

**THE SCOPE AND AMBIT OF JUDICIAL INTERVENTION  
IN  
ELECTION DISPUTES IN INDIA**

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***Abstract***

*Resolution of election disputes by an independent body is a sine qua non of free and fair elections. The Supreme Court of India has also stamped this with approval in cases that have fallen before it. Judicial review is a basic feature of the Constitution of India. However, with the Constitution of India vide its Article 329 (b) imposing a bar on judicial interference in election matters, the question of judicial review in such matters assumes significance. Article 329 (b) bars the courts from entertaining any election related matter and mandates that such matter can be questioned only by an election petition under the law prescribed by the appropriate legislature, i.e., the Representation of the People Act, 1951. The High Court being the forum prescribed under law to entertain the election petitions, the question thus arises whether the matters pertaining to nomination, cancellation of poll, re-poll, recount, etc can be entertained by the concerned Court under its writ jurisdiction or not. This paper attempts to answer these questions by exploring the judicial exposition on the point.*

**1. Introduction**

Judicial review is the power of a court to pass upon the validity of the acts of a legislature in relation to a 'higher law' which is regarded as binding on both.<sup>1</sup> It is the determination of the validity of statutes or decisions, orders or instruments of different organs of the State, by the competent courts of jurisdiction. Judicial review has been held to be the basic feature of the Constitution of India.<sup>2</sup>

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<sup>1</sup> Edward S. Corwin, 'Judicial Review in Action', *University of Pennsylvania Law Review and American Law Register*, Vol. 74, No. 7, 639 (May, 1926).

<sup>2</sup> *Keshavanand Bharati v. State of Kerala*, AIR 1973 SC 1461; *Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SC 2299; *Minerva Mills v. Union of India* (1980) 3 SCC 625.

To keep alive public confidence in the electoral process, it is necessary to have speedy, fair and inexpensive adjudication of election disputes. A judicial tribunal or court to deal with disputes arising out of elections is, therefore, an important requisite of free and fair elections. Such a provision is required for enforcement of the law made for eradicating mal-practices in the elections and to ensure punitive action against the person who deviates from the prescribed rules. Thus election disputes have to be resolved by an authority having the power of judicial review. In *Indira Nehru Gandhi v. Raj Narain*,<sup>3</sup> it has been held that the Legislature cannot assume this role upon itself.

In *N.P. Punnuswami v. Returning Officer, Namakkal Constituency*,<sup>4</sup> Fazal Ali, J. said that before election machinery can be brought into operation, one of the requisites which is required to be attended is that there should be a judicial tribunal to deal with disputes arising out of or in connection with elections. In *Indira Nehru Gandhi v. Raj Narain*,<sup>5</sup> Mathur, J. cited with approval the above said observation of Fazal Ali, J. in *Ponnuswami's* case which was reiterated by the Supreme Court in *Mohinder Singh Gill v. Chief Election Commissioner*.<sup>6</sup> This paper gives an account of the forum provided under law for adjudication of election disputes and analyses the scope of the intervention of the judiciary in the resolution of disputes connected with elections.

## **2. The Mode and the Forum for Resolution of Election Disputes**

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<sup>3</sup> AIR 1975 SC 2299.

<sup>4</sup> AIR 1952 SC 64.

<sup>5</sup> *Supra* note 3.

<sup>6</sup> AIR 1978 SC 851.

Under Article 329 (b),<sup>7</sup> 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. Accordingly, the Representation of the People Act (the R. P. Act), 1951 enacted in exercise of such power, provides for the mode and the forum for the resolution of disputes regarding elections.<sup>8</sup> The mode is the Election Petition and the forum is the Election Court.

Any challenge to the election is maintainable only by an election petition. Section 80 of the Representation of the People Act, 1951 provides that no election shall be called in question except by an election petition presented in accordance with the provisions of that Act. The language of Section 80 is quite similar to that of Article 329 (b) of the Constitution.

The trial court for an election petition is the High Court within the local limits of whose jurisdiction the election to which the election petition relates has been held.<sup>9</sup>

The Representation of the People Act, 1951, as it stood prior to 1966, provided for a system of Election Tribunals. By Article 324 (1) of the Constitution, the power to appoint Election Tribunal was vested in the Election Commission. Every order of the Tribunal was final and conclusive. But, in course of time, the High Courts, under Articles 226 and 227 and the

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<sup>7</sup> Article 329 (b) reads as follows:

“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.”

