CHAPTER III

Indian Constitutional and the Representation of People Act-Perspective.
CHAPTER-III

THE INDIAN CONSTITUTIONAL AND
THE REPRESENTATION OF PEOPLE ACT-PERSPECTIVE

3.1 GENERAL INTRODUCTION

Constitution of India declares that Indian democracy is 'of the people, by the people, and for the people'. The Preamble to the Constitution of has incorporated some basic features to ensure economical, political and social justice. A really democratic country is one which has a 'rule of law', and is governed by the people, for the people. Rule of law means a system, which shall ensure equality before law, transparent and good governance, corruption free bureaucracy and a quick readressal of people's grievances but these basic principles of the 'rule of law' are missing, from our day to day life. The answer is very simple. Primarily, India followed the British Westminster style of parliamentary
democracy and made a provision of equal rights and universal adult franchise. But in actual life, those rights were marginalised seriously, and hence, been turned just in to a vote bank. This has resulted in the exploitation of Indian citizens by various interest groups. It has resulted in the following consequences:

- Rampant corruption has become an integral part of each and every level of governance.
- Violation of law with immunity has become a routine affair.
- Remedial measures are not easily available, and there is a strong nexus between the powerful: politicians, bureaucrats and the organised mafia.
- Immense economical, social and political exploitation is not at all a matter of concern for any politician; and
- From the entire country, there is not a single person from the masses, who does, not have grievances that relates to government at one level or the other.

The Constitution has failed to enshrine appropriate provisions, which could have ensured good governance. It vindicates the views of the former British Prime Minister, Winston Churchill, who once said, "Democracy is the worst form of government, except all those other forms that have been tried." But, I also disagree with him. In my opinion, any form of the so-called democracy should not be defined or called a democracy, till the following fundamental principles are not inserted in the system with concrete mechanism for their implementation.

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• Truth must prevail;
• Justice must be supreme;
• Reins of powers should be in the hands of the people;
• Unity, based on self reliance, self respect and self dependence amongst the people must be supreme;
• Everyone, including the constitutional authority should be accountable before the law and the system, irrespective of status or position;
• Justice delivery system should be easy, affordable and within reasonable time;
• In the election mechanism, value should be given to the voters, rather than voting;
• Individualistic politics should not be allowed at any level, and at any cost;
• Promotion in politics should be based on experience, competency and performance
• The fruits of progress should have a horizontal distribution;
• System should not be allowed to discriminate between the powerful and the powerless.
• Each individual should be kept away from the democratic process, if he does not obey these principles in letter and spirit.

The word democracy is derived from the words 'demos' and 'kratos' meaning people and authority respectively. It is a way or manner of living or stating it more specifically a form of governance where every individual directly or indirectly participates in the rule making. Democracy is a concept, a political philosophy, an ideal practiced by many nations
culturally advanced and politically mature by resorting to governance by representatives of the people elected directly or indirectly.

The Preamble to the Constitution of India provides a constitutional democratic system to guide the fate of Indian people. It declares the country as a sovereign, socialist, secular, democratic, republic to bind the country into a single unit. The Preamble to the Constitution read along with several its provisions clearly reflects that the democracy established in India is that of a free and open society as opposed to an un-free and closed society. In fact democracy is one of the basic inalienable features of the Constitution of India and forms part of its basic structure

The word 'election' implies persons who are to elect, (called the electors), the office to which election is to be made, and the person who is to be elected (called the candidate). According to Black election is the process of selecting a person to occupy a position or office, usually a public office. Election is thus defined as the choice of persons to fill public office, means the expression by vote, of the will of the people or of a numerous body of electors. Election has also been defined to mean the act or process of choosing a person or persons for an office, position or membership as by ballot. In the Representation of the People Act, 1951 the word election is defined as: "election means an election to fill a seat or seats in either House of Parliament or in the House or either House of the Legislature of a State." The word election as used in the Representation of the People Act, 1951 includes every stage from the time the notification calling for election is issued till the declaration of the result. The expression election means selection of a person by vote or even otherwise. When a person is nominated by way of selection on the basis of a given criteria
from amongst several persons, then, in the broader sense, he is elected to the office. The Supreme Court while dealing with the meaning of the word election as used has observed that the word in connection with the process of selection of proper representative has acquired both a wide and a narrow meaning:

(i) In the narrow sense it is used to mean the final selection of a candidate which may embrace the result of the poll when there is polling or a candidate being returned when there is no polling.

(ii) In the wide sense the word is used to connote the entire process culminating in a candidate being declared elected

Krishan Iyer J was of the view that every step from start to finish or the total process constitutes election, not merely the conclusion of culmination. The rainbow of operations, covered by the compendious expression 'election' thus commences from the initial notification and culminates in the declaration of the return of a candidate. There cannot be two views or doubts about the fact that 'free and fair elections' are a basic postulate of a free democratic society. The Supreme Court has observed:

"Democracy is government by the people. It is a continual participative operation, not a cataclysmic, periodic exercise. The little man, in his multitude, making his vote at the poll does a social audit of his Parliament plus political choice of his proxy. Although the full flower of participative government rarely blossoms, the minimum credential of popular government is appeal to the people after every term for a renewal of

2 Under Article 329(b) the Constitution of India
3 Mohinder Singh Gill v. Chief Election Commissioner 1978 -AIR-(SC)-0-851
confidence. So we have adult franchise and general elections as constitutional compulsions\(^4\)."

The inseparability and the inter-relation between elections and democracy has been succinctly stated by the apex court in the following words: "the concept of democracy as visualized by the Constitution presupposes the representation of the people in Parliament and State legislatures by the method of election." Hence a true, independent and liberal democracy cherishes free, fair and impartial elections because it is through them that true democracy is born.

3.2 Bar to interference under Constitution:

It is of the essence of the functioning of a democracy that election to public offices must be open to the scrutiny of an independent tribunal. Constitution visualizes the resolution of election disputes by judicial process by ascertaining the facts relating to the election and applying the law. The Supreme Court held that free, fair, fearless and impartial elections are the guarantee of a democratic polity\(^5\). Effective mechanism is the basic requirement for having such election. For conducting, holding and completing the democratic process, a potential law based upon requirements of the society is concededly of paramount importance. A balanced judicial approach in implementing the laws relating to franchise is the mandate of this Court. Before examining the matter of jurisdiction it shall be of relevance to refer to which reads:

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\(^4\) Supra
\(^5\) V.S. Achuthanandan v. P.J. Francis 2001-SCC-3-81
"329. Bar to interference by courts in electoral matters.-

Notwithstanding anything in this Constitution

(b) no election to, either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature."

It has been observed by the Supreme Court that the non-obstante clause which begins debars us, as it debars any other court in the land, to entertain a suit or proceeding calling in question any election to Parliament or the State Legislature. The proceedings have to be initiated by an election petition and in such manner as may be prescribed by the statute. The Supreme Court in Jyoti Basu v. Devi Ghosal enunciated the Constitutional position as follows: A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a Fundamental Right nor a common Law Right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute to an election. Statutory creations they are and subject to statutory limitations. The rights arising out of elections, including the right to contest or challenge an election, are not common law rights. They are creatures of the statutes which create, confer or limit those rights. For deciding the question whether an election can be set aside on any alleged ground, the courts have to consult the provisions of law governing the particular

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6 Article 329 of the Constitution of India
7 Art 329 of the Constitution of India
8 1982-AIR(SC)-0-983
election. They have to function within the framework of that law and cannot travel beyond it.

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. The Supreme Court\(^9\) 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\(^10\) 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\(^11\).

Thus in order to avoid dual jurisdiction over the election matters the Election Commission recommended that trial of election petitions should be entrusted to the High Courts instead of election tribunals. Parliament thus enacted a provision\(^12\) providing that the "High Court" shall be the authority for presentation of election petitions under Article 329(b) of the Constitution. This was incorporated by an amendment in the year 1966.\(^13\)

3.3 Extent of Power as provided under Representation of People's Act, 1951:

The Representation of People's Act, 1951 was enacted by the Parliament in exercise of its powers under Art 327. RPA, 1951 makes

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\(^9\) Under Article 329(b) Constitution of India
\(^10\) Under Article 329(b) Constitution of India
\(^12\) Under Section 80-A of the Representation of the People Act, 1951
\(^13\) (Act 47 of 1966)
detailed provisions with regard to all matters and all stages connected with elections to various Legislatures. The RPA, 1951 has been held to be a complete and self-contained code within which must be found any right claimed in relation to an election or an election dispute. Part VI of RPA, 1951 deals with disputes regarding elections and provides for manner of presentation of election petitions their trial and procedure thereof. The Act\textsuperscript{14} provides that "No election shall be called in question except by an election petition presented in accordance with the provisions this part." In furtherance of this provision it is provided that the court having jurisdiction to try election petitions shall be High Court. Such jurisdiction shall be exercised by a single judge of High Court and the Chief Justice shall from time to time assign one or more judges for that purpose.

