RELIGION AND ELECTION LAW

*Parmanand Singh**

In election law, use of religion in elections constitutes a corrupt practice and entails penal consequences. An analysis of the constitutional policy and cases involving appeal to religion under the Representation of People Act, 1951 reveals that the judicial approach has remained inconsistent and no clear principle can be culled out from the authoritative pronouncements. For example the conceptualisation of Hinduism and Hindutva by the Supreme Court in Hindutva judgments delivered in November, 1995 has proved to be troublesome for future of secular democracy as it may reinforce the hegemony of dominant Hindu religion in public life. The efforts to delink religion from politics have remained a distant dream.

In the present paper some questions have been raised in order to explore how religion can be eliminated in political life.

I. Should Religion and Politics be Mixed?

In S.R. Bommai v. *Union of India*[1], a nine-judge bench of the Supreme Court described "secularism" as a basic feature of the Indian Constitution. In drawing this conclusion, the court referred to sections 29-A, 123(3) and (3A) of the Representation of People Act, 1951. Section 29-A requires political parties to swear allegiance to the principles of secularism and allotment of symbols. Sections 123(3) and (3A) define two corrupt practices : appealing for votes on the ground of religion and promoting feeling of enmity or hatred between different communities. Referring to these provisions of election law P.B. Sawant J. held :

> Religion can not be mixed with any secular activity of the State. In fact encroachment of religion into secular activities is strictly prohibited.

In the words of Justice K. Ramaswamy :

> The secular government should ... bring order in the society ... the manifesto of a political party should be consistent with ... secularism ... fraternity, unity and national integrity .... Even in its manifesto a political party cannot escape constitutional mandate—after it was registered under section 29A .... Introduction of religion into politics is not merely a negation of the constitutional mandates but

> also a positive violation of the constitutional obligation, duty, responsibility and positive prescription of prohibition specially enjoined by the Constitution and Representation of People Act.

The learned judge continued further;

> A political party that seeks to secure power through a religious policy or caste-orientation policy disintegrates the people on the grounds of religion and caste. It divides the people and disrupts social structure on the grounds of religion and caste which is obnoxious and anathrema to the constitutional culture and basic features. Appeal on grounds of religion offends secular democracy.

Justice B.P. Jeevan Reddy was more explicit about the role of religion in politics:

> It is clear that if any party or organisation seeks to fight elections on the basis of a plank which has proximate effect of eroding the secular philosophy of the Constitution it would certainly be guilty of following an unconstitutional course of action. Political parties are formed and exist to capture or share state power. The Constitution requires the state to be secular in thought and action, the same requirement attaches to political parties as well. The Constitution does not recognise, it does not permit, mixing religion and state power.

The following points emerge from *Bommai's case* :

(1) No political party can fight an election on the plank of religion.

(2) It is the duty of the courts to interpret sections 123 (3) and (3A) of the Representation of People Act in a way that religion is not allowed to overplay in elections.

(3) The Election manifesto should eschew religion altogether for electoral gains.

(4) It is the duty of the courts to interpret the law so as to ensure that the candidates set up by a political party espousing a particular religion should not escape the charge of corrupt practices.

(5) Law does not permit recognition of communal parties as political parties.

II. Should Religion be allowed to influence the Government?

The question that arises is whether law relating to use of religion in election can be reconciled with the constitutional conception of secularism as enunci-

ated in *Bommai's* Case. Is the use of religion altogether forbidden in election speeches?

Section 123 (3) reads :

> The appeal by a candidate or his election 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, 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.

Section 123 (3A) reads :

> The promotion of or attempt to promote feeling of enmity or hatred between different classes of 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.

The consequences of the foregoing provisions can be summed as;

(a) violation of the foregoing provision is a basis for setting aside an election under section 100 (1) (b) of Representation of People Act, 1951.

(b) Violation of section 123 (3A) (not section 123 (3)) is also a basis of criminal punishment under section 125 of the Representation of People Act, 1951 and section 171-C of the Indian Penal Code.

