

Identity-Based Electoral Speech and Its Place in a Constitutional Democracy

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Abstract: India's 'Representation of the People Act, 1951' (RPA), includes two provisions that restrict certain categories of electoral speech. The first such provision is Section 123 (3) of the RPA which restricts electoral appeals made by political representatives on ethnic or religious grounds while the second is Section 123 (3A) of the RPA which prohibits the promotion of enmity or hatred by political representatives between different classes of citizens. This paper examines the impact of these restrictions on political representation in India and its effects on competing democratic constitutional values. Our examination finds that the restrictions on identity-based appeals fail to optimally balance competing democratic values, and this adversely affects Indian democracy. The paper finally makes a case for redrawing the contours of the restrictions placed by Sections 123 (3) and 123 (3A) on Indian electoral speech so as to best strengthen Indian democracy.

A. Introduction

Ramchandra Guha, in *India after Gandhi*,¹ writes that the real success story of modern India lies not in the domain of economics but in that of politics. He traces the axes along which conflicts in India run, namely, caste, language, religion, class, and gender, and remarks on India remaining a peaceful democracy despite its "low levels of income and literacy and high levels of social conflict".²

Nevertheless, the axes of conflict that Guha describes have deeply influenced Indian democracy and have shaped its laws, particularly those governing its electoral process. Unarguably, a robust constitutional democracy necessitates free and fair elections driven by

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1 *Ramachandra Guha, India after Gandhi, the History of the World's Largest Democracy*, London 2017.

2 Ibid.

legitimate political competition.³ At the core of a healthy and functional democratic electoral system lies electoral speech along with its associated freedoms and responsibilities. This paper explores how legislation impacting the design and function of the electoral process in India, particularly identity-based electoral speech, contributes to its democratic health.

Within the broader genus of legislation that impacts the design and function of the electoral process, this paper focuses on two provisions, Section 123 (3) and Section 123 (3A) of the Representation of the People Act, 1951 (RPA). Both these provisions restrict certain categories of appeals for votes or electoral speech made by Indian electoral candidates to their electorates by classifying them as “corrupt practices”.

Section 123 (3) of the RPA⁴ classifies electoral appeals made by political representatives on grounds of religion, caste, language or community as a “corrupt practice”. Additionally, Section 123 (3A) of the RPA⁵ makes the promotion of or the attempt to promote enmity or hatred between different classes of Indian citizens on the ground of religion, caste, community or language, by a candidate or his agent, a corrupt practice. The authors refer to these electoral appeals or speech on the ground of religion, race, caste, community, or language as “**identity-based appeals**” or “**identity-based speech**”. These two terms are used inter-changeably in this paper for brevity and ease of reference.

This paper does not delve deeply into the history and “violent legacy of Indian Partition”⁶, but it does touch upon the historical context and more recent sectarian strife that have influenced the law on identity-based appeals and its interpretation by Courts. Section B of the paper traces the legislative history of Sections 123 (3) and 123 (3A) of the RPA and discusses the scope of its restrictions on identity-based electoral appeals, as interpreted

3 See *Aziz Huq / Tom Ginsburg*, How to Lose a Constitutional Democracy, *UCLA Law Review* 65 (2018), p. 78, 87.

4 Section 123. Corrupt practices. —The following shall be deemed to be corrupt practices for the purposes of this Act: [...]

(3) The appeal by a candidate or his agent or by any other person with the consent of a candidate or his election agent to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language or the use of, or appeal to religious symbols or the use of, or appeal to, national symbols, such as the national flag or the national emblem, for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate:

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. [...].

5 Section 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.

6 *William Dalrymple*, The Great Divide, The Violent Legacy of Indian Partition, the *New Yorker*, 22 June 2015, <https://www.newyorker.com/magazine/2015/06/29/the-great-divide-books-dalrymple> (last accessed on 1 December 2020).

by the Supreme Court of India in the seminal case of *Abhiram Singh v. CD Commachen*⁷. Section C examines the impact of the law regulating identity-based appeals on political representation in India and its effects on competing democratic constitutional values. The argument that follows is that the restrictions on identity-based appeals fail to optimally balance competing democratic values, essential for a healthy democracy. Section D makes a case for a redrawing of the contours of Sections 123 (3) and 123 (3A) of the RPA to effectively balance the competing interests of core democratic values. This paper's chief objective remains to offer ways in which legislation that impacts electoral appeals can be best molded to strengthen the world's largest democracy.

B. The scope of restrictions on electoral appeals in India

1. The RPA and its legislative history

The RPA was enacted by the Indian Parliament, among other things, to rein in corrupt and illegal election practices. The RPA originally classified “systematic appeals” by candidates to voters on grounds of religion, caste, race or community as a “minor corrupt practice”.⁸ Subsequently, the RPA was amended in 1956 and the distinction between major and minor corrupt practices was removed.⁹ This led to identity-based appeals, whether by a candidate or his agent or any other person¹⁰, being made a major corrupt practice under Section 123 (3) of the RPA.¹¹

Subsequently, three significant changes were made to the RPA by an amendment in the year 1961. Firstly, the words “systematic appeal”¹² in Section 123 (3) were reduced to merely “appeal”. This was done to enlarge the provision's scope and curb “communal and separatist tendencies in the country”.¹³ Secondly, the word ‘his’ was introduced before ‘religion’ so that Section 123 (3) now read: “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

7 *Abhiram Singh v. C.D. Commachen* (2017) 2 SCC 629.

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

9 Section 8A of the RPA presently recognizes only ‘corrupt practices’.

10 From 1958 onwards, a legislative amendment recognized appeals by “any person” under Section 123(3) only if made with the consent of the candidate or his election agent.

11 Earlier, Section 123. (3) read: “The systematic appeal by a candidate or his agent or by any other person to vote or refrain from voting on grounds of caste, race, community or religion or the use of, or appeal to, religious symbols 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 that candidate's election.”

12 See discussion on legislative history of Section 123 (3) of the RPA in the majority opinion in *Abhiram Singh*, note 7, para. 14 – 32.

13 *Ibid*, para. 20.

voting for any person on the ground of **his religion, race, caste, community or language** or the use of, or appeal to religious symbols or the use of, or appeal to, national symbols, such as the national flag or the national emblem, for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate.”¹⁴ Finally, the amendment also introduced a new Section 123 (3A) to the statute book that was aimed at preventing what could be classified as ‘identity-based electoral hate speech’. While some legislators protested that these amendments served no useful purpose, other than restricting political reach to oppressed minorities, the amendments were successfully defended on the premise that a political candidate seeking votes solely based on the language he spoke or the religion she practiced was subversive of democracy.¹⁵

II. Abhiram Singh’s expansive interpretation of the word “his”

The amendment to Section 123 (3) that included the word “his” so that it read “the appeal by a candidate [...] to vote or refrain from voting for any person on the ground of ‘his’ religion, race, caste, community or language” displayed legislative shortsightedness in defining the provision’s scope. The word “his” went on to cause serious ambiguity over whether an electoral appeal would still be ‘a corrupt practice’ if it was made only in the name of the ethnic identity¹⁶ of the voters and not that of the candidate. The ambiguity over the interpretation of the word “his” was finally resolved by a seven-judge bench of the Indian Supreme Court in *Abhiram Singh v. C.D. Commachen*.¹⁷

Abhiram Singh’s case originated from a 1990 election to the state legislature of Maharashtra. Abhiram Singh, a candidate of the Bharatiya Janata Party [BJP], returned the highest votes in his electoral constituency. Abhiram Singh’s rival candidate of the Congress Party, C.D. Commachen, filed a case against him before the Bombay High Court [State High Court] seeking his disqualification for corrupt practices under Section 123 (3). The High Court held Abhiram Singh guilty of corrupt practices under Section 123 (3) for explicitly seeking votes from Hindu voters based on his Hindu religion. Abhiram Singh appealed against his disqualification before the Supreme Court of India.¹⁸ While determining the scope of Section 123 (3) in the appeal, a reference over the meaning and amplitude of the word “his” came to be made to a seven-judge constitution bench of the Supreme Court.¹⁹ The Court, by a 4:3 majority opinion, interpreted the phrase “his” in Section 123 (3) to mean the ethnic identity of “(i) the candidate, or (ii) his agent, or (iii) any other person mak-

14 Emphasis supplied.

15 *Abhiram Singh*, note 7, para. 30.

16 The term ‘ethnic identity’ in this article is a collective reference to an identity based on religion, race, community or language.

17 *Abhiram Singh*, note 7.

18 *Abhiram Singh v. C.D. Commachen* (1996) 3 SCC 665.

19 *Abhiram Singh v. C.D. Commachen* (2014) 14 SCC 382.

ing the appeal with the consent of the candidate, or (iv) the elector”²⁰, and held that any such appeal amounted to a corrupt practice. On the other hand, the minority decision held that the phrase “his” in Section 123(3) of the RPA did not refer to the ethnic identity of the voter but only to the ethnic-identity of “the candidate in whose favour a vote is sought” or that of “another candidate against whom there is an appeal to refrain from voting.”²¹ In other words, the minority held that electoral appeals by candidates on the basis of the ethnic identity of voters did not amount to a corrupt practice.

The majority’s purposive interpretation of the word “his”, largely adopted to protect India’s secular fabric, turned what may have been legislatively intended as a severe restriction on identity-based appeals into an absolute ban on such appeals.²² The court’s interpretation therefore proscribes any voter-based religious appeals, meaning a Hindu candidate would even be disqualified to appeal to Muslim voters by saying “If you vote for me, I will stand up for your right to practice Islam without fear”. While criticisms over the decision’s disproportionate impact on competing democratic freedoms will be examined further on, *Abhiram Singh* undoubtedly gave the broadest interpretation to already expansive restrictions on identity-based appeals.