The concepts of common law and equity are strangers to the branch of election law. The rights of free, fair and independence of elections are a matter of great importance and fundamental to any democracy. Hence, the entire election process commencing from the issuance of notification calling upon a constituency to elect a member or members right up to the final resolution of the dispute, if any, concerning the election is regulated by RPA, 1951 different stages of the process being dealt by different provisions of the Act.

Section 100 of the RPA, 1951 deals with the grounds on which an election may be challenged by means of election petition. Section 100 reads:

"100. Grounds for declaring election to be void – (1) Subject to the provisions of sub-section (2), if the High Court is of opinion –

\textsuperscript{14} Under Section 80 of the Representation of Peoples Act, 1951
(a) that on the date of his election a returned candidate was not qualified, or was disqualified, to be chosen to fill the seat under the Constitution or this Act or the Government of Union Territories Act, 1963(20 of 1963): or
(b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent: or
(c) that any nomination paper has been improperly rejected: or
(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected-
(i) by the improper acceptance of nomination, or
(ii) by any corrupt practice committed in the interests of the returned candidate by any agent other than his election agent, or
(iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or
(iv) by any non-compliance with provisions of the Constitution or of this Act or of any rules or orders made under this Act, the High Court shall declare the election of the returned candidate to be void.

(2) If in the opinion of the High Court, a returned candidate has been guilty by an agent, other than his election agent, of any corrupt practice but the High Court is satisfied-
(a) that no such corrupt practice was committed at the election by the candidate or his election agent, and every such corrupt practice was committed contrary to the orders, and without the consent, of the candidate or his election agent;
(b) that the candidate and his election agent took all reasonable means for preventing the commission of corrupt practices at the election; and
(c) that in all other respects the election was free from any corrupt practice on the part of the candidate or any of his agents, then the High Court may decide the election of the returned candidate is not void."

Thus the Act provides two kinds of grounds to the petitioner: the grounds in clauses (a) to (c) are grounds of election petition as such while the grounds in clause (d) are available to a candidate only if the candidate as far as the result is concerned has been 'materially affected.' What shall amount to being materially affected has not been specified in RPA, 195115. According to the Supreme Court whether the result of the election could be said to have been materially affected must depend on the facts,

15 Under Section 100 of the Representation of Peoples Act, 1951
circumstances and reasonable probabilities of case, particularly on the
difference between the number of votes secured by the successful
candidate and the candidate securing the next highest number of votes as
compared with the number of votes secured by the candidate whose
nomination was improperly accepted and the proportion by which the
number of wasted votes bears to the number of votes secured by the
successful candidate. Thus if the number of votes secured by the
candidate whose nomination was improperly accepted is disproportionately
large as compared with the difference between the votes secured by the
successful candidate and the candidate securing the next highest number
of votes and if the votes Secured by the candidate whose nomination was
improperly accepted bears a fairly high proportion to the votes secured by
the successful candidate, the reasonable probability is that the result of the
election has been materially affected

3.4. Article 329(b) vis-à-vis Article 226: Article 329(b) of the
Constitution begins with the words: "Notwithstanding anything in this
Constitution...." This is a non obstante clause. But Article 226 confers
extremely wide powers on the High Court. He question thus then that
arises is whether the expanse of Article 329(b) is so wide that it cannot be
bypassed by Article 226. The answer to this question has usually been
answered in the affirmative by the courts. In other words the provisions of
Art 329(b) have an over-riding effect on the provisions of Art 226. In the
Poonuswami case this question was considered by the Supreme Court. In
this case the appellant was one of the persons who has filed nomination
papers for election to the Madras Legislative Assembly from the Namakkal
constituency. The Returning Officer rejected the appellant's nomination
paper on certain grounds. The appellant thereupon moved the High Court
under Art 226 of the Constitution praying for a writ of certiorari to quash the order of the Returning Officer to include his name in the list of valid nominations to be published. The High Court dismissed the appellant’s application on the ground that it had no jurisdiction to interfere with the order of the Returning Officer by the reason of the provisions of the Constitution.\(^{16}\)

In appeal before the apex court the issue to be decided was whether the view expressed by the High Court is correct that its jurisdiction is affected by the Constitution\(^ {17}\). Upholding the observations of the High Court the Supreme Court observed that Art 329(b) was apparently enacted to prescribe the manner in which and the stage at which this ground and other grounds may be raised under the law to call the election in question. If the grounds on which an election can be called in question could be raised at an earlier stage and errors, if any, are rectified, there will be no meaning in enacting a provision like Art 329(b) and in setting up a special tribunal. The Court further observed that any other meaning ascribed to the words used in the Article would lead to anomalies, which the Constitution could not have contemplated. One of them being that conflicting views may be expressed by the High Court at the pre-polling stage and the election tribunal at the stage when the matter is brought up before it. Hence, the State High Courts have no jurisdiction under Article 226 of the Constitution to entertain petition.

The Punjab and Haryana High Court in a significant judgment held that an “election petition is a far more effective relief” in case of

\(^{16}\) Under Article 329(b) the Constitution of India  
\(^{17}\) Ibid
wrong rejection of nomination papers. The court observed that it is unfortunate that some papers have been wrongfully rejected but law provides relief to the candidate through an election petition before the election tribunal, which may declare the election to be void altogether on the ground of wrong rejection of nomination papers. The Division Bench commenting upon the extent of Art 226 in election matters observed that the powers under Art 226 are available when exercise of said power sub-serves the progress of election. The High Court is empowered to act under Art 226 in order to facilitate the election.

This question again came up for consideration before the Supreme Court in Mohinder Singh Gill18's case. The issue inter alia was formulated as: "whether the writ petition challenging cancellation integrated with re-poll is barred under Art 329(b)" Answering the question in the affirmative it was held that the catch-all jurisdiction under Article 226 cannot consider the correctness, legality or otherwise of the direction for cancellation integrated with re-poll. For the prima facie purpose of such a re-poll is to restore a detailed poll process and to complete it through the salvationary effort of a re-poll. A writ petition challenging the cancellation coupled with re-poll amounts to calling in question a step in 'election' and is therefore barred by Art. 329(b). In the case of Inderjit Barua v. Election Commission19 the petitioners sought to escape from the bar20 by contending that they are challenging the impugned elections as a whole and not any individual election and that the bar of Art 329(b) therefore does not stand in the way of writ petitions filed by them challenging the

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18 1978—AIR-(SC)-0-851
19 1984-AIR(SC)-0-1911
20 Under Article 329(b) the Constitution of India
impugned elections. However the court rejected the contention of the petitioners holding that this escape route is not open to the petitioners. The court observed that there is in the Representation of People Act, 1951 no concept of election as a whole. Even where in form the challenge is to the elections as a whole, in effect and substance what is challenged is election from each constituency and Art 329(b) must therefore be held to be attracted.

A significant pronouncement of the Supreme Court in respect of the expanse of the writ jurisdiction of the High Courts under Art 226 in respect of election matters is K. Venkatachalam v. A. Swarnikan. In this case the appellant before the Supreme Court was elected to the Tamil Nadu Legislative Assembly at the general election held from Lalgudi assembly constituency. No election petition was filed questioning his election. One year after his election one of the rival candidates filed a writ petition before the Madras High Court alleging that the appellant was not registered as an elector in the constituency. The High Court allowed the writ and declared that appellant was illegally elected. On appeal the Supreme Court upheld the decision of the High Court.

"The Constitution is couched in widest possible term and unless there is clear bar to jurisdiction of the High Court its powers under Article 226 of the Constitution can be exercised when there is any act which is against any provision of law or violative of constitutional provisions and when recourse cannot be had to the provisions of the Act for the

21 1999-AIR (SC)-0-1723
22 p.1734, para 27.28
23 Under Article 226 Constitution of India
appropriate relief. In circumstances like the present one bar of provision\textsuperscript{24} will not come into play when case falls under Constitution\textsuperscript{25} and whole of the election process is over ....... (W)e are, therefore, of the view that the High Court rightly exercised its jurisdiction in entertaining the writ petition under Article 226 of the Constitution and declared that the appellant was not entitled to sit in Tamil Nadu Legislative Assembly."

However the Venkatachakam's\textsuperscript{26} case is a one-off instance and the only one known where a sitting member has been disqualified by means of a writ petition. Generally the powers of the High Courts under Art 226 with respect to election matters has been held to very limited and narrow. The Supreme Court\textsuperscript{27} added a word of caution and observed that the success of a candidate should not be lightly interfered who has won at an election should not be lightly interfered with. Any person seeking such interference must strictly conform to the requirement of law. Though the purity of election has to be safeguarded and the court should be vigilant, the setting aside of elections involves serious consequences not only for the returned candidate and the constituency but also for public at large in as much as re-election involves huge load on public funds and administration.