The underlying policy of sections 123(3) and (3A) is that the Government should not act on religious basis. In other words, religion should not be influenced through elections. The purpose is also to prevent voting on the ground of religion. The underlying policy, therefore, is that those who return to power through elections should not be allowed to pursue a religious ideology through governmental policies or actions. It is even a constitutional requirement that voters should not be religiously motivated.

III. Is the Use of Religions Absolutely Prohibited in elections?

In *Ebrahim Sulaiman Sait* v. *M.C. Mohammad*[2], it was alleged that Sait had said in an election speech that the Jan Sangh, a political party leaning towards Hindus, had caused killings of Muslims and burning of mosques in North India. The question was whether Sait committed corrupt practice under section 123(3) of the Representation of People Act?

The Supreme Court held that even though the speech had a communal tone, it did not make an appeal in the name of religion. The court observed :

> communal parties were allowed to function in politics in India. An appeal made to voters on communal basis, should not, therefore, be viewed as corrupt practice.

Earlier in 1965 in *Kultar Singh* v. *Mukhtar Singh*[3], the Supreme Court held that appeal to uphold the honour of the Panth was an appeal to vote for Akali Dal, a political party and was not an appeal in the name of Sikh religion.

Implicit in this holding is a view that it is not illegal for a political party to have a religious identification. Chief Justice Gajendragadkar in *Kultar* held that 'Panth' could indicate Sikh religion that it only denoted Sikh politics. It is submitted that the Supreme Court in this case did not realise that Akali Dal is identified by Sikh religion and it is clear from the fact that this party had been asserting a claim for a Sikh homeland on the basis of religious identity.

In *Raman Bhai* v. *Dabhi*[4], Madholkar J. was confronted with a case where the symbol of star was alloted to the candidate's party. The allegation related to the misuse of symbol by giving it a religious colour when an appeal was made on behalf of the candidate through distribution of pamphlets drawing upon the imagery of the polar star Dhruva. In mythology Dhruva was dedicated to religion. The pamphlet clearly showed that the candidate devoted to Hindu religion. It was certainly an appeal in the name of religion. Yet, Justice Madholkar held that the pamphlet did not amount to corrupt practice because Dhruva was served but not worshiped as God. The learned Judge emphasised that Dhruva has not been raised to the status of divinity.

In *Z.B. Bukhari* v. *Brij Mohan Mehra*[5], Beg J. seem to be troubled by *Kultar*. Bukhari's election was challenged on the ground that he had alleged that another Muslim candidate was not a true Muslim because he was member of Congress (I) which was interested in the change in Shariat (Muslim personal law). Bukhari's election was set aside under section 123(3) of Representation of People Act.

Justice Beg in a brilliant opinion developed his own concept of secularism in interpreting election law. Rejecting the argument that presentation of personal laws was not a religious issue he held that in an election a candidate could not be allowed to tell electors that their rivals are unfit on grounds of their religion. The aim of sections 123(3) and (3A), according to him was to eliminate divisive factors in elections. A secular state had to ensure that the existence or exercise of a political or civil right or the right or capacity to occupy any office or position under it or to perform any duty did not depend upon the profession or practice of any religion.

In *Harcharan* case,[6] S. Mukharji J., resurrected Justice Beg's opinion in *Bukhari* and rejected *Kultar's* approach of drawing a distinction between direct and indirect appeal to religion. The court in *Sait* had virtually accorded legitimacy to communal appeals. *Harcharan* like *Bukhari* appealed to secularism in determining the question of appeal in the name of religion.