III. Restrictions on electoral speech

Section 123 (3) and Section 123 (3A), viewed through judicial interpretation, largely restrict two kinds of electoral speech or appeals:

- i. Speech that makes identity-based appeals to electors, irrespective of whether the appeal is based on the identity of the candidate or of the elector.²³ An example of such speech would be the sitting Chief Minister of an Indian state, who, while campaigning, used the expression that his rival parties believe in ‘Ali’²⁴, while his party believes in ‘Bajrang Bali’.²⁵ The Election Commission of India sent a show cause notice²⁶ to this lead-

20 *Abhiram Singh*, note 7, para. 50.2.

21 *Ibid.*, para. 158.

22 *Ratna Kapoor*, Belief in the Rule of Law and the Hindu Nation and the Rule of Law, in: J. Christopher, T. Bloom / A.P. Chatterji (eds.), *Majoritarian State – How Hindu Nationalism is Changing India*, Oxford, Epub Edition April 2019, p. 302.

23 Section 123 (3) of the RPA as interpreted in *Abhiram Singh*, note 7.

24 A linguistic proxy for Islam.

25 Refers to a Hindu god, and in this context is a linguistic proxy for strong nationalistic Hinduism.

26 A show cause notice is similar to a court summons.

er²⁷ and finally censured him and barred him from holding public meetings for 72 hours.²⁸

- ii. Electoral Speech based on identity that promotes enmity and hatred between classes of citizens.²⁹ An example of this would be a candidate who was sent a show-cause notice by the Election Commission of India, for inter-alia, violating Section 123 (3A), when he described the prime minister of India as a “killer of Muslims”, and said that the purpose of the elections was to humiliate the Muslim community.³⁰

Since restrictions are fully realized only through punitive consequences, Section 8 A of the RPA makes provisions for the disqualification of persons from being a member of either house of parliament, legislative assemblies or legislative councils of states for having been found guilty of a corrupt practice.³¹ Sections 99 and 100 of the RPA also provide that an election can be declared void by a High Court if it is of the opinion that a corrupt practice has been committed by the returned candidate. Finally, Section 125 of the RPA states that a person who promotes enmity between classes of citizens based on religion, caste etc., in connection with an election, shall be punishable with imprisonment for up to three years.³²

Therefore, restrictions on identity-based appeals are enforced in the following manner:

- a) Disqualification from being a member of parliament, legislative assembly, etc.
 - b) An election being declared void.
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- 27 Election Commission of India, Commission’s Notice to Mr. Yogi Adityanath dated 11.4. 2019, <https://www.eci.gov.in/files/file/9893-commissions-notice-to-shri-yogi-adityanath-dated-11042019/> (last accessed on 1 December 2020).
 - 28 Election Commission of India, Commission’s Order dated 15.04.2019 to Ms. Mayawati and Mr. Yogi Adityanath along with letter to all Chief Electoral Officers, <https://www.eci.gov.in/files/file/9927-commissions-order-dated-15042019-to-ms-mayawati-and-shri-yogi-adityanath-along-with-letter-to-all-chief-electoral-officers/> (last accessed on 1 December 2020).
 - 29 Section 123 (3A) of the RPA.
 - 30 Election Commission of India, Commission’s Order dated 30.04.2019 to Mr. Azam Khan, <https://www.eci.gov.in/files/file/10089-commissions-order-dated-30042019-to-shri-azam-khan/> (last accessed on 1 December 2020).
 - 31 8A. Disqualification on ground of corrupt practices.
(1) The case of every person found guilty of a corrupt practice by an order under section 99 shall be submitted ...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 subsection shall in no case exceed six years from the date on which the order made in relation to him under section 99 takes effect. [...]
(3) Before giving his decision on any question mentioned in sub-section (1) or on any petition submitted under sub-section (2), the President shall obtain the opinion of the Election Commission on such question or petition and shall act according to such opinion.).
 - 32 125. Promoting enmity between classes in connection with election. -
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.

c) Imprisonment, which is a consequence that only follows if the speech in question promotes enmity between classes of persons.

The Model Code of Conduct [‘MCC’], a set of guidelines issued by the Election Commission of India also supplements the restrictions contained in the RPA.³³ The MCC prohibits all parties and candidates from engaging in any activity which “may aggravate existing differences or create mutual hatred or cause tension between different castes and communities, religious or linguistic”.³⁴ It also prohibits appeals “to caste or communal feelings for securing votes”.³⁵ Further, the MCC prohibits “Mosques, Churches, Temples or other places of worship” from being used for election propaganda.³⁶ While the Election Commission can censure political candidates for violating the MCC, its violation does not constitute a criminal offence or lead to the disqualification of a candidate. More stringent legal measures to ensure MCC guidelines are complied with can only be addressed through the corresponding provisions of the RPA or the Indian Penal Code, as applicable. The MCC for this reason has been criticized as not being legally enforceable.[

C. The impact of identity-based appeals on India’s democracy

The universal merits of democracy are well captured in Amartya Sen’s ‘three-fold merit’ framework: the ‘intrinsic’ merit of political freedom in enriching people’s lives; the ‘instrumental’ merit in the manner in which it allows for recognition of political and economic claims, and its ‘societal’ merit in shaping a society’s values and ideas.³⁷ However, prior to examining the impact of identity-based appeals on India’s democracy, it is necessary to clarify our conception of democracy. Our conception of democracy agrees with Jeremy Waldron’s ‘constitutional conception of a democracy’, in so far as democracy at a minimum is the right to participate in the making of laws.³⁸ This view has found acceptance in India with even its pre-independence nationalist movement fairly unanimously acceding to India granting universal adult suffrage to all its citizens from its inception.³⁹ Sure enough, Article 326 of the Indian Constitution granted universal suffrage to all its citizens and the Indian Supreme Court has affirmed Waldron’s ‘equal participatory right’ view of democracy in these words: “all citizens are regarded as equal and the vote of all citizens, which is the source of governing power, is assigned equal weight”.⁴⁰ However, Waldron’s view misses

33 Election Commission of India, Model Code of Conduct for the Guidance of Political Parties and Candidates, <https://www.eci.gov.in/mcc/> (last accessed on 1 December 2020).

34 Ibid.

35 Ibid.

36 Ibid.

37 Amartya Sen, Democracy as a Universal Value, *Journal of Democracy* 10 (3) (1999), p. 3.

38 Jeremy Waldron, *Law and Disagreement*, Oxford 2004, p. 285.

39 Pratap Bhanu Mehta, State and Democracy in India, *Polish Sociological Review* 178 (2012), p. 203, 205.

40 *Government of NCT of Delhi v. Union of India* (2018) SCC Online 661.

that a democracy entails the equal participatory right of every citizen not just in the making of the law but also in its enforcement and adjudication.⁴¹ The Supreme Court's idea of democracy as the equal right to be the "the source of governing power" meets our augmented view of Waldron. Since our conception of democracy is, at a minimum, the equal right of every citizen to participate in 'self-governance', it follows that all rights and conditions necessary to preserve this foundational 'equal participatory right' is also minimally constitutive of democracy. The Indian notion of democracy however entails not just equality from the vantage point of participating in self-governance through the power of the vote but also aspires to individual equality.⁴² This individual equality promises an equal enjoyment of socio-economic parity and basic human freedoms such as the freedom of expression, religious freedom, or the freedom to live with dignity.⁴³ Viewed in such light, Indian democracy is constituted by a minimum equal participatory right and an aspirational right to individual equality. B.R Ambedkar, one of the chief architects of the Indian Constitution, recognized the arduous contradictions between achieving the equal participatory and aspirational aspects of Indian democracy in these words: "On 26th January, 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality."⁴⁴

Consequently, in our further examination of identity-based electoral speech, our use of the terms 'democratic interests' or 'democratic values' refers to the rights and conditions necessary to preserve the 'equal participatory right' as well as the more aspirational 'right to individual equality' in a democracy.

I. An ethnic democracy out of a multi-ethnic democracy

The 2019 Lok Sabha elections in India saw a communally charged atmosphere in the backdrop of a wave of Hindu nationalism in India.⁴⁵ Aside from appeals to religion, the recent