The domain and the extent of the writ jurisdiction under Art 226 thus is very restrictive. Barring a few notable exceptions when the courts have taken that extra step considering the circumstances of the case the courts have usually declined to entertain election matters under Art 228 keeping in view the bar imposed by Art 329(b). The principles governing the

\textsuperscript{24} Under Article 329(b) Constitution of India
\textsuperscript{25} Articles 191 and 193 Constitution of India
\textsuperscript{26} 1999—AIR(SC)-0-1723
\textsuperscript{27} Jeet Mohinder Singh v. Harindar Singh Jasri 2000-AIR(SC)-0-256
exercise of powers of High Courts under Art 226 can thus be summarized in the words of the apex court itself. The Supreme Court has observed that erroneous actions which are amenable to correction in writ jurisdiction of the courts should be such as have the effect of interfering in the free flow of the scheduled election or hinder the progress of election which is of paramount consideration. If by an erroneous order the conduct of the election is not hindered then the courts under Art 226 of the Constitution should not interfere with the orders of the returning officers the remedy for which lies in an election petition only. The High Courts should observe a self-imposed limitation on their powers to act under Art 226 by refusing to pass orders which would inevitably result in indefinite postponement of elections to legislative bodies. The important principles regarding the jurisdiction of High Courts in respect of election matters and their powers to entertain election petitions can thus be deduced and be stated as follows:

1. The constitutional provisions and the Representation of People Act clearly express the rule that there is a remedy for every wrong done during the election process. The remedy in respect of electoral process is not extinguished by virtue of Art 329(b). The only thing it does is that the remedy is postponed to the post-election stage.

2. The reason for the postponement of the remedy in respect of wrong done in connection with the elections is postponed to the post election stage because of a vital reason. Having regard to the important functions which the Legislatures have to perform in democratic countries, it has always been recognized to be a matter of first importance that elections should be conducted as early as possible according to time schedule. All
the controversial matters and all disputes arising out of elections should be postponed till after the elections are over, so that the election proceedings may not be unduly retarded or protracted.

3. The constitutional position and mandate thus has been clear – that the electoral process once started cannot be interdicted or interfered with by courts, at any intermediary stage till its completion and culmination in the declaration of the result.

4. Without interrupting, obstructing or delaying the progress of the election proceedings, judicial intervention is available if assistance of the court has been sought for merely to correct or smoothen the progress of the election proceedings, to remove the obstacle therein, or to preserve a vital piece of evidence if the same would be lost or destroyed or rendered irretrievable by the time the results are declared and the stage is set for invoking the jurisdiction of the court. 5. In deciding and entertaining matters related to the elections the courts cannot resort to help of principles of equity and common law in order to expand the scope of their jurisdiction in election matters. The right to dispute a election is a statutory right i.e. a creation of the statue and thus is subject to the limitations created by the statute. The limits laid down by the statute in terms of forums which can be approached cannot be transgressed.

3.5 Election funding and corruption:

As early as 1964, the Santhanam Committee on prevention of corruption had sounded a warning: "Public belief in the prevalence of
corruption at high political levels has been strengthened by the manner in which funds are collected by political parties, especially at the time of elections". Seven years on, the noted economist, Prof K. N. Raj, concluded that "Indian politics has become increasingly capital-intensive" even as the Wanchoo Committee on taxation, while discussing the problem of generation and proliferation of black money, recommended "not just election grants but general grants-in-aid for political parties".

Meanwhile, corruption has grown steadily. A decade after Santhanam Committee's warning the then President, V. V. Giri, expressed his anguish over the rising menace. In his address to the nation on the eve of Independence Day in 1974, he observed: "It is most regrettable development in recent years that money power has come to play such a dominant role in elections to legislatures that people may lose faith in cherished democratic values if leaders of all political parties do not take prompt corrective measures".

3.6 Election commission of India: The election commission in India is a statutory body set up under Article 324 of the constitution for superintendence, direction and control of the preparation of the electoral rolls for, and conduct elections to the parliament, state legislatures and offices of president and vice president of India. The commission has also to (1) lay down general rules for election, (2) determine constituencies and to prepare electoral rolls, (3) to gave-recognition to the political parties, (4) allot election symbols to political parties and individuals contesting the elections and (5) appoint election tribunals to decide disputes and doubts arising as a result of election to Parliament and State legislatures.
Since its inception in 1950 and till October 1989, the commission functioned as a single member body consisting of the Chief Election Commissioner. On October 16, 1989, the president of India appointed two more election commissioners on the eve of general election to house of the people held in November-December 1989. However, the said two commissioners ceased to hold office on January 1, 1990 when these two posts of election commissioners were abolished. Again, on October 1, 1993, the president appointed two more election commissioners. Simultaneously, law was also amended to provide that the Chief Election Commissioner and other Election Commissioners will enjoy equal powers and will receive equal salary, allowances and other perquisite. The law further proved that in case of difference of opinion amongst the chief Election Commissioner and/or two other Election Commissioners, the matters will be decided by the commission by majority. The validity of that law was challenged before the Supreme Court. The constitution Bench of the Supreme Court, consisting of five judges, however, dismissed the petitions and fully upheld the provisions of the above law by a unanimous judgment on July 14, 1995.

The Chief Election Commissioner and Election Commissioners are entitled to the same salary and other facilities, like rent free accommodation, which are provided to a judge of the Supreme Court. The term of office of the Chief election commissioner and other Election Commissioners is six years from the date he assumes office or till the day he attains the age of 65 years, whichever is earlier.

28 Chief election commissioners and other Election commissioners (conditions of service) Act 1991
Ever since India became republic, we have so far 12 general elections to Lok Sabha, otherwise known as the House of the people, and a number of elections to the legislative Assemblies of various state. Before the first general elections in 1952, elections in India were held with the participation of the people on the basis of limited and restricted electorate in constituencies formed mainly on communal basis. Constitution in independent India provides for elections on the basis of universal adult suffrage and on the basis of general electoral roll making ever adult citizen eligible for inclusion in the said roll irrespective one's religion, race, caste or sex. Thus, in one stroke, not only were communal constituencies abolished but also women got the voting right straightaway.

3.7 Electoral Law:

The Representation of the people Act 1951 provides for registration of political parties by the Election Commission. A party registered with the Election commission may be granted recognition as a national or state party on the fulfillment of certain criteria for poll performance. If a political party fulfils the criteria for recognition under the election symbols Order 1968 in four or more states, it is deemed to be national party. A political party recognized in less than four states is a state party in the state or states in which it is recognized as such. The commission grants the status of a state party to the outfit which wins approximately six per cent of Assembly seats or four per cent of the votes polled in a general election. An exclusive symbol is reserved for a national party throughout India. In

29 325 and 326 of the Constitution of India
30 Under Section 29 A of the Representation of Peoples Act, 1951
the case of State party, a symbol is reserved for it in the state or states in which it is so recognized. Such reserved symbols are allotted only to the candidates of the parties for which they are so reserved. 

Of the eight parties which were given the national level in 1996 elections, Congress secured 28.80 percent followed by the Bharatiya Janata party with 20.29 percent. Taking the third and fourth place were the Janata Dal (8.08 percent) and the Communist party of India Marxist (6.12 percent). The remaining four national parties were the Samata Party (2.17 percent) the Communist Party of India (1.97 percent), the all India Indira Congress Tiwary (1.43 percent) and the Janata party (0.19 percent). Bahujan party though categorized as a state party, secured 3.64 percent of the vote in 1996. Telugu Desam got 2.97 percent, Tamil Manila Congress 2.19 percent and the Dravida Munnetra Khzhagam 2.15 percent.

Powers of the commission are subject to judicial review. Since the commission is a 'tribunal', the High Court shall be competent to interfere with its order where it is without jurisdiction or contravenes a fundamental right, or other mandatory procedure of the constitution of the constitution is a blanket ban on legal proceedings to challenge electoral steps taken by the Election Commission and its offices for carrying forward the process of election starting from the notification by the president by the president uls 14 of the representation of the people Act 1951 to its culmination in the formal declaration of the result of the election. Hence, even though an error of law relating to a mandatory provision is committed in the election process at any stage prior to the declaration of result, the High Court,

^31 As on July 1,1997, as many as 619 political parties were registered with the Election Commission. Of them, eight were recognized national parties and 38 as state parties.
under article 226, cannot interfere with the process of election. The remedy to rectify such an error, at that stage, lies before the Election Commission. Any delimitation order also cannot be challenged in courts.

