

REGULATION OF HATE SPEECH

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On March 7, 2009, Varun Gandhi, the great-grandson of India's first prime-minister, Jawaharlal Nehru, also the potential Bharatiya Janata Party candidate from Pilibhit in Uttar Pradesh, made disturbing remarks against a minority community in condemnable hate speech to polarise voters on communal basis and gain electoral leverage. Not only did the incident ignite violent protests and incur the wrath of the Election Commission, it also attracted several provisions of the election and criminal laws. Though the immediate impetus for this article is the Varun Gandhi hate-speech controversy, the episode is merely a starting point for delving into a much larger debate on hate speech laws. Therefore, this article seeks to examine laws employed to combat hate speech and to determine if anti-hate speech laws can adequately regulate situations such as the Varun Gandhi episode, or if they require change.

I. INTRODUCTION

“Like an unchecked cancer, hate corrodes the personality and eats away its vital unity. Hate destroys a man's sense of values and his objectivity. It causes him to describe the beautiful as ugly and the ugly as beautiful, and to confuse the true with the false and the false with the true.”¹

The definition of hate speech is as elusive as the aforesaid definition of hate.² Most often it is characterised by its potential effects - “that it promotes fear, incites violence, articulates, identities as divisive, indoctrinates prejudice and promotes discrimination”.³ Though there is no commonly agreed definition

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¹ Quote by Martin Luther King Jr., available at http://www.quotationspage.com/quotes/Martin_Luther_King_Jr. (Last visited on November 16, 2009).

² AMAN Panchayat, *Hate Speech Restrictions- A Primer*, available at www.amanpanchayat.org/documents/reports/Hate-Speech.rtf (Last visited on November 16, 2009).

³ *Id.*

of hate speech yet, according to Helen Darbishire, “the classic definition of hate speech is expression or expressions that incite(s) hatred, particularly racial, national or religious in nature.”⁴ Thus, ‘hate speech’ is a term for speech intended to offend a person or persons on the basis of attributes such as race, gender, nationality, religion and ideology. The most distinctive feature of hate crime such as hate speech is that a person is attacked as a representative of a group or community rather than as an individual.⁵ Hate speech can assume different forms: it can be direct or indirect; veiled or overt; single or repeated; backed by power, authority, or threat, or not and can be delivered orally, in writing, on the internet, or in the form of a tangible thing.⁶ Further, hate speech can also be classified as political and ordinary hate speech. Between the two, dissemination of hatred by politicians through political hate speech has greater repercussions due to its wider reach and ability to influence public opinion which can eventually result in the breakdown of public order. Some of the most pertinent historical examples of hate speech include the anti-Semitic and anti-Tutsi hate speeches made in Nazi Germany and Rwanda respectively, as a political gimmick to gain temporary control of the government.⁷

The ideology of hate creates a “social common sense” which eventually turns into the conviction of large sections of the society and often manifests itself in the form of hate speech. This sets the foundation for the provocation of communal violence. Communal violence in turn widens the schism between communities which ultimately leads to ghettoization; both physical as well as psychological.⁸ The final consequence in this chain of events is likely to be the creation of an unfortunate situation in which the community against whom hate is perpetrated is subjected to social discrimination to the extent of physical elimination, as was witnessed in the case of Jews.⁹

Even though the need to prohibit and prevent hate speech is incontrovertible, opponents of hate speech restrictions often argue that the

⁴ Helen Darbishire, *Hate Speech: New European Perspectives*, Roma Rights, No. 4, (1999) available at http://www.errc.org/rr_nr4_1999/legalde1.shtml as cited in Deepali Ann Fernandes, *Protection of Religious Communities by Blasphemy and Religious Hatred Laws: A Comparison of English and Indian Laws*, 45(4) JOURNAL OF CHURCH AND STATE, 669 (2003).

⁵ *Id.*

⁶ Richard Delgado & Jean Stefancic, *Four Observations About Hate Speech*, 44 WAKE FOREST L. REV. 353 (2009), 357.

⁷ V.R. Narayanaswami, *The Vocabulary of Hate*, LIVEMINT, June 21, 2009, available at <http://www.livemint.com/2009/06/21210950/Ask-Mint—The-vocabulary-of-h.html> (Last visited on November 15, 2009).

⁸ The most prominent example on this account is that of Gujarat which witnessed large scale ghettoization.

⁹ Ram Punyani, *Why Hate Speech?*, TEHELKA, March 27, 2009, available at http://www.tehelka.com/story_main41.asp?filename=Ws040409Ram_Punyani.asp (Last visited on November 15, 2009).

prohibition of hate speech may result in an infringement of freedom of expression, which could have an adverse effect on: (1) political awareness and expression; (2) legitimate criticisms and scholarly analysis of religion; and (3) humour and artistic expression.¹⁰ Further, liberal religious discussion helps expose notorious practices within a religion which may be in violation of human dignity. For instance, in India, the evil practice of sati and dowry were severely condemned even in the face of much opposition, thus resulting in the passing of prohibitive legislation. They contend that such social reforms would never have occurred if constructive criticism of other religions and cultures were prohibited and penalised. However, what is to be noted is that though most democracies value and guarantee freedom of speech as a fundamental human right, they also have laws that impose prohibition on the public dissemination of discriminatory messages.¹¹ The rationale behind punishing the use of hate propaganda is arrived at by “weighing the orator’s interests to the right of free expression against both the dignitary harm to individuals and the collective harm to pluralism”.¹²

In a heterogeneous society such as India, even though anti-hate laws impose a certain amount of restriction on the fundamental right to freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution, the Apex Court of the country has upheld their constitutionality on the grounds of being a reasonable restriction aimed at maintaining public order under Article 19(2).¹³ However, this article does not aim to examine the hate speech debate through the lens of constitutional law. In the Varun Gandhi case, the Election Commission of India (*hereinafter* EC) registered criminal cases against Varun Gandhi under the Indian Penal Code (*hereinafter* IPC) and the Representation of People Act, 1951, (*hereinafter* RPA) and took *suo motu* cognisance of his violations of the Model Code of Conduct (*hereinafter* MCC).¹⁴ It is against this backdrop

¹⁰ See Parliamentary Assembly Council of Europe, *Blasphemy, Religious Insults and Hate Speech Against Persons On Grounds Of Their Religion*, June 7, 2007, available at <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc07/EDOC11296.htm> (Last visited on November 15, 2009); See generally Graham Darling, *Freedom of Expression Background*, available at <http://www.law.ualberta.ca/centres/ccs/issues/freedomofexpressionbackground.php> (Last visited on November 16, 2009).

¹¹ A non-exhaustive list of countries that have restricted hate speech includes: Australia, Austria, Belgium, Brazil, Canada, Cyprus, Denmark, England, France, Germany, India, Ireland, Israel, Italy, Sweden, and Switzerland.

¹² *Supra* note 6, 366.

¹³ G.V. Godse v. Union of India, AIR 1971 Bombay 56; See Deepali Ann Fernandes, *Protection of Religious Communities by Blasphemy and Religious Hatred Laws: A Comparison of English and Indian Laws*, 45(4) JOURNAL OF CHURCH AND STATE, 669 (2003); See generally Rajeev Dhavan, *India Needs a Law to Check Hate Speech*, March 29, 2009 available at <http://www.sacw.net/article799.html> (Last visited on November 15, 2009); Soli Sorabjee, *Who'll Silence Varun?*, INDIAN EXPRESS, March 27, 2009, available at <http://www.indianexpress.com/news/wholl-silence-varun/439578/0> (Last visited on November 15, 2009).

¹⁴ V. Venkatesan, *Varun Gandhi Speeches: Poll Panel Order Gives Model Code Teeth*, THE HINDU, March 24, 2009, available at <http://www.thehindubusinessline.com/2009/03/24/stories/2009032450620400.htm> (Last visited on November 14, 2009).

that we intend to elaborately discuss the relevant provisions of the election and criminal laws that are aimed at regulating hate speech.

II. HATE SPEECH

Historically, India has had a multiplicity of religions, castes, cultures, languages and ethnicities. Also, the communal background to India's partition and the continued religious diversity within the country has turned India into a fragile nation where religious passions can be easily ignited. Therefore, when a political leader unleashes communal hate speech, it often threatens to destroy the democratic and plural fabric of the country. Recognising this, the Hon'ble Supreme Court of India had warned:¹⁵

“Our political history made it particularly necessary that these differences, which can generate powerful emotions, depriving people of their powers of rational thought and action, should not be permitted to be exploited, lest the imperative conditions for the preservation of democratic freedoms are disturbed.”

The role of hate speech in incitement of communal feelings and violence was also highlighted by various commissions of inquiry established to inquire into riots, communal and caste violence and massacres. For instance, the Sri Krishna Commission Report that investigated into the 1992-93 Bombay riots concluded:¹⁶

“[L]arge scale rioting and violence was commenced from 6th January 1993 by the Hindus brought to fever pitch by communally inciting propaganda unleashed by Hindu communal organizations and writings in newspapers like ‘Saamna’ and ‘Navakal’. It was taken over by Shiv Sena and its leaders who continued to whip up communal frenzy by their statements and acts and writings and directives issued by the Shiv Sena Pramukh Bal Thackeray.”

In India, the advent of hate speech in the political sphere was marked by the rise of communal streams in politics, like the Muslim League on one side and the Hindu Mahasabha, Rashtriya Swayamsevak Sangh (*hereinafter* RSS), Vishwa Hindu Parishad (*hereinafter* VHP) on the other.¹⁷ The ideology of nationhood of these streams was based on a single religious community. For instance, the RSS and VHP believed in a monolithic conception of Hinduism and

¹⁵ Ziauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra, AIR 1975 SC 1788, ¶ 11.

