Compendium of Election Laws, Practices and Cases of Selected Commonwealth Countries

Volume 2, Part 1



Commonwealth Secretariat

Compendium of Election Laws, Practices and Cases of Selected Commonwealth Countries

Volume 2, Part 1

Prepared and presented by Carl W Dundas

Commonwealth Secretariat

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The views expressed in this compendium do not necessarily reflect the opinion or policy of the Commonwealth Secretariat.

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OTHER WORKS BY THE AUTHOR

Practical Steps in Negotiating Maritime Boundary Agreements: Guide to Small States, Commonwealth Secretariat (1991)

Organising Free and Fair Elections at Cost-Effective Levels, Commonwealth Secretariat (1993)

Dimensions of Free and Fair Elections: Frameworks, Integrity, Transparency, Attributes and Monitoring, Commonwealth Secretariat (1993)

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PREFACE

Volume Two of the Compendium of Election Laws, Practices and Case Studies in Selected Commonwealth Countries deals with election cases which are arranged according to themes. This style of presentation is aimed at making election cases user-friendly. Interventions in the electoral process by the judiciary are not expected to be disrupted of that process, but have the potential to contribute significantly to the enhancement of the management of elections.

Nine specific themes, namely, election management bodies, electoral boundaries, registration of voters, nominations, voting – the right to vote, manner of voting and bogus voting, election irregularities, election expenses and the media, and a miscellaneous theme, are covered. It is believed that this modest work will lead to more of this type of exercise being undertaken.

The cases presented in this volume were taken from the certified copies of original judgements. The headnotes of most of them were designed specifically to bring out the essentials of each case. The background facts, the core of the judgement and the case cited, have been highlighted for the purposes of easy references, while each judgement is presented in its completed form.

An attempt has been made to highlight four specific themes, namely, election management bodies, the right to vote, the role of media and election irregularities. Like volume 1, this volume is presented in two parts. Parts 1 and 2 deal with five themes each.

INTRODUCTION

The judiciary in many jurisdictions has been clothed with a prominent role in the promotion of free and fair election. The fear of a disruptive and intervening court upsetting the electoral process in an untimely manner is gradually giving way to a more positive approach to a constructive role for the court. Election cases do not always attract the attention of law reporters, particularly in small countries. Thus, many important contributions by the courts to the development of election law and management are not widely appreciated. In each of the following themes, cases collected from many jurisdictions illustrate significant judicial decisions and utterances on vital issues. The overall strategy employed in this compilation is to demonstrate the contribution of the courts to the proper organisation and conduct of free and fair multi-party elections.

Theme 1 – Election Management Bodies

The cases selected for this theme seek to encompass a range of issues. This theme presents one of the great pillars of free and fair elections. These cases provided the courts with the opportunity to pronounce on some issues central to good practice in election management. These include the appointment, integrity and behaviour of individual members of the election management body; the status, role and standing of the election management body; and the impartiality, independence and fairness of the election management body. At this point of time, unfortunately, it cannot be said that the concept of an election body being independent of the ruling party or government of the day has gained widespread acceptance. However, there is a growing trend towards establishing election management bodies that are set up as constitutional entities free of the control of government or any other outside authority. Some of the cases included herein attracted the views of the courts on the question of independence of the election management body in the respective concerned jurisdictions.

In such jurisdictions where the election management body is charged with the task of the superintendence, organisation and control of election organisation and conduct, the question has always arisen as to the extent and scope of the competence of such a body. This area has proven to be a fertile one for the ruling of the courts. Some of the cases included in this volume illustrate the treatment by the courts of this issue.

Theme 2 – Electoral Boundaries

This theme does not attract a great many cases. One reason for this is due to the fact that, in many jurisdictions, the question of demarcation of electoral boundaries is a non-justiciable issue. However, it is widely acceptable that the requirement of fair demarcation of electoral boundaries is a basic element in the quest for free and fair elections. The limitation on the competence of the courts to intervene in boundaries in many jurisdictions has created the general impression that this area is more of a political than a legal one, but this is clearly not so. There is no inherent or fundamental reason whey the demarcation of electoral boundaries or the formula on which the boundaries are constituted, should not be subject to the scrutiny of the courts or to a fair and impartial treatment like all other processes of the electoral system. Good practices should prevail throughout the system.

It is also the case that in many jurisdictions, the issue of electoral boundaries is closely tied up with constitutional law where the court is given competence. This makes boundary issues expensive and dilatory to deal with.

Notwithstanding the foregoing observations, there is a faint trend, discernible in some regions of the Commonwealth, to clothe the 'general election management body' with the task of demarcating electoral boundaries. This development is a sound one since it removes, or at least has the potential to remove, the political influence from electoral boundary demarcation. Gerrymandering of electoral boundaries should not be encouraged whether by removing the competence of the court to deal with the matter or, by conferring the right to demarcate such boundaries on a body other than the body responsible for election management and conduct.

The issue of whether each electoral district of similar nature and status should contain more or less an equal number of voters has come up from time to time; the lone case included under this theme deals at length with this matter.

Theme 3 – Registration of Voters

The regime for voter registration may be broadly divided into two categories, namely, compulsory and voluntary systems. The courts will take each category as they find it in the legislative scheme. Similarly, in a first-past-the-post system of elections, voter registration is usually governed by tight rules of residence which are upheld by the courts. Thus, in order to register, a prospective voter must meet the residential requirements that are in place. One issue which the courts are frequently called upon to decide is the question of whether or not a person is a national of the country concerned. The cases included in this compilation display a rich collection of issues arising in the consideration and decision on this question.

Matters such as the completeness of the voters' register and the level of tolerance of discrepancies are not readily justiciable in a voluntary registration system. Similarly, the use or otherwise of up-to-date technology for the purposes of voter registration will not be enquired into by the courts. However, the use of computerised technology may raise questions as to the consideration of the nature of the evidence that can be adduced in court. In general terms, the role of the courts is somewhat limited in helping to mould the quality and efficacy of voter registration, but the future is likely to see an increased role in preventing arbitrarily actions by election management bodies in this area.

Theme 4 – Nomination of Candidates

The nomination of candidates offers a rich ground for intervention by the courts; and this notwithstanding the fact that in many jurisdictions an aggrieved prospective candidate can only move the courts by way of an election petition after the elections in question are held. Amongst the issues that are frequently bought before the courts are the nationality of a prospective candidates, the status of the individual, that is, whether he/she holds an office of profit of the state or is a public servant, whether he/she was forcible prevented from handing in the nomination papers within the stipulated time and whether the nomination papers were rejected on grounds of mere technicality. The role of the courts is likely to increase and become more dynamic in many Commonwealth countries.

Theme 5 – Voting

The theme of voting is a multi-dimensional one. It covers fields such as the right to vote, the manner of voting, validity of a voter and bogus voting. All these issues have been treated by the courts, in the case included herein. This is an area which has the potential for a dynamic approach by the courts through bold interpretation. Perhaps, a greater effort should be made to protect the right of an individual in a manner not dissimilar to that of human rights. No vote should be lightly ruled to be invalid when the voter's intention is clear, even though the technical voting rule may not be strictly followed.

Theme 6 – Election Irregularities

The courts are the best placed entity to assist the quest for election purity. Perhaps the greatest threat to an healthy election process is corruption, particularly the incidence of bribery. The cases selected for this theme provide a range of issues in respect of which the courts showed their distaste for corruption in elections, while frowning on those who mischievously falsely raise charges against the innocent.

But election irregularities are not always of the most serious types. For these categories, some argue that conflict resolution means might be more suitable to provide solutions than the courts, particularly where the incidents giving rise to the irregularities are rooted more in politics than individual statutory breaches.

Theme 7 – Political Parties

Political parties often trigger issues which require adjudication by the courts. Such issues include, registration, de-registration, recognition and de-recognition as a national party, succession of a party by another, the appointment or election of a new leadership for a party, the allocation of party symbol to contest an election, as well as party campaign expenses. The selection of cases within is aimed at highlighting the courts' treatment of some of these issues. Many jurisdictions deal inadequately with these issues in their legislative scheme and so the courts' role is vital in the development of the law in this area.

Political parties (though not ruling parties) frequently complain about the lack of fair access to the publicly-owned media and this has led to intervention by the courts. Recent trends suggest that the courts are being called upon to determine the standard of impartiality and fairness that the media should apply to political parties. However, in the absence of specific legislation with sanctions, the court may find it difficult to formulate general standards in this area.

Theme 8 – Election Expenses

The influence of 'money power' on the electoral process has provoked a varied response by election commentators. The limits, if any, to be placed on the expenditure of political parties and candidates have been equally controversial. However, many jurisdictions find it necessary to impose sharp limits on expenditure of parties and candidates. The issues encountered under this term are many, for example, should the state fund the election campaigns of parties and candidates? Should foreign individuals or companies contribute to election campaign? Should all contributions to an election campaign be recorded and made public? What sanctions should be imposed for breach of the spending limits laid down? Should the legislative scheme provide for strict accounting procedure? Should the election management body be clothed with the authority to ensure that proper accounting is done by each candidate and/or political party?

Sometimes the amount and the treatment of the deposit paid to contest an election is challenged by unsuccessful candidates. The cases selected for this theme illustrate the treatment of some of these issues by the courts.

Theme 9 – The Media

As the role of the media in elections generally increases through the growing international trend of political broadcasts and debates by opposing candidates, the impartiality of media houses comes under even closer scrutiny. In some jurisdictions the parties, particularly the smaller parties and independent candidates, look to the courts to uphold the delicate balance between the parties. There is considerable scope here for the courts to enunciate some acceptable norms where the legislature or the parties, or both, have been unable to do so. Good practice should be able to take root at the level of the publicly-owned media, both with respect to free time (if any) that is made available, as well as time available for purchase. Since the media has the potential to impact on or largely influence the quality of the playing field for electioneering, considerable attention has been devoted to this theme.

Theme 10 – Miscellaneous

The miscellaneous theme seeks to deal with issues of a recurring nature which do not readily fall within the other themes. For example, the status of public servants in the political process.

THEME 1

ELECTION MANAGEMENT BODIES

JUDGEMENT OF

THE SUPREME COURT OF INDIA

AT

NEW DELHI

Dated the 14th day of July 1995

WRIT PETITION (CIVIL) NO. 805/1993
AND CONNECTED PETITIONS

ELECTION COMMISSION OF INDIA
Nirvachan Sadan, Ashoka Road
New Delhi – 110 001

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 805 OF 1993

T. N. Seshan,
Chief Election Commissioner of India — PETITIONER

V

Union of India & Others — RESPONDENTS

WITH

WRIT PETITION (CIVIL) NO. 791 OF 1993

Cho S. Ramaswamy — PETITIONER

V

Union of India & Others — RESPONDENTS

V

WITH

WRIT PETITION (CIVIL) NO. 825 OF 1993

B. K. Rai & Another — PETITIONERS

V

Union of India & Others — RESPONDENTS

WITH

WRIT PETITION NO. 268 OF 1994

Common Cause
A Registered Society — PETITIONER

V

Union of India & Others — RESPONDENTS

Elections *– Size of Election Commission – Independence of Commission – Business of Election Commission – President's power to increase size of Election Commission – Position and status of Members of Election Commission – Malafides in expansion of Election Commission – Chief Election Commissioner's behaviour – Legislative competence – Status of officers whose conditions of service are akin to those of Judges of The Supreme Court – Articles 123 & 324 of the Constitution of India.*

Background Facts: *The President of India, in exercise of powers conferred upon him by clause 1 of Article 123 of the Constitution of India, promulgated an Ordnance (No 32 of 1993) entitled "The Chief Election Commissioner and other Election Commissioners (Conditions of Service) Amendment Ordinance, 1993" (referred to as "the Ordinance") to amend the Chief Election Commissioner and other Commissioners (Conditions of Service) Act, 1991" (referred to as "the Act").*

The Act laid down the conditions of service of the Chief Election Commission (referred to as "the CEC") and Election Commissioners (referred to as "the ECs") appointed and Article 324 of the Constitution.

The Ordinance contained new provisions which regulate the procedures of Elections Commissions in their transaction of business, including the voting procedures.

On the date of the publication of the Ordinance, 1st October, 1993, the President fixed, pursuant to clause 2 of Article 324 of the Constitution of India, the number of Election Commissioners (other than the CEC) at two. By a notification on the same date, the President appointed Mr. S. Gill and Mr. G.V.G. Krishnamurthy as Election Commissioners with effect from 1st, October, 1993.

The CEC and others brought an action challenging the legality of the Ordinance and the appointment of the two Election Commissioners.

Held: *That the Ordinance and the notifications issued thereunder were lawful and valid. The Election Commission would be expanded to include the Chief Election Commissioner and two Election Commissioners.*

Before:

Ahmadi, C J I, J. S. Verma, J, N. P. Singh J, S. P. Bharucha J, M. K. Mukherjei J.

Cases Cited in Judgement:

S.S. Dhanoa v *Union of India & Others [1991] 3 SCC 567*
M.S. Gill v *Chief Election Commissioner (1978) 2 SCR 292*

JUDGEMENT

Ahmadi, C J I: The President of India, in exercise of powers conferred upon him by clause (1) of Article 123 of the Constitution of India, promulgated an Ordinance (No. 32 of 1993) entitled "The Chief Election Commissioner and other Election Commissioners (Conditions of Service) Amendment Ordinance, 1993" (hereinafter called "The Ordinance") to amend "The Chief Election Commissioner and other Commissioners (Conditions of Service) Act, 1991" (hereinafter called "The Act"). This Ordinance was published in the Gazette of India on October 1, 1993. Before we notice the amendments made in the 1991 Act by the said Ordinance it may be appropriate to notice the provisions of the 1991 Act. As the long title of the Act suggests it lays down the conditions of service of the Chief Election Commissioner (hereinafter called "The CEC") and Election Commissioners (hereinafter called "The ECs") appointed under Article 324 of the Constitution of India. Section 3(1) provides that the CEC shall be paid a salary which is equal to the salary of judge of the Supreme Court of India. Section 3(2) says that an EC shall be paid a salary which is equal to the salary of a judge of the High Court. Section 4 lays down the term of office of the CEC and ECs to be six years from the date on which the incumbent assumes charge of his office, provided that the incumbent shall vacate his office on his attaining, in the case of the CEC, the age of 65 years and the EC the age of 62 years, notwithstanding the fact that the term of office is for a period of six years. Section 8 extends the benefit of travelling allowance, rent-free residence, exemption from payment of income tax on the value of such rent-free residence, conveyance facility, sumptuary allowance, medical facilities, etc., as applicable to a judge of the Supreme Court or a Judge of the High Court of the CEC and the EC, respectively. By the Ordinance the title of the Act was sought to be amended by substituting the words "and to provide for the procedure for transaction of business by the Election Commission and for Matters" for the words "and for Matters". By the substitution of these words the long title to the Act got further elongated as an Act to determine the conditions of service of the CEC and other ECs and to provide for the procedure for transaction of business by the Election Commission and for matters connected therewith or incidental thereto. In section 1 of the Principal Act, for the words and brackets "the Chief Election Commissioner and other Election Commissioners (Conditions of Service)" the words and brackets "the Election Commission (Conditions of Service of Election Commissioners and Transaction of Business)" came to be substituted with the result that the amended provision read as the Election Commission (Conditions of Service of Election Commissioners and Transaction of Business) Act, 1991. The definition clause in section 2 also underwent a change, in that, the extant clause (b) came to be renumbered as clause (c) and a new clause (b) came to be substituted, by which the expression "Election Commission" came to be defined as Election Commission referred to in Article 324 of the Constitution of India. Consequent changes were also made elsewhere. In sub-section (1) of section 3, after the words "Chief Election Commissioner", the words "and other Election Commissioners" came to be inserted, with the result that they came to be placed on par with regard to salary payable to them and sub-section (2) came to be omitted. In section 4 the first proviso came to be substituted as below:

"Provided that where the Chief Election Commissioner or an Election Commissioner attains the age of 65 years before the expiry of the said term of six years, he shall vacate his office on the date on which he attains the said age."

Thus, the age of superannuation of both the CEC and the ECs was fixed at 65 years. If they attain the age of 65 years before completing their tenure of six years they would, in view of the proviso, have to vacate office on attaining the age of 65 years. In Section 6, sub-section (2), after the words "Chief Election Commission", the words "or an Election Commissioner" came to be inserted and for the words "sub-section (4)" the words "sub-section (3)" came to be substituted. It further provided for the deletion of sub-section (3) and the re-numbering of sub-section (4) as the words "or as the case may be, 62 years" shall be omitted. After section 8 in the Principal Act, by the Ordinance, a new Chapter came to be inserted comprising two provisions, namely, Sections 9 and 10. The new Chapter so inserted is relevant for our purpose and may be reproduced at this stage:

CHAPTER III

TRANSACTION OF BUSINESS OF ELECTION COMMISSION

9. The business of the Election Commission shall be transacted in accordance with the provisions of this Act.

10. (1) The Election Commission may, by unanimous decision, regulate the procedure for the transaction of business and also allocation of the business amongst the Chief Election Commissioner and other Election Commissioners.

(2) Save as provided in sub-section (1) all business of the Election Commission shall, as far as possible, be transacted unanimously.

(3) Subject to the provisions of sub-section (2), if the Chief Election Commissioner and other Election Commissioners differ in opinion on any matter, such matter shall be decided according to the opinion of the majority.

On the day of publication of the Ordinance, 1st October, 1993, the President of India, in exercise of powers conferred by clause 2 of Article 324 of the Constitution of India, fixed, until further orders, the number of Election Commissioners (other than the CEC) at two. By a further notification of even date, the President was pleased to appoint Mr. M. S. Gill and Mr. G.V.G. Krishnamurthy as Election Commissioners with effect from 1st October, 1993.

The first salvo was fired by Cho. S. Ramaswamy a journalist, on 13th October, 1993. By a Writ Petition (Civil) No. 791 of 1993, he prayed for a declaration that the ordinance was arbitrary, unconstitutional and void and for issuance of a writ of certiorari to quash the notifications fixing the number of Election Commissioners at two, and the appointments of Mr. M.S. Gill and Mr. G.V.G. Krishnamurthy made thereunder. This was followed by Writ Petition No. 805 of 1993 by the incumbent CEC himself, claiming similar reliefs on 26th October, 1993. Two other writ petitions were also filed, questioning the validity of the Ordinance and the notifications referred to earlier. Three of these writ petitions came up for preliminary hearing on 15th November, 1993. While admitting the writ petitions and directing rule to issue in all of them, in the writ petition filed by the CEC, notice on the application for interim stay, as well as for the production of documents, was ordered to be issued and an ad interim order to the following effect was passed:

> "Until further orders, to ensure smooth and effective working of the Commission and also to avoid confusion both in the administration as well as in the electoral process, we direct that the Chief Election Commissioner shall remain in complete overall control of the Commission's work. He may ascertain the views of other Commissioners or such of them as he chooses, on the issues that may come up before the Commission from time to time. However, he will not be bound by their views. It is also made clear that the Chief Election Commissioner alone will be entitled to issue instructions to the Commission's staff as well as to the outside agencies and that no other Commissioner will issue such instructions."

By a subsequent order dated 15th December, 1993, after hearing the learned Attorney-General for the Union of India and the learned Advocates General for the states of Maharashtra and West Bengal, the court directed that all the state governments who want to be heard will be heard through their counsel and further directed that the interim order shall continue till further orders. Lastly, it observed that since the questions involved related to the interpretation of article 324 in particular, the matters should be placed before a Constitution Bench.

During the pendency of the aforesaid Writ Petitions, the ordinance became an Act (Act No. 4 of 1994) on 4th January, 1994 without any change.

Before we proceed further it would be proper to notice article 324 of the Constitution. It reads as below:

> "324 Superintendence, direction and control of elections to be vested in an election commission (1) The superintendence, direction and control of the preparation of the electoral rolls for and the conduct of all elections to parliament and to the legislature of every state and of elections to the offices of President and Vice-President held under this constitution shall be vested in a Commission (referred to in this constitution as the Election Commission).

(2) The Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the president may from time to time fix and the appointment of the Chief Election Commissioner and other Election Commissioners shall, subject to the provisions of any law made in that behalf by parliament, be made by the President.

(3) When any other Election Commissioner is so appointed the Chief Election Commissioner shall act as the chairman of the Election Commission.

(4) Before each General Election to the House of the People and to the Legislative Assembly of each State, and before the first General Election and thereafter before each biennial election to the Legislative Council of each State having such Council, the president may also appoint after consultation with the Election Commission such Regional Commissioners as he may consider necessary to assist the Election Commission in the performance of the functions conferred on the Commission by clause (1).

(5) Subject to the provisions of any law made by Parliament, the conditions of service and the tenure of office of the Election Commissioners and the Regional Commissioners shall be such as the President may, by rule, determine:

> Provided that the Chief Elections Commissioner shall not be removed from his office except in like manner and on the like grounds as judge of the Supreme Court and the conditions of service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment:
>
> Provided further that any other Election Commissioner or Regional Commissioner shall not be removed from office except on the recommendation of the Chief Election Commissioner.

(6) The president, or the Governor of a State, shall, when so requested by the Election Commission, make available to the Election Commission or to a Regional Commissioner such staff as may be necessary for the discharge of the functions conferred on the Election Commission by clause (1)."

The abridged factual matrix on which the constitutional validity of the Ordinance (now Act) and the consequential orders and appointments of the ECs have been questioned in the above petitions may be broadly indicated at this stage as follows:

The present CEC claims that after his appointment on 12th December, 1990 he insisted on strict compliance with the model code of conduct by all political parties and candidates for election and

took stern action against factions thereof regardless of the political party or candidate involved. The ruling party at the centre was irked as a few of the by-elections of the ruling party leaders/cabinet ministers were put off because of the Government's failure to deploy sufficient staff and police forces for the elections, and the ruling party lost the elections in Tripura on account of the strict action taken by the CEC against erring officials and the consequent postponement of elections. The ruling party made attempts to influence the CEC but could not do so as he did not allow the emissaries of the party to meet him. The CEC also filed a writ petition in the Supreme Court for enforcing the constitutional right of the Election Commission to staff and police forces. The CEC declined to postpone elections to four State Assemblies despite requests from the ruling party. The ruling party, including the Prime Minister, became irritated by such an unbending attitude on the part of the CEC. The ruling party, therefore, with a view to freezing the powers of the CEC and to preventing him from taking any action against violations of the code of conduct, chose to amend the law and misused the power of the President under Article 324 (2) of the Constitution by issuing the notification dated 1st October, 1993, fixing the number of ECs at two and simultaneously appointing Mr. M. S. Gill and Mr. G. V. G. Krishnamurthy as the other two ECs.

The CEC not only imputes malafides to the issuance of the aforesaid notifications and appointments but also alleges that the intention behind issuing the ordinance was to sideline the CEC and to erode his authority so that the ruling party at the centre could extract favourable orders by using the services of the newly-appointed ECs.

Sections 9 and 10 of the Ordinance (now Act) are challenged as ultravires of the Constitution on the plea that they are inconsistent with the scheme underlying Article 324 of the Constitution, in that, the said Article 324 did not give any power to the parliament to frame rules for transaction of business by the Election Commission. Section 10 is also challenged on the grounds that it is arbitrary and unworkable. Similarly, the notification fixing the number of other ECs at two is challenged as arbitrary and in violation of Article 14 of the Constitution.

The writ petitions are resisted by the respondents, viz. the Union of India and the two other ECs, Mr. M.S. Gill and Mr. G. V. G. Krishnamurthy, as wholly misconceived. It is contended, on behalf of the Union Government, that various advisory bodies had, from time to time, called for a multi-member Election Commission. It denies the allegation that the decision to convert the Election Commission into a multi-member body had any connection with the alleged discomfiture of the ruling party at the centre on account of the staff attitude of the CEC. It is further stated that the multi-member body would not have been able to function without a supporting statute providing for dealing with different situations likely to arise in the course of transaction of business. The ordinance was framed keeping in view the observations made in this regard by this court in the case of *S.S. Dhanoa* v *U.O.I & Others* (1991) 3 SCC 567. It is strongly denied that the changes in the law were made malafide with a view to forcing the CEC into submission or to eroding his authority by providing that, in the event of a difference of opinion, the majority view would prevail. It is contended that the plain language of Article 324 (2) envisages a multi-

member Commission and, therefore, any exercise undertaken to achieve that objective would be consistent with the scheme of the said constitutional provision and could, therefore, never be branded as malafide or ultravires of the Constitution. A provision to the effect that, in the event of a difference of opinion between the three members of the Election Commission, the majority view should prevail, is consistent with democratic principles and can never be described as arbitrary or ultravires Article 14 of the Constitution. The Union of India, has, therefore, contended that the writ petitions are wholly misconceived and deserve to be dismissed with costs.

The preamble to our Constitution proclaims that we are a Democratic Republic. Democracy being the basic feature of our constitutional set-up, there can be no two opinions that free and fair elections to our legislative bodies alone would guarantee the growth of a healthy democracy in the country. In order to ensure the purity of the election process, it was thought by our Constitution-makers that the responsibility to hold free and fair elections in the country should be entrusted to an independent body which would be insulated from political and/or executive interference. It is inherent in a democratic set-up that the agency legislatures should be fully insulated so that it can function as an independent agency, free from external pressures from the party in power or executive of the day. This objective is achieved by the setting up of an Election Commission, a permanent body, under Article 324 (1) of the Constitution. The superintendence, direction and control of the entire election process in the country has been vested under the said clause in a commission called the Election Commission. Clause (2) of the said Article then provides for the constitution of the Election Commission by providing that it shall consist of the CEC and such number of ECs, if any, as the President may from time to time fix. It is thus obvious from the plain language of this clause that the Election Commission is composed of the CEC and, when they have been appointed, the ECs. The office of the CEC is envisaged to be a permanent fixture but that cannot be said of the ECs, as is made manifest from the use of the words "if any". Dr. Ambedkar, while explaining the purport of this clause during the debate in the Constituent Assembly, said:

> "Sub-clause (2) says that there shall be a Chief Election Commissioner and such other Election Commissioner as the President may, from time to time, appoint. There were two alternatives before the drafting committee, namely, either to have a permanent body consisting of four or five members of the Election Commission who would continue in office throughout without any break, or to permit the President to have an ad hoc body appointed at the time when there is an election on the anvil.
>
> The Committee has steered a middle course. What the Drafting Committee proposes by sub-clause (2) is to have, permanently in office, one man called the Chief Election Commissioner, so that the skeleton machinery would always be available."

It is crystal clear from the plain language of the said clause (2) that our Constitution-makers realised the need to set up an independent body or commission which would be permanently in session with at least one officer, namely, the CEC, and leave it to the president to further add to the commission such number of ECs as he may consider appropriate, from time to time. Clause (3) of the said article makes it clear that when the Election Commission is a multi-member body, the CEC shall act as its chairman. What will be his role as a Chairman has not been specifically spelt out by the said article and we will deal with this question hereafter. Clause (4) of the said article further provides for the appointment of RCs to assist the Election Commission in the performance of its functions set out in clause (1). This, in brief, is the scheme of article 324 in so far as the constitution of the Election Commission is concerned.

We may now briefly examine the position of each functionary of the Election Commission. In the first place, clause (2) states that the appointment of the CEC and other ECs shall, subject to any law made on their behalf by Parliament, be made by the President. Thus, the President shall be the appointing authority. Clause (5) provides that, subject to any law made by Parliament, the conditions of service and the tenure of office of the ECs and the RCs shall be such as may be determined by rule made by the President. Of course, the RCs do not form part of the Election Commission but are appointed merely to help the Commission, that is to say, the CEC and the ECs, if any. As we have pointed out earlier, the tenure, salaries, allowances and other perquisites of the CEC and ECs were fixed under the Act as being equivalent to those of a judge of the Supreme Court and the High Court, respectively. These have undergone a change after the Ordinance which so amended the Act as to place them on par. However, the proviso to clause (4) of Article 324 says: (i) the CEC shall not be removed from his office except in like manner and on the like grounds as a judge of the Supreme Court, and (ii) the conditions of service of the CEC shall not be varied to his disadvantage after his appointment. These two limitations on the power of Parliament are intended to protect the independence of the CEC from political and/or executive interference. In the case of ECs, as well as RCs, the second proviso to clause (5) provides that they shall not be removed from office except on the recommendation of the CEC. It may also be noted that while, under clause (4), before the appointment of the RCs, consultation with the Election Commission (not CEC) is necessary, there is no such requirement in the case of appointments of ECs. The provision that the ECs and the RCs, once appointed, cannot be removed from office before the expiry of their tenure, except on the recommendation of the CEC by the first proviso to clause (5), means that the ECs and the RCs have been assured of independence of functioning by the provision that they cannot be removed, except on the recommendation of the CEC. Of course, the recommendation for removal must be based on intelligible and cogent considerations related to the efficient functioning of the Election Commission. That is so because this privilege has been conferred on the CEC to ensure that the ECs, as well as the RCs, are not at the mercy of the political or executive bosses of the day. It is necessary to realise that this check on the executive's power to remove is built into the second proviso to cause (5) to safeguard the independence, not only of these functionaries, but of the Election Commission as a body. If, therefore, the power were to be exercisable by the CEC as per his whim and caprice, the CEC himself would become an instrument of oppression and would

destroy the independence of the ECs and the RCs if they were required to function under the threat of the CEC recommending their removal. It is, therefore, needless to emphasise that the CEC must exercise this power only when there exist valid reasons which are conducive to the efficient functioning of the Election Commission. This, briefly stated, indicates the status of the various functionaries constituting the Election Commission.

The concept of plurality is writ large on the face of Article 324, clause (2), which clearly envisages a multi-member Election Commission comprising the CEC and one or more ECs. Visualising such a situation, clause (3) provides that, in the case of a multi-member body, the CEC will be its Chairman. If a multi-member Election Commission was not contemplated, where was the need to provide in clause (3) for the CEC to act as its Chairman? There is, therefore, no room for doubt that the Election Commission could be a multi-member body. If Article 324 does contemplate a multi-member body, the impugned notifications providing for the other two ECs cannot be faulted solely on those grounds. We may here quote, with approval, the observations of a two-judge bench of this court in *S.S.Dhanoa* v *Union of India and Others (1991)*3 SCC 567, vide paragraph 26:

> "There is no doubt that two heads are better than one, and particularly when an institution like the Election Commission is entrusted with vital functions, and is armed with exclusive uncontrolled powers to execute them, it is both necessary and desirable that the powers are not exercised by one individual, however all-wise he may be. It ill conforms to the tenets of the democratic rule. It is true that the independence of an institution depends upon the persons who man it and not on their number. A single individual may sometimes prove capable of withstanding all the pulls and pressures, which many may not. However, when vast powers are exercised by an institution which is accountable to none, it is politic to entrust its affairs to more hands than one. It helps to assure judiciousness and want of arbitrariness. The fact, however, remains that where more individuals than one, man an institution, their roles have to be clearly defined, if the functioning of the institution is not to come to nought."

It must be realised that these observations were made notwithstanding the fact that the learned judges were alive to and aware of the circumstances in which the President was required, in that case, to rescind the notifications creating two posts of ECs, and appointing the petitioner Dhanoa and another to them.

There can be no dispute and indeed there never was, that the Election Commission must be an independent body. It is also clear from the Scheme of Article 324 that the said body shall have the CEC as a permanent incumbent and, under clause (2), such number of other ECs, if any, as the President may deem it appropriate to appoint. The scheme of article 324, therefore, is that there shall be a permanent body to be called the Election Commission, with a permanent incumbent to be called the CEC. The Election Commission can therefore be a single member

body or a multi-member body if the President considers it necessary to appoint one or more ECs. Up to this point there is no difficulty. The argument that a multi-member Election Commission would be unworkable and should not, therefore, be appointed must be stated to be rejected. Our Constitution-makers have provided for a multi-member body. They saw the need to provide for such a body. If the submission is accepted that a multi-member body would be unworkable, it would be tantamount to destroying or nullifying clauses (2) and (3) of Article 324 of the Constitution. Strong reliance was, however, placed on Dhanoa's case to buttress the argument. The facts of that case were just the reverse of the facts of the present case. In that case, the President, by a notification issued in pursuance of clause (2) of Article 324, fixed the number of ECs, besides the CEC, at two, and a few days thereafter by a separate notification issued under clause (5) of Article 324, the President made rules to regulate their tenure and conditions of service. After watching the functioning of the multi-member body for some months, the President issued two notifications rescinding, with immediate effect, the notification by which the two posts of ECs were created and the notification by which the petitioner and one other were appointed thereto. The petitioner, S.S. Dhanoa, challenged the notifications rescinding the earlier notifications, first on the ground that, once appointed, an EC continues in office for the full term determined by rules made under clause (5) of article 324 and, in any event, the petitioner could not be removed except on the recommendation of the CEC. At the same time, it was also contended that the notifications were issued malafide under the advice of the CEC to get rid of the petitioner and his colleague because the CEC was, from the very beginning, ill-disposed or opposed to the creation of the posts of ECs. According to the petitioner, there were differences of opinion between the CEC on the one hand and the ECs on the other and, since the CEC desired that he should have the sole power to decide, he did not like the association of the ECs.

The principal question which the division bench of this court was called upon to decide was whether the President was justified in rescinding the earlier notifications creating two posts of ECs and the subsequent appointment of the petitioner and his colleague as ECs. The court found as a fact that there was no imminent need to create two posts of ECs and fill them by appointing the petitioner and his colleague. The additional work likely to be generated on account of the lowering of the voting age from 21 years to 18 years could have been handled by increasing the staff, rather than by appointing two ECs. So the Court took the view that from the inception, the Government had committed an error in creating two posts of ECs and filling them. We do not, at present, wish to comment on the question as to whether this aspect of the matter was justiciable. It was further found as fact that the attitude of the petitioner and that of his colleague was not co-operative, and had it not been for the sagacity and restraint shown by the CEC, the work of the Commission would have come to a standstill and the Commission would have been rendered inactive. It is for this reason that the Court observed that no-one need shed tears on the posts being abolished (vide paragraphs 20, 23, 24 and 25 of the judgment). The court, therefore, upheld the Presidential notifications rescinding the creation of the two posts of ECs and the appointment of the petitioner and his colleague thereon. Notwithstanding this bitter experience, the division bench made the observations in paragraph 26 extracted above with which we are in respectful agreement. We cannot overlook the fact the when the Constitution-makers provided

for a multi-member Election Commission, they were not oblivious of the fact that there may not be agreement on all points, but they must have expected such high-ranking functionaries to resolve their differences in a dignified manner. It is the constitutional duty of all those who are required to carry out certain constitutional functions to ensure the smooth functioning of the machinery without a clash of egos. This should have put an end to the matter, but the division bench proceeded to make certain observations touching on the status of the CEC vis-a-vis the ECs; the procedure to be followed by a multi-member body in decision-making in the absence of rules in that behalf etc., on which considerable reliance was placed by counsel for the petitioners.