Every candidate will have to take an oath or make an affirmation searing his true faith and allegiance to the constitution of India and to uphold the sovereignty and integrity of India. If a candidate files his nomination from more than Congress constituency, he is required to take an oath or subscribe to an affirmation only once. The returning office's functions were held to be quasi judicial in nature and any challenge to his decisions can only be made by way of an election petition giving paramountcy to election process taken up to its logical conclusion.

The law lays down that the following practices will amount to corrupt practices.

1. Bribery and illegal gratification;
2. Unique influences;
3. Appeal on the grounds of religion, race, caste, community or language or appeal to religious symbols.
4. Promotion of feelings of enmity or hatred between classes or citizens;
5. Publication of false statement attacking rival candidate's personal character;
6. Incurring or authorizing of expenditure exceeding the ceiling fixed by law;
7. Hiring or procuring the propelled vehicles for free conveyance of any elector to and from a polling station;
8. Obtaining of prescribed Government servant's assistance as laid down by law; and

Proof any of these, would entail the setting aside of the election. Similarly, the RP Act of 1951 lays down in the grounds for declaring the election void. It lays disqualification of the elected candidates; improper rejection of nomination by the returning office, improper acceptance of nomination, and by any other non-compliance with the provisions of the constitution or of the RP Act 1951 or any rules or orders made under the Act.

Whether a particular speech invoking Hindutva or "Hinduism has to be restrained must be determined with in the prohibition. It was held that "ordinarily, Hindutva is understood as a way of life or a state of mind and it is not fundamentalism". Expressions "Hinduism" and Hindutva used in election speeches do not automatically amount to corrupt practice. It was that religion should not be used by a candidate to exact political mileage for getting votes or for alienating the electorate from another candidate. It is for this reason that the state has no religion in neutrality because politics and religion cannot be mixed.

3.8 Election expenses:

By the 1956 Constitutional Amendment

1. The period of accounting was restricted between the date of notification and the date of election;

32 Under Section 123 of the Representation of Peoples Act, 1951
2. Solemn oath by or affirmation by the candidate and his election agent accompanying the election expenses account was dispensed with;

3. The form prescribed for the maintenance of the account was dispensed with, with the result that for the submission of election expenses account, no formal form is now used.

By 1974-75 amendments,

1. The period was still reduced as one between the date of a candidate's nomination and the date of declaration of the result;

2. And explanation was added to section 77(1) to say that the candidates need not account for election expenses incurred or authorized by other in connection with the candidate's election including the party which had set him up;

3. any judgment rendered under the old law in this respect was set aside; and

4. the constitution was also amended to constitute a separate and special tribunal for dealing with elections of VIPs, like Prime Minister. Of course, the constitution Bench of the Supreme Court, though it upheld these amendments, struck down the one amendment, relating to shutting down judicial review in such matters.

When the Janata Government came to power, the provisions in Article 329A relating to the constitution of a tribunal to try election petitions against VIPs was deleted in 1978 by the constitution amendment Act 1978
but no amendment to Section 77 in 1974 to cure the distortions was, however, undertaken.

The Supreme Court of India\textsuperscript{33} held that any party expenditure incurred to authorized to be incurred, particularly in its candidate's constituency, and not of an expenditure of the party of a general nature, and if the candidate acquiesces in it by his presence, it decision of the Court was rendered in Smt. Indira Gandhi's appeal after the amendments to the provision\textsuperscript{34}, and even then the judicial review taken away by amending law was struck down by the constitution bench of the Supreme Court of India. It was held by the court\textsuperscript{35} that the candidate cannot be allowed to place his own funds in the possession of a political party or a trade union or some other person and then placed for the protection of explanation to section 88. What matters for the purpose of explanation 1 is not whose hands spend the money, but the essence of the matter is whose money it is.

Just a few weeks before the elections in 1998, the political parties stated wooing the traders to collect funds. The Congress followed the conventional methods, but the BJP had been more innovative using the coupon system to build up their party funds. Prominent traders are said to have donated anything from Rs.51,000 to hundreds of limited to individuals. Therefore, traders associations were approached. Party workers were called upon and were handed over coupons ranging from Rs. 100 to Rs. 1000. This way, funds were collected at district level.

\textsuperscript{33} Kanwar Lan Gupta Vs Amarnath Chawla 1975-AIR-(SC)-0-308
\textsuperscript{34} Under Section 77 of the Representation of Peoples Act, 1951
\textsuperscript{35} Dr P. Nalla Thampy Vs Union of India 1985-AIR(SC)-0-1133
Parties set up finance committees at Assembly level which kept track of all the money collected through the coupons.

Over the years, political parties have been collection funds through various sources, including industrialists. The Act\textsuperscript{38} in India provides that the corporations can donate 5 percent of the average three year actual profits. These donations need to be shown in the balance sheet. Because of the license raj, businessmen were afraid to clearly spell out their political preferences. But with the process of liberalization setting into motion there was change. Tatas worked doubt a formula where the percentage of funds given to a political party depended on the number of seats bagged in the last elections. Such a formula is reasonable and should encourage the corporations to make the donations transparent and make the donations transparent and make them by cheques instead of cash.

3.9 Election reforms:

Successive elections, especially the tenth general elections, increasingly proved that rigging had become a disgraceful feature of the Indian Elections. The proliferation of non serious candidates, communalization of politics, abuse of administrative machinery and the colossal amount of money spent by candidates have created an atmosphere which is not conductive to free and fair elections in a democracy, and for which the election commission had been set up. A package of reforms in the form of a bill was presented to the Government in 1972 when S.P.Sen-verma was the Chief Election Commissioner (CEC). A Joint-Select committee of parliament studies it and a bill was ready for

\textsuperscript{38} Under Section 93 A of Company Act
adoption. It was introduced in the Lok Sabha in 1973 but could not be adopted. The emergency followed. When the Lok Sabha was dissolved in December, 1976, that bill was still on the agenda. In 1977, S L Shakdhar, the then CEC, setup reform proposals. R K Trivedi and Peri Sastry also gave their own suggestions. In 1989-90, Law Minister Dinesh Goswami headed a committee. T N Seshan, the ninth Chief Election Commissioner, also sent comprehensive proposals in February 10, 1972. But in the absence of any response from the parliament T N Seshan sought to restore to the Election Commission the necessary power conferred on it by the constitution.

When Seshan pointed out that the first pre condition for a “free” election was to enable people to vote “freely”, with an adequate security contingent everywhere to ensure their security, his powers were questioned. It seemed to suit politicians to let things go, the way they were going. Several great men had found their way to Rajya Sabha from States with which they had no connection. The purpose of Rajya Sabha, being the council of States, is that no one can be its member if he/she is not ordinarily a resident in that state. The idea is that the states should have a role in the governance of the “Union of State” that India is, people outside the state can only pretend to represent that state in the Rajya Sabha and that militates against the spirit of the theory of representation. That is a distortion of a constitutional intention. It seems to be a fraud regularized through years of practice, Seshan felt. The Supreme Court of India recognized the commission’s powers in this regard and the Parliament amended the RP Act accordingly.
It was under all such circumstances that Seshan took upon himself the task to curb malpractices one after the other. To curb impersonation, he introduced the system of identity cards and prescribed that every candidate had to submit an account of his expenses for the election in a particular manner. Every candidate, who had figured in the elections since 1987, was subjected to a probe. In December 1993, by an order, he insisted that every candidate would submit along with his return of expenses, an affidavit on oath, and list out all tangible items of election expenditure such as posters, public meetings, gates, arches, cassettes and badge, and every district election officer should certify the returns after formal enquiry. This narrowed the scope to deflate the total expenses. As a result, in the next round of by elections austerity was observed. Election Commission sent video camera crew at several places in many constituencies to record scenes of ostentatious election and "technical" posters.