In *Harcharan,* an Akali Dal candidates's election was set aside on the ground of section 123(3). It was proved that hukumnamas were issued by Akal Takht seeking support for Akali Dal candidates. There was no direct but indirect appeal to vote for the candidates set up by Akali Dal. The speeches given by Akali Dal leaders with the same concern were also proved. Mukharji J. made a very instructive observation :

> It would not be an appeal to religion if a candidate is put by saying vote for him because he is a good Sikh or he is a good Christian or he is a good Muslim, but it would be an appeal to religion if it is publicised that not to vote for him would be against Sikh religion or against Christian religion or against Hindu religion or to vote for the other candidate would be an act against a particular religion. It is the *total effect of such appeal* that has to be borne in mind in deciding whether there was an appeal to religion as such or not.[7]

IV. Are the Hindutva Judgement Consistent with the Value of Secularism?

The link between religion and politics or between religion and community has become the most intensely debated issue today. Faced with the demolition of Babri Masjid in 1992, the Narsimha Rao government tried to make a law to delink religion from politics. The two Bills moved by the Government namely, The Constitution (Eighteeth Amendment) Bill, 1993 and the Representation of the People (Amendment) Bill, 1993 failed and due to strong opposition of certain political parties these two Bills were withdrawn for further consultation.

The statement of objects and reasons to the amendment to section 29 (A) (1) added by 1989 amendment and by inserting 29 (B) proposed by the 1993 Bill stated that the aim was to prevent the registration of political parties bearing a religious name. It has, however, been noted above that the delinking of religion from politics was achieved by *Bommai* by detailed reference to sections 123(3) and (3A) of the Representation of People Act. It is in this background that we should consider *Hindutva* Judgements.

On December 11, 1995 a three judge bench of the Supreme Court speaking through Justice J.S. Verma delivered seven judgments to dispose of thirteen election appeals against the decisions of Bombay High Court. All these

thirteen petitions related to the challenging of elections of Shiva Sena - BJP combine candidates. In all these cases (namely *Yeshwant Prabhoo, Manohar Joshi, R.G. Kapse, Ramakant Mayker, Movshwar Save, Chandrakanta Goyal* and *S.V. Mahadik*), the common issue was whether invoking Hindutva ideology by the Shiva Sena and BJP leaders or the candidates etc. constituted corrupt practices under sections 123(3) and 3(A) of the Representation of the People Act.

In *Yeswant Prabhoo,*[8] Justice J.S. Verma addressed fully to the Hindutva argument and decided it which he followed in all the judgements. Of all these seven judgments, the decision of the court in *Manohar Joshi* [9] generated, national debate. The principles which the court laid down in these cases are :

(*a*) No precise meaning can be ascribed to the terms Hindu, Hindutva or Hinduism.

(*b*) No meaning in abstract can confine these terms to the narrow limits of Hindu religion alone or to strict Hindu religious practices, unrelated to the content of Indian culture and heritage or culture and ethos of the people of India.

(*c*) The term Hindutva is related more to state of mind and the way of life of the people in the sub-continent.

(*d*) In view of what has been said above, the terms Hindutva or Hinduism *per se* cannot be assumed to mean and be equated with Hindu fundamentalist bigotry.

(*e*) For the same reasons, the terms Hindutva and Hinduism cannot be construed to fall always within the prohibition in sub-sections (3) and (3A) of section 123 of Representation of People Act, 1951.

(*f*) Whether reference in an election speech to Hindutva or Hinduism is hit by sections 123 (3) or (3A) is a question of fact.

(*g*) Misuse of these terms to promote communalism cannot alter their true meaning.

(*h*) The word Hindutva is also used and understood as synonym of 'Indianization' i.e. development of a uniform culture by obliterating the differences between various cultures co-existing in the country.

(*i*) The assertion by a candidate in an election speech that he would set up the first Hindu State on the Indian soil did not amount to an appeal to religion, it was at best a hope expressed by him.

In deciding the meaning of the terms 'Hindutva' and 'Hinduism', Justice Verma relied on *Shastri Yagnaprushodji* v. *M.B. Vaishya*[10] and *C.W.T. Madras* v. *Sridharan.*[11]

The last point (i) was made by the learned judge in *Manohar Joshi's* case. The verdict was widely acclaimed by the Sangh Parivar as victory of truth. Critics of the judgment described it as giving free hand to voters of communal politics.