¹⁶ Sri Krishna Commission Report, Chapter III, ¶ 1.2(i).

¹⁷ *Supra* note 9; See also Donna M. Wulff, *Hindu Nationalism: An Oxymoron*, 4 THE BROWN JOURNAL OF WORLD AFFAIRS 165 (1997).

intolerance of minorities.¹⁸ Such an ideology of religion-based nationalism often gets converted into hatred for the other communities and ultimately manifests itself in the form of vitriolic hate speech.

In the Indian context, hate speech can be perceived in two ways. Firstly, it may be considered as a “concentrated expression of sectarian-communal ideology”.¹⁹ Secondly, hate speech can be perceived as being based on the politics of exclusion.²⁰ This exclusionary policy can be based on a number of factors like religion, region, linguistic considerations etc. A pertinent example is that of *Shiv Sena* Pramukh Bal Thackeray, the self-proclaimed messiah of the Marathi *manus*. His antipathy towards other linguistic and religious concerns was first expressed in his anti-south-India tirade and was followed by his anti-Muslim diatribe. This policy of exclusionary politics in the name of language, religion and region was further continued by his nephew, Raj Thackeray, through his harangue against the North Indians who according to him are usurping the jobs of the Marathi *manus*. Recently, there has been a trend in India to resort to communally charged speeches, especially to garner votes during elections. For instance, post-Godhra, in the run-up to the Gujarat Assembly election of December 2002, the BJP and VHP unleashed hate speech with unprecedented ferocity. This vicious communal campaign following the state-sponsored pogrom against Muslims helped the BJP to emerge victorious in Gujarat in the Assembly elections.

Hate speech is usually the outcome of the politics of divisiveness and is a weapon in the hands of those who thrive on identity politics, far away from the real issues of the society. Clearly, the urgency of preventing inflammatory speeches which disturb communal harmony is indisputable. Therefore, various Indian laws at the constitutional, criminal and election levels, contain important hate speech restrictions. Not only is engaging in hate speech during elections a corrupt practice and an electoral offence. In fact, irrespective of elections also, communal or anti-national hate speech is a crime inviting heavy punishment, including imprisonment between three and five years under various provisions of the IPC.²¹

III. ELECTION LAWS GOVERNING HATE SPEECH

From its very inception, India had opted for a parliamentary form of democracy. In keeping with its British legacy, India first went to polls in 1952, both at the national as well as the State levels.²² Today, the electoral system in India is

¹⁸ Dr John Zavos, *The End of Hindutva? A Reflection on the General Election in India*, May 28, 2004, available at www.eias.org/luncheon/india280504/zavos.pdf (Last visited on November 15, 2009).

¹⁹ *Supra* note 9.

²⁰ *Id.*

²¹ The IPC, 1860, § 153A, § 153B, § 295A and § 505(2).

²² See *P.R. Belegali v. B.D. Jatti*, AIR 1971 SC 1348; *Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SC 2299; *Mohinder Singh Gill v. The Chief Election Commissioner*, AIR 1978 SC 851.

marred with many inconsistencies and such discrepancies have paved the way for anti-social elements to enter into the electoral fray. Though the EC has taken due note of such discrepancies and many a times made fair recommendations to the government on the need for altering the existing laws,²³ the EC's record for punishing electoral hate speech still continues to remain "a blank page".²⁴ In fact there have barely been any cases where the election of a candidate was invalidated on account of communal speeches made by him, even though statistics reveal that almost 3423 candidates are currently barred from contesting elections due to "corrupt electoral practices."²⁵

A. THE REPRESENTATION OF PEOPLE ACT, 1951

Elections in India are regulated under the Representation of People Act, 1951. To ensure that men of high ethical values are elected as the representatives of the people of India, the RPA has laid down certain rules of electoral morality and prohibited certain acts which denigrate the purity of the elections. Part VII of the RPA classifies condemnable acts committed during elections into two categories: corrupt practices and electoral offences. The principal distinction between these two categories of proscribed acts is that while a wrong committed under corrupt practice can be brought before the courts only at the end of elections by way of an election petition filed in accordance with the provisions of Article 329(b) of the Constitution of India and Part VI of the RPA, an electoral offence can be taken cognizance of and proceeded with as soon as the offence is committed as per the provisions of the Criminal Procedure Code, 1973. Further, while conviction for a corrupt practice entails civil disabilities like disqualification from voting and contesting elections for a certain period, conviction for electoral offence attracts criminal liability like imprisonment for a term which may extend to three years, or with fine, or both.²⁶ In the realm of the electoral hate speech debate in India, the relevant provisions of the RPA are §§ 123(3),²⁷ 123(3A)²⁸ and 125.²⁹ As per § 123 (3), appeal in the name of religion, caste,

²³ Sumandeep Kaur, *Electoral Reforms in India: Proactive Role of Election Commission*, MAINSTREAM WEEKLY, November 25, 2008, available at <http://www.mainstreamweekly.net/article1049.html> (Last visited on November 14, 2009).

²⁴ Vinay Sitapati, *Frame by Frame*, THE INDIAN EXPRESS, March 19, 2009, available at <http://www.indianexpress.com/news/frame-by-frame/436181/0> (Last visited on November 14, 2009).

²⁵ *Id.* (The only case where this form of malpractice has been brought to book is Suryakant Venkatrao Mahadik v. Smt. Saroj Sandesh Naik, 1996 SCC (1) 384. In this case the SC set aside his election on this ground).

²⁶ See K. MENDIRATTA & V.S. RAMADEVI, HOW INDIA VOTES: ELECTION LAWS, PRACTICE AND PROCEDURE 906-08 (2007).

²⁷ The RPA, 1951, § 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

community or language is a corrupt practice. Further, promotion or attempt to promote enmity and hatred amongst different groups of people is both a corrupt practice under §123(3A) and an electoral offence under § 125.

1. Meaning of Candidate

The corrupt practice provisions under § 123(3) and § 123(3A) of the RPA are applicable to acts of ‘candidates’ or their agents or any other person who committed the corrupt practice with the consent of the candidate. Therefore, the fundamental question that arises with respect to a corrupt practice is- who is a candidate? Currently, § 79(b)³⁰ of the RPA defines a ‘candidate’ as a person who has been or claims to have been duly nominated as a candidate in any election. However, the position of law prior to 1975 was different. Under the original enactment of § 79(b), a candidate was defined as “any person who had been or claimed to have been duly nominated as a candidate at any election or held himself out as a prospective candidate from the date of the election in prospect”. This section was marred with ambiguity as the questions of when an election was in prospect and from when a person started holding himself out as a candidate were disputed questions of facts in each case. This was duly considered in the case of *Raj Narain v. Indira Nehru Gandhi*³¹ and thereafter § 79(b) was amended in 1975 with the objective of removing the uncertainty afflicting the definition of a candidate. The amended provision regarded only such person as a candidate who had been or claimed to have been duly nominated as a candidate at an election and not the one who was yet to be nominated. In other words, a candidate can only be held liable, whether directly or vicariously, for any act constituting a corrupt practice, if such a wrong is committed on or after the date on which he has been nominated at an election by filing his nomination papers and not otherwise even if the act is proved to have been committed by him.³² This implies that in the

of that candidate or for prejudicially affecting the election of any candidate shall be deemed to be corrupt practices for the purposes of this Act.

Provided that no symbol allotted under this Act to a candidate shall be deemed to be a religious symbol or a national symbol for the purposes of this clause.]”

²⁸ The RPA, 1951, § 123(3A): “The promotion of, or attempt to promote, feelings of enmity or hatred between different classes of the citizens of India on grounds of religion, race, caste, community, or language, by a candidate or his agent or any other person with the consent of a candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate shall be deemed to be corrupt practices for the purposes of this Act.”

²⁹ The RPA, 1951, § 125: “Any person who in connection with an election under this Act promotes or attempts to promote on grounds of religion, race, caste, community or language, feelings of enmity or hatred, between different classes of the citizens of India shall be punishable, with imprisonment for a term which may extend to three years, or with fine, or with both.”

³⁰ The RPA, 1951, § 79(b) – “candidate” means a person who has been or claims to have been duly nominated as a candidate at any election.”

³¹ AIR 1975 SC 1590.

³² *Id.*, ¶ 90.

Varun Gandhi episode, any grievance with regard to the commission of a corrupt practice under § 123(3) or § 123(3A) could not have been agitated against him because he was not a ‘candidate’ on the date when the hate speech was made, by virtue of him not having filed his nomination papers by then.³³ As is evident from this example, the amendment to the definition of candidate which was intended to aid in the process of justice, is instead aiding politicians to engage in corrupt practices such as making inflammatory communal speeches. The misuse of this provision is largely owing to the fact that election campaigning in India starts much before a person files his nomination papers. This gives prospective candidates the opportunity to make incendiary speeches to polarize voters and garner votes without any fear of attracting disqualification under the law. This is a blatant flaw in the provisions of the RPA and demands immediate attention.