T N Seshan retired in 1996, but his successor chief Election Commissioner Dr M S Gill and Election Commissioners G V G Krishnamurthy and J M Lyngdoh continued the reforms. Immediately after the announcement of 1998 polls, the commission announced that it was the moral duty of all political parties to ensure that criminal and history sheeters were not given the ticket. Strict instructions were issued to resident and liaison commissioners of all states and union territories at Delhi to ensure that no part of state guest house, bhawans and sadans were utilized for any political activities, such as party meetings, press conferences and consultations, Hoardings containing messages and highlighting individual leader or leaders or incorporating any political message could not be displayed on public property. Defacement of
property for use of posters etc. was strictly prohibited. In the RJD-RJP order, the commission laid down a clear policy for the future: If people break away from a party to which they have been elected, they will not get the commission's recognition for any level till they have contested the next election on their strength and obtained their own mandate. The Election law has also undergone some important changes, though the representation of the people Act 1996. Some of the important changes are as under:

1. Disqualification on conviction under the prevention of insults to national honour act 1971: Any conviction under section 2 or section 3 of the prevention of insults to national honor act 1971 shall hereafter entail disqualification for contesting elections to parliament and state legislatures for a period of six years from the date of such conviction:

2. Increase in security deposits and number of proposers: The amount of security deposit which a candidate at an election to the House of the people or a state legislative assembly has to make has been enhanced as a measure to check the multiplicity of non-serious candidates. In the case of an election to the house of the people, the amount of security deposit has been increased from Rs. 500 to Rs.10000 for the general candidate and from Rs. 250 to Rs.5000 for a candidate who is a member of Scheduled Caste or Scheduled Tribe. In the case of election to a state legislative assembly, the candidates will have to make a deposit of Rs. 5000 if they are general candidates and Rs.2500 if they belong to a Scheduled Caste or Scheduled Tribes, instead of Rs.250 and Rs.125 respectively as was being previously
deposited by them. The amended law further provides that the nomination of a candidate in a parliamentary or assembly constituency should be subscribed by 10 candidate has not been set up by a recognized national or state parry. In the case of a candidate setup by a recognized party, only one proposer is sufficient:

3. Restriction on contesting election from more than two constituencies: a candidate shall hereafter not be eligible to contest election from more than two parliamentary or assembly constituencies at a general electing or at the bye elections which are held simultaneously. Similar restrictions will apply for biennial-elections and bye elections to the council of states and legislative councils;

4. Listing of names of candidates: for the purpose of listing of names of candidates, they shall classified as
   a. Candidates of recognized political parties;
   b. Candidates of registered unrecognized parties; and
   c. Independent candidates.

Their names in the list of contesting candidates and in the ballot papers will now appear separately in the above order and in each category they will be arranged in alphabetical order:

5. Death of a candidate: previously, the election was countermanded on the death of a contesting candidate. In future, no election will be countermanded on the death of a contesting candidate. If the deceased candidate, however, was setup by a recognized national or state party the party concerned will be given an option to nominate another candidate with in
seven days of the issue of a notice to that effect to the party concerned by the Election Commission;

6. Prohibition of going armed to or near a polling station: Going armed with any kind of arms, as defined in Arms act 1959, within the neighborhood of a polling station is now a cognizable office punishable with imprisonment upto two years or with fine or with both. The arm found in possessing of the offender shall also be liable to confiscation and license granted in relation to such art shall also be deemed to have been revoked. These provisions shall, however, not apply in the case of returning officer, presiding officer, any police officer or any other person appointed to maintain peace and order at the polling station;

7. Grant of paid holiday to employees on the day of poll; all registered electors who are employed in any business, trade, industrial undertaking or any other establishment shall be entitled to a paid will receive their wages for the said day. But his will not apply in the case of an elector whose absence may cause danger or substantial loss in respect of the employment in which he is engaged. Any employer contravening the law shall be punishable with fine upto Rs. 500;

8. Prohibition on sale etc of liquor. No liquor or other intoxicants shall be sold, given or distributed at any shop, eating place, hotel or any other place whether public or private, within a polling area during the period of 48 hours ending with the hour fixed for the conclusion of poll. Any person contravening the law shall be punishable with imprisonment upto six months or with fine upto Rs. 2000 or with both; and
9. Time limit for holding bye elections: Bye elections to any House of parliament or a state legislative assembly will now be held within six months of occurrence of the vacancy in the house. However, this stipulation will not apply where remainder of the term of the member, whose vacancy is to be filled, is less than one year or where the election commission, in consultation with the central Government, certifies that it is difficult to hold the bye election within the said period.

Clause (2) of section 126 of the Representation of the people act prohibits "display to the public any election matter by means of cinematography, television or other similar apparatus, during the 48 hours ending with the hour fixed for conclusion of the poll. Contravention of this is a penal offence punishable with imprisonment up to two years.

The commission placed restriction on the dissemination of information through opinion polls. The commission barred publication of results of opinion polls for 14 days from February 14, 1998 and exit polls for 12 days from February 16, 1998.

In its guidelines, it laid down that the agencies conducting the opinion or exit polls, while publishing the result, must indicate the size of the electorate and geographic spread of survey so conducted. They must invariably give details of methodology and the key professionate involved in the conduct of the polls.

3.10 Reservation of seats:

The Constitution Act 1987 provides for determination of seats reserved for schedule tribes in Arunachal Pradesh, Meghalaya, Mizoram and Nagaland by amending Article 332 of the constitution. Under the
After constitution Act 1991, the Union Territory of Delhi became the national capital territory of Delhi from February 1, 1992. A legislative assembly with 70 seats was proved in place of 56 metropolitan council seats. Under the Government of National Capital Territory of Delhi Act 1990, seven out of 70 seats were reserved for scheduled castes. The constitution Act 1992 provides for determination of seats reserved for scheduled tribes in Tripura by amending Article 332 of the constitution. Under the representation of the people Act 1992 three more seats were reserved for STs. The total number of seats reserved for STs in Tripura became 20 instead of 17 as it was prior to the amendment. In pursuance of section 4 of the Jammu and Kashmir representation of the people Act 1957, the order made by the delimitation commission under the act in respect of delimitation of Assembly constituencies in the state Jammu and Kashmir was published in the Jammu and Kashmir Government Gazette on April 27 1995. The seats were increased from 76 to 87 in which seven seats are reserved for scheduled castes.

3.11 Women and on The Election:

"yad rakho is bar, dihao nari shakti ka vaar". "Bebas rahe croro nariyan, Bharat mata ko nehin manzoor. Chunage erger achacha neta, yeh

37 Under Clause (d) of Sub-Section 3 of Section 4
stihi bedlegi zaroor". With these words when elections to the 12th Lok Sabha were round the corner, the National commission for women decided to launch a pre election motivation of and for women to broaden the political parties' appeal and perspective. The above slogans were just a part of the commission's determined campaign to ensure that "clean and good candidates" got elected to the new Lok Sabha. The strategy was also designed to bring pressure on political parties to put up more women candidates, and to sensitive women voters and train them so that they were able to focus on issues which have an impact on their future, the nutrition and health of their children and themselves rather than waste their vote on under serving candidates. In fact, statistics of previous elections forces the commission to chalk out strategy and make serious attempt in stopping "power-hungry men" and in persuading them to bolster the image of women thus not ignoring their problems.

Two comprehensive national election surveys conducted in 1971 and 1996 reveal a significant rise in the proportion of women among the politically active classes of citizens. Of those who now take an active interest in the campaign, more than one third comprises women. Their level of identification with parties has gone up.

Their share has more than doubled among those who attended election meetings and those who are members of political parties. Their level of participation is still very low as compared to the men. Women are still less than one fifth of the party members. Politics and elections are still considered to be a man's domain. If we ask people whether women should take part in politics, everyone, including the men, say "yes". But when it comes to their actually participation, there are still a number of
invisible barriers that block their entry. While a change has begun to take
effect, the political voice of Indian women is still muted. With a view to
increase women's participation, in the year of 1998 general elections, the
National commission for women also planned silent picketing outside the
headquarters of political parties by rotation. They carried placards
requesting party high commands not to give ticket to people with a criminal
record/ background, or to those who are not sensitive to women related
issues and overall development of society. The commission also
contacted mahila wings of political parties and urged them to ensure that
no less than 50% of the total candidates contesting for their parties are
women.

3.12 Vote Bank

As the election campaign for the 12th Lok Sabha gathered
momentum, the BJP was the only one of many political parties assiduously
wooing women voters. Whether it is crime against women, prohibition,
education for girls and 33% reservation in legislature, issues of gender
equality topped the agenda. The reasons were primarily tow fold. First the
sheer size of the female electorate which turn out to vote in greater
numbers. In Andhra Pradesh and Haryana in the past, women had swept
N T Rama Rao and Bansi Lal to power on the prohibition plank. Secondly,
pressure from women themselves for a bigger stake in the power structure
was evident by the increasing number of women candidates and voiced
evermore stridently in the wake of 33% reservation in local self-
government.
All said and done. Women’s reservation bill only seems to be a lip
sympathy to garner votes nearly 50% of the electorate. This became
apparent in July 1998 when the 84th constitutional amendment bill was
introduced in parliament. The draft bill was snatched by a RJD MP,
crumpled and thrown down, to the apparent approval of many of the
members. The Government had secured Congress and left parties
support for the constitutional amendment. MPs from OBCs cutting across
gender and party lines, played the leading role in stalling the Bill. They
were supported by Muslim MPs. The contention of Laloo Prasad Yadav
and Mulayam Singh Yadav was that not only should a sub quota be
created for OBCs within the 33%, but minorities Buddhists, Christians,
Sikhs, jains and parsis, besides muslims must be included as well. The
last demand. They know, is impossible to concede in secular India. All
opening the floodgates of religious reservations. The bill was also
opposed by section of the BJP and the Congress. Thus with the exception
of the left, all political parties now stand exposed for their patent double
standards on the Bill.