- 41 Our claim that democracy includes the right of the every citizen to have a say in who will adjudicate laws is not arguing for the election of judges (although this is a practice in some countries) but that people elect representatives who generally have some role in the appointment of judges.
- 42 *Fali Sam Nariman*, The Indian Constitution: An experiment in Unity Amid Diversity, in: Robert Goldwin, Art Kaufman / William A Schambra (eds.), *Forging Unity out of Diversity – The Approaches of Eight Nations*, Washington, DC 1989, p. 11; *Soli J Sorabjee*, Indian Democracy: reality or myth?, *India International Center Quarterly* 33 (2) (2006), p. 83, 87; *Ashutosh Varshney*, Asian Democracy through an Indian Prism, *The Journal of Asian Studies* 74 (2015), p. 917, 923.
- 43 *Pratap Bhanu Mehta*, *The Burden of Democracy*, New Delhi 2017 (digital edition) p. 2; *Varshney*, note 42.
- 44 See extract of Indian Constituent Assembly debates accessible at http://164.100.47.194/Loksabha/Debates/Result_Nw_15.aspx?dbsl=503&ser=&smode=#M65*14 (last accessed on 1 December 2020).
- 45 *Thomas Blom Hansen*, Democracy Against the Law, in: J Christopher, T. Bloom / A.P Chatterji, (eds.), *Majoritarian State – How Hindu Nationalism is Changing India* (HarperCollins Publishers India) Epub Edition April 2019; *Jeffrey Gettleman, Kai Schultz, Suhasini Raj / Hari Kumar*, Under Modi, a Hindu Nationalist Surge Has Further Divided India, *The New York Times*, 11 April 2019,

election cycle, like the previous ones, also saw prominent religious figures contest elections. The elections even witnessed a candidate currently on trial for terrorism charges win an election for the incumbent party.⁴⁶ The term ‘ethnic democracy’ has been applied to a multi-ethnic democracy in which a dominant ethnic group has mobilized its defining cultural identity [religious, racial or other] to provide themselves with a de-facto superior class of citizenship.⁴⁷ This de-facto superior citizenship, in some form or the other, allows more rights to the majority or dominant ethnic groups over other ethnicities. Consequently, the rights of the de-facto inferior class of citizens are also diluted, ultimately undermining their ‘equal participatory right’ in the state’s affairs. For example, covert threats of violence used by citizens of a dominant ethnic group to prevent citizens of a minority ethnic group from exercising their right to vote, negates the equal participatory right of the minority group and strikes at the core of democracy. An ethnic democracy is therefore antithetical to democracy. A trend of growing Hindu nationalism in India has ignited academic debate over whether the country is presently straying towards an “ethnic democracy” or has displayed the innate characteristics of one since inception.⁴⁸ The Indian Supreme Court’s description of ‘Hindutva’ as ‘a way of life’ in *Dr. Yeshwant Prabhoo v. Prabhakar Kunte*⁴⁹ reflects that ethnic democracy tendencies can even receive legal sanction. Scholars argue that in terming ‘Hindutva’ as ‘a way of life’ the court assumes that the socio-religious norms of “Hindutva” [the religion of the Hindu majority] can be extended as ‘a way of life’ for all people across multi-ethnic India.⁵⁰

Unarguably, however, past sectarian strife coupled with various measures adopted by the Indian state to rein in anti-democratic majoritarian tendencies confirm its vulnerability to “ethnic democracy” traits. The ban on identity-appeals is itself an example of the Indian legislature enacting strong measures to guard elections from “ethnic democracy” tendencies. The Indian Supreme Court’s heavy reliance on secularistic principles to review state action⁵¹ and its decision in *Abhiram Singh* are further examples of the state’s acknowledgment of its “ethnic democracy” tendencies. An examination of the impact of restrictions on

<https://www.nytimes.com/2019/04/11/world/asia/modi-india-elections.html> (last accessed on 1 December 2020).

- 46 Iain Marlow / Archana Chaudhary, Fielding a terror accused: BJP leaves the moral question to the people, *Business Standard*, 6 May 2019, https://www.business-standard.com/article/elections/india-voters-to-decide-on-morals-of-terror-suspect-candidate-119050600077_1.html (last accessed on 1 December 2020).
- 47 Christophe Jaffrelot, A Defacto Ethnic Democracy?, in: J Christopher, T. Bloom / A.P Chatterji (eds.), *Majoritarian State – How Hindu Nationalism is Changing India* (HarperCollins Publishers India) Epub Edition April 2019.
- 48 Ibid.
- 49 *Dr. Yeshwant Prabhoo v. Prabhakar Kunte* (1996) SCC (1) 130.
- 50 Cossman Brenda / Ratna Kapur, Secularism: Bench-Marked by Hindu Right, *Economic and Political Weekly* 31 (38) (1996), p. 2613.
- 51 *S.R Bommai v. Union of India* (1994) 3 SCC 1; *Kultar Singh v. Mukhtiar Singh* (1964) 7 SCR 790; *Abhiram Singh*, note 7.

identity-based appeals on India's democracy must be viewed in the backdrop of these "ethnic democracy" tendencies and the existing polarization caused by political actors.

II. Competing democratic values

For a multi-ethnic democracy like India to thrive, there must be optimal balancing between competing values that the restrictions on electoral speech promote on one side and those that its freedom of exercise promote on the other. Freedom of political speech is implicitly at the core of any Constitutional Democracy.⁵² While protecting political speech serves core democratic values, its absolute freedom can impair competing democratic values such as the integrity of the electoral process⁵³ or religious non-discrimination.⁵⁴ We grant that competing values in promoting and restraining of political speech are not perfectly commensurable. However, the balancing or formulating of incommensurable values in some manner is common in adjudicating between conflicting rights and is invaluable for effectively delineating the contours of political speech itself.⁵⁵ The optimization of competing values is determined by the influence of a democracy's unique socio-cultural or multi-ethnic facets. In the Indian context, this optimization must therefore take cognizance of its strong "ethnic democracy" tendencies.⁵⁶

Before examining if the restrictions on electoral speech afforded by Section 123 (3) and 123 (3A) of the RPA are optimally balanced against conflicting democratic values, it is important to lay out three zones of conflict created by these restrictions. These zones of conflict help provide a clearer view of what democratic values the restrictions seek to serve and what values they constrain.

1. Secularism versus the Freedom of Speech and Expression

The first zone of conflict lies between secularism and the freedom of expression. India being a secular democracy and its political parties vying for state power, the restrictions on identity-based appeals seek to promote the democratic value of secularism by restraining

52 Dieter Grimm, Freedom of Speech in a Globalized World, in: Ivan Hare / James Weinstein (eds.), *Extreme Speech and Democracy*, Oxford 2009; James Weinstein, *Extreme Speech Public Order and Democracy*, in: Ivan Hare / James Weinstein (eds.), *Extreme Speech and Democracy*, Oxford 2009; See also, *Central Prison v. Dr Ram Manohar Lohia* AIR (1960) SC 633; *Australian Capital Television Pty Ltd v. The Commonwealth* (1992) 177 C.L.R. 106; *McIntyre v. Ohio Election Commission* 514 US. 334 (1995).

53 Stephen Breyer, *Our Democratic Constitution*, N.Y.U Law Review 77 (2002), p. 245, 253; William P. Marshall, *False Campaign Speech and the First Amendment*, University of Pennsylvania Law Review 153 (2004) p. 285.

54 Mark Anthony Norwood v. *The United Kingdom*, App No. 23131/03 (EctHR, 16 July 2003).

55 Jeremy Waldron, *Fake Incommensurability: A response to Professor Schauer*, Hastings Law Journal 45 (1994), p. 813, 820.

56 Jaffrelot, note 47.

candidates from making parochial and identity-based religious appeals.⁵⁷ Secularism as a democratic value not only prevents religious discrimination by the state against its citizens but also accords legitimacy to a democracy. The legitimacy of majority decisions in a democracy is intrinsically tied to whether all its members feel they are equally valued irrespective of their religious beliefs and can therefore accord respect to majority decisions.⁵⁸ The importance of secularism also assumes great proportions in a country where religious divides and violence have been stoked by the political class.⁵⁹ Significantly, the Indian idea of secularism that came to be entrenched in the Constitution is one that was uniquely shaped by its past and was purposively fashioned to dictate its future. Prior to the partitioning of the Indian sub-continent and while still under colonial rule, its polity was rife with contestation between the accommodation of Muslim and Hindu interests. The British are credited with promoting communal strife by allowing separate electorates to Muslims and Hindus in certain provinces.⁶⁰ Eventually, with the meeting of the demand of Muhammad Ali Jinnah's movement for a separate Islamic state, the sub-continent witnessed a bloody partition that tore two nations out of the sub-continent. It was out of this sense of futility in sustained pre-independence efforts to create one nation and the resolve to obliterate the recurrence of such communal conflict, that the distinctive Indian idea of secularism was born.

Rajeev Bhargava describes the distinctiveness of Indian secularism as a secularism that follows 'principled distancing' between religion and the state unlike a total distancing between the church and the state embraced by the West.⁶¹ According to Bhargava, such principled distancing emerges from the Indian constitution's construct that maintains secular goals but allows a fair degree of interference in matters of religion in the private sphere to achieve its secular end.⁶² For example, Article 17 of the Constitution in outlawing untouchability specifically impacted the Hindu caste system while Article 30 (1) of the Constitution protected religious minority communities who managed their own educational institutions.⁶³ One can argue that the Indian state bestowed secularism upon a people who was steeped in a culture that was at odds with secularism and this contradiction forced the arm of the state to extend further to uphold secularistic principles. *Ashis Nandi* attributes the memory of partition with having led to the wide consensus that "an area of sanity had to be preserved in the polity" and "community-based nepotism had to be contained".⁶⁴ *Nandi* fur-

57 *Abhiram Singh*, note 7; *Kultar Singh*, note 51.

58 *Waldron*, note 38, p. 287.

59 *SR Bommai*, note 51; *Kultar Singh*, note 51.

60 *Madhav Khosla*, *India's Founding Moment – The Constitution of a Most Surprising Democracy*, Cambridge 2020, p. 135.

61 *Rajeev Bhargava*, *The Distinctiveness of Indian Secularism*, in: T.N Srinivasan (ed.), *The Future of Secularism*, New Delhi 2006.

