there may be fine as a form of sanction), the courts have created 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, "[w]here 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."[21] This is the context in which the English courts have discussed the notion of quasi-criminal offences.[22]

However, in the context of the RPA, there is no issue of strict liability which confronts the court. Instead, the issue is whether the expression used in the statute should be accorded a broader meaning. Further, what is at stake here is democratic and ethical election practices 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 ethical practices in electoral campaign can be diluted as the provisions are

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20 Jacqueline Martin and Tony Story, *Unlocking Criminal Law* 93-95 (Routledge, New York, 2013).

21 *Id.* at 94.

22 See *Alphacell Ltd* v. *Woodward* (1972) 2 All ER 475 which deals with the notion of quasi-criminal offences in the context of river pollution by the company which the House of Lords found as guilty by making a distinction between 'truly' criminal and 'quasi' criminal offences.

quasi-criminal is to restrict the 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 them in a restrictive manner.

Nevertheless, the dissent finds its best articulation when it discusses the role of identities in public space in the electoral context.[23] This is where the dissent receives its appeal and persuades many. The dissent underscores the importance of the discussion on caste, religion, race or language in the electoral context. Undoubtedly, no law can attempt to sanitize the public space, in the electoral context or otherwise, of discussions of caste, religion *et al.* Non-discussion of caste or religion only reflects disregard of the social context which is deeply hierarchical. A discussion on these aspects is a must and only a privileged complacency can afford to dismiss such an important social discussion. What is prohibited by section 123(3) is not discussion but appeal to vote on the prohibited grounds. The dissent notes that "the statute does not prohibit discussion, debate or dialogue during the course of an election campaign on issues pertaining to religion or on issues of caste, community, race or language. Discussion of matters relating to religion, caste, race, community or language which are of concern to the voters is not an appeal on those grounds."[24] After an extensive discussion on the importance of caste, religion, race, language in the public sphere and the constitutional context, the dissenting opinion 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."[25]

It is submitted that this is where the dissent deviates into fallacious reasoning. The dissent presumes that inclusion of the appeal to voter within section 123(3) would mean a ban on the discussion of identities from the public discourse. But this is not the consequence of the inclusion of the voter/elector within section 123(3). This point requires further elaboration to understand the context in which one must consider identities and their use in public discourse.

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23 *Abhiram Singh, supra* note 1, para 21 (per Chandrachud J).

24 *Id.*, para 21.

25 *Id.*, para 22.

If an appeal is formulated in terms of emancipation of marginalized sections of society, then such an appeal would not fall within the limits imposed by the section. An individual who belongs to a lower caste and is asserting his caste identity to combat discrimination, s/he is merely pursuing a desirable act which is also constitutionally sanctified. To suggest even remotely that any such use of caste-based speech would fall foul of section 123(3) is absurd. Therefore, electoral appeal to the voter/ elector does not become "corrupt practice" merely by invocation of any identity. One has to demonstrate the nexus between identity invocation and its direct relationship with personal benefit to win the election. Such personal gain can also accrue by general appeal to the religion of the voter. It is only when such a nexus between identity evocation and furtherance of electoral prospects exists that the speech would fall foul under section 123(3). Therefore, it is perfectly possible, and desirable, to provide a purposive interpretation to 'his' such that the pronoun includes the voter/ elector without an erasure of identity politics from the public space.

An emancipatory appeal towards eradication of discrimination is both constitutionally permissible and ardently desirable. A dalit candidate's appeal against caste violence and soliciting of votes for the eradication of caste discrimination, though based on 'his' caste, should not be illegal, provided he can establish that the discrimination he sought to combat is real and a concern which is genuine and not merely to serve the prospects of winning the election. The court may either take judicial notice or adduce evidence to discern whether at the time of appeal the discrimination referred to, was real or fabricated to win elections and furthering communal or caste propaganda.[26]

Following the logic of the dissent, an appeal by a non-Hindu candidate seeking votes for establishing *Hindu rashtra* (Hindu nation), which may be his party line, is not necessarily an appeal to 'his' (or her) religion nor necessarily against his opponent (who might well be a Hindu). Such an appeal would be

