Chapter 7

RESOLUTION OF ELECTORAL DISPUTES IN INDIA AND IRAQ: A FACTUAL ANALYSIS

7.1 INTRODUCTION:

Elections are generally a cornerstone of any democracy as they serve a number of significant functions, i.e., they provide the Government with legitimacy, as officials are chosen through the popular will\(^1\) and more importantly, they allow for the alternation of governing coalitions, which ostensibly permits the entry of new ideas into policy debates and different approaches to governance.\(^2\) Thus, it is paramount to have free, fair, fearless and impartial elections to guarantee of a democratic polity.\(^3\)

Elections can be free and fair if they are transparent and subject to judicial scrutiny. Moreover, elections can be free and fair if the entire electoral exercise is conducted in full public gaze with active participation of political parties and candidates who are the main stakeholders and of electors who are the ultimate beneficiaries under democracy.\(^4\) However, if the elections are neither free nor fair, chances for disputes arising among the contending parties is very high.

In case any electoral dispute arises, whether the aggrieved has right to institute an election petition is a fundamental or statutory right is a question that needs to be considered in this doctoral thesis. The Supreme Court of

India in this regard has observed in *Jyoti Basu v. Devi Ghosal*\(^5\) that 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 and so is the right to dispute an election”. Thus, outside of statute, there is no right to elect, no right to be elected and no right to dispute to an election. Therefore, for deciding the question whether an election can be set aside on any alleged ground, the Courts have to not only consult the provisions of law governing the particular election, but they also have to function within the framework of that law and cannot travel beyond it.

The object subserved by the judicial scrutiny of elections when questioned by means of election petition has been further explained by the Supreme Court of India in *Azhar Hussain*\(^6\) as follows:

In a democratic polity, ‘election’ is a mechanism devised to mirror the true wishes and the will of the people in the matter of choosing their political managers and their representatives who are supposed to echo their views and represent their interests in the legislature. The results of the election are subject to judicial scrutiny and control only with an eye on two ends, *first*, to ascertain that the will of the people is reflected in the results and *second*, to secure that only the people who are eligible and qualified under the Constitution obtain the representation. In that order, the ‘true will’ is ascertained for the Courts will step in to protect and safeguard the purity of elections for if corrupt practices have influenced the result, or the electorate has been a victim of fraud or deception or compulsion on any essential

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\(^5\) 1982 AIR 983: 1982 SCR (3) 318.

matter, [or when the essential qualifications for eligibility demanded by the constitutional requirements are not fulfilled], the will of the people as recorded in their votes is not free and true… and the Courts would … be justified in setting aside the election in accordance with the law if the corrupt practices are established.

But in *Jeet Mohinder Singh*⁷, the same Court added a word of caution referring to the settled legal principle in the field of election jurisprudence as under:

The success of a candidate who has won at an election should not be lightly interfered with. Any petition seeking such interference must strictly conform to the requirements of the law. Though the purity of the election process has to be safeguarded… [it should be remembered that] the setting aside of an election involves serious consequences not only for the returned candidate and the constituency, but also for the public at large in as much as re-election involves an enormous load on the public funds and administration.

It is in view of the above that both the Constitutions of India and Iraq together with local legislations prescribe the manner in which and the stage at which a dispute relating to an election to any House of Parliament/Council of Representatives or of a State Legislature/Governorate shall be submitted for resolution by judicial process. All these shall be discussed hereunder.

⁷ *Jeet Mohinder Singh v. Harmindar Singh Jassi*, AIR 2000 SC 256. See also, *Mahender Pratap v. Krishan Pal*, AIR 2003 SC 304; (2003) 1 SCC 390 where the Supreme Court observed that the parties to the election dispute must approach the Court with genuine grievances on truthful facts. False cases not only contribute to the workload of the Court and kill its precious time but create hurdles in the ways of genuine litigants who sincerely need assistance of the Court for obtaining justice. Therefore, appropriate deterrent action like dismissal of false petitions with costs, prosecution for perjury or initiation of contempt proceedings should be taken by the Court lest the judicial process would continue to be polluted and misused by undeserving parties who have no real grievance.
7.2 CONTENTS, PROCEDURE AND TRIAL OF ELECTION PETITIONS: INDIAN PERSPECTIVE

The Constitution of India, 1950, the supreme law of the land, visualizes the resolution of election disputes by judicial process by ascertaining the facts relating to the election and applying the law. It categorically provides that no election to either House of Parliament or 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 under any law made by the appropriate Legislature. ⁸

7.2.1 CONTENTS OF ELECTION PETITION:

The juristic principle of law is that person accused of corrupt practices must know precisely what he is accused of to accord him an opportunity to meet the allegations made against him. If the accusations leveled are nebulous or if they do not establish a corrupt practice, then the charges fail at the very threshold. An election petition must therefore contain not only a concise statement of material facts on which the petitioner relies, ⁹ but also all details of any corrupt practice that the petitioner alleges including a complete statement of the names of the party alleged to have committed such corrupt practice, ¹⁰ the date of the commission of the corrupt practice and the place at which the corrupt practice took place. ¹¹ It must also appear from the allegations that the corrupt practices were indulged in either by the candidate himself or by his agent, or by any other person with the express or implied consent of the candidate or his election agent. However, the

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⁸ Art.329, the Constitution of India, 1950.
⁹ S.83(1)(a), the Representation of People’s Act, 1951.
¹¹ S.83(1)(b), supra note 9.
allegations in the election petition should not be vague\textsuperscript{12}, general in nature or lacking in material particulars, or frivolous or vexatious as the Court has power to strike down or delete pleadings if they suffer from the vices aforementioned.\textsuperscript{13}

Moreover, where any allegations have been made in the election petition of any corrupt practices having been committed at the election, the petition must also be accompanied by an affidavit of the petitioner in the prescribed form\textsuperscript{14} affirmed or sworn before the Magistrate of First Class or Notary or Commissioner of Oaths\textsuperscript{15}, in support of the allegations of such corrupt practices and the particulars thereof.\textsuperscript{16} In the affidavit, the petitioner has to specify which of the allegations about commission of corrupt practice are true to his personal knowledge and which of such allegations are true to his information received by him from other sources.