2. Meaning of ‘Agent’ and ‘Consent’ under Corrupt Practices:

An act may amount to a corrupt practice under § 123(3) and § 123(3A) of the RPA, not only when it has been committed by a candidate, but also when it is done by the candidate’s agent or any other person, with the consent of the candidate or his election agent. The expression ‘agent’ has been defined in Explanation (1) to § 123 of the RPA. It includes “an election agent, a polling agent and any person, who is held to have acted as an agent in connection with the election with the consent of the candidate”. For the purpose of the Act, the expression ‘agent’ has a much wider connotation than it is ordinarily understood to have under the law of contract.³⁴ An agent is ordinarily a person authorized by a candidate to act on his behalf on a general authority conferred on him by the candidate. Under the Act, an ‘agent’ includes not only a person, who has been specifically engaged by the candidate or his election agent to work for him in the election, but also a person, who does in fact work for him and whose services have been accepted by the candidate.³⁵ Thus, an election agent is considered the alter ego of a candidate. Further, under the provision of § 123, the candidate is held accountable for an alleged corrupt practice committed by his agent because of the authority given by the candidate to perform the act on his behalf. However, the election agent may himself be implicated, if the High Court after considering the evidence on record is convinced that the election agent has committed the corrupt practice.³⁶

³³ Varun Gandhi made the hate speeches on March 7, 2009. However, he filed his nomination papers more than a month later on April 22, 2009. Therefore, he was not a candidate as per the amended definition of ‘candidate’ under the RPA, on the date when the hate speech was made by him in Pilibhit. *See Varun files nomination, declares assets worth five crores*, THE TIMES OF INDIA, April 22, 2009 available at <http://timesofindia.indiatimes.com/india/Varun-files-nomination-declares-assets-worth-Rs5cr/articleshow/4434625.cms> (Last visited on November 15, 2009).

³⁴ Nani Gopal Swami v. Abdul Hamid Choudhury, AIR 1959 Gau 200, ¶ 4.

³⁵ *Id.*

³⁶ *See Patangrao Kadam v. Prithviraj Sayajirao Yadav*, AIR 2001 SC 1121, ¶ 4.

In case of hate speeches made by the leader of the party, the candidate cannot be held liable for the same, as ordinarily an agent has to act on the candidate's instructions. Since a leader neither acts on the instructions of the candidate nor is under his control, he is not an agent of the candidate. Thus, a candidate cannot be held liable for the hate speech made by his leader unless his consent for the same is proved. Also, since there can be no presumption in law that there is consent of every candidate of the political party for every act done by every acknowledged leader of the party, the consent of the candidate cannot be assumed merely from the fact that the candidate belongs to the same political party, of which the wrongdoer is a leader.³⁷ Such consent can however, be implied from the circumstances, for instance, the personal presence of the candidate at the time and place where the offending speech is made by the party leader without any objection from the candidate would imply consent.³⁸ The question of consent, whether express or implied, is therefore a question of fact and not a mixed question of fact and law.³⁹ The consent is paramount to associate the candidate with the actions of other persons.

As the candidate can be held vicariously liable for the conduct of his election agent(s), it is of utmost importance that the term, 'election agent' be interpreted within the context of the specific facts and circumstances of each case that comes up for adjudication. To ensure that no person is in a position to take undue advantage of the delicate position of the candidate, appropriate determination of relevant facts is absolutely essential. In the event that such an approach is not followed by the adjudicating authority, the candidate may be falsely implicated, leading to a gross miscarriage of justice.

3. Recommendations made by various Commissions

Free and fair elections are the very foundations of democratic institutions.⁴⁰ Unfortunately, the Indian democracy has witnessed a steady deterioration in the standards and practices of the political groups over time. Money-power, muscle-power, corrupt practices and unfair means are being rampantly employed to win the elections. With a view to reduce these grave maladies that have crept into the Indian electoral system, various electoral reforms have been suggested by reports of various commissions such as the 170th Law Commission Report on Electoral Reforms⁴¹ and the Report of the National Commission for Review of the Working of the Constitution⁴² (*hereinafter* NCRWC).

³⁷ See *Ramakant Mayekar v. Celine D'Silva*, (1996) 1 SCC 399, ¶ 33.

³⁸ See *Chadrakanta Goyal v. Sohan Singh Jodh Singh Kohli*, (1996) 1 SCC 378, ¶ 9.

³⁹ See *Sarat Chandra Rabha v. Khagendranath Nath*, AIR 1961 SC 334, ¶ 9.

⁴⁰ See *P.R.Belagali v. B.D. Jatti*, AIR 1971 SC 1348.

⁴¹ Law Commission of India, *One Hundred Seventieth Report on Reform of the Electoral Laws*, May 1999, available at <http://www.lawcommissionofindia.nic.in/lc170.htm> (Last visited on November 15, 2009).

⁴² National Commission for Review of Working of the Constitution, *Electoral Processes and Political Parties*, available at <http://lawmin.nic.in/ncrwc/finalreport/v1ch4.htm> (Last visited on November 11, 2009).

The scope of this article limits us to discuss only those recommendations which relate to corrupt practices.

§ 8A⁴³ of RPA governs disqualification on the ground of corrupt practice. As per the present position of law, violation of § 123(3) or § 123(3A) entails disqualification under § 8A of RPA. The current practice, however, is a long and labyrinthine process as the order for disqualification can be issued only after it has passed through several phases of scrutiny. Firstly, once the High Court holds a candidate guilty of corrupt practice, the case is referred to the Secretary of the concerned State Legislature or the Secretary General of the Lok Sabha or Rajya Sabha, as the case may be. It is then forwarded to the President, who in turn forwards it to the EC. It is only then that the EC has the jurisdiction to tender its opinion to the President based on which the disqualification order is issued. The NCRWC, with a view to avoid such delays, recommended that in matters of disqualification on grounds of corrupt practices, the President should determine the period of disqualification under § 8A based on the direct opinion of the EC.⁴⁴

⁴³ The RPA, 1951, § 8A: **Disqualification on ground of corrupt practices-** “(1) The case of every person found guilty of a corrupt practice by an order under § 99 shall be submitted, as soon as may be, after such order takes effect, by such authority as the Central Government may specify in this behalf, to the President for determination of the question as to whether such person shall be disqualified and if so, for what period: Provided that the period for which any person may be disqualified under this sub-section shall in no case exceed six years from the date on which the order made in relation to him under § 99 takes effect. (2) Any person who stands disqualified under § 8A of this Act as it stood immediately before the commencement of the Election Laws (Amendment) Act, 1975 (40 of 1975), may, if the period of such disqualification has not expired, submit a petition to the President for the removal of such disqualification for the unexpired portion of the said period. (3) Before giving his decision on any question mentioned in sub-section (1) or on any petition submitted under sub-section (4), the President shall obtain the opinion of the Election Commission on such question or petition and shall act according to such opinion.”

⁴⁴ The position of law on the point of disqualification prior to the Election Laws Amendment Act, 1975 mandated that any person found guilty of corrupt practices was automatically disqualified for a period of six years from the date the order of the court took effect. But this provision was amended by the 1975 Amendment seeking to avoid the implementation of such a blanket provision as it was felt that the nature and gravity of the corrupt practice committed should be taken into consideration and the period of disqualification should be decided accordingly. Even though the Goswami Committee on Electoral Reforms was in favour of the pre-amended position of disqualification, the EC was of the contrary view as it felt that the present provision provides greater flexibility in deciding the quantum of punishment based on the nature and gravity of the corrupt practice committed. The EC in furtherance of this view has in certain cases like the *Re Balasaheb Thackeray* case prescribed disqualification for the maximum period of six years, as it considered the disparaging remarks made against a particular community of a much graver nature since it had the innate ability to malign the piety of the electoral process. On the other hand, in cases like the *Re K Mohan Rao*, the EC was of the view that a mere appeal on the ground of religion by means of some posters exhibited only in certain places was not as a grave a practice to entail disqualification for period of six years and hence recommended a far lesser punishment of disqualification for just one year. See *supra* note 26.

Further, every election petition is expected to be tried expeditiously and the trial concluded within 6 weeks from the date on which the election petition is presented to the High Court.⁴⁵ But reality paints a different picture, where petitions remain pending for years, and in the meantime, the term of the accused candidate expires, defeating the very purpose of the case and reducing the judicial decision to mere precedential value. The NCRWC has suggested that all election-related petitions should be heard and decided by a separate judicial set up within a time bound period i.e. within 6 to 12 weeks by dedicated benches of special courts. In the alternative, special election benches may be constituted in the High Courts and earmarked exclusively for the disposal of election petitions and election disputes.⁴⁶

Under the existing laws, a person facing criminal charges can contest an election. As a result there has been widespread criminalization of politics since such persons with criminal antecedents may not dither to contravene the law again. The NCRWC had taken note of this fact and had suggested that any person charged with any offence punishable with imprisonment for a maximum period of five years or more, should be disqualified for being chosen as, or for being, a Member of Parliament or State Legislature and he shall so remain disqualified for a period of one year from the date the charges were framed against him by the court in that offence and will continue to remain disqualified till the conclusion of the trial for that offence.⁴⁷ In case a person is convicted of any offence by a court of law and sentenced to imprisonment for six months or more, the bar should apply during the period under which the convicted person is undergoing the sentence and for a further period of six years after the completion of the period of the sentence.⁴⁸ A potential candidate against whom charges have been framed may approach the Special Court who shall be obliged to enquire whether there is indeed a *prima facie* case justifying the framing of charges and shall decide within a strict time-frame.⁴⁹ These Special Courts should be constituted at the High Court level and should decide the case within a period of six months. Further, appeals against their decision should lie before the Supreme Court only.⁵⁰ The Law Commission had also opined that even though disqualification should not occur when a mere F.I.R. or police report (challan) is filed, disqualification should occur when charges are drawn up by a court. This would mean that in all cases where trial has begun, the disqualification should start.⁵¹

These recommendations of the Law Commission, if given due attention, can prove to be highly effective as it gives very clear and succinct guidelines for

⁴⁵ The RPA, 1951, § 86(7).