We have already highlighted the salient features regarding the composition of the Election Commission. We have pointed out the provisions regarding the tenure, conditions of service, salary, allowances, removability, etc., of the CEC, the ECs and the RCs. The CEC and the ECs alone constitute the Election Commission, whereas the RCs are appointed merely to assist the Commission. The appointment of the RCs can be made after consulting the Election Commission since they are supposed to assist that body in the performance of the functions assigned to it by clause (1) of Article 324. If that be so, there can be no doubt that they would rank next to the CEC and the ECs. That brings us to the question regarding the status of the CEC vis-à-vis the ECs. It was contended by the learned counsel for the petitioners that the CEC enjoyed a status superior to the ECs for the obvious reason that: (i) the CEC has been granted conditions of service on par with a judge of the Supreme Court, which was not the case with the conditions of service of ECs before the Ordinance; (ii) the CEC has been given the same protection against removal from service as that available to a judge of the Supreme Court, whereas the ECs can be removed on the CEC's recommendation; (iii) the CEC's conditions of service cannot be altered or varied to his disadvantage after his appointment; (iv) the CEC has been conferred the privilege to act as Chairman of the multi-member Commission; and (v) the CEC alone is the permanent incumbent, whereas the ECs could be removed, as happened in the case of Dhanoa. Strong reliance was placed on the observations in paragraphs 10 and 11 of Dhanoa's case in support of the argument that the CEC enjoys a higher status vis-à-vis the ECs while functioning as the Chairman of the Election Commission. The observations relied upon read thus:

> "10. However, in the matter of the conditions of service and tenure of office of the Election Commissioners, a distinction is made between the Chief Election Commissioner on the one hand and Election Commissioners and Regional Commissioners on the other. Whereas the conditions of service and tenure of office of all are to be such as the President may, by rule determine, a protection is given to the Chief Election Commissioner in that his conditions of service shall not be varied to his disadvantage after his appointment, and he shall not be removed from his office except in like manner and on the like grounds as a judge of the Supreme Court. These protections are not available either to the Election Commissioners or to the Regional Commissioners. Their conditions of service can be varied even to their disadvantage after their appointment and they can be removed on the recommendation of the Chief Election Commissioner, although

> not otherwise. It would thus appear that in these two respects not only are the Election Commissioners not on par with the Chief Election Commissioner, but they are placed on par with the Regional Commissioners, although the former constitute the Commission and the latter do not and are only appointed to assist the Commission.
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> 11. It is necessary to bear these features in mind because although clause (2) of the article states that the Commission will consist of both the Chief Election Commissioner and the Election Commissioners, if and when appointed, it does not appear that the framers of the Constitution desired to give the same status to the Election Commissioners as that of the Chief Election Commissioner. The Chief Election Commissioner does not, therefore, appear to be primus inter pares, i.e. first among equals, but is intended to be placed in a distinctly higher position. The conditions that the President may increase or decrease the number of Election Commissioners according to the needs of the time, that their service conditions may be varied to their disadvantage and that they may be removed on the recommendation of the Chief Election Commissioner, militate against their being of the same status as that of the Chief Election Commissioner..."

While it is true that under the scheme of Article 324, the conditions of service and tenure of office of all the functionaries of the Election Commission have to be determined by the President unless determined by law made by Parliament, it is only in the case of the CEC that the first proviso to clause (5) lays down that they cannot be varied to the disadvantage of the CEC after his appointment. Such a protection is not extended to the ECs. However, it must be remembered that by virtue of the Ordinance, the CEC and the ECs are placed on par in the matter of salary, etc. Does the absence of such provision for ECs make the CEC superior to the ECs? The second ground relates to removability. In the case of the CEC, he can be removed from office in like manner and on the like ground as a judge of the Supreme Court, whereas the ECs can be removed on the recommendation of the CEC. That, however, is not an indicia for conferring a higher status on the CEC. To so hold is to overlook the scheme of article 324 of the Constitution. It must be remembered that the CEC is intended to be a permanent incumbent and, therefore, in order to preserve and safeguard his independence, he had to be treated differently. That is because there cannot be an Election Commission without a CEC. That is not the case with the other ECs. They are not intended to be permanent incumbents. Clause (2) of the Article 324 itself suggests that the number of ECs can vary from time to time. In the very nature of things, therefore, they could not be conferred the type of irremovability that is bestowed on the CEC. If that were to be done, the entire scheme of article 324 would have to undergo a change. In the scheme of things, therefore, the power to remove in certain cases had to be retained. Having insulated the CEC from external political or executive pressures, confidence was reposed in this independent functionary to safeguard the independence of his ECs, and even RCs, by enjoining that they cannot be removed except on the recommendation of the CEC. This is evident from the

following statement found in the speech of Shri K. M. Munshi in the Constituent Assembly when he supported the amended draft submitted by Dr. Ambedkar:

> "We cannot have an Election Commission sitting all the time during those five years doing nothing. The Chief Election Commissioner will continue to be a whole-time officer performing the duties of his office and looking after the work from day to day but when major elections take place in the country, either Provincial or Central, the Commission must be enlarged to cope with the work. More members, therefore, have to be added to the Commission. They are, no doubt, to be appointed by the President. Therefore, to that extent, their independence is ensured. So there is no reason to believe that these temporary Election Commissioners will not have the necessary measure of independence."

Since the other ECs were not intended to be permanent appointees, they could not be granted the irremovability protection of the CEC, a permanent incumbent, and, therefore, they were placed under the protective umbrella of an independent CEC. This aspect of the matter escaped the attention of the learned judges who decided Dhanoa's case. We are also of the view that the comparison with the functioning of the executive under Articles 74 and 163 of the Constitution in paragraph 17 of the judgement, with respect, cannot be said to be apposite.

Under clause (3) of Article 324, in the case of a multi-member Election Commission, the CEC "shall act" as the Chairman of the Commission. As we have pointed out earlier, Article 324 envisages a permanent body to be headed by a permanent incumbent, namely, the CEC. The fact that the CEC is a permanent incumbent cannot confer on him a higher status than those not intended to be permanent appointees. Since the Election Commission would have a staff of its own dealing with matters concerning the superintendence, direction and control of the preparation of electoral rolls, etc., that staff would have to function under the direction and guidance of the CEC and, hence, it was in the fitness of things for the Constitution-makers to provide that, where the Election Commission is a multi-member body, the CEC shall act as its chairman. That would also ensure continuity and smooth-functioning of the Commission.

This brings us to the question of what role the CEC has to play as the Chairman of a multi-member Election Commission. Article 324 does not throw any light on this point. The debates of the Constituent Assembly also do not help. Although there has been a multi-member Commission in the past, no convention or procedural arrangement had been worked out then. It is this situation which compelled the Division Bench of this Court in Dhanoa's case to, inter alia, observe that in the absence of rules to the contrary, the members of a multi-member body are not and need not always be on par with each other in the matter of their rights, authority and powers. Proceeding further in paragraph 18, it was said:

> "18. It is further an acknowledged rule of transacting business in a multi-member body that when there is no express provision to the contrary, the business has to

> be carried on unanimously. The rule to the contrary such as the decision by majority, has to be laid down specifically by spelling out the kind of majority – whether simple, special, of all the members present and voting etc. In a case as that of the Election Commission which is not merely an advisory body but an executive one, it is difficult to carry on its affairs by insisting on unanimous decisions in all matters. Hence, a realistic approach demands that either the procedure for transacting business is spelt out by a statute or a rule either prior to or simultaneously with the appointment of the Election Commissioners or that no appointment of Election Commissioners is made in the absence of such procedure. In the present case, admittedly, no such procedure has been laid down."

We must hasten to add that the accuracy of the statement, that in a multi-member body, the rule of unanimity would prevail in the absence of express provision to the contrary, was doubted by counsel for the respondent ECs. At the same time, counsel for the Union of India and the contesting ECs contended that the Ordinance was promulgated by the President strictly in conformity with the view expressed in Dhanoa's case.

From the discussion up to this point, what emerged is that, by clause (1) of Article 324, the Constitution-makers entrusted the task of conducting all elections in the country to a Commission referred to as the Election Commission and not to an individual. It may be that if it is a single-member body, the decisions may have to be taken by the CEC, but still they will be the decisions of the Election Commission and not of an individual. It may be that, if it is a single-member body, the decisions may have to be taken by the CEC, but still they will be the decisions of the Election Commission. They will go down as precedents of the Election Commission and not the individual. It would be wrong to project the individual and eclipse the Election Commission. Nobody can be above the institution which he is supposed to serve. He is merely the creature of the institution: he can exist only if the institution exists. To project the individual as mightier than the institution would be a grave mistake. Therefore, even if the Election Commission is a single-member body, the CEC is merely a functionary of that body: to put it differently, the alter ego of the Commission and no more. And if it is a multi-member body, the CEC is obliged to act as its chairman. "Chairman" according to the Concise Oxford Dictionary means a person chosen to preside over meetings, e.g. one who presides over the meetings of the Board of Directors. In Black's Law Dictionary, 6th Edition, page 230, the same expression is defined as a name given to a Presiding Officer of an assembly, public meeting, convention, deliberative or legislative body, board of directors, committee, etc. Similar meanings have been attributed to that expression in Ballentine's Law Dictionary, 3rd Edition, pages 189–190; Webster's New Twentieth Century Dictionary, Unabridged, 2nd Edition, page 299, and Aiyer's Judicial Dictionary, 11th Edition, page 328. The function of the chairman would, therefore, be to preside over meetings, preserve order, conduct the business of the day, ensure that precise decisions are taken and correctly recorded and do all that is necessary for the smooth transaction of business. The nature and duties of this office may vary depending on the nature of business to be transacted but, by and large, these would be the functions of a chairman. He must so conduct himself at the meeting

chaired by him that he is able to win the confidence of his colleagues on the Commission and carry them with him. This a chairman may find difficult to achieve if he thinks that others who are members of the Commission are his subordinates. The functions of the Election Commission are essentially administrative, but there are certain adjudicative and legislative functions as well. The Election Commission has to lay down certain policies; decide on certain administrative matters of importance as distinguished from routine matters of administration, and also adjudicate certain disputes, e.g. disputes relating to allotment of symbols. Therefore, besides administrative functions, it may be called upon to perform quasi-judicial duties and undertake subordinate legislation-making functions as well. See *M. S. Gill* v *Chief Election Commissioner* (1978) 2 SCR 272. We need say no more on this aspect of the matter.

There can be no doubt that the Election Commission discharges a public function. As pointed out earlier, the scheme of Article 324 clearly envisages a multi-member body comprising the CEC and ECs. The RCs may be appointed to assist the Commission. If that be so, the ECs cannot be put on par with the RCs. As already pointed out, ECs form part of the Election Commission, unlike the RCs. Their role is, therefore, higher than that of RCs. If they form part of the Commission, it stands to reason to hold that they must have a say in decision-making. If the CEC is considered to be a superior in the sense that his word is final, he would render the ECs non-functional or ornamental. Such an intention is difficult to cull out from Article 324, nor can we attribute it to the Constitution-makers. We must reject the argument that the EC's function is only to tender advice to the CEC.

We have pointed out the distinguishing features from Article 324 between the position of the CEC and the ECs. It is essentially on account of their tenure in the Election Commission that certain differences exist. We have explained why in the case of ECs the removability clause had to be different. The variation in the salary etc. cannot be a determinative factor, otherwise that would oscillate, having regard to the fact that the executive or the legislature has to fix the conditions of service under clause (5) of Article 324. The only distinguishing feature that survives for consideration is that, in the case of the CEC, his conditions of service cannot be varied to his disadvantage after his appointment, whereas there is no such safeguard in the case of ECs. That is presumably because the posts are temporary in character. But even if it is not so, that feature alone cannot lead us to the conclusion that the final work in all matters lies with the CEC. Such a view would render the position of the ECs as that of mere advisers, which does not emerge from the scheme of Article 324.

As pointed out earlier, neither Article 324 nor any other provision in the Constitution expressly states how a multi-member Election Commission will transact its business, nor has any convention developed in this behalf. That is why, in Dhanoa's Case, this Court thought the gap could be filled by an appropriate statutory provision. Taking a clue from the observations in that connection in the said decision, the President promulgated the Ordinance whereby a new chapter, comprising sections 9 and 10, was added to the Act, indicating how the Election Commission will transact its business. Section 9 merely states that the business of the Commission shall be

transacted in accordance with the provisions of the Act. Section 10 has three sub-sections. Sub-section (1) says that the Election Commission may, by unanimous decision, regulate the procedure for transaction of its business and for allocation of its business among the CEC and the ECs. It will thus be seen that the legislature has left it to the Election Commission to finalise both matters by a unanimous decision. Sub-section (2) says that all other business, save as provided in sub-section (1), shall also be transacted unanimously, as far as is possible. It is only when the CEC and the ECs cannot reach a unanimous decision in regard to its business that the decisions has to be by majority. It must be realised that the Constitution-makers preferred to remain silent as to the manner in which the Election Commission would transact its business, presumably because they thought it unnecessary and perhaps even improper to provide for the same, having regard to the level of personnel it had in mind to man the Commission. They must have depended on the sagacity and wisdom of the CEC and his colleagues. The bitter experience of the past, to which a reference is made in Dhanoa's case, made legislative interference necessary, once it was also realised that a multi-member body was necessary. It has manifested the hope in sub-sections (1) and (2) that the Commission will be able to make decisions with one voice. But just in case that hope is belied, the rule of the majority must come into play. That is the purport of section 10 of the Act. The submission that the said two sections are inconsistent with the scheme of Article 324, in as much as they virtually destroy the two safeguards, namely, (i) the irremovability of the CEC; and (ii) prohibition against variation in service conditions to his disadvantage after his appointment, does not cut ice. In the first place, the submission proceeds on the basis that the other two ECs will join hands to render the CEC non-functional, a premise which is not warranted. It betrays the CEC's lack of confidence in himself to carry his colleagues with him. In every multi-member Commission, it is the quality of leadership in the person heading the body that matters. Secondly, the argument necessarily implies that the CEC alone should have the power to make decisions which, as pointed out earlier, cannot be accepted because that renders the EC's existence ornamental. Besides, there is no valid nexus between the two safeguards and Sections 9 and 10; in fact, the submission is a repetition of the argument that a multi-member Commission cannot function, that it would be wholly unworkable and that the Constitution-makers had erred in providing for it. Tersely put, the argument boils down to this: erase the idea of a multi-member Election Commission from your minds or else give exclusive decision-making power to the CEC. We are afraid that such an attitude is not conducive to democratic principles. Footnote 6 to page 657 of Halsbury's Laws of England, 4th Edition (Re-issue), Vol. 7(1) posits:

> "The principle has long been established that the will of a Corporation or body can only be expressed by the whole or a majority of its principals, and the act of a majority is regarded as the act of the whole. (See Shakelton on the Law and Practice of Meetings, Eighth Edition, Compilation of AG, page 116.)"

The same principle was reiterated in *Grindley* v *Barker* 126 English Reporter 875 at 879 & 882. We do not consider it necessary to go through various decisions on this point.

The argument that the impugned provisions constitute a fraud on the Constitution, in as much as they are designed and calculated to defeat the very purpose of having an Election Commission, is begging the question. While in a democracy every right-thinking citizen should be concerned about the purity of the election process, this court is no less concerned about the same as would be evident from a series of decisions. It is difficult to share the inherent suggestion that the ECs would not be as concerned about it. And to say the CEC would have to suffer the humiliation of being overridden by two civil servants is to ignore the fact that the present CEC was himself a civil servant before his appointment as CEC.

The Election Commission is not the only body which is a multi-member body. The Constitution also provides for other public institutions to be multi-member bodies, e.g. the Public Service Commission. Article 315 provides for the setting up of a Public Service Commission for the Union and every State and Article 316 contemplates a multi-member body with a Chairman. Article 338 provides for a multi-member National Commission for SC/ST comprising a chairman, vice-chairman and other members. So there are also provisions for the setting up of certain other multi-member Commissions or Parliamentary Committees under the Constitution. These, too, function by the rule of majority and so we find it difficult to accept the broad contention that a multi-member Commission is unworkable. It all depends on the attitude of the chairman and its members. If they work in co-operation, appreciate and respect each other's point of view, there will be no difficulty, but if they decide from the outset to pull in opposite directions, they will, by their conduct, make the Commission unworkable and thus fail the system.

That brings us to the question of malafides. It is in two parts. The first part relates to events which preceded the Ordinance, and the second part to post-Ordinance and notification events. On the first part, the CEC contends that since, after his appointment, he had taken various steps with a view to ensuring free and fair elections and was constrained to postpone certain elections which were to decide the fate of certain leaders belonging to the ruling party at the centre, i.e. the National Congress (1), he had caused considerable discomfiture to them. His insistence on strict observance of the model Code of Conduct had also disturbed the calculations of the ruling party. According to him, he had postponed the elections in the Kalka Assembly Constituency, Haryana, because the Chief Minister of Haryana, belonging to the ruling party at the centre, had flouted the guidelines. Similarly, he had postponed the elections in the State of Tripura which ultimately led to the dismissal of the Government headed by the Chief Minster belonging to the ruling party at the centre. The postponement of the by-elections involving Shri Sharad Pawar and Shri Pranab Mukherjee also upset the calculations of the said party. He had also postponed the election of the Ranipet Assembly Constituency, Tamil Nadu, as the Chief Minister of the State had flouted the model Code of Conduct by announcing certain projects on the eve of the elections. Shri Santosh Mohan Dev, Union Minister, who belonged to the ruling party, was also upset because the CEC took disciplinary action against officials who were found present at his election meetings. The ruling party was also unhappy with his decision to announce general elections for the State Assemblies for Madhaya Pradesh, Uttar Pradesh, Rajasthan, Himachal Pradesh and the National Capital Territory of Delhi as the party was not ready for them. According to the CEC, he had

also spurned the request made through the Lieutenant Governor of Delhi by the said party for postponement of elections. According to him, emissaries were sent by the said party at the centre to him but he did not oblige, and he even took serious exception to the conduct of the Governor of Uttar Pradesh, Shri Moti Lal Vohra, for violating the model Code of Conduct. Since the ruling party at the centre failed in all its attempts to prevail upon him, it decided to convert the Election Commission into a multi-member body and, after having the Ordinance issued by the President, the impugned notifications appointing the two ECs were issued. The extraordinary haste with which all this was done while the CEC was at Pune, and the urgency with which one of the appointees, Shri M.S. Gill, was called to Delhi by a special aircraft betrayed the keenness on the part of the ruling party to install the two newly-appointed ECs. The CEC describes in detail the post-appointment events which took place at the meeting of 11th October, 1993 in paragraphs 18 (c) to (f) and (g) of the writ petition. According to him, by the issuance of the Ordinance and the notifications, the ruling party is trying to achieve indirectly that which it could not achieve directly. These, in brief, are the broad counts on the basis of which he contends that the ruling party at the centre was keen to dislodge him.

On behalf of the Union of India it is contended that the allegation that the power to issue an Ordinance was misused for a collateral purpose, namely, to impinge on the independence of the Election Commission, is wholly misconceived since it is a known fact that the demand for a multi-member Commission had been raised from time to time by different political parties. The Joint Committee of both Houses of Parliament had submitted a report in 1972 recommending a multi-member body, and the Tarkunde Committee, appointed on behalf of the Citizens for Democracy, also favoured a multi-member Election Commission in its report submitted in August 1974. Similarly, the Committee on electoral reforms appointed by the Janata Dal Government, in its report in May 1990, favoured a three-member Election Commission. Various Members of Parliament belonging to different political shades had also raised a similar demand from time to time. The Advocates General of various States, in their meeting held on 26th September, 1993 at New Delhi, had made a similar demand. It was, therefore, not correct to contend that the decision to constitute a multi-member Election Commission was abruptly taken with a malafide intention, to curb the activities of the present CEC. The allegation that the decision was taken because the ruling party at the centre was irked by the attitude of the CEC in postponing elections on one ground or the other is denied. The issue regarding the constitution of a multi-member Election Commission was a live issue and was discussed at various fora. Even the Supreme Court in Dhanoa's case had indicated that vast discretionary powers, with virtually no checks and balances, should not be left in the hands of a single individual, and it was desirable that more than one person should be associated with the exercise of such discretionary powers. It was, therefore, in the public interest that the Ordinance in question was issued, and two ECs were appointed to associate with the CEC. The deponent contends that this was a bone fide exercise and it was unfortunate that a high-ranking official like the CEC had alleged that one of the ECs had been appointed because he was a close friend of the Prime Minister, an allegation which was unfounded. It is, therefore, denied that the Ordinance and the subsequent notifications appointing the two ECs were intended to sideline the CEC and erode his authority. The Government bona

fide followed the earlier reports and the observations made in Dhanoa's, therefore, contended that Sections 9 and 10 do not suffer from any vice as alleged by the CEC. The two ECs have also filed their counter-affidavits denying these allegations. Shri G.V.G. Krishnamurthy, respondent No.3 in the CEC's petition, has pointed out that the CEC had made unprecedented demands, for example, (i) to be equated with Supreme Court Judges, and had pressurised the Government that he be ranked along with Supreme Court Judges in the Warrant of Precedence; (ii) that powers of contempt of court be conferred upon the Election Commission; (iii) that the CEC had refused to participate in meetings as ex-officio member of the delimitation Commission headed by Mr. Justice A.M. Mir, Judge of the High Court of J & K, on the grounds that his position was higher, he having been equated with judges of the Supreme Court; (iv) that the CEC be exempted from personal appearance in Court; (v) the Election Commission be exempted from the purview of the UPSC so far as its staff was concerned, etc.

The learned Attorney-General pointed out that no malafides can be attributed to the exercise of legislative power by the President of India under Article 123 of the Constitution. He further pointed out that, having regard to the express language of Article 324(2) of the Constitution, it was perfectly proper to expand the Election Commission by making appropriate changes in the extant law. The question whether it is necessary to appoint other ECs besides the CEC is for the Government to decide and that is not a justiciable matter. The demand for a multi-member Commission had been voiced for the last several years, and merely because it was decided to make an amendment in the statute through an Ordinance, it was not permissible to infer that the decision was actuated by malice. It was lastly contended that Article 324 nowhere stipulates that, before ECs are appointed, the CEC will be consulted. In the absence of an express provision in that behalf, it cannot be said that the failure to consult the CEC before the appointment of the two ECS vitiates the appointment.

One of the interveners, the petitioner of SLP No. 16940 of 1993, has filed written submissions through his counsel wherein, while supporting the action to constitute the multi-member Commission, he has criticised the style of functioning of the CEC and has contended that his actions have, far from advancing the cause of free and fair elections, resulted in hardships to the people as well as the system. It has been pointed out that several rash decisions were taken by the CEC on the off-chance that they would pass muster, but when challenged in court he failed to support them and agreed to withdraw his orders. It is, therefore, contended that the style of functioning of the present CEC is itself sufficient reason to constitute a multi-member Commission so that the checks and balances mechanism that the Constitution provides for different institutions may ensure proper decision-making.

There is no doubt that when the Constitution was framed, the Constitution-makers considered it necessary to have a permanent body headed by the CEC. Perhaps the volume of work and the complexity thereof could be managed by a single-member body.

At the same time it was realised that, with the passage of time, it may become necessary to have a multi-member body. That is why express provision was made in that behalf in clause (2) of Article 324. It seems that for about two decades the need for a multi-member body was not felt. But the issue was raised and considered by the Joint Committee which submitted a report in 1972. Since no action was taken on that report, the Citizens for Democracy, a non-governmental organisation, appointed a committee headed by Shri Tarkunde, a former Judge of the Bombay High Court, which submitted its report in August 1974. Both these bodies favoured a multi-member Commission but no action was taken and, after a lull, when the Janata Dal came to power, a committee was appointed which submitted a report in May 1990. That committee also favoured a multi-member body. Prior to that, in 1989, a multi-member Commission was constituted, but we know its fate (see Dhanoa's case). But the issue was not given up, and demands continued to pour in from Members of Parliament of different hues. These have been mentioned in the counter of the Union of India. It cannot, therefore, be said that this idea was suddenly pulled out of a bag. Assuming the present CEC had taken certain decisions not palatable to the ruling party at the centre, as alleged by him, it is not permissible to jump to the conclusion that that was the cause for the Ordinance and the appointments of ECs. If such a nexus is to weigh, the CEC would continue to act against the ruling party in order to keep the move for a multi-member commission at bay. We find it difficult to hold that the decision to constitute a multi-member Commission was actuated by malice. Therefore, even though it is not permissible to plead malice, we have examined the contention and see no merit in it. It is wrong to think that the two ECs were pliable persons who were being appointed with the sole object of eroding the independence of the CEC.

We may, incidentally, mention that the decisions taken by the CEC from time to time postponing elections at the last moment, of which he has made mention in his petition, have evoked mixed reactions. This we say because the CEC uses them to lay the foundation for his contention that the entire exercise was malafide. Some of his other decisions were so unsustainable that he could not support them when tested in Court. His public utterances at times were so abrasive that this Court had to caution him to exercise restraint on more occasions than one. This gave the impression that he was keen to project his own image. That he has very often been in the newspapers and magazines and on television cannot be denied. Against this backdrop, if the Government thought that a multi-member body was desirable, the Government certainly was not wrong and its action cannot be described as malafide. Subsequent events would suggest that the Government was wholly justified in creating a multi-member Commission. The CEC has been seen in a commercial on television and in newspaper advertisements. The CEC has addressed the Press, and is reported to have said that he would utilise the balance of his tenure to form a political party to fight corruption and the like (Sunday Times, Bombay, dated June 25th, 1995 page 28). Serious doubts may arise regarding his decisions if it is suspected that he has political ambitions, in the absence of any provision, such as Article 319 of the Constitution. The CEC is, it would appear, totally oblivious to the sense of decorum and discretion that his high office requires, even if the cause is laudable.

That brings us to the question of legislative competence. The contention is that, since Article 324 is silent, Parliament expected the Commission itself to evolve its own procedure for transacting its business, and since the CEC was the repository of all power to be exercised by the Commission falling within the scope of its activity, it did not see the need to engraft any procedure for transacting its business. If the Election Commission, at any time, saw the need for it, it would itself evolve its procedure, but Parliament cannot do so and hence Sections 9 and 10 are unconstitutional. Except for the legislation specifically permitted by clauses (2) and (5) of Article 324 and Article 327 and 328, Part XV of the Constitution does not conceive of a law by Parliament on any other matter and hence the impugned legislation is unconstitutional.

Now it must be noted at the outset that both clauses (2) and (5) of Article 324 contemplate a statute for the appointment of ECs and for their conditions of service. The impugned law provides for both these matters, and provisions to that effect cannot be challenged as unconstitutional since they are expressly permitted by the said clauses (2) and (5). Once the provision for the constitution of a multi-member Commission is unassailable, provisions incidental thereto cannot be challenged. It was urged that the legislation squarely fell within Entry 72 of List T of the Seventh Schedule. That entry refers to "Elections to Parliament, and Vice-President; the Election Commission". If, as argued, the scope of this entry is relatable and confined to clauses (2) and (5) of Article 324 and Article 327 and 328 only, it would be mere Lautology. If the contention that the CEC alone has decisive power is not accepted, and we have not accepted it, and even if it is assumed that the normal rule is of unanimity, sub-sections (1) and (2) of Section 10 provide for unanimity. It is only if there is no unanimity that the rule of majority comes into play under sub-section (3). Therefore, even if we were to assume that the Commission alone was competent to lay down how it would transact its business, it would be required to follow the same pattern as is set out in Section 10. We, therefore, see no merit in this contention either.

We would here like to make it clear that we should not be understood to approve of the ratio of Dhanoa's case in its entirety. We have expressly approved it where required.

One of the matters to which we must turn is the question of the status of an individual whose conditions of service are akin to those of the judges of the Supreme Court. This seems necessary in view of the reliance placed by the CEC on this aspect to support his case. In the instant case, some of the service conditions of the CEC are akin to those of the Supreme Court Judges, namely, (i) the provision that he can be removed from office in like manner and on like grounds as a Judge of the Supreme Court; and (ii) his conditions of service shall not be varied to his disadvantage after appointment. So far as the first is concerned, instead of repeating the provisions of Article 124 (4), the draftsman has incorporated the same by reference. The second provision is similar to the proviso to Article 125 (2). But does that confer the status of a Supreme Court Judge on the CEC? It appears from the D.O. No. 193/34/92 dated July 23, 1992 addressed to the then Home Secretary, Shri Godbole, that the CEC had suggested that the position of the CEC in the Warrant of Precedence needed consideration. This issue he seems to have raised in

his letter to the Prime Minister in December 1991. It becomes clear from Shri Godbole's reply dated July 25th, 1992, that the CEC desired that he be placed at No. 9 in the Warrant of Precedence at which position the Judges of the Supreme Court figured. It appears from Shri Godbole's reply that the proposal was considered but it was decided to maintain the CEC's position at No.11 along with the Comptroller and Auditor General of India and the Attorney-General of India. However, during the course of the hearing of these petitions it was stated that the CEC and the Comptroller and Auditor General of India were thereafter placed at No. 9A. At our request the learned Attorney-General placed before us the revised Warrant of Precedence which did reveal that the CEC had climbed to position No 9A, along with the Comptroller and Auditor General of India. Maintenance of the status of Judges of the Supreme Court and the High Courts is highly desirable in the national interest. We mention this because of late we find that even personnel belonging to other fora claim equality with the High Court and Supreme Court Judges merely because certain jurisdictions earlier exercised by those Courts are transferred to them, not realising the distinction between constitutional and statutory functionaries. We would like to impress on the Government that it should not confer equivalence or interfere with the Warrant of Precedence, if it is likely to affect the position of High Court and Supreme Court Judges, however pressing the demand may be, without first seeking the views of the Chief Justice of India. We may add that Mr. G. Ramaswamy, learned counsel for the CEC, frankly conceded that the CEC could not legitimately claim to be equated with Supreme Court Judges. We do hope that the Government will take note of this and do what is needful.

We have deliberately avoided going into the unpleasant exchanges that took place in the chamber of the CEC on 11th October, 1993, to which reference has been made by the CEC in paragraph 18 (c to f and g) of his petition. These allegations have been denied by Shri Krishnamurthy, and Shri Gill does not support the CEC when he says he was abused. Although these allegations and counter-allegations found their way into the press, we do not think any useful purpose will be served by washing dirty linen in public except to show both the CEC and Shri Krishnamurthy in a poor light. They have several years of experience as civil servants behind them. All of them have served in responsible positions at different levels. It is a pity they did not try to work as a team. The efforts of Shri Gill to persuade the other two to forget the past and to get on with the job fell on deaf ears. Unfortunately, suspicion and distrust got the better of them. We hope that they will forget and forgive, start on a clean slate of mutual respect and confidence and get going on the task entrusted to them in a sporting spirit, always bearing in mind the fact that the people of this great country are watching them with expectation. For the sake of the people and the country, we do hope that they will eschew their egos and work in a spirit of camaraderie.

In the result, we uphold the impugned Ordinance (now Act 4 of 1994) in its entirety. We also uphold the two impugned notifications dated 1st October, 1993. Hence, the writ petitions fail and are dismissed. The interim order dated 15th November, 1993 will stand vacated. If, as is reported, the incumbent CEC has proceeded on leave, leaving the office in charge of Shri Bagga, Shri Bagga will forthwith hand over charge to Shri Gill till the CEC resumes duty. The IAs will stand disposed of. In the facts and circumstances of the case, we direct parties to bear their

own costs. If the CEC has incurred the costs of his petition from the funds of the Election Commission, the other two ECs will be entitled to the same from the same source.

.....CJI

.....J.
(J. S. Verma)

.....J.
(N. P. Singh)

.....J
(S.P. Bharucha)

.....J
(M. K. Mukherjee)

New Delhi
14th July, 1995

JUDGEMENT OF THE HIGH COURT OF KARNATAKA

AT

BANGALORE

Dated the 24th day of November 1994

Before

THE HONOURABLE MR JUSTICE R V RAVEENDRAN

WRIT PETITION NO. 32175/1994

1. B. L. Shankar **2. Sri Srikanth S Vantagodi**

PETITIONERS

(By Sri Ko Channabasappa – Advocate)

V

1. The Chief Election Commission **2. The Chief Electoral Officer of Karanataka**

RESPONDENTS

Sri Jayaram & Jayaram and
Sri Sanjeev Ahuja – Adv. for R.1
Sri M B Prabkhakar – HCG for R.2)

Writ Petition is filed under Article 226 of the Constitution of India r/w Rule 2 and 3 of the Writ Proceedings Rules praying to quash the order dated 31st August 1994 vide Annexure A and the order dated 17th December 1994 vide Annexure B as unconstitutional and as such null and void and etc.

***Elections** – Candidates' election expenses – Keeping accounts – Power of Election Commission to issue Orders requiring specific manner of keeping accounts – Day-to-day keeping of accounts – Whether Election Commission could require a candidate to use prescribed register to keep accounts – Whether Election Commission had legal competence to issue orders – Whether Election Commission had right to inspect account before its submission.*

***Before**: R. V. Raveendram J*

***Background Facts:** The Election Commission issued two Orders: Order No. 76/93/J S II, dated 17th December 1993, and Order No. 76/ES003/94 JS II, dated 31st Agust 1994, containing instructions for guidance of contesting candidates in regard to maintenance of day-to-day expenses as required by Section 77 of the Representation of the People Act, 1951 and Rule 86 of the Conduct of Elections Rules 1961.*

The petitioner contended that the Election Commission had no competence, either under the Constitution of India or under the Representation of the People Act, to issue such Orders and hence they were null and void.