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26 This point was made by Ashok Kumar Sen, the then law minister, who added the word 'his' in the proposed section. In his Lok Sabha speech cited in the dissenting judgment he said: "are we going to allow a man to go to the electorate and ask for votes because he happens to speak a particular language or ask the electorate to refrain from voting for a particular person merely on the ground of his speaking a particular language or following a particular religion and so on?…But if you say that Bengali language in this area is being suppressed or the schools are being closed…because they bore a particular name, then, you are speaking not only to fight in an election but you are also really seeking to protect your fundamental rights, to preserve your own language and culture. That is a different matter." Cited in *Abhiram Singh, supra* note 1, para 30 (per Chandrachud J).

permissible according to the dissenting opinion. Would this not be both against the spirit of the law and constitutional guarantee of India being a secular republic? This is why the logic of the dissent is deeply flawed. No wonder, following its own logic, the court approvingly cited the case of *Murli Manohar Joshi* v. *Nitin Bhaurao Patil*.[27] In the case, the candidate M.M. Joshi had stated in his electoral appeal that "the first Hindu state will be established in Maharashtra." The Supreme Court decided this case in his favour by resorting to the bizarre reasoning that such an exhortation does not amount to "corrupt practice" and though "despicable", it can at best be described as a "hope" and "not appeal for votes on the ground of his religion."[28]

This case was a part of the infamous *Hindutva* cases trilogy[29] and elicited severe criticism from both the bar as well as the academic community.[30] Despite such repeated criticisms, the manner in which the case found its way, approvingly, in the dissenting opinion is telling about the limits and possible dangers of the dissenting opinion. The approval of *Murli Manohar Joshi* also signals to deeply regressive possibilities. If 'his' is to be understood merely as the candidate or his rival, then an exhortation for generally creating a theocratic state - in this case, the Hindu state - would not be corrupt. An anti-constitutional aspiration would thus become permissible under section 123(3). In this sense, it seems quite logical that any discussion in general about the correctness of *Hindutva* decisions is absent from the script of the dissenting opinion.[31] Nevertheless, it should be clear that the concern of the dissenting judges that a broader or

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27 (1996) 1 SCC 169.

28 *Id.,* para 62 (per J.S. Verma J).

29 The other two being *Yeshwant Prabhoo* v. *Kashinath Kute* and *Bal Thackeray, supra* note 4.

30 See Brenda Cossman and Ratna Kapur, "Secularism's Last Sigh?: The Hindu Right, the Courts, and India's Struggle for Democracy" 38(1) *Harvard International Law Journal* 113 (1997); Rajeev Dhavan & Fali Nariman, "The Supreme Court and Group Life: Religious Freedom, Minority Groups, and Disadvantaged Communities" in B.N. Kirpal & Gopal Subramaniam (eds.), *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* (Oxford University Press, New Delhi, 2004); Gary J. Jacobsohn, *supra* note 3 at 163-202 (for a full exploration of various dimensions of *Ramesh Prabhoo*'s case). For a discussion on how the judgments conflated between Hinduism and *Hindutva,* see *supra* note 3 at 203-209 and S.P. Sathe, *Judicial Activism in India* 185-191 (Oxford University Press, New Delhi, 2002).

31 However, what is surprising is a similar absence from the majority opinion despite their engagement with the case on more technical terms- an issue which will be taken up when the majority opinion is discussed.

purposive interpretation would ban any possibility of discussion on social transformation is both unfounded and fallacious.

In the latter half of the judgment, the court emphasized the continuity of judicial precedent and the need not to disturb the trend of judicial decision-making unless there are compelling reasons to do so. The dissenting opinion acknowledged the fact that the nine-judge bench decision of *S.R. Bommai* v. *Union of India*[32] has interpreted section 123(3) differently. Nevertheless, it pointed out that "Bommai does not provide a conclusive interpretation of section 123 (3)" since the issue in that case was directly related to the sections.[33]

IV Making sense of majority opinion(s): An uphill task

The majority of the Supreme Court in *Abhiram Singh* decided in favour of a broader and purposive interpretation of section 123(3) of the RPA. Such a broad interpretation must include the identity of the elector/ voter within the scope of the prohibition of the section. Four judges in majority have written three separate opinions. This section will discuss these opinions to appreciate their argument and reasoning.