62 *Ibid.*

63 *Ibid.*

64 *Ashis Nandi*, *An Anti-secularist Manifesto*, *India International Centre Quarterly* 22 (1) (1995), p. 35.

ther posits that those who entered politics were “screened for their commitment to secular values”, due to the history and context of partition.⁶⁵ In our view the RPA’s attempt to eschew electoral appeals on the basis of religious identity is an example of such screening at play. The restraints on sectarian electoral speech placed by the RPA are an attempt to uphold secularism by keeping religion (among other things) out of political speech. In doing so it may be fulfilling what has been described as “the animating impulse of Indian secularism to produce peace by not making religion a matter of public contestation”.⁶⁶

Nevertheless, as indispensable as secular values may be, one cannot deny that a candidate having to eschew political speech concerning religious and social matters in a pluralistic country like India suffers restraints on his freedom of speech and expression, guaranteed under Article 19 (1) of the Constitution.⁶⁷ In fact, a critique of the RPA’s framework [as interpreted by the majority in *Abhiram Singh*] is that it undermines the role of religion in public life, and in doing so, prepares the ground for a backlash. In this context, *TN Madan*’s criticism of secularism as “the dream of a minority which wants to shape a majority in its own image”⁶⁸ gains relevance. Madan places the blame for fundamentalism and fanaticism not only on anti-secular zealots, but also on secularists who “deny the very legitimacy of religion in human life and society”.⁶⁹

The same critique can also be extended to electoral speech dealing with caste identity.⁷⁰ Kancha Ilaiah observes that the rise of the Bahujan Samajwadi party and its mobilization of ideology enabling Dalit and Bahujan individuals to consolidate their political representation would serve to counter social oppression suffered by them.⁷¹ He proceeds to observe that the increased political mobilization around the ideology of caste was a sign of the maturing of Indian democracy.⁷² However, the majority view in *Abhiram Singh* would largely curtail political candidates from making appeals to caste in ideological terms. While the majority in *Abhiram Singh* rightly observed that speech by political candidates covers only a miniscule area of free speech⁷³ it wrongly held it to be unprotected speech.⁷⁴ The majority view also failed to appreciate that this area, albeit small, impacts a very strong and vital right of

65 Ibid.

66 *PB Mehta*, In post-mortem of secularism, we are hand wringing over religion, missing the real crisis, Indian Express, New Delhi, 11 August 2020, <https://indianexpress.com/article/opinion/columns/secularism-pratap-bhanu-mehta-yogendra-yadav-ayodhya-ram-temple-babri-masjid-6549335/> (last accessed on 1 December 2020).

67 *Abhiram Singh*, note 7, para. 119; *Central Prison*, note 52; *Romesh Thappar v. State of Madras* AIR (1950) SC 124; *State of U.P v. Raj Narain* (1975) 4 SCC 428.

68 *T.N Madan*, Secularism in Its Place, *The Journal of Asian Studies* 46 (1987), p. 747.

69 Ibid.

70 *Kancha Ilaiah*, BSP and Caste as Ideology, *Economic and Political Weekly* 29 (1994), p. 668.

71 Ibid.

72 Ibid.

73 *Abhiram Singh*, note 7, para. 48.

74 Ibid.

free speech. It did not view every voter as having a right to be engaged in public discussion, including the right to know a political candidate's position on all public matters, as a facet of his individual right of political expression or participation. This individual right of political expression is at the core of any democracy.⁷⁵ Consequently, a voter's right to know how a candidate will treat members of his faith is an essential part of his individual right of political expression and restrictions on identity-based appeals constrain this right. Therefore, the restrictions create a zone of conflict between the secularism that it seeks to promote on one hand and the freedom of political expression that it potentially restrains on the other.

2. Social Harmony versus Recognition

The second zone of conflict lies between promoting social harmony and recognizing social disparities. Sections 123 (3) and 123 (3A) of the RPA read with the Model Code of Conduct aim to promote harmony between classes of people, with the promotion of enmity or hatred between classes of Indian citizens being a punishable offence. If democracy rests on the equal right of all citizens of a state to participate in its affairs, 'social harmony' protects this participatory right from becoming illusory. Social harmony is necessitated for a peaceful society that unitedly protects this core democratic right of equal participation. While contestation for political representation between religious identities preceded the birth of the Indian state, the same contestation also extended to caste identities. India's history of conflict and the caste system being the longest-lasting regime of social discrimination known to the world⁷⁶ justified restrictions on electoral speech to prevent sectarian strife. However, the post-independence idea of Indian unity was entrenched in a higher constitutional commitment by an exceptionally diverse people to unitedly live as "equal" and "free human beings".⁷⁷ The Indian idea of unity therefore goes beyond merely restricting sectarian passions on religious or caste lines and also extends to making all its citizens equal and free participants in the state.⁷⁸ While the restrictions on electoral speech promote social harmony by reining in volatile sectarian passions, they can also restrict democratic mobilization needed to further equality and freedom that are dynamic in nature. It is here that group mobilization and addressing past or existing systemic discrimination against certain groups gain importance as democratic interests.

The minority opinion in *Abhiram Singh*⁷⁹ warned against the perils of reading the restrictions on identity-based appeals too widely by holding that electors have "a legitimate expectation that the discrimination and deprivation which they may have suffered in the

75 Weinstein, note 52; *Abhiram Singh*, note 7, para. 119; See also *PUCI v. Union of India* (2003) 2 SCR 1136.

76 Pradeep K. Chibber / Rahul Verma, *Ideology and Identity, The Changing Party Systems of India*, New York 2018, p. 18.

77 Mehta, note 43; Varshney, note 42.

78 Ibid; Khosla, note 60, p. 133.

79 *Abhiram Singh*, note 7.

past (and which many continue to suffer) on the basis of their religion, caste, or language should be remedied”.⁸⁰ The restrictions adversely impact what is known as the value of recognition, meaning “the State’s correction of group-based social inequalities and its accommodation of the interests of historically marginalized social groups”.⁸¹ For example, India continues to see demands by various caste groups for reservations.⁸² These demands for reservation based on caste identity are unarguably alive and form an important force for ‘social mobilization’ in order to seek ‘recognition’. If social mobilization is the means, recognition is the end. The minority opinion in *Abhiram Singh* observes social mobilization to be “a powerful tool of bringing marginalized groups into the mainstream”⁸³, and found that speech expressing the legitimate concerns of citizens over identity-based social injustices was constitutionally protected.⁸⁴ Social mobilization and its resultant recognition are important interests to be protected in a multi-ethnic democracy.⁸⁵

The restrictions on identity-based appeals therefore promote the democratic interest of social harmony on one hand but may adversely affect the value of recognition on the other. When contrasted, the value of social harmony preserves peace in a democracy and recognition remedies injustice in a society. Both these values however are indispensable to according legitimacy to a democratic polity. While the State is justified in enacting laws to prevent candidates who encourage caste-based or sectarian conflict, it also has an important democratic interest in allowing marginalized communities to seek political representation to redress historical injustices.⁸⁶

3. Legitimate Electoral Process

The third zone of conflict exists between two different facets of promoting a legitimate electoral process, a core interest of democracy.⁸⁷ Electoral integrity is an important facet of a legitimate electoral process.⁸⁸ In restricting appeals to highly polarizing issues like religious, linguistic and caste-based identity, the legislature sought to promote an idea of dispassionate voter decisions removed from deceptive practices that appeal to anti-democratic

80 Ibid, p. 119.

81 Chibber / Verma, note 76.

82 Reservation is a form of affirmative action in India.

83 *Abhiram Singh*, note 7, para. 119 – 120; Chandrachud J; Chibber / Verma, note 76.

84 Ibid.

85 Ibid.

86 Ibid.

87 Weinstein, note 52; Raj Narain, note 67; *Abhiram Singh*, note 7, para. 120.

88 Raj Narain, note 67; *Abhiram Singh*, note 7, para. 119; Breyer, note 53; Marshall, note 53.

identity interests.⁸⁹ If no limits whatsoever are cast over how votes are sought, the purity of the electoral mechanism can suffer.⁹⁰

Simultaneously, an unfettered exchange of ideas is also a facet of a legitimate electoral process.⁹¹ In this regard, identity-based appeals or identity-based speech are vital means to ensure unfettered exchange and the competition of ideas in a diverse multi-ethnic society. Although the notion of the ‘marketplace of ideas’ may not be an Indian construct, the rapid growth of Hindu majoritarianism in India has raised the argument that Indian secularism has taken a body blow because the masses have not been convinced of its value through democratic exchange.⁹² The imposition of secularism upon citizens purely as recipients and not as participants was hailed as path likely to fail even by founders of the Indian state.⁹³ *Ashgar Ali Engineer* asserts that “democracy is nothing if it does not give free play to the power struggle between various sections of people”.⁹⁴ While admitting the emotive value of religion and caste as markers of identity, he proceeds to hold that political assertion by identities, within democratic limits, has its own legitimacy. The solution then, according to Engineer, is to allow democratic aspirations, while not tolerating violent assertions.⁹⁵ Accordingly, ‘open politics’, including open discourse on issues of sectarian identity, as long as it does not violate certain norms [such as the incitement to violence, or promoting hatred], may only increase the legitimacy of the electoral process, by increasing political competition.⁹⁶

Therefore, the existing restrictions on identity-based appeals promote electoral integrity on one hand and curtail necessary political competition on the other.

III. *An inefficacious balance*

A close review of the restrictions of Section 123 (3) and Section 123 (3A) as interpreted by the majority decision of the Supreme Court in *Abhiram Singh* leave the authors to conclude

89 *Abhiram Singh*, note 7, para. 30.

90 *Breyer*, note 53; *Marshall*, note 53.

91 The ‘marketplace of ideas’ theory was developed by the United States Supreme Court in cases involving the first amendment. The marketplace of ideas refers to the environment created by free-speech, akin to a market with a free flow of goods and services, where good ideas outlive the bad ones. See also, *Joseph Blocher*, *Institutions in the Marketplace of Ideas*, *Duke Law Journal* 57 (2008), p. 821.