<sup>8</sup> The provision for election petitions has been laid down in Chapter II, Part VI, Sections 79 to 122 of the Representation of the People Act, 1951.

<sup>9</sup> S. 80 A (1), the R.P. Act, 1951 read with S. 79 (e), the R.P. Act, 1951.

Supreme Court under Article 136, started admitting appeals against the decisions of Election Tribunals. A three- tier set up emerged, i.e. first the Election Tribunal, then the High Court and then the Supreme Court. In 1956, by amendment in the Act of 1951, the provision for regular appeal from an Election Tribunal to the High Court and then to the Supreme Court under Articles 132,133 and 136, was introduced. This three-tier system prolonged the final decision relating to election disputes. On the recommendation of the Election Commission, in its report on the Third General Election (1962, Vol. I, P.117) for the abolition of Election Tribunals, Article 324 of the Constitution was amended by the Constitution ( Nineteenth Amendment) Act, 1966, by which the provision for establishing Election Tribunals was abolished. The R.P.Act, 1951 was also amended accordingly by the Representation of the People (Amendment) Act, 1966, by which the jurisdiction for the trial of election petitions was vested in the High Courts. At present, there is , thus, a two tier system. Election petition is filed directly in the High Court, from which appeal may be preferred to the Supreme Court ( under Section 116 A, 116B and 116 C of the R.P. Act, 1951). Under the existing law all election petitions are presented to the High Courts and appeals, both on questions of fact and law, lie to the Supreme Court. <sup>10</sup>

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<sup>10</sup> By the Constitution (39th Amendment), Act, 1975, Article 329–A was inserted to make a special provision for settlement of election disputes relating to the Prime Minister and the Speaker of the Lok Sabha. The petition was to be presented before the prescribed authority and was to be tried by a special authority constituted for the purpose. In pursuance to Article 329-A, Parliament enacted the Disputed Elections (Prime Minister and Speaker) Act, 1977, under which petitions were to be filed before the Election Commission and were to be tried by the special authority consisting of a sitting judge of the Supreme Court whose decision was final. However, the Constitution (44th Amendment) Act, 1978, restored the position before the Constitution (39th Amendment), Act, 1975. Thus, election petition against any elected member, including the Prime Minister and the speaker of the Lok Sabha, can be filed before the High Court.

The jurisdiction to try an election petition is exercised ordinarily by a single judge of the High Court and the Chief Justice, from time to time, assigns one or more judges for that purpose. Provided that where the High Court consists only of one judge, he is to try all election petitions presented to that Court. The High Court in its discretion may, in the interest of justice or convenience, try an election petition, wholly or partly, at a place other than the place of seat of the High Court.<sup>11</sup>

As far as the powers of the High Court are concerned, although the functioning of the High Court in matters of election disputes is regulated by the Representation of the People Act, 1951, the High Court still retains the status of a Court and its inherent powers are available to it. Under Article 215 of the Constitution, a High Court is a Court of Record and is repository of all its multi-dimensional powers, and every such power is inherent in the High Court. This is how a 'Court' functioning as a tribunal is different from an 'authority' acting as a tribunal.<sup>12</sup>

In *T. Deen Dayal v. High Court of Andhra Pradesh*,<sup>13</sup> the Supreme Court, agreeing with the view of the High Court that the jurisdiction to try an election petition under the Act is given to 'a Court', held that the authority designated being the High Court, it has jurisdiction to take action for Contempt of Court as a Court of Record under Article 215 of the Constitution, while trying an election petition.

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<sup>11</sup>Section 80 A (2) & (3), the R.P. Act, 1951.

<sup>12</sup> *Ram Lakhan v. Ram Charitra*, AIR 1993 All 199.

<sup>13</sup>(1997) 7 SCC 535. The contention of the appellant was that notwithstanding Section 80A of the Representation of the People Act, 1951 conferring the jurisdiction on the High Court to try an election petition, it must be deemed that the High Court is functioning as 'an authority' only and not as a Court and therefore, has no jurisdiction to issue suo motu notice under the Contempt of Courts Act, 1971.

Further, to be in consonance with Article 14 of the Constitution and in the public interest, a disputed question / point of law is open to reference to a larger bench, even in an election petition under the Act so that the law laid down in that respect is certain, consistent and clear.<sup>14</sup>

### **3. The *Locus Standi* and the Period of Limitation for an Election Petition**

Section 81 of the Representation of the People Act, 1951 provides for the *locus standi* and prescribes the period of limitation for an election petition.