There has been some controversy in India on the point whether the affidavit in support of the allegations of corrupt practices should disclose the source or sources of the information or not. In this regard, the Apex Court had held in \textit{Krishan Chander}\textsuperscript{17} that there is nothing in Form 25 which requires the petitioner to state the source or sources of information forming the basis for allegation of corrupt practice. Thus, an allegation of corrupt practice in an election petition cannot be ignored on the ground that the source of information has not been disclosed by the petitioner. The Court also observed that under Order VI Rule 15(2) of the \textit{Civil Procedure Code},

\textsuperscript{12}The question of vagueness should be raised at the earliest and if no objection is raised and the parties go to trial despite the vagueness, the respondent cannot thereafter have a grievance that the petition should have been dismissed for the said defect – \textit{Abdul Hamid Choudhury v. Nani Gopal Swami}, 22 ELR 358 (SC); \textit{Quamarul Islam v. S. K. Kanta}, AIR 1994 SC 1733.
\textsuperscript{14}\textit{T. Phunzathang v. Hangkhanlian}, AIR 2001 SC 3924.
\textsuperscript{16}S.83(1)(c), supra note 9.
\textsuperscript{17}\textit{Krishan Chander v. Ram Lal}, 53 ELR 289.
the disclosure of the source of information is not requisite. But in several other subsequent cases,\textsuperscript{18} the Apex Court has held that the sources of information must be set out in an affidavit whether the provisions of the \textit{Civil Procedure Code} apply or not. The non-disclosure of the sources of information will make the affidavit defective as it will indicate that the petitioner did not come forward with the sources of the information at the first opportunity. The real importance of disclosing the sources of information is to give to the respondent notice of contemporaneous evidence on which the petition is based and that will give the other side an opportunity to test the genuineness and veracity of the source or sources of information and to discover any embellishment.\textsuperscript{19} Besides, disclosure of source of information helps to bind the petitioner to the charges leveled and to prevent any fishing and roving inquiry in the trial of the petition.\textsuperscript{20}

Every election petition and every Schedule and Annexures to the petition must be signed by the petitioner and also verified in the manner laid down in the \textit{Code of Civil Procedure}, 1908.\textsuperscript{21} This is a mandatory requirement.\textsuperscript{22} But any defect in the verification is curable and cannot render an election petition to be dismissed \textit{in limine}.\textsuperscript{23} The object of verification of an election petition as explained by the Apex Court is to fix the responsibility for the averments and allegations in the petition on the person


\textsuperscript{19} \textit{Ibid}.


\textsuperscript{21} Ss.83(1)(c) and 83(2), supra note 9.

\textsuperscript{22} \textit{Manohar Joshi v. Damodar Tatyaba}, (1991) 2 SCC 342.

signing the verification and at the same time, discouraging wild and irresponsible allegations unsupported by facts.  

Every election petition generally contains two types of reliefs: first, relief simpliciter – that the election of the returned candidate or candidates at the impugned election may be declared void. *Second*, composite relief which combines two reliefs, *namely*, a) that the election of the returned candidate may be declared void, and b) that, in place of the returned candidate, either the petitioner himself, if he was a candidate, or some other candidate may be declared as having duly elected at the impugned election.  

In view of the above, the question that crops up is whether it is permissible for a party to furnish particulars even after the period of limitation? In this regard, the Supreme Court of India has held that it may be permissible for a party to furnish particulars even after the period of limitation for filing an election petition has expired with the permission of the Court, no material facts, unless already pleaded, can be permitted to be introduced after the expiry of the period of limitation.  

7.2.2 PROCEDURE FOR FILING ELECTION PETITION:  

Pursuant to the mandate of the Constitution as provided under Part XV, essential provisions governing all matters relating to election petitions have been made by Indian Parliament in Part VI of the RPA-II. Section 81 of the RPA-II specifically provides, *inter alia*, that no election petition shall be filed before the date of declaration of result of the election.

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25 S.84, supra note 21.
27 See, Ss.79-122, supra note 25.
The election petition can however be filed before the High Court within forty-five days from the date of declaration of results. After the filling of the election petition and after submitting the requisite number of attested copies of the petition, the petition can ordinarily be tried by a single judge of the High Court or by any number of the judges the Chief Justice of the High Court may assign.

But the question is who can be a ‘petitioner’ in an election petition? An election petition can generally be filed either by an individual candidate at the impugned election or by any elector at that election and by no one else. The ‘candidate’ here implies a person who has been or claims to have been duly nominated as a candidate at the election. A person whose nomination is rejected is also a candidate for the purposes of Section 81(1) of the RPA-II. On the other hand, an ‘elector’ refers to a person who was entitled to vote at the election to which the election petition relates, but it is not necessary that he should have voted for that election. Even if he has not voted, he is entitled to file an election petition. But it has to be noted that

28 S.81, ibid. The period of forty five for presentation of the election petition is mandatory and sacrosanct. Any election petition presented to the High Court beyond the prescribed period shall therefore be summarily dismissed under S.86 of the Representation of People’s Act, 1951 [K. V. Rao v. B. N. Reddi, AIR 1969 SC 872]. Moreover, the High Court has no discretion or power to condone the delay on any ground at all [Hukumdev Narain v. Lalit Narain Mishra, AIR 1974 SC 480]. The only exception to the entertainment of the election petition shall be the closure of the High Court on the day of presentation. In such an event, the petition must be filed on the very first day on which the High Court reopens after the forty-fifth day which was a closed day for the High Court in view of the provisions of S.10 of the General Clauses Act, 1897 [Harinder Singh v. Karnail Singh, AIR 1957 SC 271].