⁴⁶ *Supra* note 42.

⁴⁷ *Id.*

⁴⁸ *Id.*, ¶ 4.12.2.

⁴⁹ *Id.*, ¶ 4.12.5.

⁵⁰ *Id.*, ¶ 4.12.6.

⁵¹ Dhavan, *supra* note 13.

the conduct of candidates. For example, any election campaigning on the basis of caste or religion and any attempt to spread caste and communal hatred during elections should be punishable with mandatory imprisonment/disqualification. It has also made a very pertinent suggestion as to the disqualification of a person based on his criminal antecedents. It is high time that a resolute stance be taken in relation to electoral hate speech, lest history be repeated which is unfortunately tainted with many glaring incidents of hate speech serving as a precursor to violent communal and religious upheavals that have disturbed the plural fabric of Indian society.

4. Hindutva Judgments

Even though the RPA is a complete and self-contained Code within which any rights claimed in relation to an election or an election dispute can be found,⁵² the importance of judicial interpretation cannot be discounted. Judicial interpretation in India in cases of electoral hate speech has been a dismal affair and the judicial reasoning has acted in facilitating rather than curbing the growth of corrupt practices such as hate speech. The gloomy side of judicial interpretation especially in relation to § 123(3) and § 123(3A) of the RPA came to the fore in *Ramesh Yashwant Prabhu v. P.R.Kunte*.⁵³ This case involved charges of corrupt practices against Prabhu, the then mayor of Bombay and his ‘agent’ Bal Thackeray. They made derogatory references to Muslims and further declared a war against the Muslims.⁵⁴ The Supreme Court though concluded that the speeches made were in violation of § 123(3A), it demonstrated a more liberal approach towards some of the pertinent issues. The court observed that mere reference to any religion in an election speech does not bring it within the purview of § 123(3) or § 123(3A), since reference can be made to any religion in the context of secularism or to criticise any political party for practising discrimination against any religious group or generally for preservation of the Indian culture. The Court further added that the particular “use made of these words and the meaning sought to be conveyed in the speech also has to be seen”.⁵⁵ By reaching such a conclusion, the Court gave a free hand to the political parties to carry on their divisive politics under the garb of secularism.

In the other *Hindutva* case of *Manohar Joshi v. Nitin Bhaurao Patil*,⁵⁶ Joshi had stated in an electoral speech that “the first Hindu state will be

⁵² See *Dhartipakar Madan Lal Agarwal v. Shri Rajiv Gandhi*, AIR 1987 SC 1577, ¶ 14.

⁵³ AIR 1996 SC 1113.

⁵⁴ “Hinduism will triumph in this election and we must become hon’ble recipients of this victory to ward off the danger on Hinduism, elect Ramesh Prabhu to join with Chhagan Bhujbal who is already there. *You will find Hindu temples underneath if all the mosques are dug out.* Anybody who stands against the Hindus should be showed or worshipped with shoes. A candidate by the name Prabhu should be led to victory in the name of religion.” See *Prabhu v. Kunte*, A.I.R. 1996 SC 1113, 1118–19 (*emphasis added*).

⁵⁵ *Supra* note 53, ¶ 45.

⁵⁶ AIR 1996 SC 796.

established in Maharashtra”.⁵⁷ However, the Court did not hold Joshi guilty for violation of § 123(3) or § 123(3A) of the RPA as in the Court’s view, such a statement was not an appeal to vote on the basis of religion, but simply “the expression, at best, of such a hope”.⁵⁸ The Court, while saying so, has opened a Pandora’s Box. Thanks to such reasoning, Varun Gandhi who was reprimanded by the EC for making comments like “all the Hindus stay on this side and send the others to Pakistan,” and “this is the lotus hand, it will cut their throats after elections” (clearly using a pejorative that plays on the fact that Muslims are circumcised), may well defend himself by claiming that he too was merely expressing the hope that Pilibhit would be rid of Muslims after the elections and was not really appealing for votes on the ground of his religion or promoting enmity.⁵⁹ The aforesaid judgments have often been used as a shield by political parties to rationalize a range of illiberal activities, the practice of hate speech being the most abused form of such activities. Varun Gandhi’s case is only the latest instance of how the *Hindutva* verdicts have conditioned the Indian political environment with a climate of impunity. Though redress is available through an election petition before a High Court, the enforcement of these provisions has been diluted considerably by the 1996 ruling of the Supreme Court in the *Manohar Joshi* case.⁶⁰

The RPA deals with situations that arise before the commencement of the elections and situations arising after the declaration of result of an election. The hate speech provisions under it are only triggered once elections are over. Further, election petitions and criminal trials take a long time and irrevocable damage may be caused if a person is not meanwhile restrained. The question that arises is that, then what happens during the campaign period? Can a candidate continue to indulge in vitriolic vituperation with impunity, vitiating the atmosphere until his conviction?⁶¹ The MCC was framed to deal with such situations that arise from the date of announcement of the schedule of election to the declaration of the result. Consequently, we will make an analysis of the powers of the EC to enforce the MCC for thwarting attempts to use communalism as a political mobilisation strategy through hate speech.

B. THE MODEL CODE OF CONDUCT

The MCC lays down broad guidelines as to how the political parties and candidates should conduct themselves during an election campaign. In the 1960’s, the political parties as well as the EC reached consensus on the need to

⁵⁷ *Id.*, ¶ 61.

⁵⁸ *Id.*

⁵⁹ See Manoj Mitta, *Hatred Justified?*, THE TIMES OF INDIA, March 29, 2009, available at <http://timesofindia.indiatimes.com/Deep-Focus/Hatred-Justified/articleshow/4329003.cms>. (Last visited on September 27, 2009).

⁶⁰ See Sukumar Muralidharan, *Law and Practice*, THE HINDU, December 27, 1997 - January 9, 1998, available at <http://www.thehindu.com/fline/fl1426/14260130.htm> (Last visited on November 15, 2009).

⁶¹ Sorabjee, *supra* note 13.

have and follow such guidelines so that free, fair and peaceful elections are conducted to ensure the vibrant working of the democracy in India.⁶² In the realm of the hate speech debate, the MCC assumes significance as Clauses (1) and (3) of Item 1 (General Conduct) of the MCC prohibit parties and candidates from making any appeals to caste or communal feelings for securing votes. Further, no party or candidate can indulge in any activity that may aggravate existing differences or create mutual hatred or cause tension among different castes, communities, religious or linguistic groups. Despite such express provisions prohibiting the use of inflammatory language, ambiguity as to the enforceability of the MCC has often prevented it from being an effective deterrent against electoral hate speech.

In the recent Varun Gandhi controversy, the use of highly provocative language and derogatory references against a certain community by him invited severe criticism from the EC. The EC, in its order to Mr Gandhi censured him for violation of the MCC and advised the BJP to not nominate him as a candidate. However, this advice fell on deaf ears. This has given rise to some questions which need to be urgently answered- Does the MCC apply to candidates alone? Is the MCC enforceable? What are the powers and duties of the EC in this situation? We shall endeavour to provide answers to the same below:

1. Does the MCC apply to Candidates alone?

In the Varun Gandhi controversy, the MCC had legally come into force with the announcement of the election schedule on March 1, 2009. Varun Gandhi delivered the impugned speeches in the course of his election campaign on March 7 and 8. However, the BJP had not declared him to be the party's candidate till then. The primary question that arose was whether the MCC would be applicable to him under the aforesaid circumstances.

As discussed earlier, the application of RPA provisions related to hate speech is restricted to candidates and their agents, thereby allowing politicians to exploit this technicality to escape the consequences of violation of the law. In contrast to RPA, the MCC provisions are for the guidance of both candidates as well as political parties. The term 'political party' has a wide connotation and includes within its ambit, all the leaders and members of the party, including prospective party candidates.⁶³ Therefore, once the MCC comes into effect on the date of the

⁶² The Government of Kerala took steps to evolve a code of conduct for observance by organised political parties prior to the general election of 1960. The code was discussed and approved by representatives of leading political parties. In December, 1966, the same code was adopted at a conference of the representatives of political parties in Kerala. In 1966, that model code was accepted by the political parties in the States of Madras, Andhra Pradesh and West Bengal. In 1968, Election Commission circulated that code to all recognised political parties in India and to the State Governments. On acceptance by the political parties, it was extended throughout the country. See Harbans Singh Jalal, *infra* note 64.

⁶³ V. Venkatesan, *Varun Gandhi Speeches: Poll Panel Order Gives Model Code Teeth*, THE HINDU BUSINESS LINE, March 24, 2009, available at <http://www.thehindubusinessline.com/2009/03/24/stories/2009032450620400.htm> (Last visited on November 14, 2009).

announcement of an election,⁶⁴ all party members would come within the purview of its provisions. Thus, whether the offensive speech was made by a politician as a candidate or not is an irrelevant consideration and does not affect the applicability of the MCC once the election schedule has been announced.