Madan Lokur J

The judgment delivered by Madan Lokur J (also on behalf of L. Nageswara Rao J) had to confront four principal submissions from the appellants.[34] *First*, the section should be given literal interpretation and "his" in the section should be confined to the prohibited identity of the candidate. *Second*, the section deserves a "restricted interpretation" as the consequences that follow, though civil in nature, are "quite severe." The consequences include annulment of the election of the candidate and a disqualification for a period of six years if the candidate is found guilty of taking recourse to corrupt practices. *Third*, the appellants argued that a broader or purposive interpretation "might fall foul" the constitutional guarantee under article 19(1)(a). *Fourth,* a broader interpretation would also mean disturbing the settled law and precedents which have preferred restricted interpretation. The court rebutting these contentions preferred the broader interpretation of section 123(3) of the RPA. However, in this sub-

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32 (1994) 3 SCC 1.

33 *Abhiram Singh*, *supra* note 1, para 43 (per Chandrachud J). In this context, the court also cited the case of *Mohd. Aslam* v. *Union of India* (1996) 2 SCC 749 where a three-judge bench decided not to reconsider the case of *M.M. Joshi.*

34 *Id.,* para 34 (per Lokur J).

section, the author would argue that the judicial reasoning has left many issues unclear.

With respect to the first argument, the court relied on an out-of-context English case to justify the purposive method of interpretation.[35] Though discussion on the use of foreign sources in judgment writing[36] is beyond the scope of this paper, it is important to state that a cross-jurisdictional dialogue on the RPA requires caution. RPA is a peculiar law for Indian circumstances which imagines campaign speech as "corrupt" and even provides punishment for certain forms of electoral speech. Such a legal conceptualization is unknown in many foreign jurisdictions.[37] Any discussion about the RPA has to engage with and respond to the Indian electoral circumstances. While Lokur J acknowledged the fact that the decision referred to has been "influenced in part by European ideas, European Community jurisprudence and European legal culture"[38] in order to provide purposive interpretation to the law, he went on to invoke a completely unrelated case from the UK![39]

How, one may ask, is relying on a decision unconnected to the issue apt, despite the fact that the statute under consideration is peculiar to the Indian conditions and politics? One wonders what stopped the judge in taking resort to purposive interpretation, by discussing corruption and secularism in the electoral context of Indian politics. That would have furnished the most authentic and valid ground for a broader interpretation. Instead of engaging carefully with the messiness of emerging electoral politics in India, Lokur J preferred relying on a distant and unconnected English precedent. Another justification given by Lokur J for purposive interpretation was that of the welfare state: "In a welfare State like ours, what is intended for the benefit of the people is not fully reflected in the text of a statute."[40] But the judge invokes this rationale without spelling out what is the *benefit of the people* arising out of the interpretation. It is submitted

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35 *Id.,* paras 36-37 (per Lokur J).

36 See generally, Madhav Khosla, "Inclusive Constitutional Comparison: Reflections on India's Sodomy Decision" 59 *American Journal of Comparative Law* 909 (2011).

37 See *supra* note 3.

38 *Abhiram Singh*, *supra* note 1, para 37 (per Lokur J).

39 *Ibid.* The judge referred to *Regina* v. *Secretary of State for Health (Respondent) ex parte Quintavalle (on behalf of Pro-Life Alliance) (Appellant)* (2003) UKHL 13, which dealt with the regulatory scope of Human Fertilization and Embryology Act 1990 addressing the issue whether live human embryos created by cell nuclear replacement (CNR) would fall within the regulatory legislation.

40 *Id.,* para 38.

that clear explanations by bringing in the electoral context and closely engaging with its complexity would have brought clarity and gone a long way in contextualizing the purposive interpretation.

Lokur J then distinguished RPA from statutes "that have a penal consequence and affect the liberty of an individual or a statute that could impose a financial burden."[41] Unlike the dissenting opinion, Lokur J implicitly denied the literal interpretation as RPA is neither a criminal statute nor does it put any excessive financial liability. Instead, he argued that the law "enables us to cherish and strengthen our democratic ideals"[42] and therefore an inclusion of the voter's identity within the prohibition is preferred. Considering how technological advancement and the increasing use of social media for electoral campaigns have opened up possibilities of exploitation, Lokur J remarked that in "today's social and technological context, it is absolutely necessary to give a purposive interpretation…rather than a literal or strict interpretation."[43] Lastly, he quite correctly pointed out that the argument of the chain of cases being disrupted is flawed. This is because there is an uncertainty that exists in the previously decided cases by the Supreme Court. Referring to the decided cases, the judge observed that "there was some uncertainty about the correct interpretation of sub-section (3) of Section 123 of the Act. It is not as if the interpretation was well recognized and settled."[44]