30 S.81(3), supra note 21 provides that apart from the original election petition filed before the High Court, the petition must be accompanied by as many copies thereof as there are respondents mentioned in the petition. The object of the provision is that the High Court Registry may be in a position to issue a notice to the respondents as soon as may be after the presentation of the election petition without loss of time in preparing the copies of the petition for service on the respondents – Satya Narain v. Dhuja Ram, AIR 1974 SC 1185.

31 S.80A(2), ibid.

32 S.81(1), ibid.

33 S.76(b), ibid.


35 S.81(1), supra note 30.
an elector in relation to a constituency means a person whose name is entered in the electoral roll of the constituency for the time being in force and who is not subject to any of the disqualifications for registration as an elector under Section 16 of the RPA-I or Section 2(1)(e) of the RPA-II. If an elector changes his residence after the elections, he still can maintain an election petition if he was elector at the election under challenge in the petition.

In regard to who can be a ‘respondent’ in an election petition, the RPA-II provides that only the returned candidate is required to be made a respondent to the petition. If however, more than one candidate was returned at the election, like, the election to the Council of States and the State Legislative Council, then all such returned candidates can be joined as respondents to the petition. Moreover, where in an election petition, allegations of any corrupt practice are made against any candidate, then such candidate must also be enjoined as respondent to the petition even if no further declaration has been claimed in the petition. For instance, in *K Venkateswara Rao*, it was alleged that one of the candidates was made to withdraw on payment to him of illegal gratification by another candidate. As the taint of corrupt practices of bribery attached both to the payee and the

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36 *Mohammed Sameer v. Abdul Kasab Moned*, AIR 2003 SC 348
38 Under S.79(f), *supra* note 21, the term ‘returned candidate’ refers to a candidate who has been elected. S.82, *ibid*.
39 S.82, *ibid*.
40 The candidate here refers to both the contesting candidate and the candidates who had withdrawn their candidature within the period prescribed for withdrawal of candidature - *K Venkateswara Rao v. Bekkam Narasimha Reddy*, AIR 1969 SC 872.
41 S.82, *supra* note 38.
42 S.82, *ibid*.
payer of illegal gratification, the candidate withdrawing his candidature was held to be necessary party to the election petition.

Section 82 of the RPA-II prescribes which of the candidates at the election are to be joined as respondents to an election petition. The question whether any third person, that is to say, a person who was not a candidate at an election can be joined as a respondent to the election petition came to be considered by the Supreme Court in *Jyoti Basu v. Debi Ghosal*. The Court held that except the candidate at the election, none else can be joined as respondent to an election petition even if he may otherwise be considered as a proper party.

In view of the observations made in *Jyoti Basu v. Debi Ghosal*, the other question that incidentally crops up is whether the Election Commission and other Election Authorities can be exceptionally joined as respondents to an election petition? In any election petitions the orders or directions given by the Election Commission in the course of conduct of election are often called in question. Quite often, the allegations of illegalities and irregularities in the scrutiny of nominations, counting of votes, etc., are also made against the Returning Officers and Election Authorities. In such cases, the Election Commission and other Election authorities are also impleaded as respondents by the petitioners. However, in view of the law laid down by the Apex Court of India in *Jyoti Basu v. Debi Ghosal*, they cannot be joined as respondents howsoever proper or desirable their participation in the trial of the petition as a party thereto may be. This question whether the Election Commission can be made a respondent to an election petition was

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44 AIR 1982 SC 983.
specifically considered by the Apex Court in *B. Sundra Rami Reddy*\(^{47}\) where the Court held that:

… the concept of joining a proper party to an election petition is ruled out by the provisions of the [RPA-II]. The concept of joinder of a party to a suit or proceedings underlying Order 1 of the *Civil Procedure Code* cannot be imported to the trial of election petition in view of the express provisions of Section[s] 82 and 87 of the Act. The Act is a self contained Code which does not contemplate joinder of a person or authority to an election petition on the ground of proper party. … [Therefore] the concept of ‘proper party’ is and must remain alien to an election dispute under the *Representation of People Act*, 1951. Only those may be joined as respondents to an election petition who are mentioned in Ss.82 and 86(4) and no others. However, desirable and expedient it may be, none else shall be joined as respondents.

The High Courts in India have framed their own rules for presentation of election petitions to them. As the rules vary, it is advisable that persons intending to file election petitions study and familiarize themselves with rules of the appropriate High Court they intend to file the petition lest they be subject to summary dismissal of their petitions under Section 86(1) of the RPA-II. There is however, some controversy on the questions whether the election petition should be presented by the election petitioner in person or through an advocate and whether the security deposit should be made separately by each of the petitioners to an election suit? The Allahabad High Court, Andhra Pradesh High Court and the Rajasthan High Court have taken

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the view that an election petition may be presented either by the petitioner in person or his authorized advocate. However, the contrary view was taken by the Madhya Pradesh High Court. To avoid any such controversy, the researcher opines that the election petitioners should present their petitions in the designated High Court before the judge or officer designated for the purpose in the rules, in person.