2. Is the MCC enforceable?

For the first four decades of its existence, the observance of the MCC was largely left to the good sense of the political parties. It remained a passive document providing general guidelines. The MCC was intended to be followed voluntarily by political parties so as to maintain election campaign on healthy lines to ensure peace and order during the campaign period. As long as the Code remained on paper and was not strictly enforced, there was no opposition. However, when the EC vigorously asserted its power to enforce the MCC by taking stringent actions ranging from censoring candidates to cancelling by-elections for violation of MCC provisions, it was met by stiff resistance and often the validity of the MCC and the legitimacy of actions taken under it were questioned.⁶⁵

Since MCC does not have a statutory status, no legal consequences can follow from the breach of its provisions. It is believed that public opinion is the moral sanction for its enforcement.⁶⁶ However, in 1994, a mild attempt was made to enforce the MCC by providing for some disincentives upon its violation through insertion of Para 16A⁶⁷ to the Election Symbols (Reservation and Allotment) Order, 1968.⁶⁸ This provision empowers the EC to suspend or withdraw

⁶⁴ Harbans Singh Jalal v. Union of India, (1997) 116 PLR 778.

⁶⁵ *Supra* note 26, 633. See also, A.G. Noorani, *A Code for Excess*, FRONTLINE, August 1-14, 2009, available at <http://www.fronnet.com/fl2616/stories/20090814261608400.htm> (Last visited on November 13, 2009).

⁶⁶ *Supra* note 26, 629-33.

⁶⁷ Election Symbols (Reservation and Allotment) Order, 1968, Paragraph 16A: "Notwithstanding anything in this order, if the Commission is satisfied on information in its possession that a political party, recognised either as a National Party or as a State party under the provisions of this order, has failed or has refused or is refusing or has shown or is showing defiance by its conduct or otherwise (a) to observe the provisions of the 'Model Code of Conduct for Guidance of Political Parties and Candidates' as issued by the Commission in January 1991 or as amended by it from time to time, or (b) to follow or carry out the lawful directions of the Commission given from time to time (emphasis supplied) with a view to furthering the conduct of free, fair and peaceful elections or safeguarding the interests of the general public and the electorate in particular, the Commission may, after taking into account all the available facts and circumstances of the case and after giving the party reasonable opportunity of showing cause in relation to the action proposed to be taken against it, either suspend, subject to such terms as the commission may deem appropriate, or withdraw the recognition of such party as the National Party or, as the case may be, the State Party."

⁶⁸ In 1968, the EC issued the Election Symbols Order while exercising its power under 324(1) read with rules 5 and 10 of the Conduct of Election Rules, 1961. The validity of the Symbols Order has been challenged under several cases alleging the lack of competence in the Commission to issue such an order. The debate on the Order's legality was finally put

the recognition of the political party as a National or State Party upon its failure to observe the MCC or follow lawful directions and instructions of the Commission. Therefore, in case of violation of MCC provisions on account of making communally provocative electoral speeches, the EC can direct the concerned party to not field the guilty as a party candidate as was done in the Varun Gandhi case. If the party in question disregards the directives of the EC and instead continues to render its name and support to the accused, it would warrant de-recognition as a National or State Party under Para 16A of the Symbols Order.

Recognition of a political party carries with it, several privileges and benefits under election law.⁶⁹ For instance, under the Symbols Order, a recognised political party is granted an election symbol reserved exclusively for it. De-recognition takes away the benefit of a common symbol. In such a situation, the candidates set up by that party will have to be regarded as independent candidates, and therefore, will be entitled to be allotted different symbols. People who subscribe to a political party give votes on the basis of its symbol. Particularly in a country like India where a majority of the voters are illiterate, a party's symbol becomes synonymous with its identity. Therefore, withdrawal of recognition can adversely affect a party's poll prospects and throw the party into "state of disarray" and therein lies the sanction.⁷⁰

Theoretically, such a law seems to provide an effective mechanism for enforcement of the MCC due to its potential to produce a deterrent effect; however, in practice it has proved to be unviable. Despite an express conferment of such a wide power upon the EC through a provision of law, the track record of its implementation shows that not many parties have been at the receiving end of the clause, thereby rendering the law practically redundant.⁷¹

to rest by the Supreme Court when it held that issuing of the order was justified under the Election Rules as well as Article 324 of the Constitution, which is plenary in character and can encompass all areas left unoccupied by legislation. *See* Sadiq Ali v. Election Commissioner, AIR 1977 SC 2155, APHLC Shillong v. M.A. Sangma, AIR 1977 SC 2155; Kanhaiya Lal Omar v. R.K. Trivedi, AIR 1986 SC 111; Jagannath Mohan v. Election Commission of India, AIR 2000 Ori 44.

⁶⁹ For a further discussion on benefits emanating out of recognition of a political party, *see supra* note 26, 599-611.

⁷⁰ *See* V. Venkatesan, *The CEC's Outlook Interview & the Symbols Order*, December 16, 2007, available at http://lawandotherthings.blogspot.com/2007_12_01_archive.html (Last visited on November 14, 2009).

⁷¹ *See* Venkitesh Ramakrishnan, *Election Battles*, FRONTLINE, January 1-14, 2009, available at <http://www.flonnet.com/fl2201/stories/20050114008113200.htm> (Last visited on November 15, 2009). This view is substantiated by the recent controversy surrounding Congress president, Sonia Gandhi's alleged misuse of aircraft belonging to the State of Chhattisgarh in violation of the MCC provisions. Paragraph 16A was invoked and a notice was issued to Congress by the EC to show cause as to why its recognition as a national party should not be withdrawn under § 16 A of the Symbols Order. However, the EC's words constituted an empty threat as no such action was undertaken despite an unsatisfactory response to the notice.

3. Should the MCC have statutory sanction?

In the mid-1980's, the EC had demanded that statutory sanction be provided to the MCC.⁷² However, they later retracted on the ground that granting of statutory status to the MCC would be a "self-defeating exercise".⁷³ The admitted reason for this retreat has been that MCC violations require quick remedial response whereas the judicial process of examination of a MCC violation would result in unnecessary delay, thereby rendering judicial decisions which are pronounced much after elections, futile.⁷⁴ The aforesaid apprehension of the EC is clearly not misplaced as can be seen in the experience with election petitions under the RPA. The law places an obligation on the judge trying an election petition to conclude it within six months from the date of its presentation.⁷⁵ However, in reality such an expeditious disposal of election petitions has only remained a distant dream. There are several instances where election petitions remained indisposed even after completion of a five-year term by the candidate whose election was challenged, thereby defeating the very purpose of the judgement.⁷⁶

However, as much as we agree with this rationale of the EC, it cannot be denied that the absence of any effective enforcement mechanism has reduced the EC to the state of a hapless spectator to the blatant violation of the philosophy and spirit of the model code.⁷⁷ Its provisions such as hate speech restrictions are flagrantly violated as there is no fear among political parties of any adverse consequences. Mere censuring by the EC, once the candidates have caused adequate damage by inciting communal passions in violation of MCC provisions, without meting out any real punishment, has made an absolute mockery of the MCC.

It is therefore imperative to provide legislative backing to the MCC so as to ensure a strict implementation of its provisions which will help in curbing electoral hate speech effectively and immediately.⁷⁸ Even the National Commission on the Review of the Working of the Constitution recommended that the "election code of conduct should be given the sanctity of law and its violation should

⁷² Noorani, *supra* note 65.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ § 86(7), R.P.A.

⁷⁶ See J. Venkatesan, *SC Pulls up Madras HC for Delay in Pronouncing Order*, THE HINDU, September 21, 2001, available at <http://www.thehindu.com/thehindu/2001/09/21/stories/0221000h.htm> (Last visited on November 16, 2009).

⁷⁷ See V. Venkatesan, *Model Code and Actual Conduct*, THE HINDU, March 13-26, 2009, available at <http://www.hindu.com/fline/fl2106/stories/20040326003402800.htm> (Last visited on November 16, 2009).

⁷⁸ The legislative competence to pass such a law emanates from Article 327 which empowers the Parliament to make laws in relation to elections, subject to the provisions of Constitution. This Article has to be read along with Entry 72 of List I of the Seventh Schedule of the Constitution of India.

attract penal action”.⁷⁹ The instant question that then comes to the mind is: How will providing the MCC with statutory backing, make it any different from the relevant provisions under RPA? The electoral candidates have unashamedly been flouting RPA provisions related to hate speech. The MCC for them would be just another law that they will find a way to bypass. One of the biggest hurdles in enforcing the RPA provisions was that justice was often denied owing to judicial delays. This delay was also cited as the reason why the EC withdrew its demand for providing statutory backing to the MCC. Therefore, in light of these legitimate concerns with regard to such a law, we suggest that under the new MCC statute, the power to punish should vest with the Commission and not with courts. Otherwise, the courts would again be burdened with a spate of litigation and would fail to deliver justice.