In this technical rebuttal to the arguments posed before the court, the issue that remained underdeveloped is the social and the constitutional context. This is referred to, in the abstract, but never spelt out clearly. This stark silence which existed in the dissent can also be attributed to the majority decisions. Lokur J pointed out the flaws in *Ramesh Prabhoo* v. *Kashinath Kunte* (the *Hindutva* judgment) and how the case wrongly distinguished *Kultar Singh*'s case which provided a broader interpretation to section 123 (3). *Ramesh Prabhoo* made an error in distinguishing *Kultar Singh* wrongly believing that the latter was a case decided prior to the 1961 amendment:[45]

> A search in the archives of this Court reveals that the election petition out of which the decision arose was the General Election of 1962 in which Kultar Singh had contested the elections…Quite clearly, the law

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41 *Ibid*.

42 *Id.*, para 39.

43 *Id.*, para 46.

44 *Id.*, para 48.

45 *Id.*, para 12 (per Lokur J). Another fact that has been overlooked by the seven-judge bench is that *Ramesh Prabhoo's* case also decided upon the constitutional vires of s. 123 of the RPA. In doing so, they flatly violated the constitutional provision which requires a minimum of five judges to decide upon an issue relating to 'substantive question of law relating to interpretation of the constitution.' The *Hindutva* judgments were decided

applicable was Section 123 (3) of the Act after the amendment of the Act in 1961.

Though Lokur J pointed out technical flaws in the *Hindutva* judgment, he chose not to engage with the fundamental issue of *Hindutva* as an electoral appeal which was also adjudicated in the same case. One may argue that the reference to seven judges is limited to the interpretation of section 123(3) but it is really this limitation posed by the order of reference that prevented the court from deciding upon the issue of *Hindutva*? Had the court reviewed the previous (problematic) position taken on *Hindutva*, would that be improper, especially when there is a history of important political issues being taken up by the constitutional benches of the apex court, even when they were not raised before the court?[46] Is it not a fair demand of the contemporary times given that *Hindutva* has taken the central stage in the social context, especially after the 2014 elections. Would it not be proper to adjudicate upon the issue when a seven-judge bench has been constituted to decide on the related issue? The necessity to adjudicate on the issue of whether *Hindutva* is a communal appeal deserved consideration as one cannot imagine a larger bench to be constituted to decide upon this issue in the near future. It looks bleak that another constitutional bench will be constituted to decide upon this issue of corrupt electoral appeal in the near future since larger benches are scarcely constituted,[47] given the burden of undecided cases before the Supreme Court. With the increasing relevance of religion in Indian elections, this was an issue which deserved judicial attention and it is unfortunate that Lokur J as well as other majority judges sidestepped the issue, despite referring to other aspects of the *Hindutva* judgments. This unsaid amidst the said is perhaps the most conspicuous aspect of the recent seven-judge bench decision.

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by three-judge bench which in itself violates the constitutional mandate, an issue which is not discussed in *Abhiram Singh* but which, coupled with other flaws of the *Hindutva* decision, should have compelled the court to decide the issue of whether *Hindutva* constitutes communal appeal.

46 One of the most prominent historical instance being the case of *Indra Swahney* v. *Union of India* (1992) Supp 2 SCR 454 (popularly known as the *Mandal* case). In this case, the Supreme Court took up the issue of permissibility of reservations in promotional posts within public employment. This issue was not before the court but the court decided to take this up.

47 See Nick Robinson *et al*., "Interpreting the Constitution: Supreme Court Constitution Benches Since Independence"46(9) *Economic and Political Weekly* (Feb., 2011).

Perhaps from the silence of the judgment, one can understand why Lokur J chose not to engage with the constitutionality argument in all its seriousness. He merely referred to the archaic decision from 1955 of *Jamuna Prasad Mukhariya* v. *Lachhi Ram*[48] and concluded with the curt statement that "[w]e need say nothing more on the subject."[49] *Ramesh Prabhoo* had strangely upheld the validity of section 123(3) under article 19(2) of the Constitution on the ground of "decency"[50] but Lokur J (like the other majority judges) did not discuss this aspect at all.