In regard to security deposit, the RPA-II provides that at the time of presenting an election petition, the petitioner is mandated to deposit in the High Court a sum of Rs.2000 as security for costs of the petition. In case of failure to deposit the amount, the petition can be dismissed in limine. The security has to be deposited in accordance with the rules of the High Court concerned. Accordingly, the election petitioner must find out the requirements and the procedure for making the security deposit laid down by the High Court concerned in its rules. Where however, an election petition is jointly filed by more than one petitioner, only one security deposit of Rs.2000 is sufficient and it is not necessary that each of the petitioners should make a separate deposit. The security so deposited by a petitioner may be used either for paying of costs awarded to any respondent by the High Court at the conclusion of the trial, or for meeting the expenses on witnesses summoned by the High Court on behalf of the petitioners. But, if

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50 S.117(1), supra note 21.
51 S.86(1), ibid. See also, Charan Lal Sahu v. Nandkishore Bhatt and Others, 53 ELR 284 where it was held that provisions of S.117(1), ibid are mandatory and non-compliance with those provisions will result in the dismissal of the petition even before the issue of notice by the High Court to the respondent or commencement of trial.
52 S.117(1), ibid.
54 Supra note 4 at 1049.
during the course of the trial, the High Court considers the deposit made to be inadequate, the Court is empowered, at any time, to call upon the petitioner to remit such other amount it may consider appropriate.\(^{55}\)

Prior to 1966 election petitions were presented to the ECI, which would constitute one-member Election Tribunals of the rank of District Judge, on an *ad hoc* basis for the trial of election petitions. But following the controversy which came up in *Hari Vishnu Kamath v. Ahmed Isheque*\(^{56}\) on whether a Tribunal or High Court should try election petitions, ECI recommended that trial of election petitions should be entrusted to the High Courts instead of Election Tribunals. Such jurisdiction is exercised by a single judge of the High Court. The Parliament thus, enacted Section 80-A of the RPA-II providing that the High Court shall be the authority for presentment of election petitions under Article 329(b) of the Constitution. This was incorporated by an amendment in the year 1966.\(^ {57}\)

The RPA-II, a complete and self-contained code that deals with election disputes in India provides that “no election shall be called in question except by an election petition presented in accordance with the provisions the Act.”\(^ {58}\) The Act further lays down the grounds for declaring an election to be void:

- on the date of a party’s election, a returned candidate was not qualified, or was disqualified to be chosen to fill the seat under the Constitution or the RPA-II or the *Government of Union Territories Act, 1963*; or

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\(^{55}\) S.117(2), *supra* note 50.
\(^{56}\) 1965 AIR 233: 1965 SCR (1)1104.
\(^{57}\) Act 47 of 1966.
\(^{58}\) S.80, *supra* note 21.
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

any nomination paper has been improperly rejected; or

the result of the election, in so far as it concerns a returned candidate, has been materially affected by:

a. the improper acceptance of nomination, or

b. any corrupt practice committed in the interests of the returned candidate by any agent other than his election agent, or

c. the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or

d. any non-compliance with provisions of the Constitution or of RPA-II or of any rules or orders made there under.\(^{59}\)

It can however be noted that what can amount to being ‘materially affected’ has not been specified in Section 100 of the RPA-II. But according to the Apex Court of India, whether the result of the election can 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.\(^{60}\) 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

\(^{59}\) S.100, ibid.

\(^{60}\) Chanda Singh v. Ch. Shiv Ram Varma & Ors., AIR 1975 SC 403.
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.

Generally, a person can file an individual petition before the Court. Whether a person can challenge a general election as a whole is a significant point to ponder. Under the RPA-II, each election from a Parliamentary or Assembly Constituency is a separate election and has to be challenged separately by means of separate election petition relating to each election. A general election as a whole cannot therefore be called in question by means of one election petition or by writ petition. In *Indrajit Barua and Ors v. Election Commission and Ors*,\(^6\) the general election to the Assam Legislative Assembly was sought to be challenged by means of several writ petitions on the ground that the electoral rolls which formed the basis for that general election were defective. Rejecting the petitions, the Apex Court held:

… what the RPA-II contemplates is election from each constituency and it is that election which is liable to be challenged by filing an election petition. It may be that there is a common ground which may vitiate the elections from all the constituencies but even so it is the election from each constituency which has to be challenged though the ground of challenge may be identical. Even where in form that 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.

\(^6\) AIR 1999 SC 398.
Election petitions can be dismissed on various grounds. Whether a petition can also be dismissed if not filed in the appropriate Bench of the High Court? There are some High Courts in India exclusively for one State and they have their Benches in different parts of the State i.e., Mumbai High Court for the State of Maharashtra having Benches at Mumbai, Aurangabad and Nagpur, the Allahabad High Court for the State of Uttar Pradesh having it Benches at Allahabad and Lucknow, etc. These Benches have jurisdiction over specified areas of the State. In some of these High Courts, the election petition can be filed in the Principal Bench relating to all parts of the State, whereas some others, such petitions have to be filed only before that Bench which has the exclusive jurisdiction over the area from where the election took place. For instance, an election petition was filed before the Lucknow Bench of the Allahabad High Court calling in question an election from Rae Bareli Parliamentary constituency which fell under the territorial jurisdiction of the Principal Bench of the High Court at Allahabad. It was held that the election petition was not properly instituted by filing before the appropriate Bench of the High Court and was dismissed as non-maintainable.\textsuperscript{62} Even the prayer of the petitioner to transfer the petition to the appropriate Bench was not considered maintainable because of the exclusive jurisdiction vested in two Benches of the High Court over specified territories.\textsuperscript{63} Moreover, by the time of dismissal of the petition, the period for filing the election petition relating to that election had expired, thus the election ultimately went unchallenged. Therefore, every petitioner must ascertain and be sure as to where the election petition is to be validly filed lest he suffers tremendously.

\textsuperscript{62} Devendra Nath Gupta v. Returning Officer, AIR 1997 SC 3454.