92 *Yogendra Yadav*, *A new freedom struggle must be based on a new nationalism*, *The Print*, New Delhi, 5 August 2020, <https://theprint.in/opinion/new-freedom-struggle-for-india-must-be-based-on-new-nationalism/484849/> (last accessed on 1 December 2020).

93 *Khosla*, note 60, p. 137.

94 *Ashgar Ali Engineer*; *Democracy and the Politics of Identity*, *Economic and Political Weekly* 33 (1998), p. 697.

95 *Ibid.*

96 *Nandy*, note 64.

that competing democratic interests are inefficaciously balanced, adversely impacting Indian democracy.

We argue that these restrictions have produced an inefficacious balance in two ways. First, the severe restrictions that completely ban identity-based appeals have little to no impact on promoting the democratic interests they seek to achieve. And second, the restrictions disproportionately affect competing democratic values in the three conflict zones described earlier.

1. Limited impact on interests served

There are three reasons that contribute to the limited impact of the restrictions on the democratic values they seek to serve. The first is that the restrictions have an element of state paternalism and weekly serve the purported interests they seek to protect. The second is the existence of covert mechanisms available to circumvent the restrictions. The third is a poor enforcement regime over violations. While all three reasons limit the impact of restrictions on electoral appeals under Section 123 (3), the restrictions under Section 123 (3A), enacted to prevent inter-ethnic hatred, are limited in impact only due to a poor enforcement regime.

a) State Paternalism

Gerald Dworkin suggests that an act or omission amounts to paternalism when it interferes with the liberty of the subject without the consent of the subject in order to improve the welfare of the subject.⁹⁷ State paternalism as applied to free speech is best described as “restriction on otherwise protected speech, justified by the governments belief that speaking or receiving information in the speech is not in citizens own best interests”.⁹⁸

Section 123 (3) of the RPA interferes with the liberty of the elector to hear identity-based appeals and does so without the consent of the elector in order to promote the welfare of the elector; that is, the elector is spared from making bad electoral choices by restricting appeals to emotive and fissiparous identity-based subjects like caste, language and religion. Parliamentary debates indicate that the legislative intent was not just to restrict ‘advocacy of unlawful action’ but to also restrict the influence of anti-democratic rhetoric towards voters. This is evident from the following extract of the then Law Minister’s speech in support of severe restrictions on identity-based appeals: “...even a stray appeal to success at the polls on the ground of one’s religion or narrow communal interests affiliation or linguistic affiliation must be viewed with disfavour by us here and the law.....we should show disfavour openly and publicly even of stray cases of attempts to influence the electorate by

97 *Gerald Dworkin*, Paternalism, in: Edward N Zalta (ed.), *The Stanford Encyclopedia of Philosophy*, Winter 2017 edition, <https://plato.stanford.edu/archives/win2017/entries/paternalism/> (last accessed on 1 December 2020).

98 *Dale Carpenter*, The anti-paternalism principle in the first amendment, *Creighton Law Review* 37 (2004), p. 583.

appealing to their sectarian interests or passions”.⁹⁹ Section 123 (3) is evidently paternalistic, having been enacted to curtail individuals from being influenced to vote out of “sectarian” passions. Nevertheless, if paternalistic legislation is deemed necessary in several instances, across democracies,¹⁰⁰ the question over when such legislation is to be eschewed remains. An objectionably paternalistic law depends on its context, impact and the expressive way in which it undermines personal autonomy.¹⁰¹ However, if paternalistic legislation that abrogates personal autonomy is always suspect,¹⁰² paternalistic legislation that abrogates personal liberty and very weakly serves its purported objective must be deemed unwarranted. Paternalism in the context of laws regulating voting and elections, may also pose problems in a democracy given that “the core justification of voting is that it treats individuals as agents”.¹⁰³ For India’s founders, its citizens were to serve as agents who self-created their own political identity, and the democratic state was to be viewed as a ‘collaborative project’ rather than as a ‘paternal entity’.¹⁰⁴ The limitations of paternalism in India may be best understood by the words of an eminent Indian lawyer who remarked: “We have abolished untouchability and outlawed backwardness in the Constitution of India. Alas, many of us have not eliminated it from our hearts”.¹⁰⁵

As described in our conception of democracy, one of the key objectives of Indian democracy is the “recognition of individuals as citizens rather than mere subjects and expanding their rights and freedoms to define their own lives”.¹⁰⁶ Apropos Section 123(3), its blanket ban on appeals is destructive of voters’ autonomy to be the sole assessors of the democratic value of electoral speech, particularly on matters of crucial public importance such as religion and social disparities. Not only is the justification of the restriction purely paternalistic, but it also weakly serves democratic interests by assuming a static-homogeneous Indian population that is equally vulnerable to anti-democratic thought. Richard Pildes warns against the drawbacks of designing democratic processes without considering the dynamic nature of ethnic identities and the Indian population is no exception.¹⁰⁷ Further, when voting outcomes in India are heavily influenced by party ideology¹⁰⁸, legislating against identity-based appeals carry little impact on curbing appeals to voters’ sectarian

99 *Abhiram Singh*, note 7, para. 30.

100 *Nicolas Cornell*, *A Third Theory of Paternalism*, *Michigan Law Review* 113 (2015), p. 1295; *Carpenter*, note 98.

101 *Ibid.*, p. 1335.

102 *Ibid.*, p. 1297; *Carpenter*, note 98.

103 *Khosla*, note 60, p. 138.

104 *Ibid.*, p. 137.

105 *Nariman*, note 42.

106 *Mehta*, note 39; *Khosla*, note 60, p. 140.

107 *Richard Pildes*, *Ethnic Identity and Democratic Institutions: A dynamic perspective*, in: *Sujith Choudhry* (ed.), *Constitutional Design for Divided Societies: Integration or Accommodation*, Oxford 2008.

108 See *Chibber / Verma*, note 76.

passions, as seen in the 2019 Parliamentary elections. Even the names of candidates' political parties in India such as the 'All-India Majis-e-Ittehadul Muslimeen'¹⁰⁹ or 'Bahujan Samaj Party'¹¹⁰ or 'Shiv Sena'¹¹¹ can appeal to sectarian interests by communicating a religious or caste-based ideological bent.¹¹² This only goes to show that restrictions on identity-based appeals not only have purely paternalistic justifications but also have limited impact in curbing anti-democratic interests. In contrast, democratic interests can better flourish by an anti-paternalistic promotion of unfettered political exchange within India's diversity¹¹³, rather than by merely curbing anti-democratic passions through legislative means. It is after all in the encouragement of the flourishing of India's diversity and not in suppressing it that India's unity has stood.¹¹⁴

b) The existence of covert mechanisms

Section 123 (3) in its current form does not adequately address covert appeals to identity-based violence and/ or discrimination, or what are often known as 'dog-whistles'. Examples of dog-whistles include terms like 'gau-raksha'¹¹⁵ (cow protection), which might not on their face be linked to religious violence, but carry connotations of identity-based violence.¹¹⁶ Pratap Bhanu Mehta's warning that bad law can lead to re-descriptions is pertinent

109 All-India Majis-e-Ittehadul Muslimeen roughly translates to *All India Council for Unity of Muslims*.

110 The term 'Bahujan' literally means 'many people' or 'the majority', but it refers to persons belonging to Scheduled Caste, Schedules Tribes and Other Backward Castes. For a more elaborate discussion on the term see *Valliammal Karunakaran*, *The Dalit-Bahujan Guide to Understanding Caste in Hindu Scripture*, https://medium.com/@Bahujan_Power/the-dalit-bahujan-guide-to-understanding-caste-in-hindu-scripture-417db027fce6 (last accessed on 1 December 2020).

111 The name of this party is inspired by the Maratha King Chhatrapati Shivaji, and the term literally means 'Army of Shivaji'. The use of Shivaji's name is an obvious appeal to the sentiments of the Maratha community. See, *Vishwas Waghmode*, *Snatching Shivaji from Shiv Sena*, *Vishwas Waghmode*, <https://indianexpress.com/article/india/snatching-shivaji-from-shiv-sena-memorial-statue-modi-4449582/> (last accessed on 1 December 2020).

112 This fact is cited as a neutral observation and we are not arguing here that these party names are anti-democratic.

113 *P. K Tripathi*, *The Indian Constitution: An experiment in Unity Amid Diversity- Discussion*, in: Robert Goldwin, Art Kaufman / William A Schambra (eds.), *Forging Unity out of Diversity – The Approaches of Eight Nations*, Washington, DC 1989, p. 51.

114 *Ibid*.

115 'Gau-raksha', meaning protection of cows, is purportedly a call to prevent the slaughter of cattle. However, groups of vigilantes with the aim of 'cow-protection', have been reported to have lynched members of minority and Dalit communities in Northern India.