4. Election Tribunals – A New Model?

The Election Commission should be allowed to act as an Election Tribunal⁸⁰ for the purpose of dealing with complaints related to violation of MCC provisions whereby they will be required to provide a time-bound judgement within the campaign period. This will ensure that a situation that

⁷⁹ *Supra* note 42, ¶ 4.15.6

⁸⁰ It is interesting to note that the framers of the Indian Constitution envisaged the appointment of an election tribunal under Article 324 for settlement of all disputes that arose in relation to elections. Interestingly, prior to 1966, election petitions were presented to the Election Commission, which would constitute one-member Election Tribunals of the rank of District Judge, on an ad hoc basis for the trial of election petitions. In *Hari Vishnu Kamath v. Ahmed Isheque*, AIR 1955 SC 233, it was held by the Supreme Court that Article 329(b) prohibited only the ‘initiation’ of proceedings, questioning an election, in any other manner other than by an election petition and once that proceeding was initiated by filing an election petition, the requirement of Article 329(b) was met and thereafter the trial of the petition by the election tribunal was subject to the general law and to the supervision of High Courts over tribunals. Election Tribunals are subject to the superintendence of the High Courts under Article 227 of the Constitution, and that superintendence is both judicial and administrative. While in a certiorari under Article 226 the High Court can only annul the decision of the Tribunals, it can, under Article 227 do that, and also issue further directions in the matter. Thus in order to avoid dual jurisdiction over the election matters the Election Commission in its Report on the Third General Elections in India in 1962, recommended that trial of election petitions should be entrusted to the High Courts instead of election tribunals. Parliament thus enacted § 80-A of the Representation of the People Act, 1951 providing that the “High Court” shall be the authority for presentment of election petitions under Article 329(b) of the Constitution. This was incorporated by an amendment in the year 1966 (Act 47 of 1966). Article 324 was amended to effect a consequential change as a result of the decision to abolish Election Tribunals and to hear election petitions by High Courts. Therefore, through the Constitution (Nineteenth) Amendment Act, 1966, the words were deleted from the Constitution and election tribunals were abolished. Instead determination of election petitions was entrusted in the High Court. See *Rav Pratap Singh, Power of the High Court to Entertain Election Petitions*, August 27, 2008, available at <http://www.legalserviceindia.com/article/1268-Powers-of-High-Court-to-entertain-election-petitions.html> (Last visited on November 11, 2009).

needs to be dealt with during the campaign period is met with an effective remedy that provides instant relief so that justice does not have to wait till the courts pass a judgment. Therefore, it may not only direct political parties not to field a particular candidate who vitiates the atmosphere, but also direct any person making a communal speech that seeks to polarise voters not to make any speeches during the election process. EC should be empowered to injunct a person or a potential candidate from indulging in making provocative speeches. Hence, the law will have more teeth as the EC will be empowered to issue binding directions as opposed to mere advisories.

Opponents of the move to provide statutory backing to the MCC argue that it would result in vesting too much power in the EC, which is capable of being abused. This argument does not stand ground as the possibility of misuse of any provision of law cannot be made the basis of its non-existence. In the words of Justice Chandrachud, “the fear of perversion is no test of power.”⁸¹ It has been held that when discretion is vested in a high functionary, it should be reasonably presumed to be used properly, not perversely. Further it is well established that since actions of the EC are subject to judicial review, the Court will have the power to strike down an act if it involves misuse of power.⁸²

5. Nature and Scope of Powers of the EC under Article 324 of the Constitution

Article 324⁸³ of the Constitution provides that the superintendence, direction and control of the conduct of elections to Parliament are vested in the EC. The terms “superintendence, direction and control” are of wide amplitude and have been interpreted to include all powers necessary for the smooth and effective conduct of elections.⁸⁴ Therefore, under Article 324, the EC can exercise any power which is necessary to achieve the objective of free and fair elections, even if the Conduct of Election Rules, 1961 do not specifically spell out such powers. This was emphatically laid down in Justice Krishna Iyer’s judgment in *Mohinder Singh Gill v. Chief Election Commissioner*⁸⁵ (hereinafter MS Gill case).

Against the backdrop of the EC’s powers under Article 324, three of India’s biggest and most renowned legal scholars have provided very interesting

⁸¹ *Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SC 2299.

⁸² *See Virendra v. The State of Punjab and Anr*, AIR 1957 SC 896; *Harishankar Bagla and Anr. v. The State of Madhya Pradesh*, AIR 1954 SC 465.

⁸³ Constitution of India, Article 324: “**Superintendence, direction and control of elections to be vested in an Election Commission:** (1) The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice President held under this Constitution shall be vested in a Commission (referred to in this Constitution as the Election Commission).”

⁸⁴ *Election Commission of India v. Ashok Kumar*, (2000) 8 SCC 216; *Lalji Shukla v. Election Commission*, AIR 2002 All 73.

⁸⁵ AIR 1978 SC 851.

and completely different perspectives on the hate speech debate. Shantibhushan, an eminent personality in the Indian legal circles and also a former Union Law Minister has agreed that the power of the EC to take action against those who use offensive language during elections are very wide and stems from Article 324.⁸⁶ He contends that the E.C. has inherent powers under Article 324 and even in the absence of MCC or the provisions of RPA, it has a duty to maintain a conducive atmosphere for holding free and fair elections. Once this power is mandated, any procedure to have it enforced is also part of that power.⁸⁷ He tries to explain this by citing extreme examples: “Supposing a political party distributes AK-47s to 1,000 members and tells them to go around the country and terrorise the voters, will the EC wait for the cases to be instituted etc. or step in to prevent the situation, so that elections are not held in those circumstances? This [Varun Gandhi’s hate speech] is something more harmful than that. You can’t divide the country, create a situation of riots, and then hold an election.”⁸⁸ In the landmark *MS Gill* case, the court had held, “Article 324 is a reservoir of power to act for the avowed purpose of, not divorced from, pushing forward a free and fair election with expedition.”⁸⁹ Relying on these words of the Court, Shantibhushan argues that under Article 324, the EC may not only direct political parties not to field a particular candidate who communalises the electoral atmosphere but may also expressly prohibit any person making a hate speech that seeks to polarise voters from making any speeches during the election process. And if its orders are not obeyed, it can also go to the extent of directing the State governments to detain such a person in custody during the period of the elections.⁹⁰

Another distinguished legal scholar, Rajeev Dhawan has a contradictory opinion. He contends that the EC can only issue warnings upon violation of the MCC, but use of its constitutional power under Article 324 to disqualify a politician who uses provocative communal speech during election campaigns would be “over-reaching its brief”.⁹¹ To solve this problem, he suggests that the EC’s powers in respect of the MCC and other directions should be given statutory recognition and the existence or the absence of the power to disqualify should be spelled out in such legislation. He establishes his argument through examples such as those of L. K. Advani, Murli Manohar Joshi, Ashok Singhal, Uma Bharati, Bal Thackeray and others against whom hate speech allegations were made in the past but without much consequence.⁹²

On the other hand, Soli Sorabjee, another renowned Indian jurist, has an absolutely different stand on this issue. He argues that under the current

⁸⁶ Shanti Bhushan, *The Election Commission and Its Powers*, THE HINDU, March 28, 2009, available at <http://www.hindu.com/2009/03/28/stories/2009032854951100.htm> (Last visited on November 15, 2009).

⁸⁷ *Id.*

⁸⁸ V. Venkatesan, *The E.C has to Prove that it Can Bite*, FRONTLINE, April 11-24, 2009, available at <http://www.hinduonnet.com/fline/fl12608/stories/20090424260811600.htm> (Last visited on November 15, 2009).

⁸⁹ *Id.*

⁹⁰ *Supra* note 86.

⁹¹ Dhawan, *supra* note 13.

⁹² *Id.*

constitutional scheme, the passing of a restraining order by the EC so as to injunct a potential candidate from using inflammatory communal language is “problematic”.⁹³ Therefore, he suggests that the appropriate course of action would be to promulgate an ordinance to amend § 153A IPC and the RPA and confer express power to injunct a person from making inflammatory speeches.⁹⁴

IV. THE INDIAN PENAL CODE

The diversity of religions, cultures, ethnicities etc in India makes it essential to ensure that religious, racial and ethnic tolerance prevails. The significance of this is also reflected in the various provisions of the IPC, which prohibit and punish hate crime. The IPC is India’s principal criminal legislation which was drafted as early as 1860 by Lord Macaulay. The rationale behind the hate speech restrictions was reflected in his opinion that:

“No man ought to be at liberty to force, upon unwilling ears and eyes, sounds and sights which must cause irritation....If I were a Judge in India, I should have no scruple about punishing a Christian who should pollute a mosque.”⁹⁵

Recently, when Varun Gandhi made fanatical pro-Hindu speeches and threatened to cut off hands of those who raised a “hand against Hindus”, he violated several provisions of the IPC dealing with hate speech.⁹⁶ In fact, the trend in India to resort to communally charged speeches especially during elections to garner votes has often attracted various hate speech related IPC provisions in the past. However, unlike the RPA provisions (discussed above), their applicability is not merely restricted to the period of elections or to election candidates. These are general laws which can be used to punish hate speeches that are made under ordinary circumstances by ordinary people, as long as the conditions given in the provisions are satisfied. Some of the important sections of the IPC, which are attracted in response to hate speech, such as § 153A, § 153B, § 295A and § 505(2) are discussed below.

A. PROVISIONS OF THE IPC RELATING TO HATE SPEECH

1. § 153A⁹⁷

Of the relevant provisions of the IPC relating to hate speech, § 153A is the one that is most often invoked. It prohibits speech or writings which promote

⁹³ Sorabjee, *supra* note 13.

⁹⁴ *Id.*

⁹⁵ Fernandes, *supra* note 13.

⁹⁶ Thaindian News, *Criminal Case Filed Against Varun for Inflammatory Speeches (Lead)*, March 17, 2009, available at http://www.thaindian.com/newsportal/politics/criminal-case-filed-against-varun-for-inflammatory-speeches-lead_100167573.html#ixzz0VGhk9dR9 (Last visited on November 15, 2009).