The Constitutional Bench of the Supreme Court had observed in the
famous Keshavananda v State of Kerala that free, fair, fearless and
impartial elections are the guarantee of a democratic polity. The
Constitutional mandate given to the Election Commission under Article 324
is to hold free and fair elections to the legislative bodies. The Election
Commission in its order observed that a very important aspect of a free

38 AIR 1973 SC 1461
and fair election is "the existence of a climate devoid of apprehension and fear of threat to life and property of an individual or a community in exercise of the right to free and fair franchise."

Thereafter the Election Commission elaborates on how this climate devoid of apprehension and fear can be achieved. It states that "the people have lost confidence in the local police, civil administration and political executive. In this election campaigns evoking passions will only shatter the fragile peace unless adequate confidence building measures are taken up in earnestness and with urgency. Foremost among these would be to arrest and punish the guilty, irrespective of their status and rank, for their crimes." The crimes against humanity were committed to gain political/electoral advantage of polarizing the secular polity on communal lines in our first past the post electoral system. If the principle of *res ipsa loquitur* is applied the role of Narendra Har Damodardas Modi, the then CM of Gujarat and his cabinet in actively promoting and participating in the violence and mass killings, rape and burning of innocent women and children and destruction of property will be visible for all to see.

The Law Commission of India observed that providing for disqualification on the ground of framing of charge-sheet would be neither unjust nor unreasonable or arbitrary because the offences referred to above are serious offences affecting the society and that the persons

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40 Affirm speaking for itself
41 Under Section 8 of the Representation of People Act, 1951 provides for disqualification for being chosen as a member of a legislative bodies if a person is convicted under section 153A (offence of promoting enmity between different groups on ground of religion, race, place of birth, residence, language etc., and doing acts prejudicial to maintenance of harmony)...or sub-section (2) or sub-section (3) of section 505 (offence of making statements creating or promoting enmity, hatred and ill will between classes or offence relating to such statements in an assembly engaged in the performance of religious worship or religious ceremonies of the Indian Penal Code (45 of 1860)...
42 170th Report to the Government of India
committing these crimes are mostly persons having political clout and influence. The Law Commission has recommended amendment of section 8 of the Representation of People Act, 1951.

The Government through makes an attempt to convey that its purpose is to debar criminals from entering into legislatures. It adds Section 8B to the principal Act, which would have the effect of disqualifying a person against whom (i) charges have been framed by a competent court (ii) in two separate criminal proceedings, showing his involvement (iii) in "heinous offences" and this should have been done at least (iv) six months prior to the date of filing nomination papers. There are three peculiar features of this amendment, which need to be noted. One, the person to be disqualified must be involved in two separate criminal proceedings. One is not enough. If a person is charged by a court with having committed "heinous offences" in only one criminal proceeding, he will not be disqualified. Two, the offence must be heinous; an ordinary offence will not do. Three, the "heinous offences", as defined in the Bill, includes waging or attempting or abetting waging of war against the Government of India, murder, kidnapping or abducting in order to murder, or for ransom, rape, custodial rape, drug peddling and a few specified offences under POTA. The person concerned can jolly well keep on committing other offences under IPC, like robbery, arson, riots, grievous hurt, extortion etc or under other local and special laws, like possessing or manufacturing arms and explosives, trafficking in women, illicit bootlegging, smuggling or amassing assets disproportionate to his income through corrupt means etc. He can rest assured that he will not be disqualified under this Bill.

43 The Representation of People (Amendment) Bill, 2002
Moreover for a criminal case against a politician to reach the court, it is necessary to have a police force, which is insulated from illegitimate political control and pressures. One need not go to Gujarat to say no. Thus presently, it will be one of the rarest of rare cases when a politician still holding some position of power is taken in a criminal proceeding to a stage where he has to face charges framed by a court of law not once but twice. Thus the scope and the operation of the provisions in its present form, as explained in the preceding paragraphs, are such that they are mostly not able to effect the arrest or punishment of the guilty irrespective of their status and rank, for their crimes.

Whereas according to the Election Commission’s order dated 16.08.2002 the environment for a free and fair election cannot be created in the absence of amongst others ‘arrest and punishment of the guilty irrespective of their rank and status.’ Here lies a vacuum. It is a situation where the law as enacted by parliament is not able to meet the challenge posed. If Modi and co are allowed to move with impunity an important aspect for a conducive law and order situation i.e. existence of a climate devoid of apprehension and fear of threat to life and property of an individual or a community in exercise of the right to free and fair elections cannot be created. The extract of the Objectives Resolution moved by Pt. Jawaharlal Nehru will come to the rescue.

44 Under Section 8 of the Representation of People Act, 1951
45 In the Constituent Assembly on 13 December 1946
46 This Constituent Assembly declares its firm and solemn resolve to proclaim India as an Independent Sovereign Republic and draw up for her future governance a Constitution.
Wherein shall be granted and secured to all the people of India justice, social economic and political; equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality; and

Wherein adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes; and whereby shall be maintained the integrity of the territory of the Republic and its Sovereign rights on land, sea, and air according to justice and law of civilized nations; and This ancient land attains its rightful and honored place in the world and makes its full and willing contribution to the promotion of world peace and the welfare of mankind. This Objectives Resolution is the spirit behind the Constitution and the constitution should be interpreted in that light. Moreover the Supreme Court has inherent powers to see that 'complete justice' is rendered in every 'cause or matter' pending before it.

The Supreme Court of India itself in its order (Union of India v Association for Democratic Reforms and Another) held as follows "Cumulative reading of plethora of decisions of this court as referred to, it is clear that if the field meant for legislature and executive is left unoccupied detrimental to the public interest, this court would have ample jurisdiction to issue necessary directions to the executive to sub-serve public interest." To the specific queries raised by the Election Commission with the Chief Secretary on the number of FIRs filed, charge-sheets filed and the progress of cases, the State Government says that out of 4208 FIRs filed

\[47\] Under Article 142 of the Constitution of India
\[48\] Dated 2nd May, 2002
\[49\] Civil Appeal No. 7178 of 2001
\[50\] Under Article 32 read with arts 141 and 142 of the Constitution
as on 31 July 2002 a total of only 1360 cases have been charge-sheeted.

"The other cases are either pending investigation or final report has been filed details of which will be provided separately."

The Election Commission states that the State Government have "on the Commission's queries subsequently been avoiding giving a clear picture on the number and identity of persons complained against, similar details of persons included in the FIRs, similar details of persons who have been arrested, similar details of persons named in the FIRs who have been enlarged on bail, similar details of persons enlarged on bail as against whom appeals have been filed for cancellation of their bail bonds."

The Election Commission observes that "everywhere there were complaints of culprits of the violence still moving around scot-free including some prominent political persons and those on bail. These persons threaten the displaced affected persons to withdraw cases against them, failing which they would not be allowed to return to their homes." In Dakor, the team was told by a delegation, in the presence of senior police officers and the district administration authorities, that the culprits had been identified before the police but no arrests had taken place and the main culprits continued to threaten the villagers to withdraw their FIRs. The team has cited many other such cases from almost all the 12 districts covered by them. The Preamble to the Constitution of India provides a constitutional democratic system to guide the fate of Indian people. It declares the country as a sovereign socialist secular democratic republic to bind the country into a single unit. The Preamble to the Constitution read

51 In paragraph 31 of its said order dated 18.08.2002
52 Kheda District
53 In Ahmedabad, the Commission itself observed that a large group of Muslim families could not move to their houses because the culprits of the riots had blocked the accesses to their houses.
along with several its provisions clearly reflects that the democracy established in India is that of a free and open society as opposed to an unfree and closed society. In fact democracy is one of the basic inalienable features of the Constitution of India and forms part of its basic structure.

The word 'election' implies persons who are to elect, (called the electors), the office to which election is to be made, and the person who is to be elected (called the candidate). According to Black election is the process of selecting a person to occupy a position or office, usually a public office. Election is thus defined as the choice of persons to fill public office, means the expression by vote, of the will of the people or of a numerous body of electors. Election has also been defined to mean the act or process of choosing a person or persons for an office, position or membership as by ballot. In the Representation of the People Act, 1951 the word election is defined as: "election means an election to fill a seat or seats in either House of Parliament or in the House or either House of the Legislature of a State." The word election as used in the Representation of the People Act, 1951 includes every stage from the time the notification calling for election is issued till the declaration of the result. The expression election means selection of a person by vote or even otherwise. When a person is nominated by way of selection on the basis of a given criteria from amongst several persons, then, in the broader sense, he is elected to the office. The Supreme Court while dealing with the meaning of the word election as used in Article 329(b) has observed that the word in connection with the process of selection of proper representative has acquired both a wide and a narrow meaning.54

54 (I) In the narrow sense it is used to mean the final selection of a candidate which may embrace the result of the poll when there is polling or a candidate being returned when
Krishan lyer J in Mohinder Singh Gill v. Chief Election Commissioner was of the view that every step from start to finish or the total process constitutes election, not merely the conclusion of culmination. The rainbow of operations, covered by the compendious expression 'election' thus commences from the initial notification and culminates in the declaration of the return of a candidate. There cannot be two views or doubts about the fact that 'free and fair elections' are a basic postulate of a free democratic society.