Another important aspect of Lokur's J opinion is its engagement with some remarks made by the Supreme Court in in *S.R. Bommai* v. *Union of India*[51] with respect to section 123(3) of the RPA. *Bommai* favoured broader interpretation of section 123 (3) of the RPA rejecting the restrictive reading of the provision as limited to the candidate and her/ his opponent. However, this was an *obiter* remark made in the judgment. Later *Prabhoos' case* took a different view without referring to *Bommai*. Lokur J in the present case distinguished *Bommai* as that case was not directly related to section 123(3) of the RPA,[52] but at the same time, approved the broader interpretation of the section on different grounds. The paper will return to this point while discussing Thakur's CJI opinion since the Chief Justice approvingly cited *Bommai,* despite the fact that Lokur J categorically distinguished the case and found the remarks made therein irrelevant to the discussion.

S.A. Bobde J

S.A. Bobde J wrote a short decision in agreement with Lokur's J interpretation of section 123(3). Some important additional arguments are provided by him to bolster a broader interpretation of the section. His reason for inclusion of elector or voter within the prohibition of section 123(3) stems from the fact that "his" under the section "must necessarily be taken to embrace *the entire transaction* of the appeal."[53] The notion of "entire transaction" takes

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48 (1955) 1 SCR 608.

49 *Abhiram Singh, supra* note 1, para 47 (per Lokur J).

50 For a criticism of the Supreme Court on this reasoning, see S.P. Sathe, *supra* note 30 at 189-190.

51 *Supra* note 32.

52 Lokur J followed the reasoning of *Mohd. Aslam* v. *UOI* (1996) 2 SCC 749, and observed that *Bommai* case and the remarks made therein were irrelevant to the discussion due to the *obiter* nature of the remarks.

53 *Abhiram Singh, supra* note 1, para 3 (per Bobde J) (emphasis added). This would mean an inclusion of "all the actors" participating in the electoral process: "the candidate, his election agent etc. and the voter."

into account the complex interplay of the electoral appeal in all its dimensions. Bobde J specifically, though briefly, points out that it is "quite conceivable that a candidate makes an appeal on the ground of religion but leaves out any reference to his religion, and only refers to the religion of the voter."[54] Along with some of these minor additions to Lokur's J decision, he also pointed out that literal interpretation can include within itself purposive interpretation: "A literal interpretation does not exclude a purposive interpretation of the provisions."[55] It is submitted that this general rule which Bobde J applies to all statutes, including penal statutes, can have dangerous repercussions. It is an established principle that penal statutes are to be strictly construed; therefore conflating literal interpretation with purposive interpretation is fraught with danger as far as individual liberty is concerned. Recent criminal law scholarship shows that the "preventive turn" in the domain of criminal law has diluted many due process guarantees to the accused.[56] A purposive interpretation of a penal statute, therefore, might dilute the due-process guarantees for the accused. By including security oriented *purposes* of legislation within the literal interpretation, the rights of the accused may be restricted or worse, denied. Even if the text of the law is accused centric, the purposive interpretation may be used to deny bail and fair trial guarantees. Thus, it is very myopic to suggest that there "seems no valid reason while construing a statute (be it a taxing or penal statute) why both rules of interpretation cannot be applied."[57]

With some of these additional comments, the short judgment written by Bobde J largely shares the reasoning of Lokur J as well as the vulnerabilities and silences, which have been pointed out earlier.

T.S. Thakur CJI

The opinion of the T.S. Thakur CJI is important for the reason that it is the decisive as well as the final judgment delivered in this case. The opening line of the judgment is an acknowledgment of the Chief Justice having "the advantage of *carefully reading* separate but conflicting opinions expressed by my esteemed brothers Madan B. Lokur and Dr. D.Y. Chandrachud, JJ."[58] He

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54 *Id*., para 4 (per Bobde J).

55 *Id*., para 2.

56 See generally, Andrew Ashworth & Lucia Zedner, *Preventive Justice* (Oxford University Press, Oxford, 2014). Also see, Henrique Carvalho, *The Preventive Turn in Criminal Law* (Oxford University Press, Oxford, 2017).