⁹⁷ IPC, 1860, § 153A: **Promoting enmity between different groups on grounds of**

enmity, hatred, ill-will or disharmony *inter alia* between different religious groups or communities. Punishment for contravention of this provision is imprisonment for three years or a fine or both.⁹⁸ This section was primarily created to “check fissiparous communal and separatist tendencies and secure fraternity so as to assure the dignity of the individual and unity of the nation.”⁹⁹ This was especially essential for the maintenance of public peace and tranquillity in a country like India where religious passions can be aroused easily.¹⁰⁰ While it is true that religious freedom must be accompanied by the liberty to free expression of religious opinions together with the liberty to criticize the religious beliefs of others, it must also be remembered that the liberty to criticize does not include a licence to resort to offensive speech.¹⁰¹ This forms the crux of this section.

Criminality under § 153A does not attach to the things said or done, but to the manner in which it is said or done. If the words spoken or written are couched in temperate, dignified and mild language and do not have the tendency to insult the feelings or the deepest religious convictions of any section of people,

religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony-

“(1) Whoever (a) By words, either spoken or written, or by signs or by visible representations or otherwise, promotes or attempts to promote, on grounds of religion, race, place or birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities, or

(b) Commits any act which is prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities, and which disturbs or is likely to disturb the public tranquility, [or] [(c) Organizes any exercise, movement, drill or other similar activity intending that the participants in such activity shall use or be trained to use criminal force or violence of knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, or participates in such activity intending to use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, against any religious, racial, language or regional group or caste or community and such activity for any reason whatsoever causes or is likely to cause fear or alarm or a feeling of insecurity amongst members of such religious, racial, language or regional group or caste or community,] Shall be punished with imprisonment which may extend to three years, or with fine, or with both.

Offence committed in place of worship, etc. - (2) Whoever commits an offence specified in sub-section (1) in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment which may extend to five years and shall also be liable to fine.”

⁹⁸ *Id.*

⁹⁹ See THOMAS DAVID, HUMAN RIGHTS: GROUP DEFAMATION, FREEDOM OF EXPRESSIONS AND THE LAW OF NATIONS 212 (1997); See also John H Mansfield, *Religious Speech under Indian Law* in COMPARATIVE CONSTITUTIONAL LAW (1989).

¹⁰⁰ See V. Venkatesan, *Hate and Abuse*, THE HINDU, July 19, 2008, available at <http://www.hinduonnet.com/fline/fl2515/stories/20080801251504400.htm> (Last visited on November 15, 2009).

¹⁰¹ Kali Charan Sharma v. King Emperor, AIR 1927 All 649.

penal consequences do not follow.¹⁰² On the contrary if such words spoken or written are crude and abusive, then for making a *prima facie* case in such circumstances, it is essential to establish that there was a deliberate “intention” on the part of a person to promote disharmony or a feeling of enmity, hatred or ill will among different religious, racial, linguistic or regional groups and castes or communities by his writings or speech. It has to be further established that his act was “prejudicial to the maintenance of harmony or is likely to disturb the public order. The intention to cause disorder or incite the people to violence is the *sine qua non* of the offence under §153A of IPC”.¹⁰³

When a matter is charged as being within the mischief of §153A, it must be looked upon as a whole, and the class of people at whom the speech is directed and also the state of feelings between the different classes or communities at the relevant time, must be taken into account.¹⁰⁴ On September 4, 2002, VHP President, Ashok Singhal made the following statement:¹⁰⁵

“People say that I praise Gujarat. Yes, I do. Gujarat has been a successful experiment. Godhra happened on February 27 and the next day, 50 lakh Hindus were on the streets. We were successful in our experiment of raising Hindu consciousness, which will be repeated all over the country now.”

This speech was made in the immediate aftermath of the 2002 Godhra carnage, when it was still a sensitive issue and people’s emotions were very volatile. It had the potential to create another Godhra episode. By lauding the riots in Gujarat, which caused the death of thousands of Muslims, he encouraged the further destruction of Muslim lives and property, thereby blatantly violating § 153A.¹⁰⁶

2. § 153B¹⁰⁷

¹⁰² Azizul Haq v. State, AIR 1980 All 149.

¹⁰³ See The Hindu, *Be Cautious in Invoking Sensitive Sections against Authors: Court*, April 22, 2007, available at <http://www.hinduonnet.com/2007/04/22/stories/2007042201611000.htm> (Last visited on November 15, 2009).

¹⁰⁴ *C.f.* Debi Soren v. State, AIR 1954 Pat 254 (Although the present case deals with hate writing but the principle discussed in the case can be extrapolated to other circumstances leading to similar consequences like hate speech).

¹⁰⁵ See V. Venkatesan, *A Test Case in Supreme Court*, FRONTLINE, March 15-28, 2003, available at <http://www.hinduonnet.com/fline/fl2006/stories/20030328002704100.htm> (Last visited on November 15, 2009)

¹⁰⁶ *Id.*

¹⁰⁷ IPC, 1860, § 153B: **Imputations, assertions prejudicial to national-integration-** “(1) Whoever, by words either spoken or written or by signs or by visible representations or otherwise, - (a) Makes or publishes any imputation that any class of persons cannot, by reason or their being members of any religious, racial, language or regional group or caste or community, bear true faith and allegiance to Constitution of India as by law established

Another related provision is § 153B which proscribes imputations that any class of persons cannot be loyal citizens because they are members of a religious group or an assertion that members of any particular community should be denied or deprived of their rights as citizens of India by virtue of their belonging to a certain community. This section was also violated by VHP President, Singhal when he commended the riots in Gujarat, impliedly asserting that Muslims be denied or deprived of their rights as citizens of India.¹⁰⁸

Under both these provisions, it is not necessary for what may have been intended to have occurred i.e. to say that the actual occurrence of the event is not necessary and it is enough if there is potential of such disharmony being caused, thereby even penalizing an attempt to cause disharmony. Thus, even though the speeches made by Varun Gandhi in a communally charged area like Pilibhit, actually did not result in any widespread communal discord, the very fact that he made such a speech in a sensitive area, knowing-fully well the possible consequences, rendered the same an attempt to promote disharmony, punishable under the aforesaid sections. Therefore, if implemented strictly, the aforesaid sections can serve as effective tools to outlaw hate propaganda and incitement of communal feelings.¹⁰⁹

3. § 505(2)¹¹⁰

Another relevant provision of the IPC is § 505(2). It makes statements that create or promote enmity, hatred or ill-will between classes, an offence that is

or uphold the sovereignty and integrity of India, or (b) Asserts, counsels, advises, propagates or publishes that any class or persons shall, by reason of their being members of any religious, racial, language or regional group or caste or community, be denied or deprived of their rights as citizens of India or

(c) Makes or publishes any assertion, counsel, plea or appeal concerning the obligation of any class of persons, by reason of their being members of any religious, racial, language or regional group or caste of community, and such assertion, counsel, pleas or appeal causes or is likely to cause disharmony or feelings of enmity or hatred or ill-will between such members and other persons, shall be punished with imprisonment which may extend to three years, or with fine, or with both.

(2) Whoever commits an offence specified in sub-section (1), in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment which may extend to five years and shall be liable to fine.”

¹⁰⁸ *Id.*

¹⁰⁹ See Rohini Hensman, *The Case for Banning the VHP, Bajrang Dal and RSS*, August 25, 2004, available at <http://www.sacw.net/article711.html> (Last visited on November 15, 2009).

¹¹⁰ The IPC, 1860, § 505(2): **Statements creating or promoting enmity, hatred or ill-will between classes-** “Whoever makes, publishes or circulates any statement or report containing rumour or alarming news with intent to create or promote, or which is likely to create or promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities, shall be punished with imprisonment which may extend to three years, or with fine, or with both.”

punishable with imprisonment up to 3 years and/or with fine. This provision is similar to § 153A, the common ingredient in both being the promotion of the feelings of enmity, hatred or ill will between different religious or racial or linguistic or regional groups or castes or communities and the requisite *mens rea* to do so. Also, for an offence to be brought under § 153A and § 505(2), it is necessary that at least two such groups or communities should be involved as merely inciting the feeling of one community or group without any reference to any other community or group cannot attract either of the two sections. The point of distinction between the two sections however is that while publication of the words or representation is not necessary under § 153A, such publication is *sine qua non* under § 505(2). This was held in *Bilal Ahmed Kaloo v. State of A.P.*¹¹¹ In this case, the Supreme Court held that the words “whoever makes, publishes or circulates” used in the setting of § 505(2) cannot be interpreted “disjunctively but only as supplementary to each other because if it is construed disjunctively, then anyone who makes a statement falling within the meaning of § 505 would, without publication or circulation, be liable for conviction”.¹¹² Though, this section is another important addition to the many anti-hate speech laws contained in the IPC, unfortunately, like the numerous other provisions, it too has failed to effectively curb the menace of hate speech.

4. § 295A¹¹³

§ 295(A) is contained in Chapter XV of IPC which deals with offences relating to religion. This provision mandates a punishment of fine and/or imprisonment up to 3 years for speech, writings, or signs which are made a “with deliberate and malicious intention” to insult the religion or the religious beliefs of any class of citizens.

The legislative history of § 295(A) provides some interesting details about this provision. In a certain Lahore High Court case,¹¹⁴ a tract, *Rangila Rasool* containing scandalous references to Prophet Mohammed’s personal life, was published. The Court ruled that although the writing was certainly offensive to the Muslim community, the prosecution was not legally sustainable because the writing could not cause enmity or hatred between different religious communities, which is necessary to constitute an offence under § 153(A) of the IPC. There was an outcry from the Muslim community and a demand for change in the law. Thereafter, §

¹¹¹ 1997 SCC (Cri.) 1094.

¹¹² *Id.*, ¶ 10.