The Supreme Court has observed: "Democracy is government by the people. It is a continual participative operation, not a cataclysmic, periodic exercise. The little man, in his multitude, making his vote at the poll does a social audit of his Parliament plus political choice of his proxy. Although the full flower of participative government rarely blossoms, the minimum credential of popular government is appeal to the people after every term for a renewal of confidence. So we have adult franchise and general elections as constitutional compulsions." The inseparability and the inter-relation between elections and democracy has been succinctly stated by the apex court in the following words: "the concept of democracy as visualized by the Constitution presupposes the representation of the people in Parliament and State legislatures by the method of election." Hence a true, independent and liberal democracy cherishes free, fair and impartial elections because it is through them that true democracy is born.

there is no polling (ii) in the wide sense the word is used to connote the entire process culminating in a candidate being declared elected

55 1978-AIR-(SC)-0-861
3.14 Bar to interference under Constitution:

It is of the essence of the functioning of a democracy that election to public offices must be open to the scrutiny of an independent tribunal. Constitution visualizes the resolution of election disputes by judicial process by ascertaining the facts relating to the election and applying the law. The Supreme Court held that free, fair, fearless and impartial elections are the guarantee of a democratic polity. Effective mechanism is the basic requirement for having such election. For conducting, holding and completing the democratic process, a potential law based upon requirements of the society is concededly of paramount importance. A balanced judicial approach in implementing the laws relating to franchise is the mandate of this court. Before examining the matter of jurisdiction it shall be of relevance to refer to Article 329 of the Constitution:

It has been observed by the Supreme Court that the non-obstante clause with which the Constitution begins debars us, as it debars any other court in the land, to entertain a suit or proceeding calling in question any election to Parliament or the State Legislature. The proceedings have to be initiated by an election petition and in such manner as may be prescribed by the statute. The Supreme Court in Jyoti Basu v. Devi Ghosal enunciated the Constitutional position as follows: A right to elect, fundamental though it is to democracy is, anomalously enough, neither a

56 V.S. Achutanandan v. P.J. Francis 2001-SCC-3-81
57 329. Bar to interference by courts in electoral matters.- Notwithstanding anything in this Constitution
(b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature."
58 Under Article 329 the Constitution of India
59 1982-AIR(SC)-0-983
Fundamental Right nor a common Law Right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute to an election. Statutory creations they are and subject to statutory limitations. The rights arising out of elections, including the right to contest or challenge an election, are not common law rights. They are creatures of the statutes which create, confer or limit those rights. Therefore, for deciding the question whether an election can be set aside on any alleged ground, the courts have to consult the provisions of law governing the particular election. They have to function within the framework of that law and cannot travel beyond it.

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. The Supreme Court\(^\text{60}\) held that constitution\(^\text{61}\) 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 Art 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. Thus in order to avoid dual jurisdiction over the election matters the Election Commission recommended that trial of election petitions should be entrusted to the High Courts instead of election tribunals. Parliament thus enacted Section 80-A of the Representation of the People Act, 1951 providing that the

\(^{60}\) Hari Vishnu Kamath v. Ahmad isheque 1955-AIR(SC)-0-233
\(^{61}\) Under Article 329(b) the Constitution of India
"High Court" shall be the authority for presentment of election petitions under the Constitution.

3.15 Extent of Power as provided under Representation of People's Act, 1951:

The Representation of People's Act, 1951 (hereinafter referred to as RPA, 1951) was enacted by the Parliament in exercise of its powers under Art 327. RPA, 1951 makes detailed provisions with regard to all matters and all stages connected with elections to various Legislatures. The RPA, 1951 has been held to be a complete and self-contained code within which must be found any right claimed in relation to an election or an election dispute. Part VI of RPA, 1951 deals with disputes regarding elections and provides for manner of presentation of election petitions their trial and procedure thereof. The Act provides that "No election shall be called in question except by an election petition presented in accordance with the provisions this part." In furtherance of this provision it is provided that the court having jurisdiction to try election petitions shall be High Court. Such jurisdiction shall be exercised by a single judge of High Court and the Chief Justice shall from time to time assign one or more judges for that purpose. The concepts of common law and equity are strangers to the branch of election law. The rights of free, fair and independence of elections are a matter of great importance and fundamental to any democracy. Hence, the entire election process commencing from the issuance of notification calling upon a constituency to elect a member or members right up to the

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62 This was incorporated by an amendment in the year 1966 (Act 47 of 1966).
63 Under Article 329(b) the Constitution of India
64 Under Section 80 of the Representation of Peoples Act, 1951
final resolution of the dispute, if any, concerning the election is regulated by RPA, 1951; different stages of the process being dealt by different provisions of the Act.

Section 100 of the RPA, 1951 deals with the grounds on which an election may be challenged by means of election petition. Section 100 reads:

"100. Grounds for declaring election to be void – (1) Subject to the provisions of sub-section (2), if the High Court is of opinion—
(a) that on the date of his election a returned candidate was not qualified, or was disqualified, to be chosen to fill the seat under the Constitution or this Act or the Government of Union Territories Act, 1963 (20 of 1963): or
(b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent: or
(c) that any nomination paper has been improperly rejected: or
(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected-
(i) by the improper acceptance of nomination, or
(ii) by any corrupt practice committed in the interests of the returned candidate by any agent other than his election agent, or
(iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or
(iv) by any non-compliance with provisions of the Constitution or of this Act or of any rules or orders made under this Act,
the High Court shall declare the election of the returned candidate to be void.

(2) If in the opinion of the High Court, a returned candidate has been guilty by an agent, other than his election agent, of any corrupt practice but the High Court is satisfied—
(a) that no such corrupt practice was committed at the election by the candidate or his election agent, and every such corrupt practice was committed contrary to the orders, and without the consent, of the candidate or his election agent;
(b) that the candidate and his election agent took all reasonable means for preventing the commission of corrupt practices at the election; and
(c) that in all other respects the election was free from any corrupt practice on the part of the candidate or any of his agents, then the High Court may decide the election of the returned candidate is not void."
Thus section 100 provides two kinds of grounds to the petitioner: the grounds in clauses (a) to (c) are grounds of election petition as such while the grounds in clause (d) are available to a candidate only if the candidate as far as the result is concerned has been 'materially affected.' What shall amount to being materially affected has not been specified in RPA, 1951. According to the Supreme Court whether the result of the election could be said to have been materially affected must depend on the facts, circumstances and reasonable probabilities of case, particularly on the difference between the number of votes secured by the successful candidate and the candidate securing the next highest number of votes as compared with the number of votes secured by the candidate whose nomination was improperly accepted and the proportion by which the number of wasted votes bears to the number of votes secured by the successful candidate. Thus if the number of votes secured by the candidate whose nomination was improperly accepted is disproportionately large as compared with the difference between the votes secured by the successful candidate and the candidate securing the next highest number of votes and if the votes Secured by the candidate whose nomination was improperly accepted bears a fairly high proportion to the votes secured by the successful candidate, the reasonable probability is that the result of the election has been materially affected

3.15.1 CORRUPT PRACTICES: CONSTITUTION AND THE RP ACT, 1951

Sec. 123 of R.P.A. which deals with corrupt practices, specifically deals with the corrupt practices of appeal on the grounds of religion, caste, etc. in sub Sec. (3) in the following manner: The appeal by a candidate or
his agent or by any other person with the consent of a candidate's 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.

Since the proof of any of the aforesaid corrupt practices by the returned candidate during the poll time would not only render void the election but also disqualify the candidate to contest in any election for six years, the allegation of corrupt practices referred to in the Act had been the subject matter of most of the election petitions. Considering the constraints of space and time, the present paper deals with judicial response to the corrupt practice of appeal on the ground of religion and

In India, caste, religion and community are inter-related. Choice of the candidates by political parties is predominantly made on the basis of caste and religious considerations. Naturally caste and religion play major role in the election campaign. The caste based politics in Karnataka and in Andhra Pradesh between two caste groups, in Karnataka between Lingayats and Vokkaliga and in Andhra Pradesh between Khammas and Reddis is a matter of common knowledge for any political observer. Similarly religion based politics has also come to stay in India in certain parts. It is not uncommon that during election campaigns some political parties align with some caste groups against other caste groups. For example, the Bahujan Samaj Party of Kanshi Ram, which forged an

88 Sec.123 (3) of the Representation of Peoples Act, 1951.
alliance and unity of middle and low castes and minorities other than Brahman, Bania, Thakur. Parties like Indian Union Muslim League, Akali Dal and BJP are winning on their religious planks. Their electoral manifestoes themselves contain promise concerning religious objectives. The pamphlets they use and the dresses they wear during campaign are adorned with religious symbols.