***Held:** That the Orders were valid.*

Cases cited in Judgement:

S. P. Gupta v *Union of India (1982) AIR SC 146*

Gadakh Yeshwantrao Kankarrao v *E. V. alias Belasaheb Vikhe Patil & Others (1993) Civil Appeal N. 2115*

Manwarlal Gupta v *Amarnath Chawla (1975) AIR SC 308*

P. Nalla Thamby v *Union of India (1985) AIR SC 1133*

T. Narayanswamy v *C. K. Jafeer Shariff (1994) 5JT SC 136*

All Party Hill Leader 'Conference, Shilling' v *Captain W A Sangwa (1977) AIR SC 2155*

Mohinder Singh Gill v *Chief Election Commission (1978) AIR SC 851*

Kanhiya Lall Omar v *R. K. Trivedi (1986) AIR SC 111*

This petition coming on for orders this day, the Court made the following:

ORDER

1. The first petitioner is the General Secretary of a recognised political party, and the Second Petitioner is an Independent candidate for election to the State Legislative Assembly. Both are voters in Karnataka. They seek the quashing of two orders issued by the Election Commission of India (the first respondent herein) that is, Order No. 76/93/J S II, dated 17th December 1993, and order No. 76/ES 003/94J S II, dated 31st August 1994 (Annexures A and B), containing the instructions for guidance of contesting candidates in regard to the maintenance of day-to-day expenses as required by Section 77 of the Representation of People Act, 1951 ("Act" for short) and Rule – 86 of the Conduct of Election Rules 1961 ("Rules" for short).

2. As reference to the directions contained in the said orders and the reasons for issue of such directions is necessary, the relevant portions of the said two orders are extracted below:

ORDER No 76/93/J S II, dated 17–12–1993

5. The increasing role of the power of money in elections is well known and is the end of maladies which sometimes reduce the process of election into a more force ??? by placing some privileged candidates with financial resources in a distinctly advantageous position compared to other candidates. The result of such an election cannot reflect the true choice of the people. The system also sometimes deprives qualified and able persons of the prerogative to represent the masses.

6. It is commonly perceived that the above quoted provisions of law (Section 77) have become utterly inadequate to check the corrupting influence of the power of money.

7. It is relevant to cite from a recent judgement of the Supreme Court in this context (Civil Appeal No. 2115 of 1993, *Gadakh Yeshwantrao Kankarro* v *E. V. alias Belasaheb Vikhe Patil and others* with Civil Appeal Nos 2116 of 1993, 2444 of 1993, 1758 of 1993):

> "The existing law does not measure up to the existing realities. The ceiling on expenditure is fixed only in respect of the expenditure incurred or authorised by the candidate himself but the expenditure incurred by the party or anyone else in his election campaign is safely outside the net of legal sanction. The spirit of the provision suffers violation through this escape route. The prescription of a ceiling on expenditure by a candidate is a mere eye-wash, and no practical check on election expenses for which it was enacted to attain a meaningful democracy. This lacuna in the law is, however, for the Parliament to fill lest the impression is reinforced that its retention is deliberate for the convenience of every one. If

this be not feasible, it may be advisable to omit the provision to prevent the resort to indirect methods for its circumvention and subversion of law, accepting without any qualm the role of money power in the elections. This provision has ceased to be even a fig leaf to hid the reality."

8. The Honourable Court has further expressed the fond wish in the above-quoted judgement that the "duty of the top echelons of leadership at the State and national level of all political parties is to set the trend for giving the needed information to the electorate by adopting desirable standards so that its percolates to the lower levels and provides a congenial atmosphere for a free and fair poll".

9. The Commission, as early as February 1992, had sent to the Government of India a detailed and self-contained note on electoral reforms proposing, among other things suitable amendment of the aforesaid provisions of law relating to election expenses to make them really effective and meaningful, and has since then been eagerly waiting for an acknowledgement of its proposals from the Government. The Commission has, in the meanwhile, carefully considered ways and means to render the accounts of election expenditure submitted by the candidates as close to the truth as possible, within bounds.

10. **The Commission directs as follows:**

10.1 The proforma prescribed for filing the returns of election expenditure vide Commissions letter No. 76/81, dated 18th September 1981, stands modified as Annexure I of this order. The revised proforma consists of two parts: Part I for maintaining the account from day-to-day; and Part II for showing the total expenditure with required details on various items listed therein.

10.2 Each candidate, while lodging the return of his election expenditure in the prescribed proforma, shall also file an affidavit on oath, as in Annexure II, that the expenditure shown as nil, if any, on items listed in Part II of the proforma or left blank herein, has not been incurred by him but by others mentioned in Explanation (1) to Section 77(1) of the Representation of the People Act, 1951. The affidavit will also clearly state that all election expenditure on listed items relating thereto has been completely and unexceptionally included in the return and there is nothing that has not been disclosed.

10.3 It is clarified here that while the above quoted provisions of law do not oblige a candidate to maintain a separate and correct account of the expenditure incurred by those mentioned in the said Explanation (1), there is no exemption from listing the tangible items of election expenditure by them which constituted a part of the election campaign – viz posters, public meetings, gates, arches, video displays etc., and to satisfy that expenditure on these items was not incurred or authorised by him.

10.4 Since the return of election expenditure filed by a candidate has to reflect the "correct" account of "all" election expenses, the District Election Officer, before accepting the account of the candidate as being in accordance with the manner prescribed, shall conduct such enquiry as he deems necessary, and at the time of communicating his report to the Commission as required under Rule 89 of the Conduct of Elections Rules, 1961, certify to the Commission, with reference to the documents filed before him and as verified by him through an appropriate enquiry, that the statement of accounts is in the manner prescribed.

10.5 The Commission intends to "supercheck" the authenticity of the returns filed through the above procedure and shall hold the candidates personally responsible for any lapse or misrepresentation.

ORDER No. 76/ES.003/94 J S III, dated 31st August 1994

3. It is significant to note that the above-quoted provisions of law and rules prescribe, inter alia, that a true and faithful account of all relevant expenditures will be "kept" "from day-to-day".

4. The Commission, being deeply aware of the increasingly vitiative role of unaccounted financial resources in elections, and the fragility of the existing law in curbing such vitiation, and to render the accounts of election expenses to be lodged under section 78 of the Representation of the People Act, 1951 truly and comprehensively reflective of the actual expenditure, has prescribed a procedure and proforma for the lodging of accounts of election expenses vide its order No. 76/93/JS II dated 17th December 1993, a copy of which is attached.

5. The superchecks conducted by the Commission in pursuance of para 10.5 of the above-mentioned order dated 17th December 1993, in a number of cases of accounts lodged by candidates at some recent elections, have revealed, inter alia, that many candidates do not "keep" a true record of day-to-day election expenditures as specifically required by the provisions of law and rules quoted above. In some cases, the date details and vouchers filed in support thereof, have been found to have been concocted, fabricated and put together in order to give a mere semblance of the fact that "a separate and correct account of all expenditure" was kept "from day-to-day".

6. The Commission is convinced that order No. 76/93/J S II, dated 17th December 1993, needs to be further fortified by additional regulatory measures. The Commission, in exercise of its power under Article 324 of the Constitution and in pursuance of section 77 of the Representation of the People Act and Rule 86 of the Conduct of Elections Rules 1961, directs as follows:

(1) A register in a standard proforma as shown in Annexure I to this order shall be issued to each candidate by the District Election Officer immediately after his nomination for keeping the day-to-day account of expenditure.

(2) This register shall be fully authenticated by the District Election Officer at the time of issue.

(3) All day-to-day accounts shall be faithfully recorded in this register, and in no other document, by the candidate or his agent authorised by him in this behalf.

(4) All documents such as vouchers, receipts, acknowledgements etc., in support of the expenditures incurred shall be obtained from day to day, as the expenditure is incurred, and maintained in the correct chronological order, along with the aforesaid register.

(5) The day-to-day account maintained in the aforesaid register, together with the supporting documents, shall be made available for inspection at any time during the process of election by the District Election Officer, Returning Officer, Election Expenditure Observer appointed by the Commission or any other such authority nominated by the Commission in this behalf. Failure to produce this register on demand will be considered a major default.

(6) While lodging the accounts of election expenditures under Section 78 of the Representation of People Act, 1951, the candidate shall file the prescribed register as a part of the proforma earlier prescribed vide Commission's order No. 76/93/J S II, dated 17th December, 1993.

3. CONTENTIONS OF PETITIONERS

The contentions of petitioners, in brief, are:

3.1 Under Article 324 of the Constitution of India, the Election Commission has been entrusted with the power of superintendence, direction and control of the conduct of the election. But the Election Commission cannot arrogate to itself any legislative power by virtually making laws in the guise of passing orders relating to election to the House of Parliament and the State Legislature. Any order passed by the Election Commission should be within the parameters laid down by Parliament in the Representation of People Act 1951 and The Conduct of Election Rules, 1961. While the Election Commission may issue directions in regard to any matter not expressly covered by any law made by Parliament, it cannot issue directions in regard to matters which are specifically provided for either in the Act or the Rules, by requiring anything contrary to or in addition to what is required by or provided for in the Act and the Rules. Any such transgression by the Election Commission should be held to be void.

3.2 The aforesaid two orders, dated 17th December 1993 and 31st August 1994, are not merely regulatory, in supervising, directing and controlling elections, but are virtually in the nature of amendments to the Act and the Rules, thereby encroaching upon the legislative powers of Parliament. The two orders introduce obligations which are contrary to the statutory provisions, and, in all events, seek to regulate matters which are specifically regulated by the Act and the Rules, and to that extent they are transgressions. While money power should not play any role in the elections and should be curbed to enable free and fair elections to the legislature, the Election Commission cannot arrogate to itself powers which are not traceable either to the Act or the Rules or Article 324 of the Constitution of India.

3.3 The said two orders transgress the statutory provisions by:

(a) requiring the candidates to maintain day-to-day accounts;

(b) requiring the candidates to maintain accounts in the Registers supplied by the Election Commission;

(c) requiring the candidates to file affidavits as prescribed in the Annexure to the order, dated 17th December 1993;

(d) providing for inspection of accounts of the candidates before they are lodged or submitted by the candidates as provided under Section 78 of the Act; and

(e) requiring candidates to maintain and submit accounts in regard to expenditure incurred by political parties, association or body of persons or individuals, in connection with the election of a candidate; and

(f) requiring anything to be done or not to be done, which is not provided either in Sec. 77 of the Act or Rule 86 of the Rules.

3.4 The said orders, in particular paras 9 and 10-3 of the order dated 17th December 1993 and para 6 of the order dated 31st August 1994, clearly show that they transgress the limits of law and exceed the provision of Section 77 of the Act and Rule 86 of the Rules. Para 9 of the order states that the Election Commission had suggested certain amendments to election law, and as there had been no response from the Government, the Commission was issuing directions contained in para 10, of the order dated 17th December 1993 virtually contain the amendments to law sought by the Election Commission, but not made by the Parliament. Similarly, para 6 of the order dated 31st August 1994 speaks of additional regulatory measures to fortify the existing directions and measures. Hence the two orders are liable to be struck down.

4. CONTENTIONS OF RESPONDENTS

4.1 The learned counsel for the first respondent contended that the petition itself was not maintainable for the following two reasons:

(a) the petition is in the nature of a public interest litigation and is not a petition by a person aggrieved by the orders. A public interest litigation is maintainable only if it is intended to promote and vindicate public interest which demands that there should (could ???) be a violation of constitutional or legal rights of a section of the public who are poor, ignorant or in a socially or economically disadvantaged position. Having regard to the principles relating to public interest litigation, the present petition is not maintainable;

(b) only a person affected by the two orders, that is, a candidate in the election, can challenge the two orders. As neither of the petitioners is an affected candidate, the petition is not maintainable;

(c) the election process having admittedly commenced, Article 329 (b) is a bar to this petition.

4.2 Dealing with merits, learned counsel for the first respondent submitted that the requirements to be fulfilled by the two impugned orders do not create or cast any fresh obligations, but merely enforce the law contained in the Act and the Rules, as they are only steps taken by the Election Commission to enforce and implement the provisions of the Act and the Rules which cast a duty on the candidates to maintain accounts. Enforcement of a law cannot be prevented by contending that such enforcement would be harsh on the subject or cause hardship to the subject. Even if the orders are construed as referring to matters which are not specifically provided for in Section 77 and Rule 86 or other Provisions of the Act and the Rules, they merely fill up blanks in law or gaps which are left uncovered, and the Election Commission has the power to issue such directions under Article 324. Proper and effective implementation of any existing law cannot, by any stretch of imagination, be termed as usurpation of the legislative power to make laws. Having regard to the provisions of the Act, the Rules and the Indian Penal Code, the inspection of accounts, even prior to the lodging of the accounts, was permissible and in fact, absolutely necessary. The two orders should not be viewed as a threat to the candidate, but as putting the candidate on notice regarding proper implementation of the Act and the Rules in the interest of maintaining the purity of elections.

5. POINTS FOR CONSIDERATION

5.1 On these contentions, the points that arise for consideration are as follows:

(i) Whether the two orders dated 17th December 1993 and 31st August 1994 are in accordance with law or transgress the limits prescribed in Section 77 of the Act, Rule 86 of the Rules and Article 324 and therefore liable to be quashed;

(ii) Whether Article 329 (b) of the Constitution of India is a bar for consideration of the petition or the granting of any relief under Article 226.

5.2 The first point does not require lengthy consideration. The learned counsel for the Election Commission has proceeded on the assumption that neither of the petitioners is a candidate in the ensuing election. But factually this assumption is erroneous. The second petitioner is stated to be an Independent candidate for election to the Arabhavi Constituency, and therefore, has sufficient interest to maintain this petition. Even otherwise, where it is alleged that a public authority has acted in violation of any constitutional or statutory obligation, resulting in any injury to the public interest, any member of public acting bona fide and having sufficient interest, can maintain an action for redressal against such public injury, vide decision of the Supreme Court in *S P Gupta* v *Union of India (AIR 1982 SC 146).* It is therefore, to be held that the petition is maintainable.

Re: Point (ii)

6. It is necessary to refer to the relevant provisions of law to consider the validity of the said two orders of the Election Commission.

6.1 Chapter VIII of the Act and the Rules deals with election expenses. Section 77 deals with the account of election expenses and maximum thereof, the relevant portion of which is extracted below:

> **SECTION 77: ACCOUNT OF ELECTION EXPENSES AND MAXIMUM THEREOF**
>
> (1) Every candidate at an election shall, either by himself or by his election agent, keep a separate and correct account of all expenditure in connection with the election incurred or authorised by him or by his election agent between the date on which he has been nominated and the date of declaration of the result thereof both days inclusive.
>
> **Explanation 1:** Notwithstanding any judgment, order or decision of any court to the contrary, any expenditure incurred or authorised in connection with the election of a candidate by a political party or by any other association or body of persons or by any individual (other than the candidate or his election agent) shall not be deemed to be, and shall not ever be deemed to have been expenditure in

connection with the election incurred or authorised by the candidate or by his election agent for the purposes of this sub-section:

Proviso (a) (b): omitted as not relevant.

Explanation 2: Omitted as not relevant.

(2) The account shall contain such particulars, as may be prescribed.

(3) The total of the said expenditure shall not exceed such amount as may be prescribed.

6.2 Section 78 requires every candidate at an election to lodge with the District Election Officer an account of his election expenses within thirty days from the date of election of the returned candidate.

6.3 Rule 86 prescribing the particulars of accounts of election expenditure to be kept by the candidates is extracted below:

RULE 86: PARTICULARS OF ACCOUNT OF ELECTION EXPENSES

(1) The account of election expenses to be kept by a candidate or his election agent under section 77 shall contain the following particulars in respect of each item of expenditure from day to day, namely:

(a) the date on which the expenditure was incurred or authorised;
(b) the nature of the expenditure (as for example, travelling, postage or printing and the like);
(c) the amount of the expenditure:
    (i) the amount paid;
    (ii) the amount outstanding;
(d) the date of payment;
(e) the name and address of the payee;
(f) the serial number of bills, if any, in the case of the amount outstanding;
(g) the name and address of the person to whom the amount outstanding is payable.

(2) A voucher shall be obtained for every item of expenditure unless from the nature of the case, such as postage, travel by rail and the like, it is not practicable to obtain a voucher.

(3) All vouchers shall be lodged, along with the account of election expenses, arranged according to the date of payment and serially numbered by the candidate

or his election agent and such serial numbers shall be entered in the account under item (f) sub-rule (1).

(4) It shall not be necessary to give the particulars mentioned in item (e) of sub-rule (1) with regard to items of expenditure for which vouchers have not obtained under sub-rule (2).

6.4 Rule 90 prescribes the maximum election expenses which can be incurred or authorised in an election.

6.5 Section 10 a requires the Election Commission to disqualify a candidate for a period of three years if he fails to lodge an account of the election expenses within the time and in the manner required. Section 7(b) defines "disqualified" as being disqualified for being chosen and being a member of either the House of Parliament or Legislative Assembly or the Legislative Council of a State.

6.6) Section 123 enumerates the corrupt practices for the purpose of the Act. Incurring or authorising expenditure in contravention of Section 77 shall be deemed to be a corrupt practice for the purpose of the Act, vide sub-section (6) of Section 123. Section 100 lists the grounds for declaring an election to be void. Under sub-section (1)(b), if the High Court is of the opinion that any corrupt practice has been committed by a returned candidate or his election agent or any other person with the consent of the returned candidate or his election agent, the election of the returned candidate shall be declared as void. Under sub-section (1)(d)(ii) and (iv), if the result of the election, in so far as it concerned a returned candidate, has been materially affected by any corrupt practice committed in the interests of the returned candidate by an agent other than his election agent, or by any non-compliance with the provisions of the Constitution or of the Act or any Rules or the orders made under the Act, then also, the election of the returned candidate can be declared void by the High Court.

6.7 Apart from these provisions, two Sections from the Indian Penal Code are also relevant. Section 171(H) deals with illegal payment in connection with an election and Section 171(I) relates to failure to keep election accounts. They are extracted below.

SECTION 171–H: ILLEGAL PAYMENTS, IN CONNECTION WITH AN ELECTION

Whoever, without the general or special authority in writing of a Candidate, incurs or authorises expenses on account of the holding of any public meeting, or upon any advertisement, circular or publication, or in any other way whatsoever for the purpose of promoting or procuring the election of such candidate, shall be punished with a fine which may extend to five hundred rupees.

Provided that any person, having incurred any such expenses not exceeding the amount of ten rupees without authority obtains, within ten days from the date on which such expenses were incurred, the approval in writing of the candidate, he shall be deemed to have incurred such expenses with the authority of the candidate.

SECTION 171–I: FAILURE TO KEEP ELECTION ACCOUNTS

Whoever being required by any law for the time being in force or any rule having the force of law to keep accounts of expenses incurred at or in connection with anelection fails to keep such accounts shall be punished with a fine which may extend to five hundred rupees."

7. Sub-section (1) of Section 77 of the Act requires every candidate at an election to keep separate and correct account of all expenditure in connection with the election incurred or authorised by him or by his election agent between the date on which he has been nominated and the date of declaration of the result thereof. The object of Section 77 was dealt with in great detail by the Supreme Court in *Manwarlal Gupta vs Amarnath Chawla,* decided on 3rd October 1994 (AIR 1975 SC 308), and the Supreme Court held that the limit on expenditure cannot be evaded by the candidate by not spending any money of his own but leaving it to the political party sponsoring him or his friends and supporters to spend an amount far in excess of the limit and thereby frustrate the object of imposing a ceiling on expenditure. Explanation (1) to sub-section (1) of Section 77 was inserted on 19th October 1974 to set at nought the above decision of the Supreme Court. The said explanation clarifies that any expenditure incurred or authorised in connection with the election of a candidate, by a political party or by any other association or body of persons or by any individual (other than the candidate or his election agent) shall not be deemed to be expenditure in connection with the election, incurred or authorised by the candidate or his election agent, for the purpose of sub-section (1).

7.1 The effect and validity of the explanation (1) of Section 77 was considered by the Supreme Court in *P. Nalla Thamby* v *Union of India (AIR 1985 SC 1133).* The Supreme Court, while upholding the validity of the explanation, held:

"We have referred to this large data in order to show that the influence of big money on the election process is regarded universally as an evil of great magnitude. But then, the question which we, as Judges, have to consider is whether the provision contained in Explanation 1 suffers from any constitutional infirmity and, particularly, whether it violates Article 14. On that question we

find it difficult, reluctantly though, to accept the contention that Explanation 1 offends against the right to equality. Under that provision, (i) a political party or (ii) any other association or body of persons or (iii) any individual, other than the candidate or his election agent, can incur expenses, without any limit whatsoever, in connection with the election of a candidate. Such expenses are not deemed to be expenditure in connection with the election, incurred or authorised by the candidate or by his election agent for the purposes of S.77(1).

Counsel for the petitioner urged that Explanation 1 renders the main provision in S.77(1) nugatory, by taking away with one hand what is given by the other. Assuming that this is so, the Explanation would not become unconstitutional for that reason. The argument really bears upon the interpretation of the Section and the Explanation, and not upon the validity of the Explanation. We do not agree that the Explanation denudes the section of its meaning and makes it purposeless. S.77(1) deals with the expenditure "incurred or authorised by" a candidate or his election agent, in connection with the election. It is obligatory to keep a separate and correct account of such expenditure. Explanation 1 deals with the expenditure incurred or authorised by a political party, or any other association or body of person or by an individual other than the candidate or his election agent. It is obligatory for the candidate or his election agent to keep a separate and correct account of such expenditure. This is for two reasons. In the first place, such expenditure is not incurred or authorised by the candidate or his election agent and therefore, in the very nature of things, they cannot keep an account of that expenditure. Secondly, the argument that expenditure of the kind described in Explanation 1 must be deemed to be incurred or authorised by the candidate or his election agent, is met by the provision in the Explanation that it shall not be so deemed. S.77(1) on the one hand and Explanation 1 on the other, deal with two different situations therefore the latter cannot render the former meaningless.

It is essential that the limited range of Explanation 1 ought not to be enlarged. The ceiling placed on election expenses is a basic commandment of the Act, not a pious edict. Its object is to keep a check on the expenditure incurred by candidates on their own elections, directly or through their election agents. They cannot be permitted to resort to subterfuges in order to evade the restraint imposed by Ss.77(1) and 77(3) of the Act. Homage to the principle of free and fair election has to be real, not formal."

7.2 The effect of Section 77 and Explanation 1 thereto, came up for consideration before the Supreme Court again in two cases, first, in *Gadakh Yashwantrao Kankar Rao* v *E. V. Alias Belasaheb Vikhe Patil & Others* (Civil Appeal Nos 2115 with 2116, 2444 and 1758 of 1993 disposed on 19th November 1993), the relevant portion of which is extracted in para 7 of the impugned order, dated 17th December 1993, extracted above. The second decision is *T.*

Narayanaswamy v *C. K. Jaffer reported in JT 1994 SC 136*, wherein the Supreme Court observed thus:

> As the law stands in India, today anybody, including a smuggler, criminal or any other anti-social element, may spend any amount over the election of any candidate in whom such person is interested, for which no account is to be maintained, or to be furnished and any such expenditure shall not be deemed to have been expenditure in connection with the election, incurred or authorised by the candidate or by his election agent for the purpose of sub-section (1) of Section 77, so as to amount to corrupt practice within the meaning of sub-section (6) of Section 123. It is true that, with the rise in the costs of the mode of publicity for support of the candidate concerned, the individual candidate cannot fight the election without proper funds. At the same time, it cannot be accepted that such funds should come from hidden sources which are not available for public scrutiny. According to us, sub-section (6) of Section 123 declaring "incurring or authorising of expenditure in contravention of Section 77" a corrupt practice has lost its significance and utility with the introduction of Explanation 1 aforesaid which encourages corruption by underhand methods. If the call for "purity of elections" is not to be reduced to a lip service or a slogan, then the persons investing funds, in furtherance of the prospect of the election of a candidate must be identified and located. The candidate should not be allowed to plead ignorance about the persons who have made contributions and investment for the success of the candidate concerned at the election. But this has to be taken care of by the Parliament.

8. Let me next refer to some decisions dealing with the powers of the Election Commission. In *All Party Hill Leaders' Conference, Shilling* v *Captain W. A. Sangma* (AIR 1977 SC 2155) the Supreme Court held that the Election Commission is empowered in its own right under Article 324 to make directions in general in the widest terms necessary and also in specific cases, in order to facilitate free and fair elections with promptitude. In *Mohinder Singh Gills* v *Chief Election Commission* (AIR 1978 SC 851), the Supreme Court held that power of the Election Commission under Article 324(1) is plenary in character, and Article 324 vests the whole responsibility for elections and, consequently, the necessary powers to discharge that function in the Election Commission. Article 324 operates in areas left unoccupied by legislation, and the words "superintendence", "direction" and "control", as well as conduct of all elections are the broadest terms which would include the power to make all provisions for free and proper elections. Article 324, on the face of it, vests vast functions, which may be powers or duties, essentially administrative and marginally even judicative or legislative. The Supreme Court further observed that "Even so, situations may arise which enacted law has not provided for. Legislators are not prophets but pragmatists. So it is that the Constitution has made comprehensive provision in Article 324 to take care of surprise situations. That power itself has to be exercised, not mindlessly nor *mala fide*, not arbitrarily nor with partiality, but in keeping with the guidelines of

the rule of law and not stultifying the Presidential Notification for existing legislation. More is not necessary to specify; less is insufficient to leave unsaid".

8.1 In *Kanhiya Lal Omar* v *R. K. Trivedi* (AIR 1986 SC 111) the Supreme Court reiterated that the words "superintendence", "direction" and "control" of the conduct of elections occurring in Article 324 operates in areas left unoccupied by legislation. The Supreme Court further observed:

> While construing the expression "superintendence", "direction" and "control" in Article 324(1), one has to remember that every norm which lays down a rule or conduct cannot possibly be elevated to the position of legislation or delegated legislation. There are some authorities or persons in certain grey areas who may be sources of rules of conduct and who at the same time cannot be equated to authorities or persons who can make law, in the strict sense in which it is understood in jurisprudence. A direction may means an order is issued to a particular individual or a precept which many may have to follow. It may be a specific or a general order. One has also to remember that the source of power in this case is the repository and source of all legal powers and any power granted by the Constitution for a specific purpose should be construed liberally so that the object for which the power is granted is effectively achieved.

8.2 These decisions make it clear that while the Election Commission has undoubtedly the power and authority to issue orders and directions in connection with superintendence, direction and control and conduct of elections, it cannot make laws in the garb of issuing orders under Article 324, contrary to any statute. In other words, the Election Commission is entitled to do everything necessary for the proper conduct of elections so long as the directions are not contrary to the provisions of the Constitution, Representation of Peoples Act, 1951, Conduct of Election Rules, 1960, or other statutory provisions.

9. In the light of the above principles, let me now examine whether the two orders dated 17th December 1993 and 31st August 1994 issued by the Election Commissioner transgress the provisions of Section 77(1) or Rule 86.

10. The first transgression complained of is that the Election Commission cannot require the candidates to maintain day-to-day accounts. It is contended that Section 77 does not contemplate maintaining of accounts from day to day and all that is required is that a candidate should maintain and lodge a true account of his expenses. It is pointed out that Section 77 does not use the words "day to day". Section 77(1) requires the candidate, either by himself or by his election agent, to keep a separate and correct account of all expenditures in connection with the election incurred or authorised by him or by his election agent, between the day on which the candidate has been nominated and the date of declaration of result of the election. Section 77(2) provides that the account shall contain such particulars as may be prescribed. Rule 86 requires that the

account of election expenses to be kept by a candidate or his election agent under Section 77 shall contain the particulars specified therein in respect of each item of expenditure from day to day. Section 171–1 of the Indian Penal Code provides that failure to "keep accounts of expenses" incurred at or in connection with an election as required by any law, shall be punished in the manner provided therein. Section 171–1 therefore contemplates inspection to find out whether accounts are "kept". The words "to keep accounts" means to maintain continuously, that is, to enter or write accounts regularly, from day to day. When expenditure is incurred day to day, accounts will also have to be maintained day to day. "To keep accounts" does not mean that the candidate can write the accounts at the end of the period for which the account is required to be maintained or keep accounts sporadically. Black's Law Dictionary (6th Edition Page 868) defines "to keep" books is to maintain books continuously and methodically for the purposes of a record. Hence, having regard to the specific provisions of Section 77(1) and (2) of the Act and Rule 86 of the Rules and Section 171–I of the Indian Penal Code, the requirement relating to maintaining "day-to-day" accounts cannot be termed a transgression.

11. The next complaint is in regard to the requirement relating to maintaining accounts in the Registers supplied by the Election Commission. The Order dated 31st August 1994 requires the candidate, or his agent authorised by him, to faithfully record the day-to-day accounts in the Register supplied by the District Election Officer and in no other document. The pro forma of the register (given in Annexure I to the Order dated 31st August 1994) shows that what is to be maintained in the Register is nothing more than what is required under Rule 86. The Register does not require entering or maintaining accounts in a different manner or the candidates to do anything not provided in Section 77 or Rule 86. The requirement to maintain accounts in the Register supplied by the Commission will ensure a uniform accounting practice, highlighting what is required under Section 77 and Rule 86, and also ensure day-to-day accounting, and make verification and inspection of accounts easy and convenient. It will also ensure that accounts are not maintained in loose sheets of paper or books, the authenticity of which cannot be verified later, and will prevent additions, alterations, substitutions or tampering. The entire idea behind the requirement is to facilitate easy verification and inspection of accounts by the District Election Officer, Returning Officer or Election Expenditure Observer or other Authority appointed by the Commission, ensuring that the accounts are properly maintained without giving room for any falsification/fabrication. Thus, the requirement is merely an effective way of implementing the provisions relating to maintenance of accounts and is not a transgression of any law.

12. The third complaint is in regard to requiring candidates to file affidavits as per pro forma contained in Annexure II of the Order dated 17th December 1993. The affidavit to be submitted merely requires affirmation that the accounts are properly maintained, and is in conformity with the requirements of Section 77 and Rule 86. The furnishing of such affidavits is part of the process of maintaining accounts and nothing more. The Election Commission is fully justified and empowered in requiring the furnishing of such affidavits.

13. The fourth complaint is in regard to provision for inspection of the accounts before they are lodged by the candidate under Section 78. There are two different and distinct consequences for not maintaining accounts. The first relates to the obligation of the lodging of an account of his election expenses (a true copy of the account kept by him under Section 77) with the District Election Officer within 30 days from the date of election of the returned candidate. If a candidate does not lodge an account as contemplated under Section 78, he incurs disqualification as provided under Section 10 a. The second relates to the obligation to maintain accounts regularly or properly, failing which the candidate commits an offence under Section 171–I of the Indian Penal Code and becomes liable for punishment, provided in the Section 171–I. The consequence of not lodging accounts under Section 78, and the consequence of not maintaining the accounts under Section 77 and Rule 86, are distinct and separate. Further, a person who does not maintain accounts also stands the risk of his election being declared void under Section 100(1)(h)(iv). If the accounts cannot be inspected before their submission, as contended by Petitioners, then it is not at all possible to find out whether a person has "kept" accounts or not. If the requirement relating to inspection of accounts is to be held as not provided for or not authorised, then it would mean that there can be no offence at all under section 171–I of the Indian Penal Code. Section 171–I of the Indian Penal Code clearly implies a power in the authority controlling elections or persons authorised by such authority, to inspect the accounts and prosecute the candidate if accounts are not kept.

14. The fifth transgression complained of is that, while Section 77 and Rule 86 contemplate and require the candidate to maintain and submit accounts in regard to the expenditure incurred by himself or his election agent, the Election Commission has exceeded its powers and jurisdiction by requiring the candidates to maintain and submit accounts in regard to the expenditure incurred by the political party to which the candidate belongs, or by any association or body of persons interested in the success of the candidate. It is contended that, whatever the position of law before the Amendment by Act 58 of 1974 introducing Explanation 1 to Section 77(1) with effect from 19th October 1974, the position now is that any expenditure incurred by any political party or any association or body of persons or any individual other than the candidate or his election agent, shall not be deemed to be expenditure in connection with the election agent; and therefore, the Election Commission cannot require the candidate to maintain accounts in regard to expenditure by a political party or others referred to in Explanation 1 to Section 77(1).

14.1 The said Explanation will have to be read keeping it in juxtaposition to Section 171–H of the Indian Penal Code which provides that whoever, without the general or special authority in writing of a candidate, incurs or authorises expenditure on account of the holding of any public meeting, or upon any advertisement, circulation or publication, or in any other way whatsoever for the purpose of promoting or procuring the election of such candidate, shall be punished with a fine which may extend to Rs. 500/-. While Section 171–H makes it an offence for any person to incur any expenditure for the purpose mentioned therein without the authority of the candidate, Explanation No. 1 to Section 77 provides that any expenditure incurred by a political or other person mentioned therein will not be deemed to be expenditure authorised by

the candidate or his election agent. The Parliament in its legislative wisdom did not choose to omit Section 171–H from the Indian Penal Code, while introducing Explanation (1) to Sec. 77(1) of the Act. Hence these provisions will have to be read harmoniously.

14.2 A careful reading of Explanation (1) to Section 77(1) would show:

(a) That the explanation refers and relates only to expenditure incurred by any political party or others (other than the candidate or his election agent) not authorised by the Candidate or his election agent; and it does not apply to any expenditure by any political party or others mentioned in the explanation, which is authorised by the candidate or his election agent, as any expenditure authorised by the candidate or his election agent becomes part of the candidate's election expenses.

(b) The explanation does not empower, authorise, or enable any political party or association or body of persons or individuals, to incur expenditure on behalf of the candidate, without the authority of the candidate. All that the explanation provides is that if any expenditure is incurred by a political party or by others (other than the candidate or an election agent), it should not be deemed to be expenditure in connection with the election, incurred or authorised by the candidate or his election agent.

(c) The insertion of Explanation (1) is to ensure that a candidate does not incur disqualification or is not accused of any corrupt practice on account of his political party or any third party spending money for his election, without his authority, thereby putting the candidate to the risks consequent upon exceeding the ceiling limit prescribed under Rule 90.

14.3 It therefore follows that if any expenditure is incurred by a political party or any other association or body of persons or by any individual, and if such expenditure is authorised by the candidate, then it becomes a part of candidate's election expenses. If, on the other hand, any political party or any association or body of persons or any individual incurs any expenditure in connection with the election of a candidate, and the candidate does not authorise such expenditure, then the same will not become part of the candidate's election expenditure, but such expenditure would be an unauthorised expenditure or "illegal payment" under section 171–H of the Indian Penal Code and the person committing such an illegal act will be subject to punishment as provided therein.