57 *Abhiram Singh, supra* note 1, para 2 (per Bobde J).

58 *Id.,* para 1 (per Thakur CJI) (emphasis added).

categorically suggests his inclination towards "the conclusions drawn by Lokur, J." which he finds "more in tune with the purpose and intention behind the enactment of Section 123 (3)."[59]

His agreement and preference for the broader interpretation is clear. However, his judgment unfortunately is neither in conversation nor carefully dealing with the issues raised by the dissenting judgment, or the other majority opinions. This is where the judgment though clear in its verdict, becomes weak in its reasoning. Thakur CJI elaborated the history of the law and its amendment. He pointed out that intent of the legislature was to expand and enlarge the scope of the section. He took the position in favour of the broader interpretation of section 123(3) as "the Parliament intended to enlarge the scope of the corrupt practice as indeed it did, the question of the scope being widened and restricted at the same time did not arise."[60] An alternative reading of the same text allowed him to maintain that as the law stood prior to the amendment there is no way to see any intent "to relax or remove that restriction."[61]

The motivation behind this interpretation of the text becomes clear with Thakur's CJI observation that the preferred interpretation should be the one guided by "constitutional ethos and the secular character of our polity."[62] Unfortunately, like the other majority decisions, Thakur CJI chose not to elucidate how exactly the *constitutional ethos* or the *secular character* would be jeopardized by following the literal interpretation of the provision. Thakur CJI approvingly and extensively cited *Bommai* and endorsed the notion of secularism.[63] However, the non-engagement with the dissenting opinion despite the fact that the Chief Justice claimed to have "carefully read" the same becomes increasingly problematic. The dissenting view rejected the relevance of *Bommai* case on a technical ground. That was because the case was not directly related to the RPA and therefore the observations made in *Bommai* with respect to the RPA, according to Chandrachud J, were *obiter dicta*. Lokur J adopted the same view with respect to *Bommai*. Despite Chief Justice's claims, it appears as if he never had the opportunity of reading this fact in both Chandrachud and Lokur's JJ

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59 *Ibid.*

60 *Id.,* para 9 (per Thakur CJI).

61 *Ibid.*

62 *Id.,* para 10 (per Thakur CJI).

63 See *supra* note 1 at 49-54 for a general discussion on secularism; *Bommai* case has been elaborately cited in the judgment, *supra* note 1 at 51-53.

opinions. Interestingly, Thakur CJI not just cited *Bommai* approvingly but even emphasized that part where section 123 (3) has been given a broader interpretation![64] The opinion seems to be out of tune and not in conversation with the dissenting view and at times even at odds with Lokur J with whom it claims to agree. It is such non-conversation which leaves one wondering what the *ratio* of the case is, as the reader struggles looking for meaning in what appear two different judgments altogether and not different opinions of the same judgment.

Instead of falling into this somewhat absurd trap, the Chief Justice should have explicitly pointed out the limitations and dangers of the dissenting opinion, *i.e.,* the dissent makes it impossible to challenge theocratic and anti-secular appeals of the nature made in *Murli Manohar Joshi;* the dissent in fact cited the case approvingly. Taking such a course would have rendered transparent the expressions used by the judge, *viz, constitutional ethos* and *secular character* of polity. This would have given the court the opportunity to discuss the (ill-)logic of *Hindutva* decisions. While Thakur CJI called for a legal interpretation that "respond(s) to the nation's need",[65] one is left wondering why the long-pending issue of *Hindutva* was not reviewed.

The court in asserting the broader interpretation of the text made the following complex observation: "…an interpretation that will have the effect of *removing* the religion or religious considerations from the secular character of the state or state activity ought to be preferred over an interpretation which may allow such considerations to enter, effect or influence such activities."[66] Thakur CJI went on to suggest, a few lines later, that "[r]eligion can have no place" in electoral process as it is a secular activity of the state.[67] The notion of "removing religion", and if we follow the text of the section it might as include removal of caste, language *etc*., led to grave possible misunderstanding of the majority opinion. How is one to read the assertion that religion, or for that matter caste, community, language or race can have no place in the electoral context? There is no question of banning a discussion on either of the categories as these have constitutional sanction. Indeed, one *ought to use* caste or religion as an emancipatory appeal in order to eradicate discrimination on such grounds. The majority judgment cannot and would not deny this as it has asserted the importance of upholding the values of the Constitution. Nevertheless, the

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64 *Id*., para 16 (per Thakur CJI).