In *Mohd. Aslam* v. *Union of India*[12], in response to an Article 32 petition, J.S. Verma J., clarified *Manohar Joshi* (1996) as follows:

(*i*) *S.R. Bommai* was not relevant in *Manohar Joshi's* case because it was not related to interpretation of sections 123 (3) and (3A) of Representation of People Act.

(*ii*) Criticisms of *Manohar Joshi* is based upon misleading of the judgment.

(*iii*) The standard of proof required under the aforesaid provisions was not satisfied to establish the commission or corrupt practice by *Manohar Joshi.*

(*iv*) The apprehensions and misgivings expressed in the writ petition are imaginary and baseless.

(*v*) *Manohar Joshi* does not conflict with *Bommai.*

(*vi*) The judgment cannot enable misuse of religion for making an appeal for votes in an election.

(*vii*) The deficiency if any in section 123 (3) has to be cured by legislation and not by the judiciary. The legislative efforts to separate religion from politics has unfortunately been abandoned.

V. Hindutva Judgment : Some Important Questions

A. Whether Bommai was Irrelevant to Hindutva Judgments?

As has been stated above, *Bommai* referred to sections 123 (3) and (3A) as well as section 29 A and therefore it is incorrect to say that in *Bommai* the question relating to meaning of these provisions neither arose nor was decided. The substance of *Bommai* is that no political party can contest an election on the plank of religion. The Bombay High Court declared the election of *Manohar Joshi* as void as the speeches given by top leaders of BJP-Shiva Sena combine was based upon the plank of Hindutva. These speeches were made at the election meetings in the presence of Manohar Joshi. In his own speech Joshi announced that the first Hindu State will be established in Maharashtra.

The Supreme Court overruled Bombay High Court and held :

> The so-called plank of the political party may at best be relevant only for appreciation of the context in which a speech was made by a leader of the political party during the election compaign, but no more for the purpose of pleading corrupt practice in the election petition against a particular candidate.

The aforesaid finding completely ignores *Bommai* that no election can be contested on the plank of religion. The finding also ignores the political reality that when a candidate contests election on the plank of Hindutva and his supporters as well as he himself gives speeches on that plank, commits corrupt practice. *Bommai* also suggests that sections 123 (3) and (3A) should be interpreted in the context of secular democracy connoting complete separation of religion from politics and not on the technical grounds like absence of an express plea of consent in the petition as has been done by the court in this case.

B. Whether Hindutva is a way of life?

The meaning of the terms Hindutva or Hinduism as connoting a way of life or the culture of people of India is said to be based upon two judgments of the Supreme Court in *Shastri Yagnapurushadji* (1966) and *CWT Madras* (1976). In the former case, it was held that Swami Narayan sect is a part of Hindu religion. The judgment in that case refers to many authorities and concludes that Hindu religion does not claim any prophet, it does not worship any one God, it does not subscribe to any dogma or believe in any one philosophical concept and that it may broadly be described as a way of life and nothing more. In relying upon this judgment, Verma J., overlooked the following observation in the same judgement :

> Beneath the diversity of philosophic thoughts, concept and ideas expressed by Hindu philosophers who started different philosophic schools lie certain broad concepts which can be treated as basic.

In the judgment, it is further observed that amongst these basic concepts is the acceptance of Veda as the highest authority in religious and philosophical matters and also the belief in rebirth and pre-existence. The judgment also mentions that *Moksha* or *Nirvana* is the ultimate aim of Hindu religion and philosophy. Then it says that Hindu religion can be safely described as a way of life based on certain basic concepts to which we have already referred.

From the above, it follows that certain basic concepts central to Hindu religion are different from those of Muslims, Christians and other religious communities. It is therefore, submitted that the view of Justice J.S. Verma that Hinduism is a way of life of the people of India including non-Hindus is not correct. No such conclusion can be derived from *Yagnapurushadji* if understood in the full contexts.