116 *Amulya Gopalakrishnan*, *Dog-whistling, the BJP's art-form of choice*, *Times of India*, 12 October 2016, <https://timesofindia.indiatimes.com/blogs/to-name-and-address/dog-whistling-the-bjps-art-form-of-choice/> (last accessed on 1 December 2020).

in this context.¹¹⁷ He argues that religious appeals can be ingeniously re-cast in non-religious terms. For example, a demand for a beef-ban can be recast as a demand qua animal husbandry.¹¹⁸ Again, in a more recent example, a prominent Indian politician and Union Cabinet Minister during an election campaign assured the protection of refugee rights in a citizenship bill in the following words: “We will give citizenship right to all the refugees, including Matuas, who have been thrown out from different countries. Refugees from other countries - Hindu, Buddhist, Sikh, Jain Christian - will never be forced to leave the country”.¹¹⁹ Such an appeal was read by many as appealing to anti-Islamic rhetoric, due to the mention of refugees of different religions without the mention of persecuted Muslims, such as the Rohingyas or Ahmadis. Therefore, the mere focus of restrictions on whether there has been an identity-based appeal (rather than on its impact or potential consequences) poorly serves its interests.

c) An impractical and poor enforcement regime

Another reason why restrictions on identity-based appeals under Sections 123 (3) and 123 (3A) so weakly serve its desired interests is a poor enforcement mechanism to act against violations which falls under the aegis of the Election Commission of India (ECI). A constitutional body set up under Article 324 of the Constitution, the ECI exists to supervise, direct and control the conduct of elections across India but it has limited powers when it comes to taking measures against corrupt practices such as identity-based appeals. The larger powers to disqualify and sentence candidates guilty of violating restrictions on identity-based appeals and fueling ethnic violence are granted to High Courts through the provision of filing election petitions, set out under the RPA.¹²⁰ ECI enforcement only revolves around passing strictures against candidates for violating identity-based appeals and banning them from campaigning for a few days during an election season. For example, where a candidate used the words “Green virus”¹²¹ and “Bajrang Bali”¹²², the ECI, under its general powers of supervision over conduct of elections under Article 324 of the Constitution, censured the candidate for using “highly provocative speech” and barred him from contesting elec-

117 *Pratap Bhanu Mehta*, High Principle, Dubious Law, *The Indian Express*, 4 January 2017, <https://indianexpress.com/article/opinion/columns/supreme-court-hindutva-case-representation-people-act-rpa-4457663/> (last accessed on 1 December 2020).

118 *Ibid.*

119 *The Economic Times*, Amit Shah vows to implement NRC in West Bengal, throw out infiltrators, 1 October 2019, <https://economictimes.indiatimes.com/news/politics-and-nation/nrc-to-be-implemented-in-bengal-asserts-amit-shah/articleshow/71394111.cms?from=mdr> (last accessed on 1 December 2020).

120 See Section 80 and 81 to 107 of the Representation of Peoples Act, 1951.

121 A veiled reference to Islam.

122 A reference to the Hindu God Hanuman.

tions for 72 hours.¹²³ In another incident, where a candidate used the words "I want to say who don't say Vande Mataram, can't worship the motherland - Giriraj's father and grandfather died on the Simaria ghat by the banks of the Ganga and did not need a grave. You on the other hand, need three-arm's-length of land. If you don't do it (say vande mataram), the country will never forgive you", the ECI merely censured and condemned the sectarian statements made.¹²⁴ Two structural flaws can be observed in this enforcement framework. Firstly, since Election Petitions before the High Court are adversarial¹²⁵ and are filed only between competing candidates or brought by electors in that constituency, several identity-based appeal violations are never brought to the High Court's notice. This arises because candidates often use identity-based appeals merely to enlarge their own votes against competing candidates who also use similar practices. Hence, election petitions before the High Court for the violation of the RPA are uncommon, unless an aggrieved candidate feels seriously prejudiced. This means that most complaints against identity-based appeals, whether filed by citizens or taken cognizance of by the ECI, are dealt with by the ECI, whose enforcement powers are grossly insufficient. Secondly, with a large pendency of cases across High Courts¹²⁶ and the ECI's weak enforcement powers, cases are not adjudicated in time nor pursued effectively. The ways in which these structural flaws can be redressed are described at Section D.

2. The disproportionate impact on competing democratic interests

While restrictions on electoral speech under Sections 123 (3) and 123 (3A) of the RPA have limited impact on the interests they seek to serve, the provisions also have a disproportionate impact on competing democratic values that must be optimally balanced against each other in a democracy, in the following manner.

a) The disproportionate impact of Section 123 (3)

The legislative intent to curb even "stray appeals"¹²⁷ to fissionary tendencies theoretically prescribes a chilling effect on electoral speech around identity-based matters of public importance. *Abhiram Singh's* majority interpretation that Section 123 (3) proscribed identity-based appeals even to voters only extended the breadth of this chilling effect on free speech. This destroys an essential balance between the values of secularism and free speech

123 See Order dated 15 April 2019, bearing No: 437/UP-HP/2019, of the Election Commission of India with respect to Mr. Yogi Adityanath, Chief Minister of Uttar Pradesh.

124 See Order dated 12 May 2019, bearing No: 437/ ES-1/ BR-HP/2019, issued by the Election Commission of India in the case of Mr. Giriraj Singh.

125 Under Section 82 of the Representation of Peoples Act, 1951.

126 See report at PRS Legislative Research, Vital Stats, Pendency of cases in the judiciary, <https://www.prsindia.org/policy/vital-stats/pendency-cases-judiciary> (last accessed on 1 December 2020).

127 *Abhiram Singh*, note 7, para. 30.

in the first zone of conflict described above and results in a disproportionately adverse impact on free speech. The majority opinion in *Abhiram Singh* pays very little attention to Section 123 (3)'s impact on free speech by holding that, since the right to contest elections is a special statutory right, restrictions on electoral speech have no bearing on the fundamental right to free speech under Article 19 (1) of the Constitution.¹²⁸ This view completely ignores the fact that a chilling effect on electoral speech directly impacts a common citizen's ability to participate in democracy. If a voter is prohibited from hearing and engaging in an unfettered exchange about religious liberty with candidates, it affects not just the candidates' rights [as viewed by the Court] but also curtails citizens' individual rights to expressly participate in the affairs of the state.¹²⁹ Thus, the right to participate in public discourse, an individual right constitutive of democracy and popular sovereignty itself¹³⁰, was abrogated by the Court in its quest to promote more abstract and purportedly higher goals of state unity and secularism.¹³¹ *Abhiram Singh* also failed to prescribe judicially manageable standards or boundaries defining what constitutes an "appeal on the grounds of his religion, race, caste, community or language", beyond leaving it to the evidence or context of each case.¹³² These unmanageable standards also raise further and significant complexities in the light of certain judgements by the Supreme Court that have interpreted Hinduism to mean a cultural way of life rather than a religion.¹³³ These broad and undefined standards may only permit covert mechanisms to defeat the law's interests while restricting valuable electoral speech.

Apropos the second zone of conflict between social harmony and recognition, while the minority opinion in *Abhiram Singh* fairly addresses the disproportionate impact of electoral speech restrictions on recognition¹³⁴, the majority pays little attention to recognition. The majority, while examining the social context in its purposive interpretation, expends greater focus on the social context of separatist tendencies than on the social context of ethnic disparities.¹³⁵ This lopsided examination severely shrinks the space for legitimate identity-based appeals that serve to recognize marginalized groups and bring them into the mainstream.

128 *Abhiram Singh*, note 7, para. 48; See critique over the *Abhiram Singh* decision in *Indira Jaising*, Stuck between 4 and 3, *The Indian Express*, 11 January 2017, <https://indianexpress.com/article/opinion/columns/stuck-between-4-and-3-4468496/> (last accessed on 1 December 2020).

129 *Abhiram Singh*, note 7, para. 119; *Weinstein*, note 52.

130 *Weinstein*, note 52.

131 *Abhiram Singh*, note 7, para. 42.

132 *Abhiram Singh*, note 7, para. 50.3; *Jaising*, note 128.

133 *Prabhoo*, note 49; See also *Kapur*, note 22; see also *Noah Feldman*, *Indias High Court Favors Nationals over Democracy*, *Bloomberg View*, 8 January 2017, <https://www.bloomberg.com/opinion/articles/2017-01-08/india-s-high-court-favors-nationalism-over-democracy> (last accessed on 1 December 2020).

134 *Abhiram Singh*, note 7, para. 119, 120.

135 *Abhiram Singh*, note 7, para. 44-47.

Finally, the restrictions on identity-based appeals, as interpreted by *Abhiram Singh*, fail to maintain a balance between electoral integrity and an unfettered contest of ideas, two competing facets of a legitimate electoral process.¹³⁶ In *Abhiram Singh*, the restrictions' limited impact in failing to curb anti-democratic interests promoted by party ideology, dog whistles and poorly regulated election manifestos¹³⁷ goes unnoticed on one hand. On the other hand, the majority also disregards the restrictions' overbreadth in completely negating the value of a free exchange of ideas around identity, recognition, and tussle of power between ethnic groups (within limits prescribed in a democracy). The majority views social media and technology as a breeding ground to foster religious appeals to voters and disturb "the even tempo of life".¹³⁸ The majority's underlying assumption is that India has a homogenous populace that is increasingly vulnerable to sectarian interests, justifying a complete legislative ban on identity-based appeals. The Court therefore prefers to pursue electoral integrity at the cost of a blanket ban on the exchange of ideas that legitimize democratic interests¹³⁹, and in doing so, does not treat voters as agents in the democratic process.

b) The disproportionate impact of Section 123 (3A)

What Section 123 (3A) seeks to restrain are identity-based appeals or electoral speech of candidates that "promote or attempt to promote, feelings of enmity or hatred between different classes of the citizens of India on the grounds of religion, race, caste, community, or language, by a candidate". Notably, the restraint on the speech is largely informed by its impact on the electorate and the content of the speech, beyond its identity-appeal, is left unexamined. This creates an "overbreadth effect" that restricts speech that that ought to be ordinarily considered harmless in a constitutional democracy. Put differently, no speech, whether valuable or not, ought to be restrained solely because of the sensitivities of people, where ordinarily such statement would cause no feelings of hatred between communities, even in the social context of that Democracy. For example, assume a candidate tells his voters that "if voted to power he will ensure that he will smash all symbols of Brahminism, and usher in a time where the histories of the oppressed are honored and remembered." A group of vigilantes belonging to a Brahmanical caste takes offence at these words and attacks the supporters of the candidate, who belong to another caste. In another example, assume a candidate who argues for discontinuing state subsidies to citizens that undertake annual international religious pilgrimages, unintentionally causes a local riot. In both these examples, the restrictions may appear unwarranted given that the content of the speech is

136 See, *Abhiram Singh*, note 7, para. 120; *Blocher*, note 91; *Breyer*, note 53.

137 In *Subramaniam Balaji v. State of T.N* (2013) 9 SCC 659, the Supreme Court explicitly observed that Section 123 (3) of the RPA does not extend to election manifesto's and extends only to individuals.