14.4 The introduction of Explanation (1) to Section 77(1) does not take away the effect of Section 171–H under which any expenditure without the general or special authority in writing of a candidate is an illegal act.

The position that emerges is thus. If a political party or any other person incurs any expenditure, and if it is authorised, it will be a part of the election expenditure of the candidate and will have

to be accounted in the manner prescribed. If is not authorised, then the candidate has no obligation to keep an account in that behalf and the candidate will not incur any disqualification or other consequences on account of such expenditure, but a person who incurs such expenditure commits an offence punishable under Section 171–H of the Indian Penal Code.

14.5 Having reached the conclusion that any expenditure incurred by a political party or by any other person, in connection with the election of the candidate, if authorised by the candidate, becomes a part of his election expenditure, the question is whether he should keep account of such expenditure or ignore that expenditure for the purpose of his accounting. The candidate will have to maintain accounts of the expenditure incurred or authorised by him or his election agent. Neither Section 77 nor Rule 86 makes any distinction between election expenses which can be traced to a political party or others. Once any expenditure is treated as the election expenses of the candidate, whatever may be the source, the candidate becomes liable to maintain accounts in respect of such expense, even if it is incurred by a political party or any other. The requirement that the candidate should account for all expenditure authorised by him, which may include any expenditure incurred by a political party, is thus justified.

15. Even though the preamble to the two impugned orders of the Election Commission may give room for an impression that the Commission is requiring something new, not provided under any existing law, an analysis of the directions contained in the orders will demonstrate that what is required to be performed by the two orders is nothing new, but what is contemplated and provided for in Section 77(1) of the Act, Rule 86 of the Rules and also Section 171–H and 171–I of the Indian Penal Code. The impugned orders do not transgress or exceed what is contained in the said provisions. They are wholly within the competence of the Election Commission having regard to Article 324. They merely implement the existing law in regard to the maintenance of accounts by candidates at Elections. The two orders may put the candidates to some inconvenience by requiring them to maintain accounts day to day in an elaborate manner, but such a requirement is well within the power of the Election Commission. The hardship or inconvenience that may be caused to the candidates in requiring them to maintain proper accounts is a very small price to be paid in the interest of the purity of elections. There is thus no merit in any of the contentions urged by the petitioners to challenge the said two orders.

RE: POINT (iii)

16. The learned counsel for the Election Commission submitted that the process of election having commenced, Article 329–B of the Constitution is a bar for grant of any relief in this petition. The petitioners contend that the subject matter of this petition is the validity of the impugned orders issued by the Election Commission, prior to the commencement of the election process, and that examination of the validity of the said orders and the decision thereon, will not come in the way of elections nor will it postpone any election nor will it affect any election. As I have upheld the validity of the two impugned orders and therefore rejected the petition, it is not

necessary to examine the question whether this Court can consider the validity of such orders passed by the Election Commission when the election process is on.

In view of the foregoing, this petition is rejected.

Sd/=Judge

IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. CIVIL APPLICATION NO. 602 OF 1992

JARAMOGI OGINGA ODINGA & 3 OTHERS — **APPELLANTS**

V

ZACHARIAH RICHARD CHESONI
THE ATTORNEY-GENERAL — **RESPONDENTS**

Before: ***F. Abdullah, J, J.W. Mwera J and E. Githinji, J.***

Elections *– Motion to remove Chairman of Electoral Commission on grounds of unfitness – Order sought to stop voter registration exercise on ground of irregularities by Electoral Commission – whether procedures to bring action were proper - whether applicants had locus standi to bring action – Lack of personal interest on part of applicants.*

Background facts: *The applicants, political party leaders, asked the Court for declaration and orders on eleven grounds against the 1st respondent, Justice Chesoni, the Chairman of the Electoral Commission, and the 2nd respondent, the Attorney-General. The prayers were for orders that the first respondent had become unfit and unqualified to head the Electoral Commission; that the voter registration exercise which was going on was null and void for that reason and that, therefore, the Court should issue a restraint order against the first respondent from acting as the Chairman of the Electoral Commission and declare the voter registration exercise of no effect at all.*

Held*: That the applicants had no locus standi to bring the motion.*

Cases cited in the Judgement:

Mwangi Stephen Murthi v *Attorney General (1981) HCCC 1170 (unreported).*

Bayes v *Gathure [1969] EA 385.*

St Benoist Plantations Ltd v *Jean Felix (1954) 21 EACA 105.*

Masaba v *R [1967] EA 488.*

R v *Magistrates Court (1957) 5LGR 129.*

R v *Paddington Valuation Officer ex parte Peachey Property Corporation Ltd [1966]/QB 380.*

Kenneth Wallace Whitfield v *Attorney General (1989) Appeal No. 11 (Commonwealth Law Bulletin vol. 16 No. 3 July 1990).*

RULING

By their originating motion, dated 13th July 1992, the applicants Messrs Odinga, Kibaki, Nganga and Makau, Chairmen of FORD, D. P. KENDA and SDP-registered political parties, came to court asking for declarations and orders on 11 grounds against the first respondent, Justice Chesoni, the Chairman of the Electoral Commission, and second respondent the Hon. Attorney General.

Put together, the prayers are for orders that the first respondent had become unfit and unqualified to head the Electoral Commission; that the voter registration exercise which was going on then was null and void for that reason, and that therefore this court should issue a restraint against the first respondent from acting as the Electoral Commission Chairman, and another order should stop the voter registration, with the end result that the voters' cards so far issued should be destroyed. In essence, this court was being asked to declare the whole voter registration exercise of no effect at all.

Mr. M'Inot represented the applicants. Mr. Ransley and Miss Janmohamed appeared for the first respondent, while Mr. Keiuwa came in for the Attorney-General.

Before the hearing of the application, which touched on various subjects including universal suffrage, preliminary points of law were raised by the respondents' counsel. These can be categorised under four main heads:

(1) non-joinder of Electoral Commission as a party;
(2) the form and procedure adopted by the applicants in bringing this application;
(3) whether there was a cause of action; and
(4) applicants' locus standi.

(1) **Non-Joinder of Party:** This was Mr. Keiuwa's main point of objection. He associated himself fully with Mr. Ransley's points which will follow presently. Then for his part Mr. Keiuwa argued before us that the applicants had not joined the Electoral Commission as a party, although prayers were made for orders against it. Accordingly, he asked us to strike out grounds 1, 2(b), 6, 7, 8, 10 and 11 of the originating motion. Mr. M'Inoti countered this by referring to Order 1 R9 CPR:

> 9. No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

In accordance with this rule then, we could only dispose of the controversy between first and second respondent. But applicants could amend the motion to bring in the Electoral Commission, otherwise any orders would affect these two only, leaving out the Electoral Commission. Mr.

M'Inoti however argued that the Attorney-General was the principal adviser and counsel of the Government with its departments. The Electoral Commission was such a department, as is the Public Service Commission, and, thus, the Attorney-General was rightly sued. The Public Service Commission is another creature of the Constitution. Several cases were cited, and chief among them was the case of *Mwangi Stephen Murith v. Attorney-General HCCC 1170/1981* (unreported). In this matter the plaintiff had been retired by the Public Service Commission. He was not amused by that. He sued the Attorney-General. One of the points that was canvassed was whether the plaintiff was non-suited on those grounds. Hancox J., as he then was, heard the case. He concluded that Murithi's case constituted civil proceedings within section 12(1) of the Government Proceedings Act. Accordingly, the Attorney-General had been properly sued. But here we came upon a hitch. These proceedings are brought under an originating motion. This form and procedure is contested by Mr. Ransley. It is not indicated in the originating motion that the Attorney-General was being sued on behalf of the Electoral Commission as a government body. Indeed, this cannot appear in the originating motion where parties are hardly described. But even if that were so, the question remained to be answered. It was added that injunctions do not issue against the Government according to Government Proceedings Act S. 16(1)(i) Cap (40), yet those were asked for in prayers 9 and 11. Secondly, it was further argued, if the Attorney-General were here for the Electoral Commission as a whole, why was the first respondent, the Electoral Commission Chairman, sued separately? Although it can be done under Order 1 Rule 9, no move had so far been taken to effect amendments to join the Electoral Commission to the parties so that any errors are corrected and the case proceeds before us to determine matters in controversy with all due parties appearing. On reading the Government Proceedings Act, there is even the issue of a statutory notice under section 13A which ought to go to the Attorney-General if he is being sued for and on behalf of the Government. When referring to this Act, Mr. Keiuwa did not refer to this section and Mr. M'Inoti did not wish to say anything about the Act.

We were, however, satisfied that the Electoral Commission should be considered in the same class as the Public Service Commission on whose behalf the Attorney-General appears in court when it is sued. He was thus sued here on behalf of the Electoral Commission and so we did not sustain the objection raised on this point at all. As for suing the first respondent separately, we were of the view that the applicants in their prayers had made complaints specific to him as the Electoral Commission Chairman. And for the that reason it was proper that he appear as a separate party.

Accordingly, we concluded that there was no non-joinder of parties.

(2) **The Form and Procedure:** Mr. Ransley raised this issue and argued before us that the Constitution, as well as any other statutes which afford an aggrieved party recourse to court for redress, also spells out the mode to follow. Where a mode is not provided for, then an originating motion comes to the parties' aid. But where there is no provision or mode to follow, then a party must seek redress by filing a plaint.

Mr. Ransley continued that this originating motion was brought under sections 60 and 123 (8) of the Constitution. None of these refer to any mode of filing proceedings under them. Why then did the applicants file an originating motion? Three cases were cited to us regarding the form and procedure of filing proceedings.

In *Boyes* v *Gathure [1969] E A 385*, an application had been made to the Registrar of Titles to remove a caveat. A party applied to a judge in chambers to extend that caveat's life. It was accordingly extended. This mode of application was challenged because the relevant Act allowed a party to "apply by summons". In this matter, the Court of Appeal considered whether it was correct for the applicant to come to the High Court to extend the life of a caveat by way of a chamber summons as he had done, or if he ought to have filed an originating summons. The former is for interlocutory matters in an existing suit, while the latter brings parties to court in a specific action for the first time and with a view to having the parties' rights determined conclusively. The court agreed that the application, by way of chamber summons, was in the wrong form but that that did not invalidate the proceedings. The irregularity did not go to the court's jurisdiction and it did not occasion any failure of justice. The judge, however, should have struck out or rejected that application, because of the wrong form of bringing it. The application ought to have been by an originating summons.

E VS E,[1910] E A 604, was the next case cited to us. It also concerned the use of originating summons in the dissolution of a Mohammedan marriage. The defendant objected to this mode of instituting proceedings. The application for dissolution was struck out because it was brought under the originating summons instead of the correct mode of plaint. This is so because under the Mohammedan Divorce and Succession Act (chapter 156) no form or procedure for dissolution of a marriage is set out. This was in line with the court's view in Boyes & Gathure case (supra), namely striking out or rejecting proceedings brought to court under a wrong form.

The earlier case of *St. Benoist Plantations Ltd* v *Jean Felix* [1954] 21 EACA 105, was relied on by both sides. This case was also referred to in the *Boyes* case (supra). In this case, the respondent had moved the court by originating the motion for an order that the court appoint two chartered accountants to investigate the affairs of the company under section 136 of the Companies' Ordinance. The affidavit in support of this originating motion showed misappropriation of the company's funds and misconduct on the part of a director. The appellant company argued, inter alia, that the application for investigation was not in the proper form as the originating motion was not then known and applied in Kenya. In this case, the originating motion had been brought under (the now) Order 50 rule 1. It was observed at pp. 108:

> It seems clear...that if the local statute law provides a form of procedure for any specific proceedings, that form must be adopted. It is only where no form is provided that one is thrown back on the English procedure as at 12th August 1897. If the local law does not provide a suitable or at least a competent mode

> of procedure for an application under section 136, it must be made under the old English procedure...by originating motion.

The same point was repeated on the same page after describing the uses of either the originating summons or originating motion in England. The court observed:

> There is in England a general rule that where a statute provides for an application to the court but does not specify the form in which it is to be made, and the Rules do not expressly provide for any special procedure, the application may usually be made by originating motion.

Mr. M'Inoti argued that, under section 60 of the Constitution, his clients had a right to come to court for redress. That section did not provide for the mode and procedure by which to come to court. Accordingly, the applicants had adopted the originating motion as the avenue to travel to court. The respondents' side would not hear of this. They argued before us that there was no right or provision to come to court under section 60. That section did not give rights of action or causes of action whereupon it could be said that if it did not provide for a mode to seek redress when those rights were breached, then the originating motion could be the appropriate way. That is what formed the substantial part of the next two preliminary points regarding the cause of action and locus standi, which we will turn to next. But we are of the view that, where no mode of coming to court is provided for, yet one has a cause of action, the originating motion may be used. In fact, the party using will choose the mode. If it is found unsuitable, a proper one will have to be adopted so that justice is done to the parties. The court then commented thus at pp. 109:

> ....(it).... may be argued, first that a suit instituted by plaint is the omnibus procedure in this country or alternatively that applications should be made here by petition. We think that an application should properly be regarded as something distinct from an action or suit commenced by a plaint. In many cases the relief sought might be obtained by action – sometimes by claiming a declaration, but an application should in the ordinary sense be a summary proceeding, something simpler and shorter than an action.

So other modes of coming to court include plaints, petitions and applications.

Accordingly, it is clear that in such a situation where one has a cause but is not provided with the form and procedure to bring that cause to court for relief, the form and procedure adopted and used should be as appropriate. In our present case, if the applicants have a cause of action under section 60 (Constitution), how do they move? That section does not provide for a mode or procedure to come to court for redress. They should, as they did, file an originating motion. We were, therefore, satisfied that the applicants' originating motion is a competent form by which to come before us. The applicants are coming to us contending that their rights under the

Constitution are in jeopardy. In other jurisdictions where a party alleges violation of his rights under the Constitution while rules obtain as to mode and procedure to go about seeking redress, the position is different. The party simply goes by the rules laid down. For instance, in Uganda in 1967 they had such a clearly laid-down régime. The party had to come to court by way of an originating motion and no other (see Masaba v R [1967] E A 488).

(3) **Cause of Action**: It was argued for the applicants that they had a cause for action under section 60 (1) Constitution because that section says:

> Section 60 (1): There shall be a High Court which shall be a superior court of record, and which shall have *unlimited original jurisdiction* in civil and criminal matters and such jurisdiction and powers as may be conferred on it by this Constitution or any other law.

We did not agree with the counsel's submissions on the applicants' behalf that by such words this section created causes of action. On plain reading, the section establishes a High Court. It gives it a wide power to deal with matters known to law without being limited as to territorial or monetary value. This contrasts with the subordinate courts whose territorial and pecuniary, as well as subject matter jurisdiction is limited by specific statutes. The same with the Court the Appeal. It too operates within a given and specific law. In essence, matters which come before it are only on appeal. It needs to be stated that the High Court does not have to deal with any subject under the sun. The subject must be known to law; it must be a justiciable matter. Also, in its exercise of jurisdiction, the court will enforce rules of practice and suppress any abuses of its process to ensure that justice is done to the parties before it. The High Court does not have a general power to entertain at the insistence of anyone any matter raising a constitutional or any other issue. Its role is not that of standing as an ever-open forum for the ventilation of all grievances that draw upon the Constitution or any law for support. The court's unlimited powers ought to be and are used with judicial restraint and only in situations where the ends of justice may be defeated by failing to exercise them. To use these inherent or residual powers, the court must be satisfied on grounds placed before it that the powers should indeed be used. That, in our opinion, is what section 60 (1) provides for. It does not create causes of action or courses to follow in those actions. Section 123 (8) gives this court power to review the action of persons or authorities given duties and functions which they should execute without control and direction from any source. This court is thus mandated to determine questions arising from whether such body or authority has exercised such functions according to the legal provisions applicable. That is all.

We appreciate that for an aggrieved party to come to us for redress under the Constitution, only two sections avail. Section 84 is for a party whose fundamental rights and freedoms have been or are likely to be infringed. These rights fall between sections 70 – 83 of our Constitution. The mode to come to this court has been by way of an originating motion. Indeed, it can be added that if by application of other sections of the Constitution, one's fundamental rights and freedoms

are breached, by clearly showing that state of affairs as bringing that party under section 84 for redress, this court will hear him or her.

This court will also hear a party whose case falls under section 67 of Constitution. By this section, if a case is before a subordinate court and it appears to that court that a substantial question of law falls to be interpreted by the High Court, that court may, or if a party to the proceedings so requests it, refer the matter to the High Court for interpretation.

No other provision exists in our Constitution creating causes and courses of action. Indeed, it is not that all sections of the Constitution must be contended in court anyway. The provision for the Electoral Commission is such a section. Under section 41 (1), the Electoral Commission is established with its chairman plus the members. This is a presidential prerogative. The qualifications for Electoral Commission members are set out in section 41 (3). The manner to remove a Commission member is by a presidential tribunal appointed under section 41 and (6). Reasons for removal fall under sub-section (5). There is no room for this court to declare any Electoral Commission member "unfit and disqualified", thereby removing him from the Electoral Commission. That is how the Legislature intended it to be, and this court will not arrogate to itself the duty or anything regarding removal of Electoral Commission members. Following from the foregoing, prayers against the Electoral Commission or its Chairman, are untenable as causes of action before this court. In sum, we were not satisfied that section 60 creates any causes of action at all. Therefore, those which were claimed as such were not maintainable before us at all. The purpose of section 60 is explained above and that is all. And if a party has no cause of action, i.e. the basis on which he/she files proceedings before a court, then that court wastes no time in going through a form of hearing. It is futile. Accordingly we were satisfied that the applicants had no cause of action to bring before us to hear. The Constitution did not create any cause of action for them and we were not told that any other law did so at all.

(4) **Locus Standi:** Do the applicants have a legal standing before this court in the current proceedings? The argument on behalf of the applicants is that they indeed have the right to bring these proceedings. They are chairmen of registered political parties. They feel that any Electoral Commission irregularity in voter registration will affect and impair the electors' right to vote in the coming general elections. It is a trite law that a party coming to court for redress should have a genuine interest known to law which has been or is likely to be prejudiced. The court then is expected to apply the law to the facts of the case which may involve a broken contract, personal injury, damage to reputation or property, breach of statutory right or duty etc. and pronounce a verdict. But if the prejudice affects others' interests, and one purports to bring any action on their behalf, one will be taken to be a mere busybody who has no right to stand before court unless one satisfies the court as to one's capacity to come to it on behalf of others. For that reason it is necessarily procedural that a party describe himself vis à vis the action and relation to other parties. When it comes to the public interest, where a party suffers generally as any other, then relator actions lie. These actions fall under sub-sections 61 and 62 of the Civil Procedure Act and are limited to public nuisance and public charity. The Attorney-General is the principal

aggrieved party but two or more private persons, having interest in the given action, and with the Attorney-General's written consent, can sue. However, even in such a situation, if a private citizen has suffered or is likely to suffer more than the public generally, then he can sue on his own.

From reading the originating motion, it is quite apparent that what the applicants are praying declarations for is to the effect that if such declarations do not issue, the Kenyan public entitled to or registered to vote in the forthcoming general elections will be prejudiced. It is claimed that there are prejudicial defaults and irregularities as per the paragraphs of the originating motion. But what is the applicants' own interest in jeopardy to entitle them to come before us? As electors? We cannot advert to any other capacities and descriptions they may have. What is the applicants' locus standi? Lord Denning's Discipline of the Law was cited to us (pp.115). Therein, the learned and eminent Lord Justice referred to two cases. In R v. Magistrate's Court (1957) 5LGR 129, it was stated that one party had been allocated a plot. The applicant, who had no legal right to it, thought that he was entitled. Lord Denning was on the bench that heard the application. They held that the applicant had a locus standi. These local government reports (LGR) are not easily available here for our own reading to follow the arguments. But the other case quoted in the same book was R v. Paddington Valuation Office Ex parte Peachey Property Corporation Ltd. [1966] 1 QB 380. A valuation list had been prepared. The applicant was not affected by any errors that were found in that list, but he was allowed to complain and be heard that the list was invalid. Particularly with regard to the last case, we cannot say what the valuation law rules involved and how they were worded. We could not, therefore, say more about it. Yet, we are still far from discerning the applicants' rights to come before us. Is this a representative proceeding before us? We can hardly say so. Are applicants aggrieved parties? In connection with these proceedings, let us turn to the National Assembly and Presidential Election Act and Rules (Chapter 7). The electors' registration is provided for in the Constitution and this Act governs the process thereof.

The law is clear (both under the NAPE Act and Rules) that a voter who is aggrieved before and after the elections can come to court.

During voter registration, any aggrieved person who feels that there is any irregularity likely to affect his right to vote, e.g. faults and errors with his card, he can go to the local registration officer, and then to the subordinate court for redress. It does not allow for some busybody to raise a complaint on behalf of others in this respect.

After elections, if one is aggrieved about the results, he can go to the subordinate court for local authority elections by way of an application. Or he can move to the High Court by filing a petition. That shows that the aggrieved party has the ground on which he stands to be heard. There is no ground on which an individual can stand before us in the voter registration, claiming to do so on behalf of the public, who are described here as millions of Kenyans. Not even on the issue of I D cards. The applicants have no "personal interest" at stake – at least the prayers do

not disclose one. Yet, it was claimed that they had an interest at stake which gave them legal standing before us. We could hardly find statute or case law in support of such a stance. Only individual voters whose "personal interest" are at stake, if any, have a legal standing before this court. It is not for anybody who feels that voters may be aggrieved.

In the matter of what may be presumed as affecting the general public, and therefore prompting one of them to file a suit or constitutional reference, two cases from the West Indies lend support to the position that one coming to court in such proceedings should have locus standi.

One such case arose in the Bahamas – *Kenneth Wallace Whitfield and The Attorney-General of the Bahamas* in re: The Bahamas Court of Appeal (Appeal No. 11/89) (published in the Commonwealth Law Bulletin Vol. 16 No. 3 July, 1990). In this case, the Prime Minister agreed with the Chief Justice before he attained the retirement age of 65 that the latter would continue in office for two more years. As per the Constitution, the Prime Minister was obliged to consult with the Leader of the Opposition on this matter. The Prime Minister, through oversight, did not do so. The appellant sought by declaration that the Chief Justice had not been validly permitted to continue in office. He had sat on an election court which dealt with a matter involving the appellant.

The Court of Appeal, in dismissing the appeal, held, inter alia, that there was no legal right being claimed and the appellant had no locus standi. The appellant had not shown that he had suffered any disadvantage or detriment because of the alleged defect in the procedure.

It can be seen, therefore, that even a person who can demonstrate a special interest he thinks entitles him to a declaration or relief, the court must be satisfied, not only that the interest exists but also that it has been prejudiced, and therefore the litigant is entitled to relief from the court he has approached. In essence, it is even harder for the intending litigant who has shown no personal interest at all which has been prejudiced, as our instant case is.

Another case is from St. Vincent and the Grenadines, also in the West Indies. Briefly put, in that country, the Constitution allowed the Governor-General to appoint two senators from the opposition in Parliament. After elections, there was no opposition member elected to the House to be appointed, but four were appointed from the government side. The plaintiffs sought for a determination on questions, inter alia, whether the government was legally constituted. The High Court dismissed the application on the grounds that the plaintiffs had no locus standi to bring proceedings. They had not proved that their personal interest was being contravened in any way by the alleged improperly constituted government. The fact that they were tax-payers and registered voters of the nation did not confer on them locus standi. (See Commonwealth Law Bulletin Vol. 17 No. 1 Jan. 1991.) We were in agreement with these two decisions that the party coming to court must have locus standi. That is the law.

In conclusion, we were satisfied that the applicants had no locus standi in regard to the prayers they presented. They did not disclose that the applicants' "personal interest" was in jeopardy, which interest would give the applicants the right in the law to stand before this court to be heard.

We, accordingly, uphold two of the preliminary points of law raised and dismiss the application with costs.

Orders accordingly delivered this 13th day of November, 1992.

F. ABDULLAH
JUDGE

E. GITHINJI
JUDGE

J. W. MWERA
JUDGE

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 5936 OF 1992

JARAMOGI OGINGA ODINGA

GITOBU IMANYARA **PLAINTIFFS**

HASSAN KADIR

V

THE ELECTORAL COMMISSION **DEFENDANT**

Before: T. Mbaluto, J

Elections *– Competence of Attorney-General to rectify Electoral Act through Revision of Laws Act – Validity of ensuing Order – Consequences of rectification – Attitude of Electoral Commission – Reliance of Electoral Commission on rectification – Legal Status of Electoral Commission – Ability to sue or be sued.*

Background facts: *The Attorney-General issued a Legal Notice on 23rd October 1992 purporting to rectify Section 13 (3)(b)(1) of the National Assembly and Presidential Election Act. The Legal Notice was issued in exercise of the powers conferred on the Attorney-General by Section 13 of the Revision of the Laws Act. The amendment had a substantial and profound effect on the meaning of the section for it practically reduced to zero the number of days which a political party had to nominate a candidate after the publication of a notice pursuant to the Section.*

The Attorney-General's amendment had changed the word "less" to "more" in the following passage:

> ***The day or days upon which each political party shall nominate candidates to contest parliamentary elections in accordance with its constitution or rules which shall not be less than twenty-one days after the date of publication of such notice.***

The Electoral Commission acted on the purported rectification of the Act by the Attorney-General by issuing a Gazette Notice No. 4887 of 3rd November 1992 giving political parties only eight days to finalise the nomination of their candidates. This notice would not have been valid prior to the rectification.

The applicants challenged the action of the Attorney-General as being null and void and of no effect and, similarly, the action taken by the Electoral Commission in issuing Gazette Notice No. 4887 of 3rd November 1992.

Held: *That the amendment of law by the Attorney-General was null and void and of no effect; the notice issued by the Electoral Commission publish in Gazette Notice No. 4887 dated 3rd November 1992 was also null and void and of no effect.*

Cases cited in Judgement:

The Queen v *Commissioner of Patents; Ex parte Martin (953) 89 Commonwealth Law Reports pp 406.*

Giella v *Cassman Brain & Co Ltd (1973) E.A. 358.*

RULING

This an application for a temporary injunction.

The applicants, Jaramogi Oginga Odinga, Gitobu Imanyara and Hassan Kadir are the Chairman, Secretary-General and Treasurer respectively, of the political party known as Forum For the Restoration of Democracy, Kenya. They have filed a suit against the Electoral Commission seeking, inter alia:

(1) A declaration that the purported "rectification" by the Attorney-General by legal notice No 276 of 1992 of 23rd October 1992 of section 13(3)(b)(1) of the National Assembly and Presidential Election Act (Chapter 7) is and has, at all times, been null and void and of no effect.

(2) A declaration that the specification of times by the Electoral Commission in Gazette Notice No. 4887 of 1992 of 3rd November 1992 in paragraphs (b) and (c) thereof are and have, at all times, been null and void and of no effect.

(3) An Order to restrain the Electoral Commission from acting or acting any further in reliance on the said specification and the said Gazette Notice until the determination of the suit.

The temporary injunction, the subject matter of this application, seeks orders substantially similar to the order sought in the third prayer stated above.

Early this year Parliament enacted the Election Laws (Amendment) Act, 1992. Section 6 of that Act amended section 13 (3) (b) of the National Assembly and Presidential Election Act to read as follows:

> "Every writ shall be delivered to the Director of Election who shall, within 10 days after receiving it:
>
> (a) .....
>
> (b) Cause to be published in the Gazette a notice in the prescribed form which shall specify:
>
> (1) The day or days upon which each political party shall nominate candidates to contest parliamentary elections in accordance with its constitution or rules which shall not be less than twenty-one days after the date of publication of such Notice".

The Act was assented to on 20th March 1992 and was deemed to have come into effect on 9th March 1992. It remained undisturbed throughout the remaining part of the life of the last

Parliament until 23rd October 1992, long after Parliament had been prorogued when section 13(3)(b)(1) thereof was purportedly rectified by Legal Notice No. 276 of 23rd October 1992 by the Attorney-General in exercise of the powers conferred upon him by section 13 of the Revision of the Laws Act (Chapter 1 of the Laws of Kenya). The rectification was effected by the deletion of the word "less" appearing therein and the insertion in its place of the word "more". Although the amendment appears minor at first glance, it had a substantial and profound effect on the meaning of the Section for, at a stroke, it not only reduced to zero the numbers of days upon which a political party had to nominate a candidate after the publication of a notice pursuant to the section, but also rendered the said section wholly meaningless and nugatory.

No replying affidavit has been filed in this matter on behalf of the Electoral Commission and, consequently, its attitude or reaction to the rectification and its role or lack of it in the matter is unknown. Mr. Ransley, who appeared for the Commission, took a neutral role on the issue, neither supporting nor opposing the rectification but contending that the Commission had to operate within the law (that is the law rectified) as it found it. Whatever the views of the Commission are on the matter, it cannot be gainsaid that the Electoral Commission was aware of the rectified law and, indeed, took advantage of the change, because by Gazette Notice No. 4887 of 3rd November 1992, it published a Notice giving political parties only eight days to finalise the nomination of their candidates, which said notice would not have been valid prior to the rectification.

The applicants in this application say that the purported rectification and the Notice published by the Electoral Commission are null and void and of no effect. They therefore seek this court's order to restrain the Commission from acting further on the said notice.

The Attorney-General issued the order contained in legal notice No. 276 of 23rd October 1992 in exercise of the powers conferred upon him by Section 13 of the Revision of Laws Act. The Section reads as follows:

> "The Attorney-General may by Order in Gazette rectify any clerical or printing error appearing in the Laws of Kenya, or rectify in a manner not inconsistent with the powers of Revision conferred by this Act any other error so appearing".

It is manifestly clear from the wording of the above-section that the Attorney-General can only rectify a law where there is:

(i) a clerical error;
(ii) a printing error; or
(iii) in a manner not inconsistent with the power of revision conferred upon him by the Act, which effectively means powers conferred by Section 8.

As submitted by Mr Nowrojee, learned counsel for the applicants, the notion of an error within the meaning of the Revision of Law Act presupposes an error is the transcription of something already in existence. Clearly, in my view, it cannot have reference to a non-existing thing. In the Australian case of the Queen v. Commissioner of Patents Ex parte Martin (1953) (89 Commonwealth Law Reports at page 406) the court said:

> the characteristic of a clerical error is not that it is in itself trivial or unimportant but that it arises in the mechanical process of writing or transcribing.

I have had a chance to look at the Bill presented before Parliament for enactment of the Election Laws Amendment Act 1992 and particularly Section 6 thereof, and I can see not a single difference whatsoever between the Bill as presented by Parliament and the Act. There was therefore no printing or clerical error in the preparation of the Act either during or after its passage by Parliament. Since on the face of it, there is no "error" clerical or printing, in the word "less" affecting in section 13(3)(b)(i) of Chapter 7 which required rectification under section 13 of the Revision of Laws Act, and no evidence has been adduced to show what error was being rectified, I must take it that there was, in fact, no such error, and that the purported rectification was sneaked in mischievously for purposes other than those stated in the said Order.

As for the powers of revision conferred upon the Attorney-General by Section 8 of the Revision of Laws Act, they are only exercisable in the preparation of the annual supplement to the Laws of Kenya which was not the case in this matter.

In any event, Section 8(4) of the Revision of Laws Act makes it clear that in exercising the powers conferred by Section 8, the Attorney-General has no power to make any changes in the substance of the law. It provides:

> Nothing, in this section shall empower the Attorney-General to make any alteration or amendment in the substance of any Law.

The rectification being complained of by the applicant effected very substantial changes to the Election Laws. As I have said above, it reduced the number of days political parties have to nominate candidates to zero. It also altered what people thought was a safeguard for political parties against being caught by surprise into a meaningless and worthless piece of provision in the National Assembly and Presidential Elections Act. The objects of the Revision of Law Act was not to enable the Attorney-General to effect such an illegal amendment, and I am convinced that the order he made under Legal Notice No. 276 of 23rd October, 1992 was in excess of the powers conferred by Section 13 of the Revision of Laws Act. The purported rectification was therefore null and void and of no effect.

In opposing the application, Mr Ransley for the Electoral Commission did not really attack the substance of the applicants' ground. Instead, he raised a technical matter urging this court to

dismiss the application on the grounds that the Electoral Commission was not a legal identity which could be sued. The basis of his argument was that the Electoral Commission and the Commissioners were government servants who, by virtue of the Government Proceedings Act, should have been sued through the Attorney-General. That, in my view, is too legalistic a point to take in a matter of such a grave importance to the country, and I will not entertain it. In any event, since its institution, the new Electoral Commission under Mr Justice Chesoni has been preaching to the country the gospel that it is independent of the Government and that it does not receive any instructions from the Government in the discharge of its functions. That is, indeed, how it should be. It may of course be that there is a lacuna in the laws that are required to formalise the Electoral Commission's independence of and separation from the Government so that it can be in a position to sue or be sued without having to involve the Attorney-General. But, whatever the position, the Electoral Commission cannot have it both ways – one day independent of the Government and on another part of the Government. That is clearly untenable. For that reason I find that the Electoral Commission can be sued independently of the Government and can be compelled by Order to act in accordance with the Law. In respect of this application, the applicants have established that by reducing the number of days provided for under the law for nomination of candidates, the Commission has wrongly deprived them of a right which the law has provided to them. That is an actionable wrong.

Lastly, I think it needs to be observed that, except where there is clear delegation, only Parliament can legislate. In saying so, I do not wish to appear to be attempting to diminish the considerable powers the Attorney-General has under the laws of this country; indeed, the powers conferred upon him by the Revision of Laws Act are a good example of the powers he wields. However, all these powers are, notwithstanding the fact that, by virtue of Section 26 of the Constitution, the Attorney-General is the Government's principal legal adviser, to be exercised judicially and impartially for the benefit of all the inhabitants of this country and not just for the benefit of a group of persons or a particular political party.

By using the formal amending provisions of the Revision of the Law Act to effect a change or alteration in substantive registration so that it operates to the prejudice of one or more political parties by not affording them adequate time to arrange for the nomination of candidates, the Attorney-General's action can only be construed to have been a misuse, if not an abuse, of the powers conferred upon his office. In my view that was clearly illegal.