#### **3.1. The *locus standi***

An election can be called in question by any candidate at such election or any elector having the right to vote.<sup>15</sup>

#### *The Candidate*

Only such candidate can challenge an election who was a candidate for that very election. Candidate means a person who has been or claims to have been duly nominated as a candidate at any election.<sup>16</sup> It is not necessary that the nomination of the candidate must be of undoubted validity. A person who 'claims' to have been duly nominated candidate, is entitled to present an election petition. Thus, a candidate though disqualified to stand for election, may be a good petitioner as he needs only to be a duly nominated candidate.<sup>17</sup>

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<sup>14</sup> *Irfan Ali Khan v. Rajendra Singh*, AIR 1990 All 78.

<sup>15</sup> Section 81 (1), the R.P.Act, 1951.

<sup>16</sup> Section 79 (b), the R.P.Act, 1951.

<sup>17</sup> *Narsimha Gowda v. Dakkappa*, 4 ELR 23. *Basappa V. Nagappa*, 3ELR, 197.

### *The Elector*

Elector means a person who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not.<sup>18</sup> Thus, elector's right to vote is the determining factor. The exercise of this right, i.e., actual voting is not necessary. An elector registered in more than one general constituency is not debarred from voting in one of them. If he so votes, he is eligible to file an election petition for the constituency for which he votes. But in case he does not vote, he can file a petition for any of the constituencies in which he is registered as voter.

However, a person, even though registered as a voter, is entitled to vote if he is subject to any of the disqualifications enumerated in Section 62 (2) of the Representation of the People Act, 1950. Also Section 62 (3) disentitles a person confined in a prison or in the lawful custody of the police from voting. It leads to the conclusion that even though an elector is registered as such on the electoral roll of the constituency, the question whether he has right to vote or not can be raised and decided in an election petition. Whether it is for the elector to prove that he does not suffer from any disqualification under Section 16 of the Representation of People Act, 1950 or for the respondent to prove the ineligibility of the elector, is unclear. From the words of Section 62 (2) that, "*no person shall vote at an election in any constituency if he is subject to any of the disqualifications...*", it seems that the onus to establish his right to challenge is on the elector. Whereas the words of Section 62 (1) the Representation of the People Act, 1951, "*...except as expressly provided by this Act,*

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<sup>18</sup> Explanation appended to Section 81(1) of the R.P.Act, 1951.

every person who is, for the time being entered in the electoral roll of any constituency shall be entitled to vote in that constituency”, raise a presumption of the voters eligibility to be an elector, thus, rendering support to the opposite view. As a general rule, an exception is to be proved by a person relying upon it.

Regarding whether the petitioner should present the election petition or can present the same through his counsel, in *Ramanlal Premi v. Shiv Pratap Singh*,<sup>19</sup> the MP High Court held that the manner of presentation of petition has been provided for under the Act itself. Its scope cannot be extended or enlarged by importing in the provisions something from Civil Procedure Code or from the general law. Presentation of election petition ought to have been made by the candidate himself. However, in *Satya Narayan v. Dhuja Ram*,<sup>20</sup> the Supreme Court held that the presentation of election petition by the counsel of the petitioner is valid as the expression ‘filing any paper’ in Vakalatnama can be held to include presentation of election petition also.

### **3.2. The Period of Limitation**

The period of limitation for filing an election petition is prescribed under Section 81 (1) of the Representation of People Act, 1951. As per Section 81 (1) an election petition must be filed within 45 days from the date of election of the returned candidate or if there are more than one returned candidates and the dates of the declaration of their being duly elected are different, then within 45 days of the later of those days.

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<sup>19</sup> AIR 1978 NOC 182 (MP).

<sup>20</sup> AIR 1974 SC 1185; In *Sheodhan Singh v. Mohan Lal Gautam*. AIR 1969 SC 1024, presentation by the Advocate's Clerk in the presence of the petitioner was entertained.