\textsuperscript{63} See generally, S.80A, supra note 21 which provides that the election petitions should be tried at the seat of the High Court or its concerned Bench. But the High Court has the discretion of trying an election petition wholly or partly, at a place other than the place of the seat of the High Court, if it considers it expedient in the interest or convenience of either the parties or its own.
One more question that haunts the researcher is whether the expanse of Article 329(b) of the Constitution 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 *Poonuswami’s case*, the appellant had filed nomination papers for election to the Madras Legislative Assembly from the Namakkal constituency. The Returning Officer rejected the appellant’s nomination papers on certain grounds. The appellant thereupon moved the High Court under Article 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 Article 329(b). In an 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 Article 329(b) of the Constitution? Upholding the observations of the High Court, the Supreme Court observed that Article 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 Article 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.

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This question again came up for consideration before the Apex Court of India in *Mohinder Singh Gill*\(^{65}\) and *K. Venkatachalam*.\(^{66}\) The Supreme Court in *K. Venkatachalam*’s case specifically made a significant pronouncement in respect of the expanse of the writ jurisdiction of the High Courts in election matters under Article 226. In this case the appellant before the 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, a rival candidate 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 held that appellant was illegally elected. On appeal, the Supreme Court upheld the decision of the High Court and observed that Art.226 of the Constitution is couched in widest possible term and unless there is clear bar to jurisdiction of the High Court, its powers 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 RPA-II for the appropriate relief.

**7.2.3 TRIAL OF ELECTION PETITIONS:**

Any elector or candidate can file an election petition if he or she thinks there has been malpractice during the election. An election petition is not an ordinary civil suit, but treated as a contest in which the whole constituency is involved. Election petitions are tried by the High Court of the State involved, and if upheld can even lead to the restaging of the election in that constituency.\(^{67}\)

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\(^{67}\) “The Function (Electoral System),” [http://eci.nic.in/eci_main1/the_function.aspx](http://eci.nic.in/eci_main1/the_function.aspx), [accessed on 16\(^{th}\) September 2013].
In a civil suit, the trial begins when issues are framed and the case is set down for recording of evidence. All proceedings before that stage are treated as proceedings preliminary to trial for making the case ready for trial. But the Supreme Court has held that this general rule is not applicable to the trial of election petitions, as in the case of election petitions all the proceedings commencing with the presentation of election petition and up to the date of decision therein are included within the meaning of the word ‘trial’. 68

Immediately an election petition has been presented to the appropriate High Court, it shall be referred to the judge assigned by the Chief Justice of the High Court for the trial of the election petitions. 69 If in respect of the same election, more than one election petitions have been filed, all of those petitions shall be referred for trial to the same judge so that only one judge hears all such connected petitions. 70 The underlying object appears to be that in some of the petitions, common questions of fact or law might have been raised and it would not only facilitate the parties and the Court in expeditious disposal of those questions but also avoid any conflicting or contradictory views being taken by different judges of the High Court on the same question of fact or law. 71 But the judge may, in his discretion, try all those petitions separately or in one or more groups as may be deemed appropriate by him. 72

It is legally mandated that before proceeding further with the trial, the petition should be examined by the trial judge whether it complies fully with the provisions of Sections 81, 82, and 117 of the RPA-II in all respects.

69 S.86(2), supra note 21.
70 S.86(3), ibid.
71 Supra note 4 at 1069.
72 Supra note 70.
Besides, the law places an obligation on the trial judge to try the petition expeditiously and to make an endeavour to conclude the trial within six months from the date on which the election petition is presented to the High Court for trial.\textsuperscript{73} To achieve this object, the law further provides that the trial of an election petition shall, so far as is practicable consistently with the interests of justice in respect of the trial be continued from day to day until the conclusion.\textsuperscript{74}

Whether the trial of an election petition is similar to the trial of a civil suit is a significant question worth discussion at this point. In \textit{Kailash}\textsuperscript{75} the Supreme Court held that the trial of an election petition is entirely different from the trial of a civil suit, as in a civil suit trial commences on framing the issues while trial of an election petition encompasses all proceedings commencing from the filing of the election petition up to the date of decision. Therefore, the procedure provided for the trial of civil suits under \textit{Civil Procedure Code} is not applicable in its entirety to the trial of the election petition. For the purpose of the election petition, the word ‘trial’ includes the entire proceedings commencing from the time of filing the election petition till the pronouncement of the judgment. The applicability of the procedure in Election Tribunal is circumscribed by two riders: firstly, the procedure prescribed in \textit{Civil Procedure Code} is applicable only “as nearly as may be”, and secondly, the \textit{Civil Procedure Code} would give way to any provisions of the Act or any rules made thereunder. Therefore, the procedure prescribed in \textit{Civil Procedure Code} applies to election trial with flexibility and only as guidelines.

\textsuperscript{73} S.86(7), \textit{ibid.}
\textsuperscript{74} S.86(6), \textit{ibid.}
\textsuperscript{75} \textit{Kailash v. Nanuku & Ors.}, AIR 2005 SC 2441.
Order VIII, Rule 1 of the Civil Procedure Code provides that the respondent shall within thirty days from the date of service of summons on him, present a written statement of his defence; provided that where he fails to file his written statement within the prescribed period for reasons beyond his control, he shall be allowed to file the same on such other day, as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons. This provision is however directory and not mandatory. The Apex Court has laid down that a prayer seeking time beyond ninety days for filing the written statement ought to be made in writing and the Court may put the respondent on terms including imposition of compensatory costs and may also insist on affidavit, medical certificate or other documentary evidence (depending on facts and circumstances of a given case) being annexed with the application seeking extension so as to convince the Court that the prayer was founded on grounds which do exist.