I think I have said enough to show that I am more than satisfied that the applicants have satisfied the tests set out in the case of *Giella* v *Cassman Brain and Co. Limited (1973) E.A. 358* for the grant of a temporary injunction. Accordingly, the application is granted in terms of the order sought in prayer number A of the Chamber Summons dated 6th November 1992. The applicants will have their costs of this application against the respondent.

Dated at Nairobi this 12th day of November, 1992.

T. MBALUTO
JUDGE

RECORD NO. 46369

IN THE SUPREME COURT OF MAURITIUS

In the matter of:

F. C. MOHAMMAD & ANOR **PETITIONERS**

V

E. A. AHMAD & ANOR **RESPONDENTS**

In the presence of:

ELECTORAL SUPERVISORY COMMISSION & OTHERS **CO-RESPONDENTS**

Before: Sir J. P. Glover, C.J. and R. Lallah, Senior Puisne Judge

Elections *– Appointment of electoral officers – Whether returning officer and deputy returning officer to be appointed by Electoral Supervisory Commission – Whether other electoral officers (senior presiding officers, presiding officers and poll clerks) should be appointed by the returning officer with approval of the Electoral Supervisory Commission – Whether such appointments, having been made by Head of Civil Service and Secretary for Home Affairs, to whom power to appoint had been delegated by the Public Service Commission, were valid – Whether, if power to make appointment was vested in the Public Service Commission, delegation of that power caused election to be tainted because power was delegated to "an officer" of the Prime Minister's Office while the Prime Minister was leader of a political party.*

Background facts: *An electoral petition was brought to overturn the results of a by-election on the grounds that the election was invalid because the election was conducted irregularly and contrary to law. These allegations were founded on the assumption that the election officers who conducted the election were appointed wrongly by an authority other than the Electoral Supervisory Commission which had been entrusted with the general responsibility for, and the duty to supervise, the conduct of election.*

Held: *That the electoral officers were properly appointed under the Constitution.*

JUDGEMENT

This electoral petition relates to a by-election for Constituency No. 3 held in October last, as a result of which the first respondent was returned. The petition avers that the latter's election was invalid because "the election was conducted irregularly and contrary to law". That averment is particularised as follows:

(a) the Returning Officer and the Deputy Returning Officer should, by law, have been appointed by the Electoral Supervisory Commission;

(b) the other electoral officers (Senior Presiding Officers, Presiding Officers and Poll Clerks) should have, by law, been appointed by the Returning Officer with the approval of the Electoral Supervisory Commission;

(c) the appointments referred to at (a) and (b) were made by the second respondent, the Head of the Civil Service and Secretary for Home Affairs, to whom the power to do so had been delegated by the Public Service Commission (co-respondent No. 4), while it had no power to appoint them and hence to delegate its alleged power;

(d) the appointments should in any event have been made as provided by law because Section 41(1) of the Constitution has entrusted the Electoral Supervisory Commission with general responsibility for, and the duty to supervise, the conduct of the elections of members of the National Assembly;

(e) even if the power to make those appointments was vested in the Public Service Commission, the election was tainted because (i) the power had been delegated to "an officer of the Prime Minister's Office" while the Prime Minister was the leader of the political party alliance which fielded the first respondent as its candidate and/or (ii) all the appointees were public officers, i.e. people "more prone to pressure and influence from the Prime Minister".

Before the enactment of the Representation of the People (Amendment) Act 1968 in May of the year, the law provided that the Governor was empowered to appoint Returning Officers and Deputy Returning Officers while the Returning Officer would, in respect of his constituency, appoint the other officers required to conduct an election, but subject to the Governor's approval.

The 1968 Act repealed and replaced the Regulations that contained those provisions by a new Schedule which sets out The National (then Legislative) Assembly Regulations 1968. Regulation 3(1) stipulated that the Electoral Supervisory Commission would henceforth appoint Returning and Deputy Returning Officers while the Returning Officers would, subject to that Commission's approval and pursuant to regulation 20(1) and (2), appoint the rest of the staff required for a poll.

When a by-election occurred in 1970 in Constituency No. 5, the Electoral Supervisory Commission appointed the Returning Officer and the Deputy Returning Officer and, one may assume, the Returning Officer also complied with the regulations as they stood in respect of other officers.

According to the evidence, when the next general election to be held under the 1968 regulations was due in 1976, the appropriate authorities, who had taken note of what were described in evidence as various malpractices in the selection of electoral staff, sought legal advice from the Attorney-General's Office. The Government was then advised that, since all persons appointed to be Returning Officer, Deputy Returning Officer, Senior Presiding Officer, Presiding Officer and Poll Clerk were the holders of a public office, the power to appoint them was vested in the Public Service Commission and, subject to its power to delegate any of its functions to a member of the Commission or to a public officer, to no-one else. In other words, the view was expressed that those provisions of the 1968 regulations which conferred power of appointment on the Electoral Supervisory Commission and the Returning Officer were unconstitutional. The Public Service Commission, no doubt for quite good reasons, decided initially to delegate its functions (which, we were told, involve the selection and appointment of some ten to twelve thousand persons for a general election) to the Secretary to the Cabinet, who at the time performed the duties of Head of the Civil Service, and later to the Head of the Civil Service and Secretary for Home Affairs. It was further decided that, as from 1976, only established public officers should be selected to work at elections. That practice has been in operation ever since, for five successive general elections, and the evidence indicates that no-one has ever complained of, or found fault with, the system. Indeed, learned counsel for the petitioners stated that the alleged irregularity they now complain of did not in any way affect the result of the impugned by-election.

Little was said by counsel for the petitioners to counter the legal proposition that, ever since it became exclusively vested with its powers of appointment by the Constitution that came into operation on the 12th August 1967, it was the Public Service Commission's sole privilege to appoint all the officers concerned with the conduct of elections. Mention was made of the status of officers of a temporary nature, and there was a passing reference to part of paragraph 61 of the Report of the Commission of Enquiry on the Recruitment of Community Service Workers in 1982.

We note that the Constitution does indeed cater for such cases in section 89, which provides that:

> (3) This section shall not apply to:
>
> (a) .....
>
> (b) .....
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> (c) .....
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> (d) .....
>
> (e) .....
>
> (f) .....

(g) any office prescribed by the Public Service Commission acting with the concurrence of a Minister, being an office the emoluments attaching to which are paid at daily rates; or

(h) any office of a temporary nature, the duties attaching to which are mainly advisory and which is to be filled by a person serving under a contract on non-pensionable terms.

It is, moreover, apposite to quote fully relevant extracts from the Report of the Commission of Enquiry referred to, which read as follows:

> 51. What immediately concerns us in this enquiry is appointments, whether temporary, acting or permanent in the public service, other than the Police Service or the Judicial and Legal Service. The Constitution has conferred exclusive power in this regard to the Public Service Commission (The PSC). There are limitations, of course, to this power. For example, in order to ensure in a greater measure the answerability of Ministers to Parliament in respect of the administration of their Ministry, the appointment of supervising officers (The Secretary to the Cabinet, the Financial Secretary, Permanent Secretaries or, in certain Ministries, Principal Assistant Secretaries) cannot be made without the concurrence of the Prime Minister who, it must be assumed, takes the wishes of his Ministers into account with regard to the appointment of the heads of their respective ministries. In addition to this limitation, there are others which are set out in detail in section 89 of the Constitution.
>
> 52. The PSC may divest itself of the power to appoint persons in the public service in respect of officers, whether temporary or permanent, the emoluments attaching to which are paid at daily rates. And the PSC can only do so by making appropriate Regulations or Orders acting with the concurrence of a Minister (section 89(3) (g) of the Constitution). The Minister concerned here must, presumably, be the Prime Minister since he has the portfolio for establishment matters and the public service generally. No such Regulations or Orders have so far, presumably for good reasons, been made by the PSC. The result is that appointments of the kind that were made in respect of the Community Service Workers still vests in the PSC. The question arises whether it would not have been possible for the PSC to delegate to a public officer, like the PAS or Mr Rajah Gopal, the power to appoint these workers who were intended to be paid at daily rates.
>
> 53. The PSC can, under section 89(2) of the Constitution, delegate any of its powers of appointment or disciplinary control to a member of the PSC or to a public officer under such conditions as it thinks fit. The question has, I know,

been mooted before whether, since specific provision has been made in section 89(3)(g) with regard to the manner in which, and the kind of offices in respect of which, the PSC may divest itself of its powers of appointment and disciplinary control, it would be open to the PSC to delegate its powers under section 89(2) rather than divest itself completely of this power. My own view is that the manner in which the section has been drafted provides an unequivocal answer. The purpose of sub-section (3) is to exclude the application of the section to certain types of offices, including the daily paid workers by means of appropriate Regulations or Orders. But if they are not so excluded under sub-section (3), they necessarily remain included among the other offices in respect of which the PSC has jurisdiction. And, in respect of those offices, the PSC can, as we know, delegate its powers of appointment. Be that as it may, the power to appoint the workers we are concerned with was not removed from the PSC, either by delegation of authority or by Regulations or Orders.

. . . . . .

61. The kind of parliamentary democracy which our Constitution has established for this country requires that elections be conducted fairly and freely. Institutional provisions provide an infrastructure independent of the political executive to organise and conduct elections in a manner designed to ensure their fairness and freedom. I have in mind the Electoral Supervisory and Boundary Commissions, the highest organs of the Judiciary which arbitrate on the rights of electors and candidates alike and, lastly, public officials whose appointment is outside the control of the political executive.

It is therefore clear that persons appointed to an office of emolument paid from public funds in the service of the State in a civil capacity in respect of the government of the country, as electoral staff patently are, must, since they do not fall within either of the categories catered for in section 89(3)(g) or (h), hold that appointment from the Public Service Commission or from a person to whom the power to appoint has been validly delegated.

We now turn to the provisions of the Constitution regarding the control and supervision of elections and shall quote Sections 40 and 41:

40. **Electoral Commissioner**

(1) There shall be an Electoral Commissioner, whose office shall be a public office and who shall be appointed by the Judicial and Legal Service Commission.

(2) No person shall be qualified to hold or act in the office of Electoral Commissioner unless he is qualified to practise as a barrister in Mauritius.

(3) Without prejudice to section 41, in the exercise of his functions under this Constitution, the Electoral Commissioner shall not be subject to the direction or control of any other person or authority.

41. **Functions of Electoral Supervisory Commission and Electoral Commissioner**

(1) The Electoral Supervisory Commission shall have *general responsibility for*, and shall supervise, the registration of electors for the election of members of the Assembly and the conduct of elections of such members and the Commission shall have such powers and other functions relating to such registration and such elections as may be prescribed.

(2) The Electoral Commissioner shall have such powers and other functions relating to such registration and elections as may be prescribed, *and he shall keep the Electoral Supervisory Commission fully informed concerning the exercise of his functions and shall have the right to attend meetings of the Commission and to refer to the Commission for their advice or decision any question relating to his functions.*

(3) Every proposed Bill and every proposed regulation or other instrument having the force of law relating to the registration of electors for the election of members of the Assembly or to the election of such members shall be referred to the Electoral Supervisory Commission and to the Electoral Commissioner *at such time as shall give them sufficient opportunity to make comments* thereon before the Bill is introduced in the Assembly or, as the case may be, the regulation or other instrument is made.

(4) *The Electoral Supervisory Commission may make such reports to the Governor-General* concerning the matters under their supervision, or any draft Bill or instrument that is referred to them, as they may think fit and if the Commission so requested in any such report, other than a report on a draft Bill or instrument, that report shall be laid before the Assembly.

(5) *The question whether the Electoral Commissioner has acted in accordance with the advice of or a decision of the Electoral Supervisory Commission shall not be enquired into in any court of law.* (Emphasis added.)

But it is also necessary, in this context, to refer to Section 3 of the Representation of the People Act which reads as follows:

3. Electoral Commissioner and his Deputy

(1) *The Electoral Commissioner shall have all the powers* of the registration officer and *of the returning officer* in an electoral area.

(2) There may be appointed a barrister-at-law to be Deputy Electoral Commissioner for an electoral area.

(3) Subject to the authority, directions and control of the Electoral Commissioner, the Deputy Electoral Commissioner shall have all the powers and may perform any of the functions of the Electoral Commissioner in the electoral area or areas for which he is appointed.

(4) Every appointment made under this section shall be published in the Gazette.

(5) (a) *The Electoral Commissioner shall ensure that* the register of electors is prepared and *the elections are conducted in any electoral area in accordance with this Act.*

(b) For the purposes laid down in paragraph (a), *the Electoral Commissioner may:*

(i) require information from any officer appointed under this Act with respect to any matter relating to the functions of the officer;

(ii) subject to this Act, *issue general instructions to an officer,* with respect to the performance of his duties.

(c) *All officers shall comply with the requirements and instructions of the Electoral Commissioner.* (Emphasis added).

A proper reading of those provisions cannot, in our judgment, produce the result that, notwithstanding the clear expression of the powers of the Public Service Commission in section 89, and the relevant definitions of the terms "public office", "public officer" and "public service" in Section 111, Section 41(1) of the Constitution, which only refers to the Electoral Supervisory Commission's general responsibility and duty of supervision, will override those other provisions in matters of the appointment of electoral staff. If the framers of the Constitution had intended to give the power of appointment to the latter Commission, they would have so stated expressly. We may add that we have notice of the fact that a fair number of Returning Officers at a general election are officers in the legal and judicial service and that, before those persons are appointed, the Judicial and Legal Service Commission is, as is required by Section 89(6) of the Constitution, duly consulted.

We turn now to the two other complaints made by the petitioners. The evidence, which we accept, shows that, in exercising the powers delegated to him by the Public Service Commission, the Head of the Civil Service and Secretary for Home Affairs relied entirely on advice tendered to him by the Electoral Commissioner and by the Returning Officer, who have, over the years, compiled a list of persons who have wide experience in the conduct of elections. The evidence further shows that, although the letters of appointment bear the heading "Prime Minister's Office", that is so only because the Head of the Civil Service and Secretary for Home Affairs is posted in the Prime Minister's Office, and that the Prime Minister was not at all involved in the process. Finally, in this connection, reference was made to the fact that the Head of the Civil Service and Secretary for Home Affairs can only, just like Permanent Secretaries and others, be initially appointed to his office with the concurrence of the Prime Minister. Having regard to the rest of the evidence, we are unable to find that the Public Service Commission has, by delegating its powers of appointment to the holder of that office, violated the principles underlying the democratic process.

The other, and last, submission for the petitioners refers to the fact that only the holders of an established public office are appointed to work at elections. As stated earlier, this complaint is based on an averment to the effect that public officers are "more prone to pressure and influence from the Prime Minister". No attempt was even made to bring any evidence to substantiate such an allegation which the Civil Service as a whole may well look upon as totally gratuitous. Moreover, the evidence, which we accept, has shown that, for a number of practical reasons, it is preferable to have recourse to public officers for the performance of duties connected with the conduct of a poll.

For all those reasons, the petition is set aside, with costs.

V. J. P. GLOVER
Chief Justice

R. LALLAH
Senior Puisne Judge

June 1993

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 6026 OF 1993

ELECTION COMMISSION OF INDIA — APPELLANT

V

STATE BANK OF INDIA STAFF ASSOCIATION
LOCAL HEAD OFFICE UNIT, PATNA & OTHERS — RESPONDENTS

WITH

CIVIL APPEAL NO. 4611 OF 1989

ELECTION COMMISSION OF INDIA — APPELLANT

V

NORTHERN ZONE INSURANCE EMPLOYEES'
ASSOCIATION THROUGH ITS DIVISIONAL
SECRETARY SHRI DURGAMAL TRIPATHI — RESPONDENT

Heard by: Ahmadi, C J I, S. Mohan, J and N. P. Singh, J

Staff of Election Commission – Power to request the President, a State Governor or a local authority to provide election staff – Whether such power of the Election Commission extends to the State Bank of India – Whether the order of District Election Officer to the State Bank of India to supply a list of officers and staff for appointment as presiding officers and Polling Officers is valid.

***Background facts**: Under Clause (6) of Article 324 of the Constitution and the Representation of the People Act, 1951 (Section 159), the Election Commission is empowered to request the President or the Governor of a State (Clause (6) of 324) or a Regional Commissioner may request a local authority, to make available such staff as may be necessary for the discharge of any functions in connection with an election. Purporting to act under these powers, a District Election Officer, on behalf of the Commission, sent an order to the Chief General Manager of the State Bank of India, Patna, requiring the officials and staff of the Bank to serve as presiding officers and polling officers at an election.*

***Held:** That the relevant provisions of the Constitution and election laws applied only in respect of officers of Central or State Governments or local authorities and not to agencies such as the State Bank of India.*

***Cases cited**:*

K P Roy v *D Rudra, District Magistrate, Howrah AIR (1971) Calcutta 461 and Civil Appeal No. 4611 1989.*

Digrijay Mote v *Union of India and Others (1993) (3) SCC 175.*

Sukhder Singh v *Bhagatram (1975) (3) SCR 619.*

Shyam Lal Sharma v *Life Insurance Corporation & Another (1970)2FLR 357*

JUDGEMENT

AHMADI, CJI

Both these appeals can be disposed of by this common judgment as the question under consideration in both cases bears on the language of clause (6) of Article 324 of the Constitution of India.

The Election Commission of India is the appellant in both the appeals. Article 324 of the Constitution vests in the Election Commission the power of superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to Parliament and to this Legislature of every State.

Clause (6) of Article 324 reads as below:

> "The President, or the Governor of a State, shall, when so requested by the Election Commission, make available to the Election Commission or to a Regional Commissioner such staff as may be necessary for the discharge of the functions conferred on the Election Commission by Clause (1)."

Article 327 enables Parliament to make provision with respect to all matters relating to, or connected 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 delimitation of constituencies and all other matters necessary for securing the due constitution of such House or Houses.

In exercise of the power vested in the Parliament under these Articles, it enacted the Representation of the People Act, 1950 and the Representation of the People Act, 1951 (hereinafter referred to as 'the 1950 and 1951 Acts', respectively). The 1950 Act provides for the allocation of seats and the delimitation of constituencies for the purpose of elections to the House of People and the Legislatures of the States, the qualifications of voters at such elections, the preparation of electoral rolls and the matters connected therewith. The 1951 Act provides for the conduct of elections to the Houses of Parliament and to the House or Houses of the Legislature of each State, the qualifications and disqualifications for membership of those Houses, and the corrupt practices and other offences at or in connection with such elections. Section 26 of the 1951 Act enables a District Election Officer to appoint a Presiding Officer for each polling station. Section 159 of the said Act reads as follows:

> 159. Staff of every local authority to be made available for election work. Every local authority in a State shall, when so requested by a Regional Commissioner appointed under clause (4) of article 324 or the Chief Electoral Officer of the

State, make available to any returning officer such staff as may be necessary for the performance of any duties in connection with an election.

From a conspectus of the above provisions it seems clear to us that, on the request of the Election Commission, the President or the Governor of the State must make available to the Election Commission such staff as may be necessary for the discharge of functions conferred on the Election Commission under Clause (1) of Article 324. In view of Clause (6) of Article 324, the President or the Governor of the State, when requested, will make available to the Election Commission the services of such staff as may be necessary for the discharge of the functions conferred on the Election Commission. By this, it is meant that the persons whose services may be placed at the disposal of the Election Commission must be persons who are either employees of the Central Government or of the State Government. Again, in view of Section 159 extracted above, when a requisition is made by the Regional Commissioner, the local authority shall make available its staff for the purpose of duties in connection with an election.

Thus far there is no dispute, but controversy arises in view of the action taken by the District Election Officer making the following requisition:

"OFFICE OF THE DISTRICT ELECTION OFFICER-cum-DISTRICT MAGISTRATE."

Ref: No. 522/Elec. Patna, the 22nd September, 1991

ELECTION TOP PRIORITY

To: Chief General Manager
State Bank of India
Jajej Road, Patna

Subject: List of Officers & Staff for appointment as Presiding Officers & Polling Officers in Mid-Term Parliamentary Election 1 Assembly By-Election 1991.

Sir,

I am to inform you that the services of a large number of officers & staff will be required for appointment as Presiding Officers, Polling Officers and Patrolling-cum-Ballot Box Collecting Officers in the forth-coming mid-term Parliamentary Election & Assembly By-Election 1991 in this district.

You are requested to send a complete list of the officers and staff of your office and the field offices located in the Patna District under you in the pro-forma given below in TRIPLICATE, through a Special Messenger to Shri Keshav

Prasad, Additional District Magistrate (Establishment), Patna Collectorate, Patna, by 5th October, 1991 at the latest. Any such officer or staff member who is either female or disabled or appointed as a cashier or deployed on night Guard duties, or is unavoidably necessary to be retained as skeleton staff in your office should be suitably indicated in the remarks column against his/her name in the list so that they may be considered for exemption from Election Duties as far as possible and practicable. You are also requested to certify that no officer or staff member has been left out.

Please give the full name and exact location and address of the office at the top of the list to facilitate service or appointment letters. The telephone number of your office and residence, if available, may also be indicated below the address.

I sincerely hope that you will extend your full co-operation, and that the list relating to your office, complete in all respect, will be made available to Shri Keshav Prasad, Additional District Magistrate (Establishment), Patna Collectorate by 5th October, 1991 at the latest.

Please accord the highest priority. Please acknowledge receipt.

Yours faithfully
Sd/-
(ARBIND PRASAD)
DISTRICT ELECTION OFFICER
cum-District Magistrate
PATNA".

It appears that on 30th October 1991 and 1st November 1991, certain orders were issued by the said District Election Officer appointing and deputing some of the employees of the State Bank of India on election duty in connection with the Elections to the Barh Parliamentary Constituency and the Pali Assembly Constituency which were to be held on 16 November 1991. Thereupon, the first respondent filed a writ petition (CWJC No. 7815 of 1991) in the High Court of Patna praying for the quashing of these communications on the grounds that the District Election Officer had no authority to requisition the services of the Bank employees for election duty.

While this writ petition was pending, some time in May, 1993, in connection with the polling to be held in 35-Patna Parliamentary Constituency, similar letters of appointment for election duty of employees of the State Bank of India were issued by the District Election Officer, Patna. Therefore, the first respondent moved an application for amendment to include a challenge to these letters of appointment as well. The amendment was allowed.

The High Court, by the impugned judgment dated 21st May 1993, held that the District Election Officer had no power under Section 26 of the 1951 Act to requisition the services of employees of the State Bank of India for election duty. The High Court took the view that the State Bank of India was not a local authority within the meaning of Section 159 of the 1951 Act. Accordingly, the High Court quashed the orders and issued a writ in the nature of mandamus, commanding the Election Commission of India not to requisition the services of the employees of State Bank of India in exercise of its power under Section 26 of the 1951 Act.

It may here be mentioned that during the pendency of the writ petition, the counsel for the Election Commission brought to the notice of the High Court, that by a judgment dated 7th November 1989, the High Court of Rajasthan had quashed the order of the District Election Officer, Ajmer dated 8th August 1989, by which he had requisitioned the services of the employees of the Life Insurance Corporation of India, Ajmer for election duty. This was in Writ Petition No. 4644 of 1989. Civil Appeal No. 4611 of 1989 is against that judgment.

The submissions of Mr S. Muralidhar, learned counsel for the appellant, Election Commission of India, in Civil Appeal No. 6026 of 1993 run thus:

Under Article 324, the superintendence, direction, control and the conduct of all elections to Parliament and to the Legislature of every State is vested in the Election Commission. These elections have to be conducted fairly and properly. A large number of officers are required to man a number of polling stations that are required to be set up in each State. For each polling station, five personnel are required at the minimum. That is why Clause (6) of Article 324 of the Constitution of India envisages that when a request is made by the Election Commission or a Regional Commissioner, the President or the Governor will provide such staff as may be necessary for discharging the functions stated in Clause (1) thereof. The question then is, whether the words "such staff" occurring in Clause (6) are to be confined only to the staff under the Government. In this connection, Article 327 may also be seen. In regard to all matters concerning the elections, the Parliament can make provisions by law. In the exercise of that power, the 1950 and 1951 Acts came to be enacted. Therefore, in ascertaining the meaning of "such staff" we will need to look at the 1950 and 1951 Acts.

Section 13A of the 1950 Act deals with the Chief Electoral Officer for each state. He will have to be a government servant. Similarly, Section 13AA deals with the District Election Officers. Under Section 13CC, officers and staff members employed in connection with the preparation, revision and correction of the electoral rolls are deemed to be on deputation. They are subject to the control, superintendence and discipline of the Election Commission. Similarly, under Section 28A of the 1951 Act, Returning Officers, Presiding Officers etc. are deemed to be on deputation and are subject to the control, superintendence and discipline of the Election Commission.

Section 21 of the 1951 Act enables the Election Commission to nominate a Returning Officer. Similarly, an Assistant Returning Officer can be appointed by the Election Commission. Both are expected to be government officers or employees of a local authority. In contrast, under Section 26, a Presiding Officer for a polling station could be anyone, not necessarily a government servant or an employee of a local authority. This is an important distinction. Section 134 talks of breaches of official duty in connection with election and includes the District Election Officers, Returning Officers, Polling Officers etc. Similarly, Rules 17(C), 34, 35 and 53(2) speak of non-government servants as well. In support of the submissions, reliance was placed on the decisions in *K.P. Roy v. D. Rudra, District Magistrate, Howrah* AIR 1971 Calcutta 461, and the judgment in Civil Appeal No. 4611 of 1989. In the first case, railway employees were involved, while in the latter, employees of the Life Insurance Corporation were involved.

Before the High Court, an argument was raised that the State Bank of India must be held to be a local authority under Section 159 of the 1951 Act. That argument is not advanced before us.

Mr Dushyant Dave, learned counsel for respondents 1 to 5 in Civil Appeal No. 6026 of 1993 countered: the source of power to requisition the services being Article 324, the Court should first read the plain words of Clause (6). That clause clearly states that the request must be made to the President or the Governor of a State. On receipt of such a request from the Election Commission, such staff as may be necessary for the discharge of the function under Clause (1) must be made available to the Election Commission or Regional Commissioner. No doubt, under Article 327, the Parliament may empower the drafting of the services of others by enactment of law. That is why Section 29 of the 1950 Act and Section 159 of the 1951 Act talk of the obligation of the local authority to make its staff available. Merely because anyone could be appointed as Presiding Officer Polling Officer does not necessarily lead to the conclusion that the services of any person, even though not a government servant could be sought under Article 324 (6). If the power, as contended by the appellant, is granted to the Election Commission, it will become an imperium in imperio. Therefore, it was expressly negatived by this Court in *Digvijay Mote* v *Union of India and Others* 1993 (3) SCC 175 at 178.

Now, we come to Article 324. It will be useful to extract the following clauses of the said Article which have a bearing on the issues involved:

> "324, Superintendence, direction and control of elections to be vested in an Election Commission. (1) The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President held under this Constitution shall be vested in a Commission (referred to in this Constitution as the Election Commission).
>
> xxx xxx xxx xxx xxx

> 324 (4) Before each general election to the House of the People and to the Legislative Assembly of each State, and before the first general election and thereafter before each biennial election to the Legislative Council of each State having such Council, the President may also appoint after consultation with the Election Commission such Regional Commissioners as he may consider necessary to assist the Election Commission in the performance of the functions conferred on the Commission by Clause (1)."

We have already extracted Clause (6) of Article 324 which empowers the Election Commission to request the President or the Governor of the concerned State to make available such staff as may be necessary for it to carry out its duty under Clause (1). Such a provision was necessary for the obvious reason that since the Election Commission has to hold elections at intervals it is not required to maintain a huge staff at considerable expense to the exchequer, and therefore the power to seek on request such staff as is necessary came to be engrafted in the Constitution itself.

We assume that the powers of the Election Commission under Article 324 are plenary. Therefore, the Election Commission may issue any direction in the matter of conduct of elections. But the question is, in the garb of conduct of elections, can the Election Commission usurp the power not vested in it? This will depend on the understanding of Clause (6) of Article 324. For the conduct of elections, when the Election Commission is to make available the staff they are obliged to provide the services. What is the meaning of "such staff"? According to Mr Dushyant Dave, we should refer to Article 310 which talks of a member of the Civil Service (in contra-distinction to Defence Service of the Union or the State), holding office during the pleasure (durante bene placito) of the President or the Governor. Obviously "such staff" can only mean that staff which is under the control of the President or the concerned Governor and not any staff over which they do not exercise control. It could mean only that staff over which the President or the Governor, as the case may be, would be in a position to exercise disciplinary powers should they refuse the President's or Governor's directive. Although the Constitution-makers did not say the Union or the State Governments but only the President or the Governor, it is obvious they would have to act consistently with Articles 74(1) and 163(1), respectively. Therefore, in response to a request by the Election Commission, the services of those government servants who are appointed to public services and posts under the Central or State Governments will have to be made available for the purpose of the election. When the Constitution came into force, the services of these officers were readily available. Of course, there were also local authorities and the services of the employees of the local authorities and were also available. That is why Section 159 of the 1951 Act provides that, on request from the Regional Commissioner or the Chief Electoral Officer of the State, the local authority of the State shall make available to any Returning Officer such staff as may be necessary to carry out the duties in connection with an election.

It is important to note that their services came to be made available as Returning Officers and Assistant Returning Officers under Section 21 and 22 of the 1951 Act introduced by Amendment Act 47 of 1966. Barring the services of these officers, does the Election Commission have power

to requisition the services of any other person? The argument of the appellant is based on several sections of the 1950 and 1951 Acts. We have referred to the relevant provisions of the two Acts above.

Merely because the provisions of the two Acts require that they must be officers of Government or local authority, unlike in the case of officers falling under Section 27 of the 1951 Act, it does, in our opinion, follow that the services of the officers of the State Bank of India could be requisitioned. Section 26 of the 1951 Act is not a source of power at all. It does not, in any manner, enable the Election Commission to draft in the services of officers other than officers of Government and local authority. To draw inspiration from these sections to support an argument that the services of any person could be drafted for the purpose of an election is untenable. It may be that to conduct the elections many polling stations are set up. Consequently, the services of many persons may be required. It may be that the Election Commission may draw the minimum staff from the banks to ensure that the banking business is not disrupted, but the question here is of power and not discretion. If there is power, it may be exercised with circumspection, and minimum staff may be requisitioned, but if there is no power, the question is of the mode of its exercise of power and not the manner of its exercise.

Article 324 does not enable the Election Commission to exercise untrammelled powers. The Election Commission must trace its power either to the Constitution or the law made under Article 327 or Article 328. Otherwise, as was held by this Court in Digvijay Mote's case (supra) in which one of us,(Mohan, J) was a party, it would become an imperium in imperio which no one is under our constitutional order.

K. P. Roy's case (supra) dealt with the appointment of railway employees as Polling or Presiding Officers. The question was whether the consent of these officers whose services were requisitioned was necessary. This has no bearing on the issue under our consideration. Besides, railway employees are government servants.

The penalty provisions under the two Acts on which reliance was placed cannot but relate to those officers who are covered thereunder and not any person as is urged by the Election Commission. There can be no question of invoking the penalty provisions against those employees whose services the Election Commission cannot requisition. We are, therefore, unable to appreciate how these provisions found in two statutes can be of any assistance in determining the scope and ambit of the power to requisition the services of employees belonging to different organisations. In our view, there is no co-relation.

The decision of this Court in *Sukhdev Singh* v *Bhagatram* (1975) 3 SCR 619 and the decision of the Allahabad High Court in the case of *Shyam Lal Sharma* v *Life Insurance Corporation & Another* (1970) 2 F LR 357 are not relevant for our purpose. The question there was whether rules or regulations framed in the exercise of statutory powers prohibiting employees from

indulging in political activities and taking part in electioneering etc. could be legally made. No such question arises here.

In view of the foregoing discussion, we hold that the impugned communications issued by the District Election Officer-cum-District Magistrate, Patna, have been rightly quashed by the High Court of Patna. Equally so, the High Court of Rajasthan was right in quashing the order of the District Election Officer, Ajmer dated 8th August 1989. We, therefore, uphold the impugned judgments of the High Courts. The civil appeals are accordingly dismissed. However, there shall be no order as to costs.

. . . . . .
(S. Mohan)

. . . . . .J.
(N. P. Singh)

New Delhi,
February 7th, 1995

THEME 2

ELECTORAL BOUNDARIES

HIGH COURT OF AUSTRALIA

BRENNAN CJ,
DAWSON, TOOHEY, GAUDRON, McHUGH AND GUMMOW JJ

JAMES ANDREW McGINTY & OTHERS — **PLAINTIFFS**

V

THE STATE OF WESTERN AUSTRALIA — **DEFENDANT**

ORDER

1. *Answer the questions reserved in the case stated as follows:*

   (i) Is section 6 of the Constitution Acts Amendment Act 1899 (WA) invalid?

   Answer: No.

   (ii) Are sections 2A(2), 6 or 9 of the Electoral Distribution Act 1947 (WA), or any of them, invalid?

   Answer: No.

   (iii) If any of sections 2A(2), 6 or 9 of the Electoral Distribution Act 1947 (WA) is or are invalid, is it or are they severable and, if so, to what extent?

   Answer: Unnecessary to answer.

2. *Costs are reserved. Any application for costs to be made in writing and filed and served within seven days; any submission resisting the order applied for to be filed and served within a further seven days and any reply to be filed and served within a further seven days.*

20 February 1996

Solicitors for the Plaintiffs:	*Frichot & Frichot*
Solicitor for the Defendant:	*P. A. Panegyres, Crown Solicitor for Western Australia*
Solicitors for the Interveners:	*Australian Government Solicitor* *I. V. Knight, Crown Solicitor for New South Wales* *B. T. Dunphy, Acting Crown Solicitor for Queensland* *R. C. Beazley, Victorian Government Solicitor* *M. D. Walter, Acting Crown Solicitor for South Australia* *W. C. R. Bale, Crown Solicitor for Tasmania*

Notice: *This copy of the Court's Reasons for Judgement is subject to formal revision prior to publication in the Commonwealth Law Reports.*

CATCHWORDS

James Andrew McGinty & Others v ***The State of Western Australia***

Constitutional Law – Commonwealth Constitution *– section 24 – "directly chosen by the people" – constitutional implications – representative government or democracy – equality of voting power – franchise.*

Constitutional Law – Commonwealth Constitution – section 106 – source of State constitutional power – application to States of implied constitutional freedoms.