#### **4. Judicial Intervention in Election Disputes**

Just because the statutes appear to the minds of the judges to violate fundamental principles of republican government, the Courts are not at liberty to declare them void unless it shall be found that those principles are placed beyond legislative encroachment by the Constitution. The principles of democratic republican government are not a set of inflexible rules and unless they are specifically incorporated in the Constitution, no law can be declared bad merely because the Courts think that it is opposed to some implications drawn from the concept.<sup>21</sup>

The Constitution of India provides for judicial review of governmental actions, both legislative and executive, which can be availed through appropriate writ petitions to the High Courts<sup>22</sup> and the Supreme Court.<sup>23</sup> However, in electoral matters, the Constitution itself imposes a bar against the interference by courts. Article 329 (b) of the Constitution expressly bars the Courts from interfering with electoral matters.<sup>24</sup>

Clause (b) of Article 329 ousts the jurisdiction of the courts to entertain any matter relating to 'election' which can be questioned only by an election petition under the law prescribed by the appropriate legislature. The scheme of Article 329 makes it clear that an election can be called in question only after the completion of the election.

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<sup>21</sup> Cooley, *Constitutional Limitations*, Vol.1 at 349-52, as referred in *Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SC 2299 at 2387.

<sup>22</sup> Articles 13 and 226 of the Constitution of India.

<sup>23</sup> Articles 13, 32, 132, 133 and 136 of the Constitution of India.

<sup>24</sup> *Supra* note 7.

In *N. P. Punnuswami v. Returning Officer, Namakkal Constituency*,<sup>25</sup> the Supreme Court held that the High Court can't interfere at the pre-election stage relying upon its jurisdiction under Article 226 of the Constitution. Art. 329 is supreme and overrides even the special powers conferred on the High Court and the Supreme Court under the Constitution. Therefore, the Returning Officer's rejecting or accepting a nomination paper could not be challenged before the High Court in a writ petition. The High Court had no jurisdiction under Article 226 to interfere, by *certiorari*, with the order of the Returning Officer who wrongly rejected the nomination paper of a candidate as this is a part of the election process and is covered by Article 329 (b) of the Constitution.

The Apex Court ruled that the words "notwithstanding anything in this Constitution" exclude the jurisdiction under Article 226 of the Constitution of India. Articles 327<sup>26</sup> and 328<sup>27</sup> of the Constitution of India begin with the words "subject to the provisions of this Constitution." This makes it clear that a law made by the Parliament under Articles 327 and 328 cannot exclude the jurisdiction of the High Court under Article 226 while that jurisdiction is excluded in case of Article. 329.

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<sup>25</sup> *Supra* note 4. In this case, the appellant's nomination paper had been rejected by the Returning Officer. He moved the High Court of Madras under Article 226 of the Constitution for the issuance of a writ of certiorari to quash the Returning Officer's order. The petition was dismissed by the High Court on the ground of lack of jurisdiction to interfere with the order of the Returning Officer by reason of Article 329 (b) of the Constitution.

<sup>26</sup> Article 327 reads:

"Subject to the provisions of this Constitution, Parliament may from time to time by law make provision with respect to all matters relating to, or in connection with, elections to either House of Parliament or to the House or either House of the Legislature of a State including the preparation of electoral rolls, the elimination of constituencies and all other matters necessary for securing the due constitution of such House or Houses."

<sup>27</sup> Article 328 reads:

"Subject to the provisions of this Constitution and in so far as provision in that behalf is not made by Parliament, the Legislature of a State may from time to time by law make provision with respect to all matters relating to, or in connection with, the elections to the House or either House of the Legislature of the State including the preparation of electoral rolls and all other matters necessary for securing the due constitution of such House or Houses."

The Supreme Court held that Article 329 (b) of the Constitution of India had the effect of ousting the jurisdiction of the High Court under Article 226 with regard to the matters arising between the commencement of the election and the final selection. On the question whether nomination could be agitated under Article 226 of the Constitution, the Court observed that Article 329 covers all electoral matters. The Court held that in Article 329 (b), the word “election” has been used in a wide sense denoting “the entire procedure to be gone through to return the candidate to the legislature.” The High Court, therefore, had no jurisdiction over the Returning Officer rejecting a nomination paper. The only way in which such decision of Returning Officer could be challenged is by filing an election petition, after the entire election is over and the successful candidates have been declared elected. The Constitution has purposely postponed all legal remedies in relation to electoral matters during the currency of the election to ensure that elections are held at the proper time and are not required to be postponed. The Court observed that immediate individual relief at an intermediate stage when the process of election is underway has to be sacrificed for the paramount public good of promoting the completion of elections.