Under Sec.123 (3) the purpose of the appeal was narrowed down to Voting' or refraining from voting for any person on the ground of religion, caste, community or language of such person instead of a general appeal to vote or refrain from voting on the ground of religion, caste, etc. In the case of appeal by a person other than the candidate or his agent, it was restricted to appeal with the consent of the candidate or his election agent. The pleading of the election petition, therefore, must contain:

- Direct and detailed nature of corrupt practice as defined in the Act.
- Details of every important particular must be stated giving the time, place, names of persons, use of words and expressions,
- It must clearly appear from the allegations that the corrupt alleged were indulged in by (a) the candidate himself (b) his express or implied consent.

Insistence of a strict proof of corrupt practice is yet another reason responsible for the failure of petitions alleging this corrupt practice. In Manmohan Kalia v. Yash and others the Supreme Court held that the allegation of corrupt practice must be proved strictly as a criminal charge,

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86 Paradoxically enough, most of the Election Petitions grounded on Sec. 123(3) appearing on the ground of religion and caste, etc. have failed in the election tribunal either due to their vagueness, non-compliance of procedure laid down in R.P.A. or want of evidence.
and the principle of preponderance of probabilities would not apply to corrupt practices envisaged by the Act. The court requires a direct evidence to prove the corrupt practice. The allegation of corrupt practice must be so clear that the inference of corrupt practice will irresistibly admit it no doubt or qualm. It cannot be left to time, chance of conjecture for the Court to draw an inference by adopting an involved process of reasoning. As a logical consequence it follows that where the allegation or fraudulent practice is open to two equal possible references, the pleadings of corrupt practice must fail. Though this standard of proof gives an adequate room for the proof by circumstantial evidence a small gap in the evidence would be fatal to the petitioner. For example, a news item in a newspaper informing an appeal to religion made in favour of a candidate was held not indicative of the fact that the candidate or his agent behind this advertisement. The Court felt that the newspaper may be prevented or garbled, hence that cannot prove by itself. In another case a recorded speech alleged to have been made by the candidate appealing on religion in soliciting vote was rejected by the Court on the ground that the recording was done by the Police and the police has failed to explain why it has done it. In another case from Andhra Pradesh, the Supreme Court held that distribution of booklets containing photographs of the party leader N.T. Rama Rao in the roles of Lord Krishna, Lord Rama, etc. in the public meeting did not prove the corrupt practice the provisions⁶⁷ as the respondent has failed to show that the candidate took part in printing or distribution of book or same having been done by candidate's agent or anybody else with his consent. The consent of the candidate, according to Supreme Court, must be proved either by direct or circumstantial evidence. But mere knowledge or connivance of similarities of ideas of the candidate

⁶⁷ Under Sec.123(3) of the Representation of Peoples Act, 1951
to the alleged corrupt practice would not amount to inference of the consent. The method by which the Courts appreciate evidence of corrupt practice provides yet another escape route for the returned candidate alleged to have been committed a corrupt practice.68

When more than one inference is possible by reading the whole, the evidence fails to prove a corrupt practice. For example, an appeal in a poster that every Sikh vote should go to candidates of Akali Dal which would lead to the attainment of the object of Punjabi Subha was held not to amount to corrupt practice under the Act69. This conclusion was reached on the basis of a 'restrictive interpretation' that the words in the statement should not be interpreted to mean anything more construction. The foregoing discussions show how much greater is the onus of proof required to prove corrupt practice of appeal to religion and caste, and how unrealistic are the conclusions drawn by the Court in those decisions that there was no corrupt practice under the appropriate provisions.70

The judicial tendency to construe strictly the words spoken and the statements issued during election campaign led the jurisprudence of 123(3) unrealistic. Statements made in Election Campaigns are not directed only to learned and educated minds like those of judges of the court. They are very often made to the illiterate voters who understand only the emotion of the speaker and not understanding the statement or speech word by word. Therefore, the best approach to construe the words contained in a speech and statement would be on the basis of what would be the effect of the said speech on the mind of ordinary voters who attend

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68 under Section 123(3) of the Representation of Peoples Act, 1951
69 Under Section 123(3) of the Representation of Peoples Act, 1951
70 Under Section 123 (3) of the Representation of Peoples Act, 1951
the meetings and read the pamphlets. In fact, in the recent past, Supreme Court itself has a second thought about the desirability of insisting on a strict proof of cases under 123(3). In Rumacharan Yadav v. Tkakur Mtmeswarnath Singh the Supreme Court cautioned that while insisting on standard of strict proof the Court should not extend or stretch this doctrine to such an extreme extent as to make it well-nigh impossible to prove an allegation of corrupt practice. Such an approach would defeat and frustrate the very laudable and sacrosanct object of the act in maintaining purity of the electoral process.

Besides relying on this standard, the Supreme Court advocated for an interpretation of the provisions of R.P.A by referring to the statement of objects of the Act. In Harcharan Singh v. Sajjan Singh the Supreme Court held thus: Condemnation of electoral campaigns on lines of religion, caste, etc. is necessarily implicit in the language of Sec.123 (3) of the Act. Consequently, the section must be so construed as to suppress the mischief and advance the remedy. Legislative history of the section is important from this point of view. The statement of objects and reasons of the Amending Act, 1961 clearly mentions the object of the amendment. In order to determine whether certain activities come within the mischief of Sec.123 (3) regard must be had to the substance of the matter rather than to the mere form or phraseology. The inhibition of Sec.123 (3) should not be permitted to be circumvented indirectly or by circuitous or subtle devices. The court should attach importance to the effect and impact of the acts complained of and always keep in mind the paramount purpose of

71 Though this approach is not new to cases brought under Sec. 123(3) very often a strict interpretation is used holding the corrupt practice is quasi criminal in nature, lop aiding the purpose of the Sec.123(3) that it is primarily intended to curb the communal and separatist tendencies.

72 Under Section.123(3)
Sec.123 (3) namely to prevent religious influence from entering the electoral field. The nature and consequence of any act may not appear in its very face but the same can be implied having regard to the language, the context, the status and position of the person issuing the statement, the appearance and known religion of the candidate, the class of persons to whom the statement or act is directed etc.

The R.P.Act\textsuperscript{73} was considered once again in detail by the Supreme Court in 1995, when the High Court of Bombay held the elections of Dr. R. Prabhoo, Mr. R. Kapse and Mr. Manohar Joshi (the Maharashtra Chief Minister) void on the ground of using Hindu religion and appealing to the voters in the name of Hindutva for securing electoral gains. The cases came before the Supreme Court on appeal and three important judgments were delivered on December 11, 1995, out of which only in one case the appeal of Dr. Prabhoo was rejected and he was held guilty of corrupt practices, on which basis the setting aside of election of Dr. Prabhoo was confirmed. The Supreme Court administered a stern warning against making speeches creating enmity among citizens on the ground of religion, but also held that the speech of Mr. Bal Thackeray too, in support of the election candidate, amounted to corrupt practice but in the second and third judgments the findings of the Bombay High Court were overturned by the Supreme Court and the elections of Manohar Joshi and Ramchandra Kapse were held valid. If the corrupt practice is committed in the interests of the returned candidate by any other person even if he be an agent other than his election agent, without the consent of the returned candidate or his election agent, the law provides for the election to be declared void under Section 100(l)(d)(ii) provided it is also pleaded and proved that the

\textsuperscript{73} Section 123 of Representation of Peoples Act, 1951
result of the election of the returned candidate has been materially affected thereby.

The Hindutva cases show that there is a good deal of distance to travel as yet. The mere mention of 'Hindu Rashtra' by the candidate or his agent would not be construed as an appeal for votes on ground of his religion, as the word 'Hindu' is not to be understood in terms of 'narrow-minded religion'. Thus in the light of the judgments, the difficulty in regulating misuse by strictly interpreting the law is clearly evident. The court held that the speeches, documents, videos etc, which may be made the basis for challenging the election of a candidate must be shown to record or depict something the candidate, etc have said during the election campaign—that is, from the date the election was notified to the close of the polling. This leaves the party free to make use of appeals of religion, caste etc, upto the day of notification of elections.

A preventive remedy like directions by Election Commission on corrupt practices as and when an allegation of appeal to religion is made during time of campaign would be more efficacious to ward off the evil effects of the appeal to religion during the campaign, than that of remedy under Sec.123 (3). It is submitted that a preventive remedy supplemented to the existing punitive remedy would serve efficaciously the purpose for which originally incorporated.

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74 Under Section 123 (3) of Representation of Peoples Act, 1951