Constitutional Law – Western Australia – electoral system – constitutional implications – representative government or democracy – equality of voting power – manner and form – Constitution Act 1889 (WA) section 73(2)(c) – "chosen directly by the people" – Constitution Acts Amendment Act 1899 (WA) section 6; Electoral Distribution Act 1947 (WA) sections 2A, 6 and 9.

Background Facts: *The question which arose was whether, in an election for the Legislative Council or Legislative Assembly for the State of Western Australia, the number of persons eligible to vote for or required to elect a member in one electorate should be approximately the same as the number of persons eligible to vote for or required to elect a member in another electorate.*

The plaintiffs contended that, under the Commonwealth of Australia Constitution 1900 and the Constitution Act 1889 (Western Australia), every legally capable adult person was entitled to vote in such an election and that each vote, so far as was reasonably practicable, should be equal in value. The plaintiffs further contended that both Constitutions contained an implied principle of representative democracy and that that principle entailed the right of each individual elector to participate in the electoral process on an equal basis. They contended that section 6 of the Constitution Amendment Act 1899 (WA) and sections 2A(2), 6 and 9 of the Electoral Distribution Act 1947 (WA) permitted breaches of that right and thus were invalid.

Held: *That the Constitution Amendment Act 1899 (WA) and sections 2A(2), 6 and 9 of the Electoral Distribution Act 1947 (WA) were valid.*

Cases cited:

Attorney-General (Cth) (Ex rel McKinlay) v *The Commonwealth (1975) 135 CLRI*
Australian Capital Television Pty Ltd v *The Commonwealth ("ACTV") (1992) 177 CLR106*
Nationwide News Pty Ltd v *Wills ("Nationwide News") (1992) 177 CLRI*

Victoria v *The Commonwealth (1971) 122 CLR 353*
Theophanous v *Herald & Weekly Times Ltd (1994) 182 CLR 104*
Stephens v *West Australian Newspaper Ltd (1994) 182 CLR 211*
New South Wales v *The Commonwealth (1975) 135 CLR 337*
Re re Electoral Boundaries Commission Act (1991) 81 DLR (4th)16
Wesberry v *Sanders (1964) 376 US1*
Re Alcan Australia Ltd, Ex parte Federation of Industrial, Manufacturing and Engineering Employees (1994) 181 CLR 96
Burke v *Western Australia [1982] WAR 248*
Cheatle v *The Queen)1993) 177 CLR 541*
Australian National Airways Pty Ltd v *The Commonwealth (1945) 71 CLR 29*
Clayton v *Heffron (1960) 105 CLR 214*
Vardon v *O'Loghlin (1907) 5 CLR 201*
Australian Railways Union v *Victorian Railways Commissioners (1930) 44 CLR 319*
Re Tracy; Ex parte Ryan (1989) 166 CLR 518
Attorney-General (NSW) v *Ray (1989) 90 ALR 263*
S (a child) v *The Queen (1995) 12 WAR 392*
Western Australia v *Wilsmore (1982) 149 CLR 79*
Dixon v. *Attorney-General (1989) 59 DLR (4th) 247*
White v *Weiser (1973) 412 US 783*
Karcher v *Daggett (1983) 462 US 725*
Reynolds v *Sims (1964) 377 US 533*
Baker v *Carr (1962) 369 US 186*
Jumbunna Coal Mine NL v *Victoria Coal Miners' Association (1908) 6 CLR 309*
Australia Agricultural Co. v *Federated Engine-Drivers and Firemen's Association of Australia (1913) 17 CLR 261*
Queensland v *The Commonwealth (1977) 139 CLR 585*
Re Tyler; Ex parte Foley (1994) 181 CLR 18
Western Australia v *The Commonwealth (1975) 134 CLR 201*
Cunliffe v *The Commonwealth (1994) 182 CAR 272*
Davis v *Bandemer (1986) 478 US 109*
Kirkpatrick v *Preisler (1969) 394 US 526*
Mahon v *Howell (1973) 410 US 315*
Connor v *Finch (1977) 431 US 407*
Brown v *Thompson (1983) 462 US 835*
Judd v *Mckeon (1926) 38 CAR 380*
Leeth v *The Commonwealth (1992) 174 CAR 455*
AG (NSW) v *Trethowan [1932] AC 526*
Bribery Commissioner v *Ranasinghe [1965] AC 172*
Victoria v *The Commonwealth and Connor (1975) 134 CAR 81*
West Lakes Ltd v *South Australia (1980) 25 SASR 389*

BRENNAN, CJ The plaintiffs, Messrs McGinty and Gallop, are Members of the Legislative Assembly of Western Australia ("the Assembly"). The plaintiff, Mr Halden, is a Member of the Legislative Council of that State ("the Council"). They challenge the validity of the laws of Western Australia governing the distribution of electorates for both the Assembly and the Council. The present distribution was effected pursuant to the *Constitution Act Amendments Act* 1899 (WA) ("the 1899 Act") and the *Electoral Districts Act* 1947 (WA) ("the 1947 Act") as amended by the *Acts Amendment (Electoral Reform) Act* 1987 (WA) ("the 1987 Act"). The 1947 Act was renamed the *Electoral Distribution Act*[1]. The Assembly now consists of 57 members[2] each of whom is returned as a member for an electoral district. The 57 electoral districts[3] are divided between the Metropolitan Area containing 34 electoral districts[5]. The districts are established by Electoral Distribution Commissioners who are required to fix the boundaries of the districts in each area so as to comprise an equal quotient of enrolled electors plus or minus 15 per cent[6]. The Metropolitan Area is defined[7] as the region that was described at 1st January 1987 in the Third Schedule to the *Metropolitan Region Town Planning Scheme Act* 1959 (WA) and Rottnest Island.

At the time when the 1987 Act was enacted, there were approximately 669,293 voters enrolled in the Metropolitan Area to elect 34 members, and 240,081 voters enrolled in the remainder of the State to elect 23 members of the Assembly. The consequence of this apportionment was to confer on a voter in an average metropolitan electoral district the power to effect the return of a member of the Assembly that was less, in mathematical terms, than the power conferred on a voter in an average non-metropolitan electoral district. The 15 per cent tolerance from the average quotient and shifts in population since the last distribution have produced some large divergences in the number of voters enrolled for districts in the two areas in the 1993 election. At the 1993 election, the quotient for a metropolitan electorate was 21,988 and Wanneroo, the most populous electorate, had 26,580 enrolled voters. The quotient at the 1993 election for an electorate outside the metropolitan area was 11,702 and Ashburton, the least populous electorate, had only 9,135 enrolled voters. The number of Wanneroo voters was 29 per cent of the number of Ashburton voters.

The Legislative Council consists of 34 members returned for six electoral regions[8]. The names of these regions and the number of members of the Legislative Council returned by each are as follows[9]:

North Metropolitan Region	7 members
South Metropolitan Region	5 members
East Metropolitan Region	5 members
South West Region	5 members
South West Region	7 members
Agricultural Region	5 members
Mining and Pastoral Region	5 members

The Electoral Distribution Commissioners are required to divide up the State into these six regions within which there are to be complete and contiguous districts[10]. The first three of these regions together form the Metropolitan Area[11]. The Mining and Pastoral Region is remote from the capital where the land use is primarily for mining and pastoral purposes[12]. The Agricultural Region is generally south, or south and west, for and adjacent to the Mining and Pastoral Region, and the South West Region consists of the remainder of the State[13]. At the 1993 election, the quotients applicable to the respective Council regions were as follows:

North Metropolitan	34,161
South Metropolitan	33,876
East Metropolitan	32,822
South West	13,721
Agricultural	13,161
Mining and Pastoral	9,097

The number of voters in the quotient for the North Metropolitan Region was 37.6% of the number of voters in the quotient for the Mining and Pastoral Region.

The disparity between the number of enrolled voters in the metropolitan and non-metropolitan districts for the election of members of the Assembly and the disparity between the number of enrolled voters in the several regions for the election of members of the Council provide the factual foundation for the challenge to the validity of the provisions of the 1987 Act which prescribe the current electoral distribution. Those disparities, it is said, are the consequence of the 1987 Act. To an extent, some disparities are mandated by the 1987 Act's division of the State into electoral districts and regions, and increases in the extent of those disparities are authorised by the tolerance on quotients authorised by the 1947 Act.

The plaintiffs submit that disparities in voting power are inconsistent with the principle of representative democracy as that principle is understood at the present time. Representative democracy, so the argument runs, requires that:

(a) every legally capable adult has the vote; and
(b) each person's vote be equal to the vote of every other person.

Of course, the term "legally capable adult" assumes without defining the scope of the franchise. In this century, the age of legal adulthood has been reduced from 21 to 18 and the legal incapacity of women to vote has been removed. Aborigines, who were once constitutionally disqualified from the franchise, are no longer so disqualified. But age, sex and race are not the only qualifications that have governed an adult's right to vote. Other qualifications have related to ownership of property and education or a period of residence within the electoral district. Disqualifications still include the status of convicted criminal and mental infirmity or absence from registered address. In view of the fact that the franchise has historically expanded in scope, it is at least arguable that

the qualifications of age, sex, race and property which limited the franchise in earlier times could not now be reimposed so as to deprive a citizen of the right to vote[14].

The qualification of electors is one thing; the voting power of those who are qualified to vote is another. In the Commonwealth Constitution, for example, section 30 was for a time the provision determining the franchise for the election of the House of Representatives. But section 26 prescribed the number of members to be chosen by the respective States and section 29 empowered State Parliaments to make laws for determining electoral divisions within the State.

The term "representative democracy" implies that the franchise be so general in its scope and voting power and be so distributed among those who have the franchise that those who are elected to govern can fairly be seen to be representatives of the people who are governed. Stephen J said in *Attorney-General (Commonwealth) (Ex rel McKinlay)* v *The Commonwealth*[15]:

> "It is no doubt true that something approaching numerical equality of electors within electorates is an important factor, together with much else, in the attainment of what many will regard as representative democracy in its purest form, just as adult suffrage, free of discrimination on the grounds of race, sex, property or educational qualification will likewise aid in its attainment. But neither of these in absolute form is necessarily imported into the Constitution by the selection of representative democracy as the chosen mode of government for the nation."

The plaintiffs submit that both the Commonwealth Constitution and the Western Australian Constitution incorporate representative democracy as the central principle of government. They challenge the proposition, accepted in *McKinlay*[16], that an equality of voting power among the electors possessing the franchise is not mandated by the Commonwealth Constitution. Western Australia, on the other hand, submits that neither the Commonwealth Constitution nor the Constitution of Western Australia requires equality of voting power. Western Australia points out that an electoral system may give effect to the political will of the overall majority of voters although there be a disparity in voting power between the voters in some districts or regions and the voters in other districts or regions, that representation of minority groups or adequate representation of geographical districts in the Parliament might be secured only, or more efficiently, by allowing a disparity of voting power[17] and that some disparity may assist in the formation of stable political institutions (both legislative and executive). These points may be well taken, although the argument focuses on the political results that can follow an unequal distribution of voting power rather than on an equality of voting power possessed by each holder of the franchise. The question whether differences in voting power can be justified by distinctions based on political opinion, minority interests or geographical residence does not admit of a definite answer.

However, it is unnecessary and, for reasons presently to be stated, impermissible to determine the validity of the 1987 Act by reference to its consistency with the requirements of a general

principle of representative democracy. "Representative democracy" has been used as a shorthand description of the form of government prescribed by the Commonwealth Constitution in order to explain how the freedom to discuss governments and political matters is implied in the Constitution. As "the people" are to choose their elected representatives[18], it has been held that the people must be left free to discuss political and economic matters in order to perform their constitutional functions[19].

Constitutional implications

Implications are not devised by the judiciary; they exist in the text and structure of the Constitution and are revealed or uncovered by judicial exegesis[20]. No implication can be drawn from the Constitution which is not based on the actual terms of the Constitution, or on its structure[21]. However, as an implication will be applied in a particular case to a specific factual situation, it may be expressed in terms relevant to that situation[22]. Although the Court was divided in *Australian Capital Television Pty Ltd* v *The Commonwealth ("ACTV)"*, there was nothing in any judgement to cast doubt on the approach then taken by Mason CJ[23]:

> "It may not be right to say that no implication will be made unless it is necessary. In cases where the implication is sought to be derived from the actual terms of the Constitution it may be sufficient that the relevant intention is manifested according to the accepted principles of interpretation. However, where the implication is structural rather than textual it is no doubt correct to say that the term sought to be implied must be logically or practically necessary for the preservation of the integrity of that structure."

In *Nationwide News Pty Ltd.* v *Wills (Nationwide News)*[24] and ACTV, the legislative power of the Parliament to enact the respective laws impugned in those cases was in question. In the former case, that question was answered by some Justices in the former case and by a majority in the latter case to deny validity to the impugned laws. The implication, albeit differently expressed, was drawn from the text and structure of Parts II and III of Chapter I of the Constitution and, in particular, from the provisions of sections 7 and 24. These provisions were seen to prescribe a manner of choosing members of the Senate and of the House of Representatives which would have been subverted if the impugned laws had validly imposed the restrictions on communications which they prescribed. In expounding the manner of choosing members of the Senate and House and House of Representatives and in showing how the impugned legislative restrictions would subvert that manner of choice, the term "representative democracy" or "representative government" was employed.

Although the term "representative democracy" is useful to explain the text on which the implied freedom depends, the term is not to be found in either the Constitution of the Commonwealth or the Constitution of Western Australia. It is logically impermissible to treat "representative

democracy" as though it were contained in the Constitution, to attribute to the term a meaning or content derived from sources extrinsic to the Constitution and then to invalidate a law for inconsistency with the meaning or content so attributed. The text of the Constitution can be illuminated by reference to representative democracy but the concept neither alters nor adds to the text. In *Victoria* v *The Commonwealth*[25], Windeyer J identified the role of implications in constitutional interpretation:

> Implications of *The Moorcock* kind give content and consequences to written contracts. Implications of a different kind may aid the interpretation of statutory provisions. That is because these must always be read as parts of a whole and with due regard to the subject with which the statute deals. In each case an implication means that something not expressed is to be understood: in the other it explains, perhaps limits, the effect of what is expressed. It is in the latter sense that, in my view of the matter, implications have a place in the interpretation of the Constitution: and I consider it is the sense that Dixon J intended when in *Australian National Airways Pty Ltd. vs The Commonwealth*[26] he said: "We should avoid pedantic and narrow constructions in dealing with an instrument of government and I do not see why we should be fearful about making implications.'" ... The only emendation that I would venture is that I would prefer not to say "making implications", because our avowed task is simply the revealing or uncovering of implications that are already there.

The text, however illuminated by implication in one case, remains to govern decision in the next.

The principle of "representative democracy" can be given the status of a constitutional imperative[27], but only in so far as the meaning and content of that principle are implied in the text and structure of the Constitution. The constitutional question for determination in this case cannot be stated as though it asks whether the distribution of electoral districts or of electoral regions is consistent with a general principle of representative democracy – especially if the content of "representative democracy" is derived from sources outside the Constitution. The constitutional question is whether there is inconsistency with the text and structure of the Constitution.

Unaffected by context, the phrase "chosen by the people" admits of different meanings. It might connote that candidates are chosen by popular direct election as distinct from election by an electoral college; or it might connote some requirement of equality or near equality of voting power among those who hold the franchise; or it might go further and import some requirement of a franchise that is held generally by all adults or all adult citizens unless there be substantial reasons for excluding them. Equally, these meanings might be attributed to the notion of "representative democracy". In this case we are not concerned with the mode of election: both the Council and the Assembly are elected by popular direct election. Nor are we concerned with the franchise. But the plaintiffs submit that an equality of voting power is implied in the Commonwealth Constitution.

Neither *Nationwide News* nor ACTV required an exhaustive determination of the content of the principle of representative democracy. Nor did the two defamation cases that followed, namely, *Theophanous* v *Herald & Weekly Times Ltd.*[28] and *Stephens* v *West Australian Newspaper Ltd.*[29]. All of these cases were concerned with the freedom of communication required to allow "the people" to perform their constitutional function of choosing their parliamentary representatives. None of these cases was concerned with equality of voting power. The principle of representative democracy that was held to be implied in those cases can be no wider than – for it is synonymous with – what inheres in the text of the Constitution or in its structure. A submission that equality of voting power in State as well as in Federal elections is implied in the Constitution is not advanced by an appeal to the principle of representative democracy if reference to the text and structure of the Constitution fails to reveal an implication of that kind. However, if there be such an implication, an inconsistent State law would be invalid.

The invalidity would not flow from the operation of section 109: it would not depend on the enactment of an inconsistent law by the Parliament of the Commonwealth. The invalidity would arise because the power of the State Parliament to make (or to sustain) the law was withdrawn by the Constitution of the Commonwealth. The invalidity would arise from want of State legislative power. As the legislative power of a State is conferred by its Constitution and that Constitution is subject to the Commonwealth Constitution, the effect of any implication derived from the Commonwealth Constitution upon a purported law of a State must be ascertained by reference to the limitation placed by the Commonwealth Constitution on State legislative power.

The relationship between the Commonwealth Constitution and the Constitution of the States

Section 106 of the Commonwealth Constitution reads:

> The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

This section has a dual operation. Its first operation is to prescribe what the new elements of the Federal polity – the States – shall be. When the people of the Australian colonies were united in the Commonwealth of Australia by the proclamation made pursuant to Covering Clause 3, and those colonies became Original States of the Commonwealth by operation of Covering Clause 6, the colonies – the old constitutional entities – acquired a new constitutional status. They became States, as the text of sections 107 and 108 shows, deriving their existence as States from the Commonwealth Constitution[30] . Secondly, section 106 conferred on the respective States substantially the Constitutions of the antecedent colonies[31]. The same Constitutions as had been conferred on the colonies prior to 1st January, 1901 were continued as the Constitutions of the

respective States thereafter, subject to such modifications as were effected by the *Commonwealth of Australia Constitution Act* 1900 (Imp) and the Constitution of the Commonwealth. As Barwick CJ said in *New South Wales* v *The Commonwealth*[32]:

> On the passage of the Imperial Act, those colonies ceased to be such and became States forming part of the new Commonwealth. As States, they owe their existence to the Constitution which, by sections 106 and 107, provides their constitutions and powers referentially to the constitutions and powers which the former colonies enjoyed, including the power of alteration of those constitutions. Those constitutions and powers were to continue by virtue of the Constitution of the Commonwealth.

Although the States owe their existence to the Commonwealth Constitution and although their respective Constitutions in 1901 were conferred by operation of section 106 of the Commonwealth Constitution, the powers vested in the respective State legislatures were subject not only to the other provisions of the Constitution but also to the limitations which had been imposed on the powers of the antecedent colonial legislatures[33]. The Australian colonies did not retain their colonial status for the purposes of the constitutional law of the Commonwealth, but their general legislative and constituent powers then remained amenable to affection by laws enacted by the United Kingdom Parliament[34]. That amenability to affection by Imperial legislation was removed only by the enactment of the *Australia Act* 1986.

In 1901, section 107 of the Constitution confirmed what section 106 might itself have provided, namely, that such power as a State Parliament possessed to alter its own Constitution[35] pursuant to the manner and form provisions of its Constitution, and to alter those manner and form provisions themselves[36], remained[37]. Thus the "manner and form" provisions of the State Constitutions are retained as they were on 1st January or as they have been altered subsequently in accordance with any relevant manner and form provisions in force at the time of the alteration. It follows that the Constitution of a State at any time must be ascertained by reference to (i) its Constitution as at Federation; (ii) the overriding effect of the provisions of the *Commonwealth of Australia Constitution Act* and the Constitution of the Commonwealth; (iii) the modifications of the State Constitution that have been made, either by Imperial legislation or State legislation provided; in the case of State legislation, it has been made in accordance with any relevant manner and form provisions of the particular State Constitution[38]; and (iv) the *Australia Act* 1986. It is possible that a law of the Commonwealth could affect the Constitution of a State in some particular, but not so as to curtail the continued existence of the State or the capacity of the Government of the State to exercise its functions[39].

The Constitutions of the several States are, by force of section 106, subject to the Commonwealth Constitution, the provisions of which may be either expressed in its text or implied in its text and structure. There is no relevant reference in the Commonwealth Constitution to the distribution of the franchise in elections for State Parliaments. But the plaintiffs and the interveners supporting

the plaintiffs submit that the Commonwealth Constitution implies a mandatory equality of voting power among the holders of the franchise for State as well as Commonwealth election. Just as Mason CJ, Toohey and Gaudron JJ held in *Stephens*[40] that the concept of representative democracy is proved in the Constitution and is the basis of an implication of freedom of communication as to political matters relating to government at State level, so the concept of representative democracy is said to be the basis of an implication of equality of voting power in State elections. To consider this argument it is necessary, for reasons earlier stated, to take as the starting point not the concept of representative democracy but the text of the Commonwealth Constitution.

Equality of voting power: Commonwealth Constitution

The provisions of Part III of Chapter I of the Constitution and, in particular, section 24 were considered in *McKinlay*[41]. In that case, the chief question was whether equality of voting power was required in respect of elections for the House of Representatives. The Court answered this question in the negative. Barwick CJ found in the different franchises and electoral systems in force in the Australian colonies at the time of Federation an explanation of the terms of section 24. He said[42]:

> "In my opinion, the expression 'directly chosen by the people' is merely emphatic of two factors: first, that the election of members should be direct and not indirect as, for example, through an electoral college and, secondly, that it shall be a popular election. It is not an indirect reference to any particular theory of government. Members of the more numerous Houses of the Australian colonies, according to the franchises to which I have referred, were, in my opinion, elected directly by popular election. Within the meaning of the constitutional expression they could properly have been said to have been directly chosen by the people of the colony."

Similarly, Gibbs J thought that the draftsmen of section 24 were "concerned with the manner of choice rather than with the people who were to choose"[43]. Mason J said[44]:

> "Part III of Chapter I of the Constitution contains several indications that equality or practically equality in the value of a vote, reflected in equality of numbers of electors or people represented by single member constituencies is not a constitutional requirement."

Murphy J, in dissent, held that section 24 required an equal number of electors in each electoral division[45]. However, although McTiernan and Jacobs JJ rejected the contention that, in the light of history, section 24 should be understood to require that there be "absolute or as nearly as practicable absolute equality of numbers of the people" in an electorate, they acknowledged that

the notion of equality is present, albeit remaining a matter of degree[46]. Stephen J adopted the same view[47].

In *Nationwide News*[48], there is a dictum by Deane and Toohey JJ[49] that tends in favour of the plaintiffs' argument:

> While one can point to qualifications and exceptions, such as those concerned with the protection of the position of the less populous States[50], the general effect of the Constitution is, at least since the adoption of full adult suffrage by all the States, that all citizens of the Commonwealth who are not under some special disability are entitled to share equally in the exercise of those ultimate powers of governmental control.

However, the support for that proposition given by their Honours is a footnote referring generally to what McTiernan and Jacobs JJ had said in McKinlay[51].

Assuming, without deciding, that the provisions of the Commonwealth Constitution impliedly preclude electoral distributions that would produce disparities of voting power – of whatever magnitude – among those who hold the Commonwealth franchise in a State[52], what do those provisions have to say with respect to the Constitutions and laws of the several States governing electoral distributions for State elections? In my opinion, the Commonwealth Constitution contains no implication affecting disparities of voting power among the holders of the franchise for the election of members of a State Parliament (hereafter "State disparities"). Far from containing an implication affecting disparities, the text of Parts II and III of Chapter I of the Commonwealth Constitution and the structure of the Constitution as a whole are inconsistent with such an implication. Sections 7, 8, 9 and 10 of the Constitution are expressed to relate only to elections for the Senate; sections 24, 25, 29 and 30 are expressed to relate only to elections for the House of Representatives; and section 41 is expressed to relate only to elections for either House of Parliament of the Commonwealth. Not only are these sections expressly confined to elections for one or other House of the Commonwealth Parliament but they are all contained in Chapter I of the Constitution which, being followed by Chapters II and III, define the structure of the Commonwealth's three branches of government. Chapter V is the Chapter relating to the States and their Constitutions. The structure of the Constitution is opposed to the notion that the provisions of Chapter I might affect the Constitutions of the States to which Chapter V is directed.

The steps in the plaintiffs' submission, so far as it is based on the Commonwealth Constitution, seem to be as follows: (i) the Commonwealth Constitution contains a principle of representative democracy; (ii) section 106 subjects State Constitutions to the Commonwealth Constitution; (iii) State Constitutions are therefore governed by the principle of representative democracy. But, as the principle of representative democracy applies only to the process of electing members to either House of the Parliament of the Commonwealth and as the only provisions of the Commonwealth Constitution that are advanced as capable of affecting the State Constitutions relate to Federal

"organic unity of the Commonwealth and the States", I am not confident that I understand the submission. However it be understood, it must involve some notion of representative democracy controlling the distribution by State Parliaments of electoral power in relation to State elections. That proposition must be rejected. So long as the constitutionally implied principle is confined by the text and structure from which the implication is drawn, the only effect that it can have on the "organic unity" is in relation to process of Federal elections. I would therefore reject the plaintiffs' submissions so far as they are based on the Commonwealth Constitution.

Equality of voting power: the Western Australian Constitution

In 1978, the *Constitution Act* 1889 (WA) ("the 1889 Act") was amended[53] by inserting, inter alia, section 73(2). Sub-section (2) of section 73 prescribes that Bills of the several kinds therein mentioned should "not be presented for assent by or in the name of the Queen" unless passed by an absolute majority of the members of the Legislative Council and the Legislative Assembly and approved by electors at a referendum. Sub-section (2) thus "entrenches" those laws of Western Australia (including *the Constitution Act*) that would be affected by Bills of the kinds specified in that sub-section. The sub-section applies to a Bill of a kind specified in par (c), namely, a Bill that:

> expressly or impliedly provides that the Legislative Council or the Legislative Assembly shall be composed of members other than members chosen directly by the people.

In Stephens[54], I said that section 73(2)(c):

> "entrenches in the *Constitution Act* the requirement that the Legislative Council and the Legislative Assembly be composed of members chosen directly by the people. This requirement is drawn in terms similar to those found in sections 7 and 24 of the Commonwealth Constitution from which the implication that effects a constitutional freedom to discuss government, governmental institutions and political matters is substantially derived. By parity of reasoning, a similar implication can be drawn from the *Constitution Act* with respect to the system of government of Western Australia therein prescribed."

The "system of government" referred to is a Legislature "chosen directly by the people". It is one thing to hold that that prescription carries the implication in both the Commonwealth Constitution and the Constitution of Western Australia that "the people" be free to discuss the matters that they need to discuss in order to choose their representatives; it is another thing to hold that the phrase implies that there be an equality of voting power. Whatever the phrase may prescribe in the Commonwealth Constitution in relation to the equality of voting power, its significance and effect

in the Constitution of Western Australia must be ascertained from its context and the circumstances in which section 73(2)(c) was enacted.

Since the 1889 Act was assented to in 1890, pursuant to the *Western Australian Constitution Act* 1890 (Imp), the electoral laws of Western Australia have been taken out of the 1889 Act where they were confirmed for the purposes of the then new Constitution of the State[55]. The laws relating to the distribution of electoral divisions were to be found in a number of different Acts in succession. In the 1899 Act, provision was made in sections 5 and 6 for Electoral Provinces for the election of the Council, and in sections 18 and 19 for Electoral Districts for the election of the Assembly. Further distributions of Electoral Provinces and Electoral Districts were made by the *Redistribution of Seats Acts* of 1904, 1911 and 1929, the *Electoral Districts Act* 1922 and the *Electoral Districts Act Amendment Act* 1928. The 1947 Act introduced new provisions for the division of the State into Electoral Provinces for the election of the Council and Electoral Districts for the election of the Assembly. These provisions were themselves altered by the *Electoral Districts Act Amendment Acts* of 1955, 1963, 1965 and 1975. The last-mentioned Act ("the 1975 Amendment") directed Electoral Commissioners to divide the Metropolitan Area into 27 Electoral Districts and to divide the Agricultural, Mining and Pastoral Area into 24 Electoral Districts[56], leaving the North-West-Murchison-Eyre Area with 4 Electoral Districts[57]. The "quota of electors in each area"[58] was to be taken as the basis for electoral districts, but a margin of allowance of 10 per cent in the Metropolitan Area and 15 per cent in the Agricultural, Mining and Pastoral Area was prescribed[59]. Sixteen Electoral Provinces for the election of the Council were to be distributed in stated numbers among the three Areas: the Metropolitan Area, the Agricultural, Mining and Pastoral Area and the North-West-Murchison-Eyre Area[60]. These were the provisions in force when section 73(2)(c) was inserted, and perhaps required a disparity in voting power in respect of both elections for the Council and elections for the Assembly.

From before Federation, the State has been so divided into electoral districts for the election of the Assembly, and electoral provinces or regions for the election of the Council that there has been inequality in the voting power of electors in different parts of the State. Throughout this time, the holders of the franchise as it stood from time to time have directly chosen the members of the Council and the Assembly for their respective electoral districts and provinces. When section 73(2)(c) was inserted in the 1889 Act in 1978, it is impossible to suppose that the Parliament of Western Australia intended thereby to override the regime of electoral districts and provinces which were then, and had historically been, the electoral framework of the State. The language of section 73(2)(c) must be construed in the light of the constitutional history of the State and the circumstances existing when that provision was introduced[61]. The purpose of that provision was not the creation of a new electoral regime, it was simply privative of the uncontrolled or partly-controlled power of constitutional amendment vested in the Parliament by section 73(1). The material purpose of the 1978 Act was expressed in its preamble as the making of further constitutional provision "to confirm the established constitutional provision aforesaid (relating to the Council, the Assembly and their powers) and to regulate the manner and form in which the powers of the Parliament of Western Australia may hereafter be exercised". Having

regard to the history of the State's electoral laws and the context and operation of section 73(2)(c), it is impossible to find an implication other than the entrenchment of the system of electing members of the Council and the Assembly by direct popular vote. To find in section 73(2)(c) an implication that electoral power be equally distributed among the people of the State, or among the people of the State possessing the franchise, would be to find a legislative intention destructive of the means by which the enacting Parliament was elected.

I may add that, if the Constitution of Western Australia had been affected by an implication drawn from the Commonwealth Constitution of the kind for which the plaintiffs contend, the provisions of the 1899 Act as in force on 1st January, 1901, which then prescribed the Electoral Provinces for electing members of the Legislative Council[62] and the Electoral Districts for electing members of the Legislative Assembly[63], would have ceased to have effect. That would have been a starting and unintended consequence of Federation for Western Australia and probably for other States as well.

The legislative power of the Parliament of Western Australia to create or to alter or to authorise the creation or alteration of electoral divisions for the election of the Council and the election of the Assembly was unaffected by the insertion of section 73(2)(c) into the 1889 Act. There was no relevant amendment to the Constitution of Western Australia after 1978 prior to the enactment of the 1987 Act. It follows that the Parliament had power to enact the impugned provisions of the 1987 Act. That Act does not touch the provisions, whether constitutional or statutory, that govern the election of members of the Senate or of the House of Representatives in the Commonwealth Parliament. The impugned provisions of the 1987 Act are therefore valid and the questions reserved for consideration by the case stated should be answered as follows:

(i) Is section 6 of the *Constitution Acts Amendment Act* 1899 (WA) invalid?
Answer: No.

(ii) Are sections 2A(2), 6 and 9 of the *Electoral Distribution Act* 1947 (WA), or any of them, invalid?
Answer: No.

(iii) If any of sections 2A(2), 6 or 9 of the *Electoral Distribution Act* 1947 (WA) is or are invalid, is it or are they severable and, if so, to what extent?
Answer: Unnecessary to answer.

DAWSON, J In this case, the plaintiffs contest the validity of Western Australian legislation which, in providing for the election of members of the Western Australian Parliament, allows non-metropolitan electorates to comprise substantially fewer enrolled electors than metropolitan electorates. This, the plaintiffs say, offends against the principle which is succinctly, though inadequately, expressed in the political slogan "one vote, one value". Observance of that principle is, so the plaintiffs contend, required by implication by both the Commonwealth Constitution, which in that respect extends to Western Australia, and the Western Australian Constitution[64].

For the purpose of the election of members of the Western Australian Legislative Assembly, the relevant legislation divides the State into two areas, one of which is the metropolitan area and the other of which is the rest of the State. Electoral distribution commissioners are required to divide the metropolitan area into 34 districts and the rest of the State into 23 districts[65]. The division into districts is required to be made in accordance with the principle that the number of enrolled electors comprised in any district must not be more than 15 per cent greater or less than a quotient obtained by dividing the total number of electors in the area by the number of districts into which the area is to be divided[66]. Since over 70 per cent of electors are enrolled in the metropolitan area, the effect of the legislation is that districts in the non-metropolitan area comprise substantially less electors than districts in the metropolitan area. Thus, as at 30th June 1995, the quotient for districts in the metropolitan area was 23,117 electors, whilst the quotient for districts outside the metropolitan area was 12,196.

Members of the Legislative Council are chosen from six regions, three of which are located in the metropolitan area. One of those three regions returns seven members and the other two return five members each. The remaining three regions are outside the metropolitan area. Two of those regions return five members each and the remaining one returns seven members[67]. The result is that less than 30 per cent of enrolled electors, being the electors outside the metropolitan area, elect 50 per cent of the members of the Legislative Council, leaving the other 50 per cent to be elected by over 70 per cent of the enrolled electors.

The argument that the Commonwealth Constitution requires electorates for the House of Representatives to contain, as far as practicable, equal numbers of persons or electors is not novel. Such an argument was put and rejected in *Attorney-General (Cth); Ex rel McKinlay* v *The Commonwealth*[68]. But the plaintiffs, encouraged by recent decisions of this Court[69], put the argument once again, seeking leave, if necessary, to reopen *McKinlay* and to have the Court overrule that decision.

In the recent decisions upon which the plaintiffs rely, a majority of this Court found that sections 7 and 24 and related sections to the Constitution by implication require that there be freedom of communication in relation to political matters. Sections 7 and 24 provide that the members of the Commonwealth Parliament be directly chosen by the people, in the case of the Senate by the people of each State, and in the case of the House of Representatives by the people of the Commonwealth. For my own part, I was of the view in each of the decisions relied upon that

sections 7 and 24 go no further than requiring that there be a choice of members of parliament by a direct, rather than an indirect, method. But the choice is to be made by the holding of elections[70] and is required to be a genuine choice so that, in the view which I expressed, any law which precluded the communication of information which was required for the exercise of a genuine choice would be invalid because it would be in conflict with sections 7 and 24[71].

