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Volume 10, May 2020 ISSN 2581-5504

"Constitutional Validity of Judicial Review in Electoral Laws"

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Abstract

The legislature initially sought to oust the jurisdiction of the Courts in relation to disputes arising out of elections by conferring on specialized election tribunals the jurisdiction to try disputes relating to the elections, with their decisions being final and binding under S. 105 of The Representation of the People Act, 1951.The paper discusses how Supreme Court has, consistently over time extended its powers under Art. 329 (b). The paper also discusses how judicial pronouncements opened the doors to challenging the election process while it is going on.

Article 329(b) of the Constitution of India, states that disputes relating to elections shall not be called into question in any Court, but in a specialized tribunal. It is a non-obstante clause which states that no election to the Parliament or to the Legislative Assembly or Council of a State shall be called in question except by an election petition. This election petition would be presented to such authority in such manner as would be provided by or under any law made by the appropriate Legislature.

Subsequently, the **Representation of the People Act, 1951** was passed by Parliament which, among other things, provided for challenging elections through election petitions to an election tribunal whose decision would be final. This election petition would be presented only after the publication of the name of the returned candidate i.e. after the elections got over. The rationale behind this was to ensure smooth conduct of elections. Art. 243(O) (b) and Art. 243(ZG) (b), which were added through the 73rd and 74th Amendment Act respectively in 1992, contain analogous provisions as regards Panchayats and Municipalities. However, since Panchayats and Municipalities are State list subjects it is for the appropriate state legislature to pass the required legislation under which such elections are to be held and challenged.[1]

Yet in a series of decisions the Apex Court as well as numerous High Courts has interpreted these provisions as giving them jurisdiction to try election cases. How the Courts have assumed jurisdiction, both appellate as well as original, and its ramifications that will be the

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[1] H. K. Saharay, The Constitution of India, 723 (Eastern Law House 3rd ed. 2002)

Volume 10, May 2020 ISSN 2581-5504

subject-matter of this paper. The author, with the help of case laws, will show how the initial hands-off attitude of the Courts, as displayed in ***Ponnuswami v. Returning Officer, Namakkal Constituency***[2], has changed to a more active one as far as election petitions are concerned. Here it is pertinent to note that Wallance. J. observed in ***Sarvothama Rao v. Chairman Municipal Council, Saidapet***[3] that

"any post-election remedy is wholly inadequate to afford the relief which the petitioner seeks, namely, that this election, now published be stayed, until it can be held with himself as a candidate…the Court cannot stultify itself by allowing the wrong which it is asked to prevent to be actually consummated while it is engaged in trying the suit."

The opposite side of this argument has subsequently been discussed in ***Desi Chettiar v. Chinnasami Chettiar***[4] which observes that portioners do have a remedy, because he cannot get election stopped but he can obtain them later.

The Supreme Court has thus, consistently over time extended its powers under Art. 329 (b). The legislature initially sought to oust the jurisdiction of the Courts in relation to disputes arising out of elections by conferring on specialized election tribunals the jurisdiction to try disputes relating to the elections, with their decisions being final and binding under S. 105 of The Representation of the People Act, 1951. In ***Ponnuswami*** case, the Supreme Court was called in to interpret the meaning of the term '**election**' in Article 329 as well as to answer whether the writ jurisdiction of the High Court under Article 226 would extend to election petitions. The appellant in this case had his nomination papers rejected by the Returning Officer and he was praying for a writ of certiorari to quash the same. Fazl Ali, J. speaking for the bench held that Art. 329 (b) effectively barred the jurisdiction of the Courts in any election matters, while the election was going on. He declared that the word "election" had been used in Part XV of the Constitution in the wide sense, that is to say, to connote the entire procedure to be gone through to return a candidate to the legislature. The appellant therefore, had to file an election petition. The Constitutional Bench of the Supreme Court held that, although this may cause hardship to the appellant, this would ensure that elections are concluded as early as possible according to the time schedule. It further held that all 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. There was utmost urgency to complete the elections as early as possible considering the vital position a legislature occupied in a democracy.