During the trial of an election petition, whether it is permissible for the Court to permit a party to seek a roving enquiry and whether it can consider any fact which is beyond the pleadings of the parties? Whenever a trial is underway, the Court is generally not allowed to let a party to the proceedings to seek a roving enquiry nor can it consider any fact which is beyond the pleadings of the parties. The parties have to take proper pleadings and establish by adducing evidence that by a particular irregularity/illegality the result of the election has been materially affected. In other words, a party must plead the material fact and adduce evidence to substantiate the same so that the Court may proceed to adjudicate upon that

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76 Ibid.
77 Ibid.
issue. Pleadings and particulars are generally required to enable the Court to decide the rights of the parties in the trial.\textsuperscript{79} Thus, the pleadings are more to help the Court in narrowing the controversy involved and to inform the parties concerned to the question in issue so that the parties may adduce appropriate evidence on the said issue.\textsuperscript{80} Therefore, a decision of a case cannot be based on grounds outside the pleadings of the parties neither is it desirable nor required for the Court to frame an issue not arising on the pleadings.\textsuperscript{81} Before a Court permits the recounting, the following conditions must be satisfied:

- the Court must be satisfied that a \textit{prima facie} case is established;
- the material facts and full particulars have been pleaded stating the irregularities in counting of votes;
- a roving and fishing inquiry should not be directed by way of an order to recount the votes;
- an opportunity should be given to file objection; and
- secrecy of the ballot requires to be guarded.\textsuperscript{82}

At the time of trial, whether the \textit{Indian Evidence Act}, 1872 can be applied for election petition? The provisions of the \textit{Indian Evidence Act}, 1872 also


apply to the trial of an election petition. But the application of this Act is subject to the provisions of the RPA-II. For instance, no witness or other person shall be required to state in the course of his evidence for whom he voted at an election, except in the case of an election to the council of States.

During the trial, the High Court has powers under Order VI, Rule 16 of the Civil Procedure Code which is applicable to the trial of the election petitions under Section 87(1) of RPA-II, to strike out pleadings which in its opinion are;

- unnecessary, scandalous, frivolous or vexatious, or
- may tend to prejudice, embarrass or delay in the fair trial of the petition, or
- are otherwise abuse of the process of law.

If after striking out such unnecessary, scandalous, frivolous or vexatious pleadings, etc., no cause of action survives, the High Court is competent to dismiss the petition under Order VII, Rule 11 of the Civil Procedure Code. The High Court can strike out the pleadings even before the respondent has filed his written statement, or even after the settlement of issues, or after the issuance of summons to witnesses. The Apex Court observed that it would be in the interest of the parties and the public if any preliminary objections in regard to unnecessary pleadings are disposed at the earliest and the petition dismissed if it did not disclose any cause of action.

But, the election petition cannot be dismissed under Order VII, Rule 11 of the Civil Procedure Code if after striking out unnecessary, vexatious

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83 S.87(2), supra note 21.
84 S.94 as amended by the Representation of People (Amendment) Act, 2003.
87 Ibid.
pleadings one cause of action or triable issue survives in the petition.\(^{88}\) A reasonable cause of action is said to mean a cause of action with some chance of success when only the allegations in the pleadings are considered.\(^{89}\)

In the trial of an election petition, documentary evidence plays a significant role as it is a contemporaneous record of the events and facts as and when they took place. The High Courts trying election petitions thus, have power not only to admit documents tendered in evidence by the parties but also power to summon for the documents considered by it to be relevant for the determination of the issues of the petition.\(^{90}\) However, such power has to be exercised after due examination of expediency, justness and relevancy of the records in relation to the trial of the petition.\(^{91}\) The Court will not exercise its discretion of summoning records where it may help the party seeking their discovery and production in making a roving and fishing inquiry.\(^{92}\) The production and inspection of documents \textit{i.e.}, ballot papers, marked copies of electoral rolls, counterfoils of ballot papers containing signatures or thumb impressions of voters, \textit{etc.}, should be allowed very sparingly where it is absolutely necessary in consideration of an issue concerning the material effect on the result of election in so far as the returned candidate is concerned. Any such order for the inspection of documents must be made by the Court in writing and not by an oral direction.\(^{93}\)

\(^{90}\) Ishwar Dutt v. Land Acquisition Collector & Anr., AIR 2005 SC 3165.
\(^{92}\) Ibid.
In regard to oral evidence which is also quite significant during the trial of an election petition, the law provides that all parties to an election petition are free to lead oral evidence of witnesses whose evidence in their opinion will prove or disprove the averment or allegations made in the petition.\textsuperscript{94} The witnesses however, will be subject to the same provisions of examination-in-chief, cross-examination and re-examination as in a civil suit tried under the provisions of the \textit{Civil Procedure Code}, 1908 and in accordance with the provisions of the \textit{Indian Evidence Act}, 1872. The application of the \textit{Civil Procedure Code} and the \textit{Evidence Act} however is subject to the provisions of the RPA-II. The High Court has discretion to refuse to examine any witness or witnesses, after scrutinizing them, if it is of the opinion that the evidence of such witness or witnesses is not material for the decision of the election petition or that the party tendering such witness or witnesses is doing so on frivolous grounds or with a view to delaying the proceedings.\textsuperscript{95}

It is a legal principle that once an election petition has been filed in a Court of law; it has to be determined and reached at its logical conclusion. But the gargantuan questions are as to whether an election petition can be withdrawn while it is at trial stage and whether an election petition can be dismissed upon the death of the petitioner? Generally, an election petition can be withdrawn before the conclusion of the trial but such withdrawal can be made only by leave of the High Court.\textsuperscript{96} The permission of the High Court for the withdrawal a petition is necessary so as to ensure that the withdrawal is bonafide and there is no inducement by any bargain or

\textsuperscript{94} S.96, \textit{supra} note 9.
\textsuperscript{95} S.87(1), \textit{ibid}; \textit{Quamarul Islam v. S. K. Kanta}, AIR 1994 SC 1733.
\textsuperscript{96} S.109(1), \textit{ibid}.
consideration. But where more than one relief has been claimed in an election petition and the prayer for the reliefs other than the main relief that the election of the returned candidate should be declared void is withdrawn during the trial of an election petition, that would not amount to withdrawal of the petition as the main petition still survives for consideration.