Even the judgment of 1976 relating to wealth tax does not lead to the aforesaid conclusion. In that case, a father and his son born from christian wives were held to form a joint Hindu family for the purpose of wealth tax. Both *Commissioner of Wealth Tax* and *Yagnapurushadji* quote with approval the definition of Hindu religion given by B.G. Tilak in Geetarahasya :

> Acceptance of Vedas with reverence; recognition of the fact that the means or ways of salvation of the truth that the number of gods to be worshipped is large that indeed is the distinguishing feature of Hindu religion.

The Supreme Court was therefore, wrong in holding that Hindutva is a way of life of the people of India and an appeal for votes based upon Hindutva or Hinduism does not by itself amounts to corrupt practice. Further, it is unclear how these two judgments decided in different context relevant in interpreting sections 123 (3) and (3A) and how *Bommai* was irrelevant which specially referred to those provisions in the Representation of People Act.

C. Whether the Statement the first Hindu state will be established in Maharashtra amounted to appeal in the name of Hindu religion?

To answer this question let us recall the observation of Justice S. Mukharji in *Harcharan* that the total effect of such appeal that has to be borne in mind in deciding whether there was an appeal to religion and also the observation of Justice B.P. Jeevan Reedy in *Bommai* that political parties are formed and exist to capture or share state power.

The court in *Manohar Joshi*, it is submitted overlooked the social reality that during election campaign the audience comprises of common men and the manner in which a statement would be understood by such an audience has to be kept in mind. When Manohar Joshi, a candidate of Shiv Sena - BJP combine, which is known for advocating Hindutva ideology and for being hostile to Muslim community, was announcing that if BJP-Shiv Sena was voted to power, the first Hindu State will be established in Maharashtra, an average voter in the audience will not understand Hinduism as a way of life or as connoting culture of the people of India. And it is almost impossible to believe that a Muslim understands Hinduism or Hindutva as a way of life and not as Hindu religion.

Therefore, the finding of the court that the statement made by Manohar Joshi was not an appeal to voters in the name of religion but "expression, at best of such a hope" is disturbing and unvincing. In a secular democracy such hopes are not expressed. If the use of Hindutva is permissible in law, there would be nothing illegal for an Akali candidate to express a hope for

establishing a Khalsa state or for a Kashmiri muslim from advocating an Islamic State.

In a sense Hindutva judgments invite a seasoned discourse on secularism and its relation with political democracy. There seems to an internal tension between secular democracy and limits on the constitutional rights to adult suffrage and rights to organise political activities for sharing power. For instance whether appeal to oppressive Hinduism sustained by Brahamanical ideology for protective discrimination or political reservation for backward communities is an appeal in the name of religion?

Is Hindutva not a politically constructed civil religion? Has *Hindutva* judgment not disregarded *Bommai's* insistence on separation of politics from religion? The crucial issue that should be debated today is how to strike a balance between values of secularism on the one hand and respect for individual's right to free speech, conscience, religion, language, and culture? If the election manifesto of a political party seeks to preserve ethnic identities or religious identities of a group, then should all the candidates of that political party referred to power be unseated on grounds of secularism? Is religion totally irrelevant for the formation of a social structure in relation to elections? And if religion is relevant in politics, will this not end up in moral hegemony of dominant Hindu religions in public life?

D. Is the Use of Religion permitted in election in the exercise of freedom of religion?

One thing however, is clear that sections 123(3) and (3A) of the Representation of People Act embodies a principle that neither the candidates nor the voters be religiously motivated and that the government should not be influenced by religion. The aim of election law is to promote the secular character of the government by prohibiting appeal to religion in elections. But an election speech made in conformity with fundamental right to freedom of religion guaranteed under Articles 25 to 30 of the Constitution can not be treated as anti-secular to be prohibited by sections 123(3) and (3A) of the Representation of People Act, 1951. This has been held by J.S. Verma J., in *Yeshwant Prabhoo.* He observed :

> A speech referring to religion during election compaign with a secular stance in conformity with the fundamental right to freedom of religion can be made without being hit by the prohibition contained in sub-section (3), if it does not contain an appeal to vote for any candidate because of his religion or to refrain from voting for any candidate because of his religion.[13]

It is thus clear that religion can be used in political speeches during elections so long as there is no appeal to religion of the candidate or of his rival.