¹¹³ The IPC, 1860, § 295A: **Deliberate and malicious acts, intended to outrage religious feelings or any class by insulting its religion or religious beliefs-** “Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of [citizens of India], [by words, either spoken or written, or by signs or by visible representations or otherwise], insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to [three years], or with fine, or with both.”

¹¹⁴ Rajpaul v. Emperor, AIR 1927 Lah 590.

295(A) was enacted by the Criminal Law Amendment Act (25 of 1927).¹¹⁵ The report of the Select Committee preceding the enactment of § 295(A) stated that the purpose of the section was to punish persons who indulge in wanton vilification or attacks upon the religion of any particular group or class or upon the founders and prophets of a religion. It however emphasized that “an insult to a religion or to the religious beliefs of the followers of a religion might be inflicted in good faith by a writer with the object of facilitating some measure of social reform by administering such a shock to the followers of the religion as would ensure notice being taken of any criticism so made.” Therefore, the Committee recommended that the words “with deliberate and malicious intention” be inserted in the section.¹¹⁶

Intention of the speaker acts as a key element in deciding whether a person is guilty under this section. If a person merely professes, practises or propagates his own religion without an intention to outrage the religious feelings of others, he would not be held guilty under § 295A.¹¹⁷ Also, simple and innocent expression of opinion, which may be an outburst while making a speech, will not bring the act within the parameters of this provision. So, the courts have to examine and understand the matter from all the facts and circumstances brought before it.¹¹⁸ Thus, what is punishable is the “deliberate and malicious intention” of outraging the religious feelings of any class of citizens in India. Despite this “malicious intent” clause, the law has been increasingly misused by political parties to defend their interpretation of religion especially during electioneering when appeal to religious sentiments is used as a means of vote-bank politics. Election campaigns in Gujarat in 2002 and in 2007 are clear instances of the absolute failure of this law. The fact is that § 295A is mostly abused and has witnessed low conviction rates and has remained largely unused by the executive in instances where its use could control the spread of communal poison.

5. § 298¹¹⁹

Another provision for curbing religious hate speech like § 295A is § 298 of the IPC, which prohibits the utterance of any word or any sound or making any gesture by any person with the deliberate and malicious intention of wounding the religious feeling of any person. §298 is much wider in its scope than § 295, as it includes within its ambit ‘any action’ which is known to wound the religious feelings of others.¹²⁰

¹¹⁵ See RATANLAL & DHIRAJLAL’S THE INDIAN PENAL CODE, 1105-06 (Y.V. Chandrachud & V.R. Manohar, eds., 2004).

¹¹⁶ Soli J. Sorabjee, *Insult to Religion*, THE INDIAN EXPRESS, June 25, 2006.

¹¹⁷ *Supra* note 115, 1105-10.

¹¹⁸ Acharya Rajneesh of *Bombay v. Naval Thakur*, 1990 CriLJ 2511 (HP).

¹¹⁹ IPC, § 298: “**Uttering, words, etc., with deliberate intent to wound the religious feelings of any person** - Whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person or places any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.”

¹²⁰ *Mir Chillan v. Emperor*, AIR 1937 All 13.

In *Narayan Das and Anr. v. State*¹²¹ the Court in reference to § 298, held that:

“The essence of the offence under § 298 consists in the deliberate intention of wounding the religious feelings of other persons. A mere knowledge of the likelihood that the religious feeling of other persons may be wounded would not suffice nor would a mere intention to wound such feelings suffice unless that intention to wound was deliberate. Where the intention to wound was not conceived suddenly in the course of discussion, but premeditated, deliberate intention may be inferred. Similarly, if the offending words were spoken without good faith by a person who entered into a discussion with the primary purpose of insulting the religious feelings of his listeners, deliberate intention may be inferred. The deliberate intention has undoubtedly to be inferred from the words spoken, the place where they were addressed and other surrounding circumstances”.

Though § 298 is wider in scope, but the offence punishable under § 295A is considered far more serious than that under § 298 as § 295A as shown by the use of the expressions ‘wounding’ in § 298 and ‘outraging’ in § 295A.

B. RELEVANT PROVISIONS UNDER THE CRIMINAL PROCEDURE CODE

Various procedural requirements contained in the Code of Criminal Procedure (*hereinafter* CrPC) act as serious impediments in the implementation of the aforesaid provisions of the IPC. For instance, under § 196(1)¹²² of the CrPC, no court can take cognizance of an offence punishable under § 153A and § 505(1) of the IPC, except with the prior sanction of the Central government or the State government. Further § 196(1A)¹²³ of the CrPC makes it mandatory to obtain the sanction of the Central or the State government or the District Magistrate to

¹²¹ AIR 1952 Ori 149.

¹²² CrPC, 1973, § 196(1): **Prosecution for offences against the State and for criminal conspiracy to commit such offence-** “(1) No court shall take cognizance of- (a) Any offence punishable under Chapter VI or under § 153A, [§ 295A or sub-section (1) of § 505] of the Indian Penal Code (45 of 1860), or
(b) A criminal conspiracy to commit such offence, or (c) Any such abetment, as is described in § 108A of the Indian Penal Code (45 of 1860), except with the previous sanction of the central Government or of the State Government.”

¹²³ The CrPC, 1973, § 196 (1A): “No court shall take cognizance of - (a) Any offence punishable under § 153B or sub-section (2) or sub-section (2) or sub-section (3) of § 505 of the Indian Penal Code (45 of 1860), or (b) A criminal conspiracy to commit such offence, Except with the previous sanction of the Central Government or of the State Government or of the District Magistrate.”

enable a court to take cognizance of an offence punishable under § 153B, § 505(2) and § 505(3) of the IPC. § 298, on the other hand, is hit by a different kind of procedural encumbrance. The general rule is that a complaint can be filed by anybody whether he is an aggrieved person or not. Instead, § 298 permits only an aggrieved person to move a magistrate. It further states that if a magistrate were to take cognizance of the offence on a complaint filed by one who is not an aggrieved person, the trial and conviction would be void and illegal.¹²⁴

Such procedural requirements have a nullifying effect on the substantive anti-hate-speech provisions. The reason for this is as follows: In India, hate speeches are mostly made during election campaigns, following which, the persons who make such speeches are often elected to power. Bringing them to book after they have assumed power is no mean feat. Getting sanction from the government would mean asking those very offenders (who are now in the government), to dig their own graves. Hence, such a provision should be done away with, as it fails to serve the very purpose of its enactment. This was also suggested by the 7th report of the Administrative Reforms Commission (*hereinafter* ARC) on 'Capacity building for conflict resolution', which felt that no sanction of the Union government or the state government should be necessary for prosecution under § 153(A) and the law should be amended accordingly.¹²⁵ Instead, the police should be given a general sanction to arrest and prosecute all such persons, whoever they may be, the moment they indulge in such despicable acts.

V. CONCLUSION

A free and fair poll lies at the heart of an effectively functioning democracy¹²⁶ and the EC is under a constitutional obligation to take all necessary steps to ensure that a nonpartisan election can be conducted in an atmosphere of communal harmony and peace. Over the last few decades, the EC has conducted a number of laudable electoral reforms to strengthen democracy and enhance the fairness of elections. Even though the election machinery under the aegis of the EC deserves credit for conducting elections in a free and fair manner, our electoral system is not impeccable and still continues to be plagued by many vices. Though several commissions have suggested reforms in the electoral law, there seems to be a lack of a political will to make any real change. Such a situation, if allowed to continue will have perilous ramifications. In the words of former President K.R. Narayanan: "half measures producing a smokescreen of change are worse than no change."¹²⁷ This is indicated by the conspicuous absence of basic issues in

¹²⁴ G. Narasimhan and Ors. v. T.V. Chokkappa, (1972) 2 SCC 680.

¹²⁵ M. Veerappa Moily, *Combating Communalism Just Takes Some Doing*, THE INDIAN EXPRESS, October 10, 2009, available at <http://www.indianexpress.com/news/combating-communalism-just-takes-some-doing/371538/0> (Last visited on November 15, 2009).

¹²⁶ See *supra* note 85; See also A.C. Jose v. Sivan Pillai & others, (1984) 2 SCC 656.

¹²⁷ Shri K.R. Narayan, Former President of India, Inaugural Speech at the Golden Jubilee Celebration of the Election Commission of India (January 17, 2001).

the political discourse causing serious concern and requiring urgent attention, lest it becomes too late. The root of the problem is not the absence of laws, but rather the lack of their effective execution. In order to stamp out these unfair tendencies, it is essential to strengthen the hands of the EC and to entrust it with adequate legal and institutional powers so that it can punish the delinquent politicians who often make a mockery of the electoral laws. Nevertheless, the ultimate success of reforms will largely be determined by the will of the political parties to adhere to and implement such reforms. An independent media and an enlightened public opinion are also irreplaceable as far as pushing through reforms is concerned. If people vote according to their convictions and use the power bestowed upon them through the right to vote in elections to punish those who transgress and violate the rules, corrupt practices will automatically disappear. And this will go a long way towards enabling democracy to flourish and grow to its full capacity.

The aforesaid analysis brings us to the conclusion that there are adequate laws for effective legal regulation of hate speech in India. The problem lies at the level of implementation and interpretation. In the words of A.G. Noorani, "Indian law empowers the state fully to deal with such speech and bring the offenders to book. It is not any inadequacy in the law but lack of the political will and administrative resolve which explains why the law has remained a dead-letter."¹²⁸

¹²⁸ A.G. Noorani, *Hate Speech and Free Speech*, 27 *ECONOMIC & POLITICAL WEEKLY* 2456 (1992).