Besides, if an election petition has been filed by more than one petitioner, an application for withdrawal of petition can be made only with the consent of all the petitioners and after following the procedure laid down for withdrawal of an election petition.

In regard as to whether an election petition can be dismissed upon the death of the petitioner, the RPA-II candidly provides that if an election petition has been filed by only one petitioner, the petition shall abate on the death of the sole petitioner. It shall also abate where it has been filed by more than one petitioner and the sole survivor of those petitioners also dies. In such event, the fact of the death of the sole petitioner or the sole surviving petitioner shall be published in such manner as the High Court may deem fit. Upon such application, another person can apply for substitution as petitioner in the same manner and during the same period which is prescribed for the substitution of the petitioner, in the case of

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97 S.110(2), *ibid*.
100 For instance, on receipt of an application of withdrawal of an election petition, the High Court has to fix the date for hearing of the application, give notice of such hearing to all other parties to the petition and cause it to be published in the official gazette, *i.e.*, the Gazette of India or State Government Gazette and in newspapers, S.109(2), *ibid*. The publication of the notice of withdrawal is mandatory, *Mohd Abubakkar Siddique v. Mustafa Shahidul Islam*, AIR 2000 SC 731: (2000) 2 SCC 62.
101 S.112(1), *ibid*.
102 *Ibid*.
103 S.112(2), *ibid*. 

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withdrawal of petition. However, the right to apply for substitution as a petitioner accrues on fulfillment of three conditions, namely:

a) that the person applying for substitution is one who might have himself been a petitioner in the first instance;

b) that the application is made within fourteen days of the publication of the notice by the High Court under Section 110(3)(b) or as the case may be, under Section 112(2) of the RPA-II; and

c) the person complies with the conditions, if any, of the High Court as to the deposit of security of costs.

The same process as illustrated above in case of death of a petitioner shall also be applicable in case of death of the respondent before the conclusion of the trial of an election petition.

Yet another question that taunts the researcher is whether the High Court can declare a candidate elected during trial of an election petition despite the fact that two or more candidates at an election secured the same number of votes? In this regard, the RPA-II provides that during the trial of an election petition, if it appears to the High Court that there is equality of votes between two or more candidates at an election and the addition of one vote would entitle any of those candidates to be declared elected, then the High Court shall decide by lot and the candidate on whom the lot falls shall be declared the winner as having received the required additional one vote.

104 S.112(3), ibid.
106 S.116, supra note 21.
107 S.102(b), ibid.
At the conclusion of the trial of an election petition, the High Court may pass any one of the following orders which may take effect as soon as it is pronounced by the Court:

- dismiss the election petition;\(^{108}\) or
- declare the election of all or any of the returned candidates to be void;\(^{109}\) or
- declare the election of all or any of the returned candidates to be void and also declare the petitioner or any other candidate to have been duly elected at the election.\(^{110}\)

Besides, the High Court shall on its discretion also fix the total amount of costs payable and specify the persons by whom such costs are payable and to whom the same shall be paid.\(^{111}\) The Court shall also intimate the substance of its decision to the Election Commission which in turn shall forward copies of the same to the Speaker or Chairman of the House of Parliament or of the State Legislature concerned and also to the Central Government, in the case of an election to either House of Parliament, or to the State Government, in the case of an election to the State Legislature.\(^{112}\)

Along with the substance of its decision, the Court is also required to send an authenticated copy of its judgment and order to the Election Commission which shall cause it to be published in the Gazette of India, if it relates to an election to a House of Parliament, or in the Official Gazette of the State concerned, in the case of an election to the State Legislature.\(^{113}\)

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\(^{108}\) S.98(a), *ibid.*
\(^{109}\) S.98(b), *ibid.*
\(^{110}\) S.98(c), *ibid.*
\(^{111}\) Ss.99 (1) (b) and 119, *ibid.*
\(^{112}\) S.103, *ibid.*
is mainly to give information to the constituency about the outcome of the election petition.

While disposing the petition, it is open for the High Court to issue two documents: one, embodying the reasons for its decision which however cannot operate as *res judicata* in a subsequent election petition\(^{114}\) and the other, the formal expression of its decision. The former will be its judgment and the latter its order. But the Court may also embody both the judgment and its order in the same document.\(^{115}\)

Every order of the High Court disposing off an election petition under Sections 98 and 99 of the RPA-II is appealable within a period of thirty days from the date of the order of the High Court only before the Supreme Court of India as a matter of right.\(^{116}\) Such appeal lies both on questions of law and fact.\(^{117}\) Appeals cannot therefore lie to the Division Bench of the High Court against the order, whether interim or final, of a single judge trying an election petition as the Division Bench has not been prescribed as the appellate authority in the election petitions under the RPA-II.\(^{118}\)

With this information about the contents, procedure and trial of election petitions pertaining to India let us find out what is in store from the point of view of Iraq, an altogether new democracy.

### 7.3 CONTENTS, PROCEDURE AND TRIAL OF ELECTION PETITIONS: IRAQ PERSPECTIVE

Handling of election disputes in Iraq is not only quite complex but riskier at the same time mainly because of the sectarian violence rampant in

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\(^{115}\) Vidyacharan Shulka v. Khubchand Baghel, AIR 1964 SC 1099.