138 *Abhiram Singh*, note 7, para. 43.

139 *Abhiram Singh*, note 7, para. 50 – 50.2.

harmless, is of democratic value and even absolves the candidate of an intention to cause harm. However, in both cases, the candidate will be held guilty of a corrupt practice under Section 123 (3A) of the RPA. The focus purely on the impact of the appeal and the disregard of the content of the speech creates a disproportionate impact on the freedoms that are constrained by the restrictions across all three zones of conflict. Therefore, there is an unjustified intrusion on the freedom of expression in zone one, recognition in zone two and unfettered political competition in zone three.

Section 123 (3A), apart from its disregard of the content of electoral appeals is also flawed in its restriction of electoral appeals to only those that are identity-based. This arises from a lot of electoral hate speech being non-identity based. Electoral hate speech is often directed at political rivals or supporters of competing ideologies and may advocate for the use of violent methods to achieve democratic interests. For example, an electoral appeal by one candidate that calls upon his supporters to assault an incumbent, rival candidate on the grounds of corruption should have no place in a democracy. While the Indian Penal Code has general provisions to punish such an electoral appeal, there is a special need to curb electoral hate speech, as recognized by the legislature while enacting Section 123 (3A). The restrictions under Section 123 (3A), in disregarding the content of the speech and limiting its focus to identity-based appeals can disproportionately impact social harmony in the second conflict zone. Additionally, the provision can also disproportionately impact legitimate political competition in the third conflict zone by allowing some political candidates to intimidate others.

Whether restrictions on speech should focus on the impact of speech or the content of speech have traditionally been areas of tension between jurists and scholars.¹⁴⁰ The ‘Clear and Present Danger’ test developed by Justice Oliver Wendell Holmes has been critiqued by Judge Learned Hand, among others, as focusing on ‘harmful consequences’ of the speech and not laying out any objective criteria to test the contents of the speech.¹⁴¹ In our view, this tension is resolved by scrutinizing both the content of a speech and its potential consequences, in order to efficaciously balance competing interests and accord higher freedom of electoral speech. A focus merely on the content of the speech, as seen in Section 123 (3), has the potential to leave out speech that is vital to public discourse in a democracy. A focus solely on the content of the speech is also likely to lead to overbreadth since it could lead to the use of ‘vague and indeterminate standards.’¹⁴²

To summarize our case, the present restrictions on electoral speech have little to no impact on promoting fair elections while disproportionately abrogating competing democratic values of grave importance. For these reasons, the contours of the restrictions need redrawning, the manner of which is further explored in Section D.

140 See *Weinstein*, note 52.

141 *Ibid.*

142 *Ibid.*

D. A balance between the occurrence and impact of electoral speech

As discussed above, the regime of Section 123 (3) and Section 123 (3A) infringes essential democratic interests served by electoral speech and meets its desired interests to a very limited extent. This calls for a reorganization of the restrictions on electoral speech which we propose will be best served through the following three structural changes.

Firstly, the restrictions imposed by Section 123 (3) are so proscriptive of democratically valuable speech and so deficient in achieving its interests that we propose to delete this section. However, the interests that Section 123 (3) seeks to achieve in promoting communal and social harmony are not unfounded. Further, the objectives served by restrictions on hate speech under Section 123 (3A) are crucial to maintaining the sanctity and stability of a fair electoral process. Accordingly, our second reform would be to amend Section 123 (3A) in a manner that better serves both its existing interests and those that a deleted Section 123 (3) would have sought to serve. As a matter of first principles, restrictions under Section 123 (3) are wholly centered on the nature or content of the speech in question, while those under Section 123 (3A) revolve around the impact of the speech. In this light, as discussed in Section C, we find that re-arranging the restrictions in a manner that efficaciously considers both its potentially dangerous impact and its objectionable content will best serve the electoral process. These restrictions that balance content and impact are to be imposed only within a well-defined narrow zone that is generally classified as “political hate speech”. This arrangement will better ensure that restrictions on free speech are more effective and that candidates and voters can exercise their right to engage in ‘public discourse on matters of national importance’. Finally, as the Latin phrase ‘ubi just ibi remedium’ goes, an effective right will require an effective remedy. Hence, thirdly, we propose a broad structural reform to the RPA, including the powers of the election commission, vis-à-vis enforcing violations of electoral hate speech laws. Before proceeding to detail our proposed reforms, we summarize our three broad structural reforms as under:

- a) *The deletion of Section 123 (3) from the statute book.*
- b) *An amendment of Section 123 (3A) in a manner that better serves its existing purpose as well as that of the erstwhile Section 123 (3) without disproportionately affecting competing interests.*
- c) *Undertaking structural reforms to strengthen enforcement powers under the RPA.*

I. Amendment of Section 123 (3A)

An amendment to Section 123 (3A) necessitates the identification of the elements of electoral hate-speech that must be restricted by the RPA. The Law Commission of India, in its 267th Report titled ‘Hate Speech’ identified certain criteria of hate speech.¹⁴³ Of these crite-

143 Law Commission of India, Identifying Criteria of Hate Speech, in: id., Report No. 267, Hate Speech, March 2017, <https://lawcommissionofindia.nic.in/reports/Report267.pdf> (last accessed on 1 December 2020), p. 32-36.

ria, the authors have adopted two, namely, the ‘Extremity of the Speech’ and ‘Incitement’.¹⁴⁴ In addition, the authors have also adopted one of the criteria laid down by the Canadian Supreme Court in *Saskatchewan (Human Rights Commission) v. Whatcott*¹⁴⁵, namely, ‘marginalizing individuals based on their membership of a targeted group’.¹⁴⁶ The principle incorporated from Saskatchewan is not alien to Indian jurisprudence given that Articles 14¹⁴⁷ and 15¹⁴⁸ of the Indian Constitution call upon the state to prevent discrimination in the public sphere. The elements of ‘incitement’ and ‘marginalization’ flows from the impact of the speech on the electorate while the element of ‘extremity of speech’, flows from the content of the speech. Pertinently, these elements of hate-speech need not be collectively present to constitute hate-speech. However, to constitute “electoral hate speech” the speech must be made in relation to an election¹⁴⁹, and it must be made by a candidate or his election agent or any other person authorized by him. In order to arrive at the most efficacious balance of democratic values promoted by electoral speech and interests that restrictions on it serve, we propose a two-step test:

1. Firstly, elements of the speech that constitute its content are weighed against elements that constitute its impact.
2. Secondly and subsequent to weighing these elements, the restrictions must extend only over a narrow zone of speech that is either very harmful in its impact or is both extreme in content and harmful in impact. Speech only extreme in nature but not harmful in impact generally ought to be excluded from the restricted zone.

144 Ibid.

145 *Saskatchewan (Human Rights Commission) v. Whatcott* [2013] 1 SCR 467.

146 Ibid; see also Law Commission of India, Review of Penal Law, in: id., Report No. 267, Hate Speech, March 2017, <https://lawcommissionofindia.nic.in/reports/Report267.pdf> (last accessed on 1 December 2020), p. 37-50.

147 **Article 14. Equality before law**

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

148 **Article 15 Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth**

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to

(a) access to shops, public restaurants, hotels and palaces of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State [...]

149 The authors have preferred to use the term ‘in relation to an election’, as opposed to the phrase ‘for the furtherance of the prospects of the election of that candidate or for the purpose of prejudicially affecting the election of any candidate’. The phrase ‘in relation to an election’ is a more inclusive term and will result in a more effective implementation of the law.

Take the example of the speech of an Indian politician who stated that his rival political party was “infected by the green virus”.¹⁵⁰ Under our proposition, this speech would be considered extreme in content given that it uses degrading and inflammatory language by referring to a community as a ‘virus’. On examination of its impact or potential impact, the speech also promotes marginalization of a minority religion, given that the colour green is a linguistic proxy for Islam in this case. We would therefore argue that this speech meets the elements of electoral hate speech, and ought to be proscribed because it is harmful in content and dangerous in impact.

In another illustration, consider a speech made in the 2009 elections by a politician¹⁵¹ who contested from the Pilibhit constituency in Uttar Pradesh.¹⁵² In an incendiary speech, he threatened to cut off the hands of members of a minority community.¹⁵³ In reference to a particular minority community, he went on to say “If someone slaps you, what do you do? (They say) turn the other cheek... I haven’t heard a stupider thing. If someone slaps you, you should cut off (expletive) his hand, so that he can never slap anyone later”.¹⁵⁴

Applying our proposed parameters, the speech in question constitutes extreme speech in content and has the potential to incite violence given that it exhorted one community to engage in violent reprisals against another. Although the speech did not incite immediate violence, the speech also advocated the marginalization of a minority community. The speech would therefore squarely fall within the ambit of identity-based electoral speech that ought to be restricted.