However, it is pertinent to note that this exclusion of the jurisdiction of the Courts, according to the honourable Supreme Court, extended only till the election tribunal gave its decision. Thereafter, the Courts interfere under Article 136 as well as Art. 226. In ***Hari Vishnu Kamath v. Syed Ahmed Ishaque***[5], the Apex Court declared that once proceedings have been

[2] AIR 1952 SC 64
[3] (1924) ILR. 47 Mad. 585
[4] AIR 1928 Mad. 1271
[5] AIR 1955 SC 233

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instituted in accordance with Article 329(b) by presentation of an election petition, the requirements of that article are fully satisfied. Thereafter when the election petition is heard by a Tribunal and decided, its decision is open to attack, as the general law applicable to decisions of Tribunals is also applicable to the Election Tribunal. Thus, the Courts gained appellate jurisdiction.

In contrast the decision of the Court in ***Ponnuswami*** case with that in ***K. Venkatachalam v. A. Swamickan***[6], a clear change is discernable. In the latter case, the appellant was appealing against a decision of the Madras High Court Division Bench in a writ petition which held that the appellant was not qualified to sit as a member of the Tamil Nadu Legislative Assembly. This decision was passed by the Court in exercise of its jurisdiction under A. 226. His contention before the Supreme Court was that the since Article 329(b) effectively barred the writ jurisdiction of the Court in electoral matters, the High Court ought not to have entertained the writ petition. However, the petitioner in this case could not challenge the election of the appellant through an election petition since the time limitation for filing such a petition, i.e. forty-five days after the candidate is returned, had expired before the fraud by the appellant was discovered. Under such circumstances, the Supreme Court held that the High Court had rightly assumed jurisdiction. Article 226 of the Constitution was to be given the widest possible meaning and where recourse could not be had to the provisions of the appropriate Act for the required relief, it could be invoked. When the appellant had got himself elected through unconstitutional means, to let him sit and vote in the Assembly would be a fraud on the Constitution.

Another case where this changed judicial attitude is visible is ***Election Commission of India v. Ashok Kumar***[7], where the counting of votes was challenged as mala fide. The Apex Court determined that any decision sought and rendered will not amount to "calling in question an election" if it subserves the progress of the election and facilitates the completion of the election. Moreover, it declared that 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 obstacles 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 stage is set for invoking the jurisdiction of the Court. This judgment raises questions as to the very need of establishing an election tribunal which will look into electoral complaints after the elections when such complaints can be brought before a Court of law during the course of the elections itself.

The roots of this shift in judicial opinion are discernible in ***Lakshmi Charan Sen v. A. K. A. Hasan Uzzaman***[8]. This case arose as an appeal against orders passed by the Calcutta High Court, directing that the instructions issued by the Election Commission should not be

[6] AIR 1999 SC 1723
[7] 2000 AIR SCW 3274
[8] 2000 AIR SCW 3274

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implemented by the Chief Electoral Officer and others, that the revision of electoral rolls be undertaken de novo, that claims, objections and appeals in regard to the electoral roll be heard and disposed of in accordance with the rules; and that, no notification be issued under Section 15(2) of the Representation of the People Act, 1951 calling for election to the West Bengal Legislative Assembly, until the rolls were duly revised. Although this case dealt with electoral rolls, the declaration made by the Court is significant. The Supreme Court held that though the High Court ought not to have passed the orders whereby it assumed control over the election process as a result of which the elections could get postponed indefinitely, yet the Courts had the power to do so. This restraint by the Courts in the exercise of its writ jurisdiction was a question of propriety rather than of power. The Supreme Court held that the High Court must observe a self-imposed limitation on their power to act under Article 226, by refusing to pass order 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. From this case to decision in the ***Venkatachalam*** case was only a matter of time.