The matter again came up before the Supreme Court for a detailed consideration in *Mohinder Singh Gill v. Chief Election Commissioner*,<sup>28</sup> wherein the Supreme Court held that the *prima facie* purpose of a re-poll was to restore a detailed poll process and to complete it

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<sup>28</sup> *Supra* note 6. In this case Election Commission's notification canceling the poll due to violence in some segments of the Constituency and directing the re-poll in the Ferozpur parliamentary Constituency of Punjab at the 1977 general election was challenged. The question before the Apex Court was whether the cancellation of the poll and the ordering of re-poll was part of 'election' and challenging it was 'calling it in question' or is writ petition under Art. 226 challenging cancellation integrated with re-poll barred by Art. 329 (b) of the Constitution.

through the salvatory effort of a re-poll. A writ petition under Article 226 challenging the cancellation coupled with re-poll amounted to 'calling in question' a step in election and was therefore barred by Article 329 (b) of the Constitution.

The Supreme Court considered at great length the scope and meaning of Article 329 (b) and reiterated its earlier decision in *Punnuswami's* case. Krishna Iyer, J. speaking for the Court, described Article 329 as 'the Great Wall of China' and amplified the law as laid down in *Punnuswami's* case. Following propositions were drawn by him :

(i) Article 329 (b) is a blanket ban on legal proceedings to challenge electoral steps taken by the Election Commission and its officers for carrying forward the process of election starting from notification to its culmination in the formal declaration of election result.

(ii) No remedy is available at any intermediate stage of election process even though the dispute relates to a matter antecedent to the conduct of election, such as nominations. The only remedy is an election petition to be filed after election is over.

(iii) Article 226 of the Constitution is also hit by the embargo imposed by Article 329 (b). However, if the petitioner agitates a matter not affecting 'the election' and the remedy for which is not available in the election petition, a petition under Article 226 might possibly lie after completion of the election. But so long as an election petition is to be heard by the High Court itself under section 80-A of the Representation of the People Act, 1951, with a

right to appeal direct to the Supreme Court, a petition under Article 226 is likely to be thrown out on the ground of alternative remedy.

There is no direct authority to establish that remedy under Article 226 will be barred in each case. Facts of each individual case shall have to be considered to reach at a conclusion whether any particular stage can be said to be a part of the election process within the meaning of Article 329 (b). Thus, it is difficult to draw a proposition applicable to all cases alike.

In *Lakshmi Charan Sen v. A.K.M. Hassan Uzzaman*,<sup>29</sup> the Apex Court held that even if it is justified for the High Court to entertain the writ petition, it would not be justified for it to pass any order which would have the effect of postponing the elections for indefinite time.

Speaking for the Court, Chandrachud C.J. observed - "India is an oasis of democracy, a fact of contemporary history which demands of the Courts the use of wise statesmanship in the exercise of their extraordinary powers under the Constitution. The High Court must observe a self-imposed limitation on their power to act under Art. 226, by refusing to pass orders or give directions which will inevitably result in an indefinite postponement of elections to legislative bodies, which are the very essence of the democratic foundation and functioning of our Constitution."

Thus, the Apex Court has expressed a note of caution for the exercise of power under Article 226 so as not to defeat Article 329 (b).

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<sup>29</sup> AIR 1985 SC 1233.

The law, thus, stands settled on the point that all doubts and disputes pertaining to election can be raised only by means of an election petition after the completion of the election.

## **5. Conclusion**

The violations of election law certainly necessitate judicial review. However, in the interest of smooth conduct of electoral process and its completion, the judiciary has taken the stand that the electoral process be not disturbed during the conduct of the elections and that an election petition be entertained after the completion of the process of elections. Article 329 (b) has an overriding effect on the special powers of the High Court or the Supreme Court of India under their writ jurisdictions. The idea is that the election process runs unobstructed from the commencement of the election and the selection of the returned candidate. *N. P. Punnuswami* and *Mohinder Singh Gill* have strongly substantiated this. However in the absence of any direct authority placing bar on the entertainment of a matter under Article 226 by the High Court, the determination of a matter whether it is part of the election process or not will depend upon the facts of each case. *Lakshmi Charan Sen* has further clarified that even in those cases where matter is entertained under writ jurisdiction by the High Court, no such order is to be passed which has the effect of postponing the elections for an indefinite time, thus maintaining the spirit and the overriding effect of Article 329 (b).

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