The wider views expressed by other members of the Court were based upon the notion that the Constitution ordains representative government from which an implication of freedom of communication is to be drawn. Thus in *Theophanous* v *Herald & Weekly Times Ltd.*[72], Mason CJ, Toohey and Gaudron JJ, having referred to *Nationwide News Pty Ltd.* v *Wills* and *Australian Capital Television Pty Ltd.* v *The Commonwealth,* said:

> In those cases, a majority of the Court distilled from the provisions and structure of the Constitution, particularly from the concept of representative government which is enshrined in the Constitution, an implication of freedom of communications. That implication does not extend to freedom of expression generally[73]. The limited scope of the freedom was expressed in various ways by the members of the Court. It was described as "freedom of communication, at least in relation to public affairs and political discussion"[74], "freedom ... to discuss governments and political matters"[75], "freedom of communication about the government of the Commonwealth levels of government"[76], "freedom of political discourse"[77] and "freedom of participation, association and communication in relation to federal elections"[78].

Mason CJ, Toohey and Gaudron JJ went on in *Theophanous*[79] to say that it was necessary in considering the expression "political discussion" to bear in mind "that the underlying purpose of the freedom is to ensure the efficacious working of representative democracy". Deane and Toohey JJ had expressed a similar view in *Australian Capital Television*[80] where they said that "it is an implication of the doctrine of representative government embodied in the Commonwealth communication about matters relating to the government of the Commonwealth". They continued: "the implication is drawn from an underlying doctrine of the Constitution rather than from any express term".

I have expressed in the previous cases the difficulty which I experience with this line of reasoning. It is a difficulty which, as I understand his judgment in *Theophanous,* McHugh J ultimately expressed when he said[81]:

> "I can find no support in the Constitution for an implication that the institution of representative government or representative democracy is part of the Constitution independently of the terms of sections 1, 7, 24, 30 and 41 of the Constitution. I think that all that can fairly be said is that those sections of the Constitution give effect to the political institution of representative government. But neither logic

> nor the efficacy of those sections or the federal system itself implies that independently of those sections the institution of representative government or representative democracy is itself part of the Constitution."

The concept of representative democracy or representative government (and the latter is the more precise expression[82]) does not have any necessary characteristics other than an irreducible minimum requirement that the people be "governed by representatives elected in free elections by those eligible to vote"[83]. Stephen J recognised as much in *McKinlay* when he observed that[84]:

> "The principle of representative democracy does indeed predicate the enfranchisement of electors, the existence of an electoral system capable of giving effect to their selection of representatives and the bestowal of legislative functions upon the representatives thus selected. However, the particular quality and character of the content of each one of these three ingredients of representative democracy, and there may well be others, is not fixed and precise."

Sections 1, 7, 8, 16, 24 and 30 of the Constitution provide for the minimum requirements of representative government but do not purport to go significantly further. The Constitution also provides for the maintenance of equal representation of the Original States in the Senate and a minimum number of senators for each Original State (section 7), the rotation of senators (section 13), the filling of casual Senate vacancies (section 15), the disqualification of members (section 44), disputed elections (section 47) and certain other matters of machinery. It further provides in section 41 that no adult person who has or acquires a right to vote for the more numerous House of Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth. Each elector has only one vote (sections 8 and 30). Otherwise the form of representative government which we are to have is left to Parliament, provision being made until Parliament otherwise provides[85]. In particular, it is left to Parliament to make laws determining the electoral divisions for which members of Parliament may be chosen. The only limitation is that a division shall not be formed out of parts of different States[86]. In providing for those matters which are confined to it, Parliament is required to determine questions of a political nature about which opinion may vary considerably. For example, the qualifications of electors are to be provided for by parliament under sections 8 and 30 and may amount to less than universal suffrage, however politically unacceptable that may be today. Thus, it may be seen that the form of representative government, including the type of electoral system, the adoption and size of electoral divisions, and the franchise are all left to Parliament by the Constitution.

In those circumstances, it was my view that no guarantee of freedom of communication, other than that required by the prescription of elections, could be read into the Constitution as an implication of representative government. The representative government prescribed by the Constitution is that for which it provides. The reasoning of the majority was to the contrary, but

that reasoning does not in my view extend so far as to support the plaintiffs' submission that, by implication, the Constitution requires electorates to be, as far as is practicable, of equal size.

There are hundreds of electoral systems in existence today by which a form of representative government might be achieved. Their merits must be judged by a number of different criteria which are likely to be incompatible with one another. As one commentator has put it[87]:

> High priority amongst conflicting criteria would generally be given to such considerations as the extent to which a particular system promoted stable and effective government, fairness of representation, a wide choice of representatives, and contact between the electorate and its chosen representatives. But there will be disagreement on the relative priorities to be attached to each of these aims. Frequently, a balance will have to be struck between them. Fair representation is a valuable aspiration, but not perhaps at the expense of encouraging the growth of too many splinter groups which could weaken the effectiveness of government. On the other hand, it would be foolish to pursue the aim of strong government so single-mindedly as to prevent the natural diversity of opinion amongst the electorate from being reflected in the composition of the legislation.

There can be no implication that a particular electoral system, of the many available, is required by the Constitution. There is, of course, the express requirement that whatever system is employed, it must result in a direct choice by the people. That must mean direct choice by the people through those eligible to vote at elections, but beyond that the matter of electoral systems, including the size of electoral divisions, and indeed whether to have divisional representation at all[88], is left to the Parliament.

Whatever those responsible for framing the Constitution may have regarded as the most appropriate electoral system for federal elections, their views are not contained in that instrument. They remain at best "unexpressed assumptions upon which the framers of the instrument supposedly proceeded"[89] and are not to be confused with those intentions which are expressed. Whilst implications can be and have been drawn from the Constitution, it is clear beyond question that implications may only properly be drawn where they are necessary or obvious. As Windeyer J observed in *Victoria* v *The Commonwealth*[90], "our avowed task is simply the revealing or uncovering of implications that are already there". That is to say, if implications are to be drawn, they must appear from the terms of the instrument itself and not from extrinsic circumstances[91]. The distinction has been drawn between textual and structural implications[92], but I am not sure that the distinction is helpful. Whether an implication is categorised as structural or not, its existence must ultimately be drawn from the text. One is brought back to the text in the end, and the danger in speaking of structural implications is, it seems to me, that there is a temptation to include by implication as part of the relevant structure, those values which the structure is capable of, but does not necessarily, accommodate[93]. That is, I think, what the plaintiffs' argument entails.

Once it is recognised, as in my view it must be, that electorates of equal numerical size are not a necessary characteristic of representative government, the plaintiffs are driven in their argument to find in the system of representative government laid down by the Constitution a requirement that there be, as nearly as practicable, electorates of equal size. But that requirement is nowhere to be found in any express provision of the Constitution, and this Court has denied in *McKinlay* that there is any bais for its implication. It is not to be found in the expression "directly chosen by the people" contained in sections 7 and 24. Indeed, sections 7 and 24 contain requirements which are to the contrary[94].

As Barwick CJ pointed out in *McKinlay*[95], no Australian colony at the time of federation insisted upon practical equality in the size of electoral divisions, and the view was then plainly open that problems of communication and access in geographically large electorates outside a metropolitan area justify different numerical sizes in electoral divisions. That is a view which obviously still prevails in Western Australia under the current legislation.

Clearly there is force in the contrary view which holds that the effect of unequal electoral divisions – malapportionment – is to weight the value of votes in the numerically smaller divisions[96]. But the extra weight is only in the consequence that an elector in a smaller electorate is required to share his or her representative with a lesser number of electors than in the large electorate. There are other ways, perhaps more significant, in which the value of a vote may be affected as, for example, where electoral divisions are defined in such a way as to allow one party in a two-party system to return a majority of representatives with less than a majority of the total votes, which may occur whether or not malapportionment also exists. Disproportion of this kind may be intentionally caused by a gerrymander[97]. Of course, the problems arising from malapportionment and disproportion would largely disappear if there were no electoral divisions within a State and a system of proportional representation were adopted – something envisaged by section 29 of the Constitution[98]. But such a system may be to the detriment of a two-party system by encouraging the growth of splinter groups. Barwick CJ adverted to the problem in *McKinlay* when, assuming electoral divisions, he said[99]:

Again, to ignore community of interest in the creation of electoral divisions and to insist on mere equality of numbers will be likely, in my opinion, to produce inequality rather than equality of voting value. It is probably impossible to devise a formula for electoral distribution which will necessarily produce equality in voting value, which will ensure that each vote is of equal weight in an election as a whole or even as between electoral divisions.

These considerations suggest that it would be unwise to freeze into a constitutional requirement a particular aspect of an electoral system the attraction of which might vary at different times, in different conditions and to different eyes. The wisdom of those who were responsible for framing our Constitution in recognising the political nature of such matters, and in leaving them to Parliament, ought not to be overborne by drawing an implication which is neither apparent nor necessary.

In *Ref re Electoral Boundaries Commission Act*[100], the Canadian Supreme Court denied that the purpose of section 3 of the *Canadian Charter of Rights and Freedom* was an absolute guarantee of equality of voting power. That section provides: "Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein". McLachlin J[101] held that effective representation, not equality of voting power per se, was the purpose of section 3 and that representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative. She continued[102]:

> "Such relative [voter] parity as may be possible of achievement may prove undesirable because it has the effect of detracting from the primary goal of effective representation. Factors like geography, community history, community interests and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic. These are but examples of considerations which may justify departure from absolute voter parity in the pursuit of more effective representation; the list is not closed."

The Canadian Supreme Court rejected, in *Ref re Electoral Boundaries Commission Act*, the approach since 1964 in the United States which views the command in Article 1, section 2 of the United States Constitution that representatives be "chosen ... by the People of the several States" as a requirement that congressional electoral districts be as nearly as practicable equal in population[103]. That construction of Article 1, section 2 was adopted by the United States Supreme Court in *Wesberry* v *Sanders*[104], having regard to the historical context of the provision, although in a forceful dissenting judgement, Harlan J expressed the view that the "historical context" relied upon by the majority "bears little resemblance to the evidence found in the pages of history"[105]. However that may be, in *Ref re Electoral Boundaries Commission Act,* McLachlin J distinguished the Canadian history of the right to vote in Canada from that of the United States and described the Canadian tradition as one of "evolutionary democracy moving in uneven steps toward the goal of universal suffrage and more effective representation, which even in its advanced stages tolerates deviation from voter parity in the interests of better representation."[106]

The United States historical context is similarly inapt in any consideration of the form of representative government for which the Commonwealth Constitution provides. The democratic traditions of both Canada and Australia find their origins in the English model rather than in rebellion against it as is the case in the United States. Thus, the reasoning in *Wesberry* v *Sanders* did not find favour with this Court in *McKinlay*[107]. As Mason J said[108]:

> "It is no answer ... to say that our Constitution is based on the American Constitution or that section 24 is based on Article 1, section 2. The interpretation adopted in *Wesberry vs Sanders* is again a modern development that altered the inequality in electoral divisions which prevailed in the United States from early

> times. This inequality was understood to involve no contravention of Article 1, section 2 until *Wesberry vs Sanders* was decided. When our Constitution was enacted, it had not been decided that Article 1, section 2 insisted upon an equality in the value of a vote. The American provision was not thought to carry that message. And it is simply not correct to say that provisions in our Constitution should receive the same construction as that given to similarly worded provisions in the United States Constitution which have a different context and a different history, more particularly when the suggested construction is of recent origin, reversing an interpretation previously accepted."

And as Gibbs J observed in *McKinlay*[109], the English model which was relevant in Australia at the time of federation did not display a history of electoral equality: after the *Reform Acts* and even after the *Redistribution Act* of 1885, there remained substantial inequality.

Whilst the plaintiffs seek, if necessary, to have the Court over-rule *McKinlay*, they attempt to sidestep that decision by placing reliance upon the recent decisions of this Court relating to freedom of communication, and by finding in the concept of representative government not only an implied freedom of communication but also an implied requirement that electoral divisions be, as nearly as practicable, of the same numerical size. As I have indicated, the system of representative government which, without mentioning it by name, the Constitution prescribes is that for which it provides. And the provision which it makes is of a minimal kind. It is fallacious reasoning to posit a system of representative government for which the Constitution does not provide and to read the requirements of that system into the Constitution by implication. An implication of that kind is drawn from an extrinsic source and not from the text of the Constitution. It imports into the Constitution values which the Constitution does not adopt, notwithstanding that it is capable of accommodating them. The Constitution does not, for these reasons, contain by implication the principle expressed in the words "one vote, one value", but the Parliament may, should it consider it desirable to do so, adopt that principle in exercising its power to provide for electoral divisions. Indeed, it has done so in accordance with its view of the practicalities in the *Commonwealth Electoral Act* 1918 (Commonwealth)[110].

I would reject the plaintiffs' argument based upon the freedom of communication cases. That leaves the decision in *McKinlay*. In my view, the reasoning of the majority in that case is compelling and I see no reason to depart from it.

It is true that in *McKinlay,* McTiernan and Jacobs J J[111] suggested that the notion of equality is to some extent present in the words "chosen by the people" so that at some point electoral inequality might be inconsistent with a choice by the people. That rejected, however, any requirement of absolute equality or nearly as practicable equality. Similarly, Mason J said[112]:

> "It is perhaps conceivable that variations in the numbers of electors or people in single member electorates could become so grossly disproportionate as to raise a

> question whether an election held on boundaries so drawn would produce a House of Representatives composed of members directly chosen by the people of the Commonwealth, but this is a matter quite removed from the proposition that section 24 insists upon a practical equality of people or electors in single member electorates."

In my view, both McTiernan and Jacobs JJ and Mason J had in mind extreme situations markedly different from that which exists under the relevant Western Australian legislation.

Because of these conclusions, it is strictly unnecessary for me to deal with the argument advanced by the plaintiffs that the requirement of electoral equality, said by them to be contained in the Commonwealth Constitution, extends to the States. But I am able to express my agreement with the conclusion reached by the Chief Justice, for the reasons given by him, that the system of representative government for which Chapter I of the Commonwealth Constitution provides is confined to the Parliament of the Commonwealth and is not intended as a prescription for the States. The continuation by section 106 of the Commonwealth Constitution of the former colonial constitutions as State constitutions is made "subject to this Constitution", but this does not serve to apply to the States provisions of the Commonwealth Constitution which otherwise have no application to them.

I am also in agreement with the Chief Justice, for the reasons which he gives, that, irrespective of the meaning to be given to the words "directly chosen by the people" in sections 7 and 24 of the Commonwealth Constitution, the words "chosen directly by the people" in section 73(2)(c)[113] of the *Constitution Act* 1889 (WA) do not contain any implication of electoral equality. In their own context they do not bear a meaning different from the similar words used in the Commonwealth Constitution.

For these reasons I agree with the answers proposed by the Chief Justice.

TOOHEY J By this case stated the Court is asked to answer the following questions:

> "(i) Is Section 6 of the Constitution Acts Amendment Act 1899 (WA) invalid?
>
> (ii) Are Sections 2A(2), 6 and 9 of the Electoral Distribution Act 1947 (WA), or any of them, invalid?
>
> (iii) If any of the Section 2A(2), 6 or 9 of the Electoral Distribution Act 1947 (WA) is or are invalid, is it or are they severable and, if so, to what extent?"

The challenge

Oversimplifying the plaintiffs' case: section 6 of the *Constitution Acts Amendment Act* 1899 (WA) ("the 1899 Act") and sections 2A(2), 6 and 9 of the *Electoral Distribution Act* 1947 (WA) ("the 1947 Act") are claimed to be invalid on the following grounds:

1. By reason of section 73(2)(c) of the *Constitution Act* 1899 (WA) ("the 1889 Act").
2. By reason of an implication of representative democracy to be drawn from the 1889 Act itself.
3. By reason of an implication of representative democracy to be drawn from the Australian Constitution and applicable to the Constitution of Western Australia.

The basic contention of the plaintiffs is that by reason of one or more of the above considerations there is an implied requirement that, within practicable and rational limits, the number of persons eligible to vote for a member in one electorate of a House of the Parliament of the State of Western Australia should be approximately the same as the number of persons eligible to vote for a member in another electorate of that House. They say that, in respect of voting for members in both the Legislative Assembly and the Legislative Council, the legislation challenged results in an unwarranted malapportionment in favour of non-metropolitan voters.

The plaintiffs point to variations in the electoral districts of both the Legislative Assembly and the Legislative Council, which they say result in such a malapportionment between voters as to be at odds with the requirements of representative democracy. As a consequence of the 1947 Act, electoral districts for voting for the Legislative Assembly contain approximately 23,000 electors, plus or minus 15 per cent, for the metropolitan zone, and approximately 12,000 electors, plus or minus 15 per cent, for the non-metropolitan zone. As to the Legislative Council, there are now six multi-member electoral regions, three in the metropolitan zone and three in the non-metropolitan zone. The distribution of seats is spread evenly between the two zones but the majority of electors is to be found in the metropolitan zone.

Thus the complaint of the plaintiffs is not that any one elector has a vote of greater value than the vote of any other elector in the constituency to which they belong. Rather, it is that there is an undue disparity in the number of electors who may vote in the various constituencies, the disparity being most marked between metropolitan and non-metropolitan voters. It will be necessary to refer to this disparity in more detail later in this judgement.

The relevant legislation

The 1889 Act is expressed in its long title to be "An Act to confer a Constitution on Western Australia, and to grant a Civil list to Her Majesty". The 1899 Act is expressed in its long title to be "An Act to amend the *Constitution Act* 1899, and to amend and consolidate the Acts amending the same".

Section 6 of the 1899 Act[114], which is under challenge by the plaintiffs, reads:

> (1) The State shall be divided into 6 electoral regions under the *Electoral Distribution Act* 1947.
>
> (2) The electoral regions known, respectively, as the North Metropolitan Region and the South West Region shall each return 7 members to serve in the Legislative Council.
>
> (3) The electoral regions known, respectively, as the South Metropolitan Region, the East Metropolitan Region, the Agricultural Region and the Mining and Pastoral Region shall each return 5 members to serve in the Legislative Council.

Section 19 of the 1899 Act, which is not under challenge, provides that, for the purposes of the Legislative Assembly, the State shall be divided into 57 electoral districts under the Electoral Act, "each returning one member to serve in the Legislative Assembly".

The sections of the 1947 Act under challenge read[115]:

> 2A (1) The State shall be divided into districts and regions in accordance with this Act as soon as practicable after the day of the commencement of the *Acts Amendment (Electoral Reform) Act* 1987.
>
> (2) If the same division under this Act has applied in respect of 2 successive general elections for the Legislative Assembly the State shall be divided into districts and regions in accordance with this Act as soon as practicable after the day that is one year after the polling day for the second of those general elections.

(3) The Governor may, by proclamation, direct that the State be divided into districts and regions in accordance with this Act as soon as practicable after the day of the issue of the proclamation.

(4) A proclamation shall be made under sub-section (3) if both Houses of Parliament pass a resolution to that effect.

(5) The date used for determining the numbers of electors for the purpose of making a division required under subsection (1) or (2) or directed under sub-section (3) shall be the day specified in subsection (1), (2) or (3) as the day as soon as practicable after which the division is to be carried out.

(6)?? (1) The Commissioners shall:

(a) divide the Metropolitan Area into 34 districts; and

(b) divide the area comprising the remainder of the state into 23 districts.

(2) The Commissioners shall make the division of an area mentioned in subsection (1)(a) or (b) into districts in accordance with the principle that the number of enrolled electors comprised in any district in the area must not be more than 15 per greater, or more than 15 per cent less, than the quotient obtained by dividing the total number of enrolled electors in the area by the number of districts into which the area is to be divided."

(9) The Commissioners shall divide the State into 6 regions so that:

(a) 3 regions, to be known, respectively, as the North Metropolitan Region, the South Metropolitan Region and the East Metropolitan Region, each consist of complete and contiguous districts that together form the Metropolitan Area;

(b) one region, to be known as the Mining and Pastoral Region, consists of complete and contiguous districts that are remote from the capital and where the land use is primarily for mining and pastoral purposes;

(c) one region, known as the Agricultural Region, consists of complete and contiguous districts that together form an

area that is generally south, or south and west, of and adjacent to the Mining and Pastoral Region; and

(d) the remaining region, to be known as the South West Region, consists of complete and contiguous districts.

Finally, it is necessary to set out a portion of section 73 of the 1889 Act, which is claimed by the plaintiffs to provide one basis upon which provisions of the 1947 Act should be declared invalid. So far as is material, section 73[116] read:

(1) Subject to the succeeding provisions of this section, the Legislature of the Colony shall have full power and authority, from time to time, by any Act, to repeal or alter any of the provisions of this Act. Provided always, that it shall not be lawful to present to the Governor for Her Majesty's assent any Bill by which any change in the Constitution of the Legislative Council or of the Legislative Assembly shall be effected, unless the second and third readings of such Bill shall have been passed with the concurrence of an absolute majority of the whole number of the members for the time being of the Legislative Council and the Legislative Assembly respectively. Provided also, that every Bill which shall be so passed for the election of a Legislative Council at any date earlier than by Part III provided, and every Bill which shall interfere with the operation of sections 69, 70, 71, or 72, or of Schedules B,C, or D, or of this section, shall be reserved by the Governor for the signification of Her Majesty's pleasure thereon.

(2) A bill that:

(a) expressly or impliedly provides for the abolition of or alteration in the office of Governor; or

(b) expressly or impliedly provides for the abolition of the Legislative Council or of the Legislative Assembly; or

(c) expressly or impliedly provides that the Legislative Council or the Legislative Assembly shall be composed of members other than members chosen directly by the people; or

(d) expressly or impliedly provides for a reduction in the numbers of the members of the Legislative Council or of the Legislative Assembly; or

(e) expressly or impliedly in any way affects any of the following sections of this Act, namely:

sections 2, 3, 4, 50, 51 and 73, shall not be presented for assent by or in the name of the Queen unless:

(f) the second and third readings of the Bill shall have been passed with the concurrence of an absolute majority of the whole number of the members for the time being of the Legislative Council and the Legislative Assembly respectively; and

(g) the Bill has also, prior to such presentation, been approved by the electors in accordance with this section, and a Bill assented to, consequent upon its presentation in contravention of this sub-section, shall be of no effect as an Act.

Section 73(2)(c)

The preamble to the legislation adding sub-section (2) to section 73 reads in part:

> And whereas by section 2 of the Constitution Act, 1889, it was provided that there shall be in place of the Legislative Council then subsisting a Legislative Council and a Legislative Assembly and that it shall be lawful for Her Majesty by and with the consent of the said Council and Assembly to make laws for the peace, order and good Government of Western Australia and its Dependencies and that such Council and Assembly shall, subject to the provisions of that Act have all the powers and functions of the then subsisting Legislative Council:
>
> And whereas it is proper and expedient that further constitutional provision be made to further establish the offices aforesaid and to regulate the powers of the holders of those offices and to confirm the established constitutional provision aforesaid and to regulate the manner and form in which the powers of the Parliament of Western Australia may hereafter be exercised in relation to the offices and powers aforesaid.

Section 73(2)(c) requires that a Bill that "expressly or impliedly provides that the Legislative Council or the Legislative Assembly shall be composed of members other than members chosen directly by the people" shall not be presented for assent unless the second and third readings have been passed by an absolute majority of both Houses and the Bill has earlier been approved by the electors at a referendum.

In the course of the second reading speech in the Legislative Assembly on the Bill that led to section 73 in its present form, the Premier said that it proposed that any future Bill "which would permit either House to be constituted by members not elected by the electors at large" would have

to meet the double requirement of an absolute majority and approval at a referendum[117]. There is no reference in the second reading speech in either House to the decision of this Court in *Attorney-General (Commonwealth); Ex rel McKinlay* v *The Commonwealth ("McKinlay")*[118]. However, given the relative shortness of time between judgement in *McKinlay* and the introduction of the amending legislation[119], the legislature can hardly have been unmindful of the decision.

McKinlay concerned a provision of the *Commonwealth Electoral Act* 1918 (Commonwealth) relating to any proposed distribution of a State into electoral divisions for elections to the House of Representatives. Section 24 of the Australian Constitution provides that the House of Representatives "shall be composed of members directly chosen by the people of the Commonwealth". By majority (Barwick CJ, McTiernan, Gibbs, Stephen, Mason and Jacobs JJ; Murphy J dissenting), the Court held that section 24 did not require the number of people or the number of electors in electoral divisions to be equal. The only difference in the language of section 24 of the Australian Constitution, "directly chosen by the people", and that of section 73(2)(c) of the 1889 Act, "chosen directly by the people", is one of juxtaposition. Therefore the reasoning in *McKinlay* has a direct bearing on the argument in the present case. Indeed the plaintiffs, while seeking to distinguish *McKinlay*, were driven as an alternative to asking the Court to overrule that decision. It will be necessary to look at *McKinlay* in greater detail; for the present it is enough to note that it stands in the way of the plaintiffs' argument that section 73(2)(c) of the 1889 Act itself demands equal value of voting power.

McKinlay may have a further significance. In Re *Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees*[120] the Court said:

> There is abundant authority for the proposition that where the Parliament repeats words which have been judicially construed, it is taken to have intended the words to bear the meaning already "judicially attributed to [them]"[121], although the validity of that proposition has been questioned[122].

It is true that *McKinlay* involved consideration of a provision of the Australian Constitution whereas section 73(2)(c) is an enactment of the legislature of Western Australia. Nevertheless, the proposition mentioned in *Alcan* has some force in the present case. Certainly, in *Burke* v *Western Australia*[123], Burt CJ, with whom Smith J agreed, found the judgments of Barwick CJ, Gibbs J, Stephen J and Mason J supportive of the view of section 73(2)(c) that an electoral system whereby members are chosen by electors organised on a geographical basis satisfies the description of members "chosen directly by the people", and that this is so "irrespective of the number of people participating in that choice and irrespective of the ratio that that number may bear to the number participating in the choice of another member in and for another province or district as the case might be"[124].

Legislative history and statutory construction tell against the plaintiffs' reliance on section 73(2)(c) in one way in which they seek to use it, that is, as directly requiring equality of voting power.

The Acts Amendment (Constitution) Bill ("the First Bill") was introduced to the Parliament on 24 August 1977. The First Bill contained the equivalent to section 73(2)(c) in its present form. The First Bill was defeated in the Legislative Council on 19th October 1977[125]. In the second reading speech to the First Bill, the "right of electors at large to elect the members of either House" in the 1889 Act seems to be an underlying assumption[126]. However, the First Bill was not seen as making any substantive changes to the 1889 Act, rather as protecting and preserving the existing structures[127]. The purpose of the First Bill was to emphasise the role of the Queen in the Parliament, to preserve both Houses of Parliament, in particular to prevent the abolition of the Legislative Council, and to protect the office of Governor[128]. It was said not to affect the question of redistribution of electoral boundaries per se[129] and not to require a referendum to change them[139].

At that time, there were considerable differences between the size of electorates[131], and the First Bill was not considered to be establishing the principle of one vote one value[132]. There was only a brief reference to the relevant aspect of clause 73 in the committee stage of the debate on the First Bill[133] and this reference suggests, if any thing, that it was part of a scheme to prevent abolition of the Legislative Council. The second Acts Amendment (Constitution) Bill ("the Second Bill") was in the same terms as the first[134]. It was also not seen as affecting the redistribution of electoral boundaries[135].

The legislative history also suggests that section 73 is a manner and form provision. Certainly, section 73(1) is a manner and form provision[136] and it has been read narrowly[137]. Sub-section (2) is also a manner and form provision, rather than any constitutional guarantee in itself. The preamble to the 1978 Act which added section 73(2) states that it is to "regulate the manner and form in which the power of the Parliament of Western Australia may hereafter be exercised".

A guide to the role of section 73(2)(c) in the present proceedings is to be found in a passage in the judgment of Mason CJ, Toohey and Gaudron JJ in *Stephens* v *West Australian Newspapers Ltd. ("Stephens")*[138] which reads:

> We do not consider that section 73 provides a foundation for any suggestion that the Western Australia Constitution contemplates the possibility that it will be amended in such a way that representative democracy will be abolished. On the contrary, section 73(2) was plainly enacted with the object of reinforcing representative democracy and placing a further constitutional impediment in the way of any attempt to weaken representative democracy. And, so long, at least, as the Western Australian Constitution continues to provide for a representative democracy in which the members of the legislature are "directly chosen by the

> people", a freedom of communication must necessarily be implied in that Constitution.

In other words, the whole of section 73(2) must be seen as a recognition that Western Australia is a representative democracy and as imposing a barrier against any attempt to detract from the elements of that polity as they are identified in the sub-section.

While the passage assumes importance in considering the inferences to be drawn from the 1899 Act itself, it does not carry the plaintiffs as far as they need to go in this aspect of their argument based on section 73(2)(c).

Representative democracy: the approach to be taken

Whatever view be taken of the scope and operation of section 73(2)(c), there is a separate and wider question, namely, whether there is to be found in the 1889 Act a concept of representative democracy which requires an equality of voting power. Thus, the statute has two aspects. One looks to section 73(2)(c) for a more specific dictate as to what is required in that respect. The other concerns the implications for representative democracy that may fairly be garnered from the Act as a whole.

To conclude that section 73(2)(c) does not of itself impose on the legislature of Western Australia an obligation to ensure that, within practicable and rational limits, the number of persons eligible to vote in one electorate should be the same as the number eligible to vote in another electorate does not dispose of the wider argument referred to in the preceding paragraph. In *Burke* v *Western Australia*[139], Burt CJ observed:

> It may be that the distribution of electors in the geographical area will be so unequal as to offend one's notion of fairness or to offend one's understanding of the idea conveyed by the words "representative democracy", but that is not to say that it offends against the idea of the sub-section.

It is, I think, convenient to approach this part of the plaintiffs' argument by going first to the Australian Constitution to see whether the implication for which the plaintiffs contend is to be found there. If it is not, it is unlikely to be found in the Constitution of Western Australia. If the implication is to be found in the Australian Constitution, a question then arises as to whether that implication thereby operates on the Constitution of Western Australia and, if it does not, whether, nevertheless, such an implication is to be found in the State Constitution. If the implication is found in the Australian Constitution and thereby operates upon the Constitution of Western Australia or if the implication is to be found in the latter, the plaintiffs have established the basic principle for which they contend.

The Australian Constitution: representative democracy

Recent decisions of the Court have held that the Australian Constitution prescribes a system of representative democracy or representative government. The terms have been used somewhat interchangeably but since it is representative democracy upon which the plaintiffs rely, I shall adhere to that term. The decisions which have given greatest emphasis to this prescription are *Nationwide News Pty Ltd.* v *Wills ("Nationwide News")*[140]; *Australia Capital Television Pty Ltd.* v *The Commonwealth ("ACTV")*[141]; *Theophanous* v *Herald & Weekly Times Ltd. ("Theophanous")*[142], and *Stephens*[143]. Those decisions necessarily left open the content of representative democracy and they did not touch the particular issues raised by the present application.

Different views have emerged as to the meaning and content of representative democracy. In *ACTV*[144], Dawson J said that "much is left to the Parliament concerning the details of the electoral system to be employed in achieving representative democracy ... And, subject to the Constitution, the method of electing members of Parliament and the determination of electoral divisions also rest with the Parliament". However, he continued that the Constitution provides for a true choice, in the sense of being an informed choice[145]. His Honour applied *McKinlay* as only requiring direct popular election[146] and saw the requirements of representative government in the Constitution as minimal[147]. McHugh J considered that the Constitution contains only a requirement of representative government, not the wider notion of representative democracy[148]. Representative government, he said, is "no more than a system under which the people were governed by representatives elected in free elections by those eligible to vote"[149]. McHugh J has taken the view that the conception of representative government at the time of federation is what is relevant[150].

There are wider conceptions to be found in judgements of this Court. In *ACTV,* Mason CJ said[151]:

> "The very concept of representative government and representative democracy signifies government by the people through their representatives". This holds the representatives accountable to the people for what they do[152]. Thus the people hold the ultimate sovereignty[153]. In *Nationwide News*, Deane J and I saw the election of members of Parliament as one way in which the ultimate power of governmental control reserved to the people under the Constitution was exercised[154]. We said[155], adverting to what was said by McTiernan and Jacobs J J in *McKinlay*[156]: "all citizens of the Commonwealth who are not under some special disability are entitled to share equally in the exercise of those ultimate powers of governmental control."

It is one thing to say that the Australian Constitution contains an implication of representative democracy. It is another to give content to that implication. The Court has said that freedom of communication on political matters is an essential requirement of representative democracy. Are

there other essential requirements and, in particular, is there one that is relevant to the present case? Clearly, no implication can be drawn in absolute terms. Nor do the plaintiffs seek to do so. Their claim is for a requirement of electoral equality "within practicable and rational limits".

The Australian Constitution does not use the expression representative democracy or, indeed, representative government. Because democracy is a "dynamic phenomenon"[157], its significance within the Constitution cannot be frozen by reference to the year 1900 or thereabouts. The Constitution must be construed as a living force[158] and the Court must take account of political, social and economic developments since that time. Even before 1900, Garran said that responsible government "as we know it, is a new thing and a changing thing"[159]. And in 1908, though in a different context, O'Connor J said that "it must always be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve"[160]. Similarly, Dixon J said[161]: "it is a Constitution we are interpreting, an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances."

Another consideration is that whilst the connotation of words in the Australian Constitution remains fixed, their denotation may vary over time[162]. Equally, while the "essential feature"[163] of a concept in the Constitution remains unchanged, the concept is necessarily applied to circumstances different to those which existed at the beginning of this century. The connotation/denotation distinction has traditionally been applied where there have been technological advances[164]. However in *Cheatle* v *The Queen,* a unanimous Court took a somewhat different approach in interpreting the phrase "trial ... by jury" in section 80 of the Constitution. The Court distilled the representative character of a jury as one of the "essential features" of trial by jury[165]. But it noted that the qualifications of jurors had changed since 1900, when only men who satisfied a property qualification were eligible. The Court said[166]: "The exclusion of women and unpropertied persons was, presumably, seen as justified in earlier days by a then current perception that the only true representatives of the wider community were men of property". It went on to hold that, in 1993, representative juries under section 80 required that women and unpropertied persons be also eligible as jurors[167].