ELECTION TO PANCHAYATS AND MUNICIPALITIES

In the case of Panchayats and Municipalities the courts have been even more open in claiming writ jurisdiction over election disputes. One case in point is that of ***Anant Janardan Patil v. State of Maharashtra***. In this [9]case, the nomination papers of the petitioner were rejected by the returning officer. The Bombay High Court directed the returning officer to accept the nomination papers but the result of the election would depend upon whether the nomination papers could stand scrutiny after the election was over. After the elections, one ground for filing an election petition was the wrongful rejection of nomination papers. In this case since the nomination papers were accepted under the order of the Court, the petitioner could not challenge and prove the validity of his papers under election laws.

As such, the Court declared that the questioning of his nomination papers would have to be under Art. 226. Thus, in this case the High Court did not bother about the constitutional bar on their jurisdiction in electoral matters. The Court decided to entertain the petition while the election was in progress and issued the order to the Returning Officer asking him to accept the nomination papers of the petitioner. It is humbly submitted that the Court ought not to have issued the direction to the Returning Officer.

In ***Lal Chand v. State of Punjab***[10] a full bench of the Punjab and Haryana High Court was called on to answer the question of whether Articles 243-O and 243-ZG (what do these constitutional provisions say) of the Constitution of India are ultra vires on the ground that these are against the basic structure of the Constitution of India inasmuch as the jurisdiction of the High Court of judicial review under Article 226 of the Constitution of India has been taken away. The High Court held that it was not against the basic structure as the term "Notwithstanding anything in this constitution" would have to be read down to mean as

[9] AIR 2002 Bom 87
[10] AIR 1999 P & H 1

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"Notwithstanding anything in this Constitution subject, however, to Articles 226/227 of the Constitution". Thus, by reading something, which is not there in the above mentioned article, the Court has greatly expanded its powers to review election disputes.

Thus, we see that the Courts have assumed writ jurisdiction in electoral matters. Although the Courts might have assumed jurisdiction in the interest of justice, its long term ramifications will have to be considered. The reasons why the Courts were initially barred from interfering was, as declared in ***Ponnuswami***, the overbearing need to make sure that nothing derailed the formation of the legislature. It was felt that by making elections free from all forms of judicial interference such disputes could be settled expeditiously under the relevant provisions of the Representation of the People Act, 1951. Although the Courts have used liberal interpretation in furtherance of the ends of justice, it has had a detrimental effect on the need to dispose of election petitions quickly. The over-burdened Indian legal system cannot meet this need. The Representation of People Act, 1951 had sought to make the decision of the election tribunals final and binding13. The Courts by laying down the policy that they would not interfere in election matters actually gained the power to do so. They made it a matter of choice and not of power. First they held that a right to appeal would lie to Courts from the decision of the tribunal. The legislature recognized this reality in 1956 and the above Act was amended to allow appeals to the high Courts14. Since this resulted in a three tier system comprising the election tribunal, the High Court and then the Supreme Court; protracted and lengthy legal proceedings became the norm in election petitions. The tribunals were abolished and the High Courts given the powers to hear election petitions directly in 1966 in order to decrease one level of litigation15. Thus the whole point behind setting up the election tribuanls and keeping their decisions beyond the purview of the Courts so as to expedite the hearing of election petition was lost.

Prof. M. P. Jain has supported this liberal interpretation given to A. 329(b) seeing as judicial review is a part of basic structure of the Constitution.16 He has moreover supported the interpretation given to A. 243-O and ZG as he feels that there is more chance of interference with the State election Commissions than the Election Commission established under Art. 324.17 However judicial review as a concept is more relevant in case of amendments, it hardly ever comes up in connection to the original provisions of the Constitution. The huge backlog of cases in India also needs to be considered. Moreover, cases tend to go on and on in the Courts. Keeping in mind the special status of an election petition and the need to dispose of them as quickly as possible, tribunals, as envisaged in the pre-1955. Representation Act, are best suited to deal with such petitions. Similar provisions in the State Acts under

A. 243-O and ZG should command the same respect from the Courts. Also, the decisions cited above has opened the doors to challenging the election process while it is going on. Since it is vitally important that nothing interferes in the formation of the legislature and it is formed as early as possible, the Author respectfully submits that the Courts should be extremely circumspect while invoking their writ jurisdiction in election cases.