\(^{116}\) S.116A(1) (2), *supra* note 21. No certificate of fitness for appeal to the Supreme Court is required under Art.134A of the Constitution, nor any special leave of the Supreme Court necessary under Art.136 for filing an appeal against the final order of the High Court in an election petition.

\(^{117}\) *Supra* note 4 at 1117.

\(^{118}\) Upadhyaya Hargovind Devshankaran v. Dhirendrasinh Virendrasinhji Solanki, AIR 1988 SC 915.
most parts of the country. Iraq has used a unified model of electoral complaint adjudication with complaints first being presented to the Independent High Electoral Commission (IHEC), a professional, autonomous, independent, and neutral authority which is only subject to the supervision of Council of Representatives.

The IHEC Board of Commissioners has exclusive jurisdiction to resolve disputes arising out of the preparation for and execution of National, Regional and Governorate elections, and may delegate jurisdiction to resolve disputes in the first instance to the electoral administration.\textsuperscript{119} The IHEC has adopted procedures related to electoral complaints. These procedures ensure all complaints are reviewed as quickly as possible. The most important complaints are considered first and decisions taken. Moreover, the complainants are able to find out what decisions have been taken in their matters immediately.\textsuperscript{120}

Any person, except electoral observers, has the right to submit complaints or election disputes to the Board of Commissioners on the electoral process.\textsuperscript{121} Submission of complaints and disputes generally takes the following steps:

- The complaints/dispute are required to be written and signed by the complainant himself or the person who witnessed the event in which the violation occurred.
- If the complainant is a political entity, then its deputy must sign the complaint.

\textsuperscript{119} Part 2(1), the \textit{Independent High Electoral Commission Regulation No.16}, 2010.
\textsuperscript{120} \textit{See}, Part 3, Part 3(1), \textit{ibid}.
\textsuperscript{121} Part 3(1), \textit{ibid}.
Complaints of the polling stage must be submitted within forty two hours starting from the date of the occurrence of the violation.\textsuperscript{122} An election petition contains the following information:

- the name of the complainant, his/her address, and phone number; and
- detailed description of the supposed violation including date, time, place, and environment.\textsuperscript{123}

Upon receipt of the complaint, the Board may call witnesses of the case and then hold meetings which might be general or private according to the Board's point of view.\textsuperscript{124} Besides, the Board may as well ask or receive evidences relating to the complaint.\textsuperscript{125} The Board has a right to refuse a complaint that is not accompanied with proper evidence or if it is lacking information as provided for under Part 3(4) of the IHEC Regulations 16,\textsuperscript{126} or is vexatious.\textsuperscript{127}

The Board of Commissioners decisions are mandated to be published in three daily newspapers, in both Arabic and Kurdish languages, for a minimum of three days.\textsuperscript{128} Any appeal should be submitted within three days starting from the second day of the publication of the final decision.

Complaints may be submitted at any stage of the process to the IHEC, which will investigate and issue a decision in response. Complaints can be submitted to the IHEC National Office and to Governorate Electoral

\begin{itemize}
  \item Part 3(3), \textit{ibid.}
  \item Part 3(4), \textit{ibid.}
  \item Part 4(1), \textit{ibid.}
  \item Part 4(2), \textit{ibid.}
  \item Part 3(4) of the IHEC Regulation No.16 provides that a complaint must be composed of the following information:
    \begin{enumerate}
      \item The name of the complainant, his/her address, and required information to call him/her.
      \item The name and information helps to call the supposed violator, if available.
      \item Detailed description of the supposed violation including date, time, place, and environment;
      \item Any other complaints related to the electoral process are submitted either to the concerned GEO's manager who will refer them confidentially or directly to the National Office.
    \end{enumerate}
  \item Part 6, \textit{supra} note 119.
  \item Part 8, \textit{ibid.}
\end{itemize}
Offices. On polling and counting complaints, voters and political entity agents are allowed to submit complaints to the Polling Station Manager using Complaint Form 110. Complaint Form 110 is available on Election Day at polling centers, governorate electoral offices, governorate counting centers, and the IHEC National Office.

A complaint must be submitted within 48 hours of the start time of polling. The Court of Cassation nominates the Electoral Judicial Panel with the sole jurisdiction to adjudicate appeals on Board of Commissioners final decisions. The panel is required to decide within 10 days, starting from the day that the appeal was referred to them by the Board of Commissioners. All decisions of the Electoral Judicial Panel are final.

At the conclusion of the trial of an election petition, the Board may impose penalties on any person or political entity that violated any rule, regulation, instructions, any Code of Conduct, or any decision which is related to arranging or carrying out elections for e.g.,

- fine;
- cancellation of the certification on the accreditation of a political entity of elections;
- preventing a political entity from participating in the future elections;
- preventing a person from participating as a candidate in the future elections;
- preventing or canceling the accreditation of a team from the observers' team in the future elections;

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129 Ibid.
131 Ibid.
• eliminating the name of the candidate from the candidate's lists of elections, etc.  

Laws governing elections in any country like any other law that governs human relations with the State or other individuals etc., in a civilized society cannot remain static. They need to be subjected to situational modifications so as to remain as purposive piece of legislations. In view of the discussion undertaken earlier in various chapters of this Doctoral Thesis, it is strongly felt that there is an urgent need for the law markers to involve in serious soul searching so as to get into the process of re-looking into the laws that facilitate in conducting free and fair elections not only in the so called matured democracy i.e., India but also in case of an armature democracy, that is, Iraq. Probably, the conclusions arrived at by the researcher in the next segment of this Doctoral Thesis based on which certain suggestions are made would come handy for the law makers and the researchers in their introspection in which they might involve in, before modifying or suggesting to modify the existing electoral laws in both the above mentioned countries.

132 Part 7, supra note 119.