The following tables better illustrate the inter-play of ‘hate-speech’ elements with each other and assumes that the speech is made in relating to an election.

150 NDTV, ‘Congress Infected By Green Virus’: Yogi Adityanath's Latest Jab, 11 April 2019, <https://www.ndtv.com/india-news/yogi-adityanath-says-congress-infected-by-green-virus-2021239> (last accessed on 1 December 2020).

151 Varun Gandhi was the politician in question; Reuters, Varun Gandhi arrested over Muslim hate speech, 29 March 2009, <https://in.reuters.com/article/idINIndia-38758620090329> (last accessed on 1 December 2020).

152 *Amrita Basu*, *Violent Conjectures in Democratic India*, New York 2015, p. 228.

153 *Ibid.*

154 *Ibid.*

TABLE 1

CONTENT OF SPEECH	IMPACT OF SPEECH		
	Incites or attempts to incite imminent violence	Incites or attempts to incite violence, but not imminent violence	Does not incite or attempt to incite violence
Extreme or degrading	YES- constitutes electoral hate speech ¹⁵⁵	YES - constitutes electoral hate speech. ¹⁵⁶	NOT electoral hate speech but may qualify as electoral hate speech if it advocates discrimination. ¹⁵⁷
Not extreme or degrading	YES – constitutes electoral hate speech ¹⁵⁸	NOT electoral hate speech but may qualify as electoral hate speech if it advocates discrimination.	NOT electoral hate speech but may qualify as electoral hate speech if it advocates discrimination. ¹⁵⁹

TABLE 2

CONTENT OF SPEECH	IMPACT OF SPEECH	
	Advocates marginalizing individuals based on their membership of a targeted group	Does not advocate marginalizing individuals based on their membership of a targeted group
Extreme or degrading	YES - constitutes electoral hate speech ¹⁶⁰	NOT electoral hate speech but may qualify as electoral hate speech if it incites imminent violence. ¹⁶¹
Not extreme or degrading	YES - constitutes electoral hate speech ¹⁶²	NOT electoral hate speech but may qualify as electoral hate speech if it incites imminent violence. ¹⁶³

155 Illustration: A (a candidate/ or his agent/ or a person authorized by him) states with the use of profanities and expletives that members of a minority religion must be killed and urges voters/ community members to take up arms.

156 Illustration: A (candidate/ or his agent/ or a person authorized by him) states, with the use of degrading language explains a 5 year pogrom he wishes to undertake, if elected, against an ethnic minority.

157 See criteria at Table 2.

158 Illustration: A (a candidate/election agent/ a person authorized by him) using a poem and euphemistic words, urges voters to take up arms overnight, against the members of his rival political party.

159 See criteria at Table 2.

160 Illustration: A (a candidate/election agent/ a person authorized by him) tweets to his followers, that a certain linguistic community is sub-human and must be boycotted entirely.

161 See criteria at Table 1.

In order to arrive at the arrangement and balance described in the table above, Section 123 (3) would be deleted and Section 123 (3A) would be replaced by the following proposed section:

New Section 123 (3A)

Corrupt Practices:

The following shall be deemed to be corrupt practices for the purposes of this Act:

.....

(3A) The use by a candidate, or his election agent, or any other person with the consent of the candidate or his election agent, in relation to an election:

- a. Of language that incites or attempts to incite persons to imminent violence*
- b. Of inflammatory or degrading language that incites or attempts to incite persons to violence.*
- c. Of language that advocates or promotes racial or ethnic discrimination or the marginalizing of individuals based on their membership of a targeted group.*

Explanation 1 to Section 123 (3A)

For the purposes of sub-section (c) membership of a targeted group would include any group membership based on religion, race, caste, community, language, sex, gender, and sexual orientation.

Explanation 2 to Section 123 (3A)

For the purposes of this Section the term ‘language’ would include spoken words, written words as well as gestures.

II. Reform over enforcement mechanisms

Enforcement hurdles with respect to the RPA and the status of the ECI being a ‘hapless spectator’ to provisions on hate speech have been the subjects of much scholarly analysis.¹⁶⁴ The authors suggest the following broad changes¹⁶⁵ to the RPA enforcement mechanism that work to curb sectarian appeals that amount to hate speech:

a) Holding political parties accountable:

Firstly, we suggest an amendment in the RPA to include a framework that holds political parties accountable for electoral rhetoric that may be included in the party manifesto or other publications made in relation to an election if such rhetoric uses inflammatory or degrading language and/or incites imminent violence. A similar arrangement is also

162 Illustration: An article written in a mainstream newspaper calls for amendments to the Indian constitution seeking to make a majority religion the official religion of the Indian republic.

163 See criteria at Table 1.

164 Ritika Patni / Kasturi Kamudi, Regulation of Hate Speech, NUJS Law Review 2 (2009), p. 749.

165 A detailed account of necessary reform to the enforcement mechanism is beyond the scope of this paper.

necessary to govern language that promotes racial or ethnic discrimination or the marginalization of individuals due to their membership of a target group.

b) Setting up of an Election Ombudsman tasked with filing Election Petitions

Secondly, the authors recommend the creation of an Election Ombudsman tasked with filing Election Petitions before High Courts, seeking the negation of elections in which candidates engaged in the corrupt practice of electoral hate speech (or any other corrupt practice). Presently, Section 81¹⁶⁶ of the RPA allows the presentation of an Election Petition, which calls into question the results of an election, by only a candidate or an elector. The authors argue that in a social context where rival candidates may have an equal interest in engaging in electoral hate speech, such an enforcement mechanism is likely to be ineffective. Further, electors in a constituency may be too intimidated to pursue litigation with respect to elections. An independent ombudsman empowered to bring Election Petitions before the Court on the grounds mentioned in Section 100 (1) and 101 of the RPA would strengthen enforcement.

Given the Election Commission's role as a regulator, it is unsuited to act as an ombudsman empowered to file adversarial election petitions to enforce the law against erring candidates. Further, the Election Commission is statutorily required to give an opinion to the President of India, under Section 8A of the RPA, to determine if a candidate must be disqualified for a corrupt practice.¹⁶⁷ Given this potential conflict of interest of the Election Commission, we suggest creating an independent Election Ombudsman to bring election petitions in suitable cases where corrupt practices, such as electoral hate-speech, have been engaged in by candidates. In order to ensure its independence, we propose that the members of the Election Ombudsman are appointed by a committee consisting of a judge of the Supreme Court, the leader of the Opposition, and a representative of the Central Government. Further, the committee members must have a fixed tenure and be removable for misconduct only through judicial inquiry.

166 81. Presentation of petitions. —

(1) An election petition calling in question any election may be presented on one or more of the grounds specified in [sub-section (1)] of section 100 and section 101 to the [High Court] by any candidate at such election or any elector 3[within forty-five days from, but not earlier than the date of election of the returned candidate or if there are more than one returned candidate at the election and dates of their election are different, the later of those two dates]....

167 1[8A. Disqualification on ground of corrupt practices:

(1) The case of every person found guilty of a corrupt practice by an order under section 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 section 99 takes effect.

....

(3) Before giving his decision on any question mentioned in sub-section (1) or on any petition submitted under sub-section (2), the President shall obtain the opinion of the Election Commission on such question or petition and shall act according to such opinion.]

The reforms suggested in this Section are predominantly directed at redrawing the contours of restrictions on political speech founded upon our argument that Section 123 (3) and Section 123 (3A) in their present form fail to efficaciously balance competing democratic interests. In recognition of the limitations of the RPA as it is today, Samuel Issacharoff writes that “the Indian approach, while committed to maintaining public order during a heated election, exposes uncertainty about voters’ motivations in exercising the franchise”.¹⁶⁸ The RPA also illustrates a paternalistic fear among Indian law-makers that “exposure to certain kinds of speech will disable” the voter.¹⁶⁹

The authors have therefore aimed to move away from the paternalism of Section 123 (3) and the overbreadth of Section 123 (3A) by suggesting a new, narrow criteria of electoral hate-speech, which strikes a balance between content-based and impact-based restrictions. While impact-based restrictions have been subject to serious scholarly critiques in the American context¹⁷⁰, we argue that in the multi-ethnic Indian context, identity-based electoral hate speech cannot entirely escape from examining the impact of the speech.

Having begun with Ramachandra Guha’s remarks on the unlikely nature of Indian democracy, the authors would be remiss in not pointing out that Guha more recently remarks that, with the erosion of public institutions and entrenched majoritarianism, India is now in danger of becoming an “election only democracy”.¹⁷¹ Collectively upholding and delicately balancing the democratic values of secularism and social harmony with the freedom of expression and group mobilization will keep India from becoming an “election only democracy”. Our suggested reform to the RPA, in conjunction with the reforms in the law on enforcement mechanisms, including holding political parties accountable for hate rhetoric, will collectively guard these foundational democratic values and strengthen the resilience of India’s democracy.

168 See, *Samuel Issacharoff*, *Fragile Democracies*, Harvard Law Review 120 (6) (2007), p. 1406.

169 *Aditya Sondhi*, Elections, in: *Sujith Choudhry, Madhav Khosla / Pratap Banu Mehta* (eds.), *the Oxford Handbook of the Indian Constitution*, Oxford 2016.

170 *Weinstein*, note 52; see also *Issacharoff*, note 168.

171 *Ramachandra Guha*, India was a miracle democracy. But it’s time to downgrade its credentials, *The Washington Post*, 14 August 2019, <https://www.washingtonpost.com/opinions/2019/08/14/india-was-miracle-democracy-its-time-downgrade-its-credentials/> (last accessed on 1 December 2020).