65 *Id.,* para 26.

66 *Id.,* para 28 (emphasis added).

67 *Ibid.*

terminology of "removing" religion as if it has "no place" only gives an erroneous impression to the reader: that the discussion or debate about identities has been excised by the apex court.[68] It is an erroneous impression as discussing religion in electoral appeal or otherwise to promote secularism or equal opportunity is a constitutionally guaranteed right which cannot be outlawed by any judicial pronouncement. It is important to note that the dissent written by Chandrachud J underscored the importance of discussing and debating caste, religion or other identities in the public space as a democratic right. Thakur CJI, in giving the impression of eradication of identity from electoral process and in not engaging with the dissent, undercuts the potential of the majority view. For the reader, therefore, it becomes an uphill task to read the majority judgment against itself in order to actualize the spirit of the majority and to safeguard the constitutional foundations.

V Conclusion

The election judgment delivered in early 2017 might have been a great opportunity for the Supreme Court in not merely redefining the idea of electoral corruption but also in establishing its own legitimacy as an institution which takes the issue of electoral corruption seriously. But the judgment's befuddled reasoning and internal-contradictions fail the judgment in attaining what it really aspires for. This decision is a reminder that how hyper-technical reasoning of legal discourse can entirely erase the larger social perspective that is expected from judicial pronouncements on important systemic issues.[69] The court provides lip service to social context interpretation and cultivation of constitutional ethos but fails to translate its aspirations into the text of the judgment. The failure to engage with the contentious issue of *Hindutva* as an electoral appeal is one glaring instance of the failure of this decision to deal with the social ethos of our times. As argued in the paper, the technocratic reasoning that the reference was limited to the question of interpretation of section 123(3) of the RPA is hardly convincing. The *Hindutva* judgments find a place both in the majority as well as the dissenting opinion. However, the court bypassed the issue conveniently. Given *Hindutva* decisions have subjected to staunch critique in the legal scholarship, *Abhiram Singh*'s silence proves how little the critical academic discourse affects the court's decision making process. These are not the only limitations of the judgment. The non-conversation between the various opinions and the inability to listen to each other is another grave flaw.

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68 See s*upra* note 12.

69 See generally, Pratiksha Baxi, "Impunity of Law and Custom: Stripping and Parading Of Women in India" in Uma Chakravarty (ed.), *Faultlines of History* (Zubaan, 2016).

Thakur's CJI startling observations that "religion will not play any role in the governance of the country" and an imploration of "removing" religion (or any other identity mentioned under section 123(3)) from a secular activity like election created multifold confusions in reading the judgment.[70] Such a conception is at odds with constitutional ethos which would allow religious and other identity based considerations to be a part of electoral process. This is an impoverished understanding of constitutional secularism which does not contemplate an erasure of the religious or the sacred. This limitation of the majority made the otherwise conservative dissent far more appealing and constitutionally sanctified to some readers of the judgment. The message of the majority judgment in the election case is simple. It extends the prohibition to such corrupt tactics where identity of the voters or the people addressed (and not merely the candidates) is evoked for electoral prospects. This is an important expansion of the prohibition under section 123 (3) of the RPA. However, the messiness of the message and the reticence of the court to take on issues of social importance makes one wonder the limits of the emancipatory imagination, of what the court itself styled as social context adjudication.

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70 Zoya Hasan misread both the law as well as the judgment in her remark that "[t]he language issue has not been so problematic, it is more or less settled; the critical issues are really religion and caste." She rhetorically asks: "Electoral politics has in fact promoted caste and one could argue that it has played a positive role in mobilisation and empowerment of the marginalised communities. So, how do you eliminate political mobilisation based on caste identity?" *Available at*: http://www.rediff.com/news/interview/identity-politics-isnt-going-away-anywhere/20170105.htm (last visited on Feb. 23, 2017). Clearly, religion also has to play a "progressive" role if employed to end religious-based discrimination. One only feels that Thakur's CJI opinion provides impetus for such possible misunderstandings of the election judgment.

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