The learned judge exemplifies his view by referring to a speech when it alleges discrimination against any particular religion and promises removal of the imbalance and discrimination. Such an election speech is not prohibited. In other words a mere mention of religion in election compaign is not forbidden. So long as it does not amount to vote in the name of religion. When it is said that religion and politics should not mix, it merely means that the religion of a candidate cannot be used for gaining political mileage.

VI. What Standard of Proof is Required to Prove a Corrupt Practice?

In order to constitute a corrupt practice, it must be established that it was committed by the candidate or his election agent or any other person with the consent of the candidate or election agent. If the appeal to religion has been made by the supporters of the candidate without the consent of the candidate or his election agent or even contrary to his instructions, the election cannot be set aside unless it is proved that the result of the election was affected by such an appeal. [Sections 123(3), (3A) read with sections 100 1(b), 1(c) (iii) and section 100 2(a)].

The required consent must be proved and cannot be assumed. Thus the top political leaders supporting the candidates set up by the party if made an appeal to religion, the election of the referred candidate cannot be held void in the absence of the proof of the consent of the candidate. For example in *Manohar Joshi,* the following statements were made by Shiv Sena Chief Bal Thackery and BJP leader Pramod Mahajan at Shivaji Park :

(*a*) To handle the Congress (I) hoodlums, the Shiva Sainiks may take law in their hands and use fire arms if necessary (Thackeray).

(*b*) To save 'Hindutva', vote for BJP - Sena nominee (Pramod Mahajan).

(*c*) Mr. Rajiv Gandhi does not know his own religion, and he has no right to speak on Hinduism (Pramod Mahajan).

(*d*) If in Maharashtra the flame of Hinduism is extinguished, then anti-national Muslims will be powerful and they will convert Hindustan into Pakistan.

(*e*) We must protect Hindutva at all costs and for that we must protect Hindutva at all costs (Pramod Mahajan).

(*f*) Rajiv Gandhi speaking on Hindutva is like a prostitute lecturing on fidelity. (Mahajan).

(*g*) (Referring to Rajiv Gandhi), wife christian, mother Hindu, father a Parsee and therefore himself without any (Hindu) culture (Mahajan).

Since the requirement of the consent of returned candidate (Manohar Joshi) was not pleaded, these speeches appealing the Hindutva were held not

amounting to corrupt practices committed by Manohar Joshi. It is surprising that Manohar Joshi did not commit corrupt practice when these objectionable speeches were made in his presence. Why could the court not imply the consent of Joshi to these speeches when the leaders of the political party were making campaign on the plank of Hindutva. The court found that there was only one allegation of corrupt practice in election petition which raised a troubled issue and that is the statement that "the first Hindu State will be established in Maharashtra".

It is true that the proceeding in an election petition alleging corrupt practice is quasi-criminal in nature and thus the provisions must be construed strictly but they should not be construed so narrowly so as to defeat the very object of law.

The reply of J.S. Verma J., in *Mohd Aslam* is that the loopholes in law or defeciencies in section 123 can be cured by law reform and not by judicial activism. What reforms or legislative change are required to be done in section 123 of the Representation of People Act is a matter of serious legal debate.

NOTES AND REFERENCES

* Professor, Campus Law Centre, Faculty of Law, University of Delhi, Delhi.

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3. AIR 1965 SC 141.
4. AIR 1965 SC 669.
5. AIR 1975 SC 1788.
6. AIR 1985 SC 236.
7. *Id* at 247.
8. *Ramesh Yeswant Prabhoo* v. *Prabhakar Kashinath Kunte* (1996) 1 SCC 130.
9. *Manohar Joshi* v. *N.B. Patil*, AIR 1996 SC 796.
10. AIR 1966 SC 1119.
11. (1976) 4 SCC 489.
12. (1996) 2 SCC 749.
13. (1996) 1 SCC 130 at 148.