By parity of reasoning, the essential feature of representative democracy is government by the people through their representatives. "[T]he powers of government belong to, and are derived from, the governed, that is to say, the people"[168]. But according to today's standards, a system which denied universal adult franchise would fall short of a basic requirement of representative democracy[170]. The point is that, while the essence of representative democracy remains unchanged, the method of giving expression to the concept varies over time and according to changes in society. It is the current perception which is embodied in the Australian Constitution. The point was made by McTiernan and Jacobs J J in *McKinlay* when they said of section 24 of the Constitution[171]:

> "The words 'chosen by the people of the Commonwealth' fall to be applied to different circumstances at different times and at any particular time the facts and circumstances may show that some or all members are not, or would not in the event of an election, be chosen by the people within the meaning of these words in section 24. At some point, choice by electors could cease to be able to be described as a choice by the people of the Commonwealth. It is a question of degree."

Likewise, around 1900, the method of choosing representatives involved significant inequality in voting power. At that time, the ratio between the number of electors in the largest and smallest electorates varied from 2:1 for the Legislative Council of South Australia to 38:1 for the Legislative Assembly of Western Australia. Clearly the expression of representative democracy then did not encompass equality of voting power. But just as clearly, the expression of the concept is now thought to do so, at least in this country. Equality of electorate size, with an allowable percentage variation, is now required for parliamentary elections in the Commonwealth[172]; New South Wales[173]; Victoria[174]; Queensland[175]; South Australia[176] and Tasmania[177]. This move towards equality of electorate size reflects a change in society's perception of the appropriate expression of the concept of representative democracy. As Mason J recognised in *McKinlay*[178]: "the conception of equality in the value of a vote or equality as between electoral divisions is a comparatively modern development". In its final report, the Constitutional Commission concluded[179]: "We believe one vote one value is an essential principle of democracy. It is fundamental to a sense of meaningful participation in Australia's democracy polity".

Once it appears, as recent decisions of the Court make clear, that the Australia Constitution established a system of representative democracy, it is apparent that more is involved than freedom of political communication. In *Australian National Airways Pty Ltd.* v *The Commonwealth*[180], Dixon J advised against "pedantic and narrow constructions in dealing with an instrument of government", saying: "I do not see why we should be fearful about making implications". To this Windeyer J added the rider[181]: "I would prefer not to say "making implications", because our avowed task is simply the revealing or uncovering of implications that are already there".

The plaintiffs placed reliance on decisions of the United States Supreme Court which have held that, as nearly as practicable, one person's vote should be worth as much as another person's[182]. However, these decisions are based on the intentions of the framers of the American Constitution and have been influenced by the history of that country. For these reasons, several of the Justices in *McKinlay*[183] held that decisions of that Court provided little guidance in this area of the Australian Constitution. I respectfully agree[184].

On the other hand, decisions of Canadian courts are more relevant as, like Australia, Canada "adopted and built on the English tradition"[185]. Canadian courts have recognised that the notion of equality is fundamental to the right to vote guaranteed by section 3 of the *Canadian Charter*

of Rights and Freedom[186]. As Cory J (dissenting), with whom Lamer CJC and L'Heureux-Dubé J agreed, said in *Reference re: Electoral Boundaries Commission Act*[187]:

> "[T]he right to vote is fundamental to a democracy. If the right to vote is to be of true significance to the individual voter, each person's vote should, subject only to reasonable variations for geographic and community interests, be as nearly as possible equal to the vote of any other voter residing in any other constituency."

Similarly, McLachlin J, with whom La Forest, Gonthier, Stevenson and Iacobucci JJ agreed, said[188]:

> "What are the conditions of effective representation? The first is relative parity of voting power. A system which dilutes one citizen's vote runs the risk of providing inadequate representation to the citizen whose vote is diluted.

The principle thus enunciated is not in absolute terms, but it follows that a general principle of equal electorates is "a minimal requirement for a representative democracy"[189]. In that event, the principle is part of the Australian Constitution, even if not expressed in any provision. It derives from section 24 ("chosen by the people") but more fundamentally from the very structure of the system of government enshrined in the Constitution. In the end, it must be accepted that equality of political rights is not achieved "if the vote of a person in one part of the country has a greater effect in securing parliamentary representation than the vote of a person in another part of the country"[190]. The principle cannot be stated in absolute terms because we are speaking of a representative democracy in which each citizen is entitled to be represented in absolute parity, not only as a matter of practicalities but also for the reason expressed by McLachlin J in the following terms[191]:

> "Factors like geography, community history, community interests and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic."

Nevertheless, recognition of these considerations does not detract from the fundamental importance to democracy of the principle itself.

Equality of voting power is an underlying general requirement in the Constitution. To a limited extent it has given way to the requirements for a minimum of five members of the House of Representatives for each State[193]. The defendant argues that these provisions tell against the principle claimed by the plaintiffs.

This argument can be rejected in relation to the Senate. The Senate is "the chamber in which the States, considered as separate entities, and corporate parts of the Commonwealth, are represented"

and [th]at the States, and not the people, are actually represented in the Senate is shown by the requirement that the "equal representation of the several Original States shall be maintained"[194].

The argument can also be rejected in relation to the House of Representatives. The provision for a minimum of five members was seen by Barwick CJ and Gibbs J in *McKinlay*[195] to preclude voting equality. But it is an historical concession to Tasmania and Western Australia which would otherwise have been entitled to only two or three members. This was considered to be an insignificant representation[196]. Other aspects of section 24 support an implication of equality of voting power[197]. In particular, section 24 embraces proportional representation as a general principle; the minimum of five members is merely an exception to this and today it only applies to Tasmania.

As noted earlier, the decision in *McKinlay* is relied upon by the defendant as an answer to the plaintiffs' case. It is true that the Court (Barwick CJ, section 24) did not require the number of people or the number of electors in electoral divisions under the *Commonwealth Electoral Act* 1918 (Commonwealth) to be equal. But in my view, it is not necessary for the Court to overrule *McKinlay* in order to accede to the plaintiffs' general argument. *McKinlay* can be distinguished from the present case.

One suggested basis for doing so is that in *McKinlay,* the plaintiff's argument was for a requirement of absolute equality tempered only by the demands of practicability and that the decision would not be inconsistent with a requirement for a lesser measure of equality, qualified by other considerations[198]. But in equality of electorate size[199], they were not contending for absolute equality. Even if this distinction were valid, in the present case, the plaintiffs couched their number of persons eligible to vote for a member in one electorate should be approximately the same as in another electorate. There is no meaningful distinction between the principle claimed in either case. Although the current plaintiffs accepted that other considerations might intrude, these would constitute a qualification on the principle of practical equality.

An important point of distinction is that in *McKinlay,* the Court was examining whether section 24, in particular the phrase "directly chosen by the people", they require equality of voting power. Most members of the Court did not examine the requirements of representative democracy. Only Gibbs J and Stephen J looked at the wider question of whether such equality was a necessary aspect of a representative democracy[200]. So, while the majority of the Court held that section 24 did not contain a requirement of voting equality, there is no majority decision on whether such a requirement is to be found in the notion of representative democracy which is the underlying basis of the Constitution. In that respect, it is important that the decision preceded the recent decisions of this Court concerning representative democracy. It is unnecessary to overrule *McKinlay* in order to accede to the proposition that a general principle of equality of voting power is an aspect of the Australian Constitution.

Implications for Western Australia

The plaintiffs argue that the organic unity of the Commonwealth and States means that they are inexorably entwined, so that an implication of electoral equality in the Australian Constitution will necessarily apply to Western Australia. In *Nationwide News,* Deane J and I spoke of the Constitution's doctrine of representative government as "structured upon an assumption of representative government within the States"[201]. It was unnecessary to explore the implications of this assumption other than in relation to the implied freedom of political discussion.

Some judgements of the Court have treated the implied freedom of political discussion in the Australian Constitution as necessitating a similar freedom at State level. The reason is to be found in the indivisible nature of public discussion and the inter-relationship between the various tiers of government[202]. But it does not follow that, in regard to the electoral process, an implication of equality in the Commonwealth necessitates such an implication in the States.

There are sections of the Australian Constitution that make State electoral laws applicable to Commonwealth elections[203]. Most of these provisions are transitional and permit State electoral laws to be overridden by Commonwealth laws[204]. Section 15, which deals with casual vacancies, comes closest to making a direct connection between the parliaments of the Commonwealth and the States[205].

Various submissions were presented to the Court by reference to section 15. The plaintiffs argued that the section presupposes that the States will have a system which in a general way corresponds with the Commonwealth system. The Commonwealth argued that the section reflected the assumption that State parliaments are predicated on the same basis as the Commonwealth Parliament. South Australia argued that it is not logically or practically necessary for the preservation of representative democracy at the Commonwealth level that there be representative democracy in the States. Tasmania pointed out that even if State electoral laws did not ensure representative democracy, this would not necessarily affect the working of the Commonwealth Parliament and in any case, the Commonwealth could insulate itself from such laws[206].

Section 15 has not been interpreted as imposing restrictions upon State parliaments. In particular, it has been held that it does not preclude the abolition of one of the houses of parliament of a State[207]. In *Clayton v Heffron*, Dixon CJ, McTiernan, Taylor and Windeyer JJ said[208]:

> "The supposition that there will be two Houses implies no intention legislatively to provide that the constitutional power of the State to change to a unicameral system, if the power existed, should cease. One can understand the section being relied upon as evidence that it is not supposed that the power to make the change existed. But that is all. Even that is not a very cogent argument."

This passage was relied on by McHugh J in *Theophanous* to deny any connection between a requirement of representative democracy in the Commonwealth Parliament and the State parliaments[209]. But, in my view, that is to draw too much from the observations of their Honours which were directed to a different issue.

It is difficult to justify giving section 15 the role contended for by the plaintiffs, given its remedial nature. Even if the replacement senator was chosen by a State parliament which was not a representative government, the effect on representative government at the Commonwealth level would be minimal. As Issacs J said in *Vardon* v *O'Loghlin*[210]:

> "[Section] 15 of the constitution was not framed with the object of meeting numerous instances of irregular Senate elections, but of providing for possible but rare contingencies of the abnormal termination of the service of senators; so rare that departures from the fundamental principles of representation through popular election would be really inappreciable because infrequent and possibly of short duration."

Section 106 of the Constitution

The plaintiffs argue that the system of representative democracy at the Commonwealth level imposes restrictions on the State legislative powers through the operation of section 106 of the Australian Constitution.

Section 106 is in Chapter V of the Constitution – "The States". It reads:

> The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

The "States" are identified in covering clause 6 of the *Commonwealth of Australia Constitution Act 1900* (UK) as such of the colonies there referred to "as may be admitted into an established by the Commonwealth as States".

It has been said that the provision "has always raised a number of difficult questions concerning the relationship between it and the State Constitutions which it sought to protect, and between those Constitutions and the Commonwealth Constitution as a whole"[211]. In the course of discussing section 106, Quick and Garran comment[212]:

> "The States retain their executive, legislative, and judicial departments before, but shorn of some of their powers and functions."

Certainly the States derive their existence as States from the Australian Constitution[213]. The original source of authority for the legislative power of the States is Imperial legislation but the present source of that power is section 106[214]. Even so, it does not follow that the plaintiffs' submission is correct.

By reason of section 106, the "Constitution of each State" continues "as at the establishment of the Commonwealth", until altered in accordance with the Constitution of the State, subject, however, to "this Constitution"[215]. The identification of "this Constitution" in section 106 is clear enough. But the scope and operation of section 106 are by no means settled. Historically, it has been seen for the most part, as offering protection to the States against the exercise of Commonwealth power. Thus in *Australia Railways Union* v *Victorian Railways Commissioners*, Dixon J expressed the matter more cautiously than other members of the Court when he said[216]:

> "It may be that section 106 provides the restraint upon the legislative power over States which differentiates it from the power over the subject and that no law of the Commonwealth can impair or affect the Constitution of a State."

Section 106 played a significant part in the decision of the Court in *Re Tracey; Ex parte Ryan*[217] that certain provisions of the *Defence Force Discipline Act 1982(Commonwealth)* were invalid. Other decisions treating section 106 as protective of State Constitutions are *Attorney-General (NSW)* v *Ray* and *S (a Child)* v *The Queen*[219].

The plaintiffs argue that section 106 makes the constitution of a state subject to the Australian Constitution and that therefore, to the extent that an implication of representative democracy is to be found in the latter, it will operate in respect of the former. Prior to *Theophanous*, the only support for giving section 106 such an operation was from Murphy J in *Western Australia* v *Wilsmore*[220] in holding that a contravention of a State Constitution was a contravention of the Australian Constitution. However, this does not really support the plaintiffs' argument, as Murphy J was dealing with a manner and form requirement in a State constitution; in that respect section 106 asserts the need to comply with the constitution of the State[221].

In *Theophanous,* there are suggestions that the implied freedom of political communication limits the legislative powers of the States on this aspect through the operation of section 106 of the Australian Constitution[222]. The strongest support comes from Dean J who treated section 107 of the Constitution, which continues the legislative powers of the State parliaments, as a provision to be read with section 106 so that those powers are subject to the Constitution. He places emphasis on the provision in section 106 that State Constitutions continued "subject to this Constitution" and held that State legislative powers were restricted by the freedom of political communication guaranteed by the Australian Constitution.

But even if emphasis is placed on the words "subject to this Constitution", what consequence does this have for State Constitutions in relation to equality of voting power as an aspect of

representative democracy contained in the Australian Constitution? The words "subject to this Constitution" override a particular aspect of a State Constitution in so far as it is contrary to the Australian Constitution[223]. The usual application of this is in the context of State Legislative powers, so that State powers are to give way to the requirements of the Australian Constitution[224].

But it does not follow that an implication of equality of voting power at the Commonwealth level effects, through section 106, an implication of equality of voting power at the State level. The words "subject to" mean "if not inconsistent with or repugnant to"[225]. Any guarantee of voting equality in Commonwealth elections will not be affected by the State electoral laws permitting inequality in State elections. In this respect there is no necessary inconsistency between voting inequality at the State level and voting equality at the Commonwealth level. The conduct of State elections will not undermine Commonwealth elections. The implication of freedom of political communication can be distinguished, for it is the nature of such communication that State restrictions may undermine the Commonwealth guarantee. This was a significant factor in Dean J's reasoning in *Theophanous*[226]. Thus, while Dean J relied on section 106 to find that State legislative powers were subject to the implied freedom of political communication, his reasoning does not mean that any Commonwealth guarantee of voting equality translates into a State guarantee of voting equality. Of course, if a provision of a State Constitution purported to affect the Commonwealth guarantee of voting equality, it would be overridden through the operation of section 106.

Section 106 does not effect a blanket importation of the Australian Constitution into state constitutions. To interpret section 106 in this way unduly subjects state constitutions. To interpret section 106 in this way unduly subjects State constitutions to the Australian Constitution at the price of the other stated aims of the section. Its primary aim is to guarantee the continuation of State constitutions after federation[227], though subject to the Constitution.

Implication of Representative Democracy in the 1889 Act

However, the concept of representative democracy is to be found in the Constitution of Western Australia. It exists by reason of its similarity in relevant respects to the Australian Constitution and by reason of the elements of representative democracy in section 73(2) of the 1889 Act. The elements in the Australian Constitution which lead to the conclusion that it is predicated on a system of representative democracy are present in the 1889 Act. One element is the vesting of legislative power in the Parliament, consisting of the Queen, the Senate and the House of Representatives[228]. This element is also present in the 1889 Act[229].

Another relevant factor is the requirement of approval by the people for the amendment of the Australian Constitution[230]. In the 1889 Act, there is a requirement of electoral approval, though it does not cover all amendments[231]. In the recent judgements of the Court to which reference has

been made, reliance was placed upon the control given to the people over the composition of Parliament by sections 7 and 24[232].

In *Stephens*[233], a majority of the Court found that representative democracy was contained in the Western Australian Constitution for the same reasons that it was contained in the Australian Constitution. Emphasis was placed on the phrase "chosen directly by the people" in section 73(2)(c) of the 1889 Act in a provision that "was plainly enacted with the object of reinforcing representative democracy and placing a further constitutional impediment in the way of any attempt to weaken representative democracy"[234].

One argument to the contrary is that no implications can be drawn from State Constitutions because they are subject to amendment. Taken to its extreme, this argument denies the drawing of implication even from entrenched provisions because they can still be changed, even though change is more difficult than for non-entrenched provisions. This argument must be rejected in the light of the decisions of this Court which have found implications in the Australian Constitution, an instrument which can be changed, albeit only by the method laid down in section 128. More generally, implications are drawn from constitutions as they presently stand. It is not to the point that these constitutions may be changed in the future so that the implication ceases to have a valid basis.

The more limited version of this argument is that implications from State constitutions can only be drawn from entrenched provisions. This is subject to the same response just given. But it may have more merit in so far as any implication drawn from non-entrenched provisions may be overridden by legislative amendment. On the other hand, even entrenched provisions may be amended. The validity of this argument does not need to be decided for the purposes of the present case as the relevant provisions of the 1889 Act in which representative democracy can be found are entrenched. Section 73(2) entrenches provisions providing for the Governor, Legislative Council and Legislative Assembly and manner and form requirements.

A further argument is that even if an implication is drawn from a State Constitution, it would not have the status to impose a restriction on the plenary legislative powers of the State. This misses the point made in the cases in which an implied freedom of political communication was found in the Australian Constitution. These cases show that the implication operates as an implied restriction and control on legislative powers, not just as an abstract principle.

Justiciability

It is one thing to enunciate equality of voting power as an aspect of representative democracy. It is another to determine whether a particular electoral system is at odds with that principle. It is yet another thing to identify the limits of justiciability in such a situation. What is under challenge here is the validity, indeed the constitutionality, of certain legislative provisions. There

can be no question of non-justiciability in that event, though the Court must give due recognition that the principle said to have been offended by the provisions in question cannot be asserted in absolute terms and therefore much must be left to the political judgement of the legislature.

Mention has been made of the observation of Burt CJ in *Burke* v *Western Australia*[235] that the distribution of electors may be so unequal as to offend one's understanding of representative democracy. And in *McKinlay*[236], Mason said:

> "It is perhaps conceivable that variations in the number of electors or people in single member electorates could become so grossly disproportionate as to raise a question whether an election held on boundaries so drawn would produce a House of Representatives composed of members directly chosen by the people of the Commonwealth."

Unlike the United States, the Canadian courts appear to have baulked at identifying a ratio beyond which there is such an imbalance as to invalidate the electoral system. It is true that in *Dixon* v *Attorney-General*[237], McLachlin CJSC said:

> "[1]t is appropriate to set limits beyond which [equality of voting power] cannot be eroded by giving preference to other factors and considerations, such as the 25% limit applied in Canada to federal electoral districts or the 10% limit established recently in Australia."

Nevertheless, she did not identify the limits which might be set.

The courts must exercise restraint in this area, in particular not seeking in effect to say how boundaries should be drawn or prescribing specific ratios that are acceptable. Clearly there may be room for disagreement as to whether a particular system offends the principle of electoral equality demanded by representative democracy. Indeed the plaintiffs speak of an implied requirement "within practicable and rational limits". It may be said that if the courts do not prescribe limits, the task of legislatures is made more difficult and the scope for challenging an electoral system is inevitably widened. The answer is that an approach in broad terms gives proper recognition to the respective roles of the legislature and the court. The task of the court is to identify and give effect to the constitutional principle at issue.

The Attack on the Legislation

As a result of the legislation now in force, the Legislative Assembly comprises 57 members (section 18(b) of the 1899 Act). Each member is elected for a single district (section 19(b) of the 1899 Act). Of the 57 members, 34 are returned for districts in the Metropolitan Area[238] and 23 for the remainder of the State (section 6(1) of the 1947 Act).

As at 6th November 1987 (the relevant sections of the 1947 Act came into operation on 30 October 1987), there were 669,293 voters enrolled in the Metropolitan area and 240,081 voters enrolled in the remainder of the State. This represented 74 per cent and 26 per cent representative of the total of enrolled voters. Having regard to the number of members constituting the Assembly, this meant that 74 per cent of the voters would elect 60 per cent of the members and 26 per cent of the voters would elect 40 per cent of the members.

In dividing the Metropolitan Area and the remainder of the State into districts, the Electoral Distribution Commissioners are required to ensure that the number of voters in any district must not be more than 15 per cent greater or more than 15 per cent less than the quotient determined by dividing the number of electors in the area by the number of districts (section 6(2) of the *1947 Act).*

From this, the plaintiffs argue that, assuming a perfect division into electorates within each area, a metropolitan vote is worth 53 per cent of a non-metropolitan vote.

As to the Legislative Council, mention has been made earlier in this judgment of the fact that it comprises 34 members from six regions (section 5 of the 1899 Act). Three regions consist of districts that form the Metropolitan Area. The fourth, the Mining and Pastoral Region, consists of districts "that are remote from the capital and where the land use is primarily for mining and pastoral purposes". The fifth, the Agricultural Region, consists of districts "generally south, or south and west, of and adjacent to the Mining and Pastoral Region". The remaining region is the South West Region. Each region must consist of "complete and contiguous districts" (section of the 1947 Act).

At the time of the 1987 legislation, the effect was that 74 per cent of metropolitan electors would chose 50 per cent of the Legislation Council members, while 26 per cent of non-metropolitan electors would chose 50 per cent of the members.

The plaintiffs argue that because of differences in the number of voters in and outside the Metropolitan Area, and having regard to the figures current at the time of the 1989 and 1993 State general elections, the ratios between the highest number of voters in one district of the Legislative Assembly and the lowest in another were 2:52.1 and 2.91:1 respectively. In other words, the numbers of voters in one district were between 252 per cent and 291 per cent of those in another. Likewise, they say, the extremes of ratios of the Legislative Council voters were 3.31:1 and 3.42:1 so that the numbers of voters in one region were between 331 per cent and 342 per cent of those in another. The plaintiffs give colour to their argument by saying that, for example, at the 1993 election, the District of Wanneroo contained 291 per cent of the number of voters in the District of Ashburton and that, in terms of current electoral enrolments, the figure is 414 per cent.

The defendant points to the vast area of the State, most of which is thinly populated, and to the difficulties of distance and communication which have the potential to impair effective representation for those who live in the more isolated parts of the State. It argues that to require electorates to be of equal size would result in electorates which were unmanageably large and difficult for the members to service. It argues that these considerations justify the impugned legislative scheme. Its written submissions point to the long history in Western Australia of differentiating between rural and urban electorates. But historical considerations are not conclusive[239].

The aim of facilitating the representation of those who live in the thinly-populated and remote areas of the State is clearly a legitimate one. As McLachlin CJSC said in *Dixon* v *British Columbia (Attorney-General)*[240]:

> "[O]nly those deviations should be admitted which can be justified on the ground that they contribute to better government of the populace as a whole, giving due weight to regional issues within the populace and geographic factors within the territory governed."

But while the aim is legitimate, it cannot be said that the legislative means chosen are proportionate to the aim. The impugned legislative scheme arbitrarily distinguishes between metropolitan and non-metropolitan areas. It does not tailor electoral divisions to take account of the difficulties faced by the voters in particularly remote areas[241]. The strength of the plaintiffs' argument lies in the fact that the system mandated by the challenged legislative provisions inevitably produces a serious malapportionment between metropolitan and non-metropolitan electors. That malapportionment results in large part from the absence of flexibility in the system which would allow for a movement in population from rural areas to urban centres, and otherwise ensure a more fair representation of urban voters. The vice lies in the absence of flexibility, rather than the need to have regard to particular problems affecting non-metropolitan electors. It was the differential treatment of areas on a generalised basis, rather than by reference to the needs of particular electoral districts, that led to the invalidation of the British Columbia legislation in *Dixon* v *British Columbia (Attorney-General)*[242]. It is true that disproportion in the value of a vote may arise in other ways, for instance through the definition of electoral divisions. And this may be deliberate, as in the case of a gerrymander. But these are not issues with which the present proceedings are concerned. It is a particular aspect of representative democracy that the Court is called upon to consider.

Conclusion

It follows that section 6 of the 1899 Act and sections 2A, 6 and 9 of the 1947 Act are together at odds with the principle of representative democracy to be found in the Constitution of Western Australia.

This is not the view of the majority of the Court. In the light of their Honours' reasons, the answers they propose to the questions asked are inevitable. If the majority view were otherwise, questions would arise as to the orders the Court should make: whether it should answer the questions in the form asked, whether orders of a declaratory nature should be made, whether any orders should be suspended for a time[243].

The view I take of representative democracy as found in the Constitution of Western Australia is that it is not a fixed concept but rather is responsive to the time and circumstances in which it falls for consideration. Therefore, rather than answer the questions as asked, it is appropriate to say no more than that if an election were now held for the Legislative Assembly or Legislative Council in accordance with the impugned statutory provisions, the members would not be chosen by the people in accordance with the constitutional dictates of representative democracy.

GAUDRON J The facts, the relevant legislative provisions, their legislative history and the questions in the case stated are set out in the judgement of Toohey J. They need not be repeated. I am in general agreement with his Honour's reasons and shall set out my own reasons only in those areas where my approach differs from his. Like his Honour, I think the preferable course is not to answer the questions in the case stated. However, my approach differs from His Honour's to the extent that I would dispose of the case stated by saying that, if elections were now held for the Legislative Council or for the Legislative Assembly of Western Australia, with members being returned for the electoral regions or electoral districts provided for, respectively, by section 6 of the Constitution Acts Amendment Act 1899 (WA) ("the 1899 Act") and sections 2A(2), 6 and 9 of the Electoral Distribution Act 1947(WA) ("the 1947 Act"), neither the members of the Council nor those of the Assembly would be "chosen....by the people" within the meaning of those words in section 73(2)(c) of the Constitution Act 1889 (WA) ("the 1889 Act").

I agree with Toohey J that it is the 1889 Act and not the Australian Constitution that is decisive in this case. I am of the view that, when proper regard is had to the system of representative democracy which inheres in the text and structure of the Australian Constitution, section 106 of the Constitution operates to require that the States, as constituent bodies of the federation, be and remain essentially democratic. But that requirement stops considerably short of the proposition advanced by the plaintiffs, namely, that the Constitution, either by reason of section 15 or by reason of section 106, requires that the Parliaments of the States be elected pursuant to voting systems which, within practicable limits, ensure equality of voting power across electorates. Subject to what I have earlier said with respect to section 106, I adopt the reasons of Toohey J for concluding that neither section 15 nor section 106 of the Constitution has that effect.

Although it is section 73(2)(c) of the 1889 Act that is decisive in this case, it is convenient to begin with an analysis of the expression "directly chosen by the people" in sections 7 and 24 of the Australian Constitution, from which the expression "chosen directly by the people" in section 73(2)(c) appears to have been taken. The language is identical, except for the placement of the adverb, and the expressions are both to be found in constitution documents. Unless there is some difference in context, ordinary principles of construction require that the expressions be construed consistently.

An argument that the expression "directly chosen by the people" in section 24 of the Constitution requires that single member electorates have equal numbers of people or equal numbers of voters was rejected by the majority in *Attorney-General (Commonwealth); Ex rel McKinlay* v *The Commonwealth*[244] (Barwick CJ, McTiernan, Gibbs, Stephen, Mason, Jacobs JJ; Murphy J. dissenting). Different approaches were taken by the different justices who constituted the majority in that case. Barwick CJ and Gibbs J each emphasised that various constitutional provisions, including sections 7 and 24, either assumed or required inequality, that at the time of federation, the franchise was not uniform throughout the colonies and that the history and origins of the Australian Constitution differed significantly from those of the Constitution of the United States of America[245], Article 1, section 2 of which also contains the phrase "chosen ...by the People" and

has been construed as requiring that, as nearly as practicable, one person's vote should be equal to another's[246]. Barwick CJ concluded that "there [was] no constitutional guarantee of a universal franchise of equal voting strength or value, nor of practical equality in electoral divisions either in numbers of people or of electors"[247]. Gibbs J concluded to similar effect, observing that "the framers of the Constitution trusted the Parliament to legislate with respect to [the democratic process]..., no doubt remembering that in England, from which our system of representative government is derived, democracy did not need the support of a written Constitution"[248].

In *McKinlay*, Mason J also referred to constitutional provisions which indicated that inequality was tolerated by the Constitution and to the different history of the Constitution of the United States[249] and concluded that section 24 permitted "some, or even a marked, variation"[250] in electorates. Even so, his Honour thought it was "perhaps conceivable that variations in the numbers of electors or people in single member electorates could become so grossly disproportionate as to raise a question whether an election held on boundaries so drawn would produce a House of Representatives composed of members directly chosen by the people of the Commonwealth"[251].

It would seem that Stephen J also accepted that there might be circumstances in which disparity between electorates might offend representative democracy which, in his Honour's view, was to be discerned in the expression "directly chosen by the people". Thus, his Honour observed that there are "finite limits" to what is comprehended by representative democracy and that "in a particular instance there may be absent some quality which is regarded as so essential to representative democracy as to place that instance outside those limits altogether"[252]. And, a little later, his Honour added that "something approaching numerical equality of electors within electorates is an important factor... in the attainment of what many will regard as representative democracy in its purest form", even though, in its "absolute form" it is not "necessarily imported into the Constitution by the selection of representative democracy as the chosen mode of government for the nation"[253].

In a joint judgment, McTiernan and Jacobs JJ rejected the proposition that section 24 required "absolute or as nearly as practicable absolute equality of numbers.. in every constituted electoral district in a State" whilst acknowledging that the "notion of equality [was] present" in the expression "chosen by the people" but that it was a "matter... of degree"[254]. Their Honours considered that the meaning and application of section 24 were not frozen by reference to the circumstances existing at federation, saying[255]:

> "The words 'chosen by the people of the Commonwealth' fall to be applied to different circumstances at different times and at any particular time the facts and circumstances may show that some or all members are not, or would not in the event of an election, be chosen by the people within the meaning of these words in section 24. At some point choice by electors could cease to be able to be described as a choice by the people of the Commonwealth. It is a question of

> degree. It cannot be determined in the abstract. It depends in part upon the common understanding of the time on those who must be eligible to vote before a member can be described as chosen by the people of the Commonwealth. For instance, the long established universal adult suffrage may now be recognized as a fact and as result it is doubtful whether, subject to the particular provision in section 30256 [of the Constitution], anything less than this could now be described as a choice by the people."

One other matter should be noted with respect to *McKinlay*. Save to the extent that Stephen J was of the view that "representative democracy.., direct popular election, and the national character of the lower House, may... be discernd in the opening words of section 24"[257], none of the Justices who constituted the majority gave precise content to the words "chosen by the people". Perhaps that is because as McTiernan and Jacobs JJ pointed out, they do not permit of exact content[258]. Whether or not this be so, the fact that no precise content was given and the different approaches in the judgments require that *McKinlay* be accepted only as authority for the proposition that section 24 does not require absolute or as near as practicable equality between electorates. More significantly for present purposes, it is not authority for the proposition that the Constitution provides general authority for continuing significant malapportionment between electorates. Rather, and save for Barwick CJ and Gibbs J, the Justices who constituted the majority in that case appear to have accepted that inequalities might be of such magnitude that, at some point, members of the House of Representatives might not be "chosen by the people" or, in the case of Stephen J, the requirements of representative democracy might not be satisfied[259].

As already indicated, reference was made in *McKinlay* to a number of matters which indicate that the Constitution tolerates some disparity in voting strength. There is, of course, the consideration that, subject to the requirement in sections 8[260] and 30[261], the Constitution expressly allowed for State laws to determine the qualification of electors until the Parliament of the Commonwealth should otherwise provide, and did so in a context where the franchise was far from uniform[262] and full adult suffrage existed only in South Australia[263]. There is also the consideration that, despite population differences between the States, section 7 requires an equal number of senators for each of the Original States[264] while section 24 directs that, notwithstanding its requirement that "[t]he number of members chosen in the several States [for the House of Representatives] shall be in proportion to the respective numbers of their people ", five members at least are to be chosen in each Original State[265].

There is one other feature of section 24 which was the subject of remarks in *McKinlay*, to which I have yet to refer. As with section 7, section 24 makes no reference to electors, elections or to persons being elected, but to members being "chosen by the people"[266]. This is of some significance in a constitutional context where there are separate provisions with respect to elections[267], the franchise[268], and the numbers of senators and members of the House of 0Representatives to be chosen in each State[269]. In that context, particularly when regard is to be had to indications that the Constitution tolerates some inequality, the expression "chosen by the

people" must be seen as mandating a democratic electoral system and not as requiring a particular electoral system or that it have some particular feature. This notwithstanding, it is clear that there is a requirement in sections 7 and 24 that senators and members of the House of Representatives be "chosen by the people". And that requirements, is not satisfied merely by the holding of elections. For example, the Parliament could not legislate pursuant to section 34 of the Constitution to make membership of a particular political party the qualification for election to the House of Representatives. Such a law would so deprive the electorate of choice that persons elected pursuant to it could not be described as "chosen by the people".

It follows from what has been said that there may be some feature of the electoral system or, as Stephen J acknowledged in *McKinlay*, "there may be absent some quality which is regarded as so essential to representative democracy"[270] that it cannot be said that persons elected pursuant to it are "chosen by the people". The problem is to identify the process by which it may be determined whether or not that is so.

As already indicated, the words "chosen by the people" mandate a democratic electoral system. In that sense, they, like Art 1, section 2 of the Constitution of the United States, are a "guarantee of democracy"[271]. It has long been accepted that the Australian Constitution is "broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve"[272]. The words "chosen by the people" are as broad and general as any in the Constitution and, as with other words which are necessarily general, they are to be approached on the basis that, although their essential meaning is unchanged, "their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge"[273]. They must also be interpreted bearing in mind that democracy was not a perfectly developed concept at the time of federation and, perhaps, is not yet so. These considerations necessitate that the content and application of the words "chosen by the people" be determined in the light of developments in democratic standards and not by reference to circumstances as they existed at federation with the consequence, as McTiernan and Jacobs JJ acknowledged in *McKinlay*[274], that what was permitted by section 24 at one time may not be permitted at another.

Notwithstanding the limited nature of the franchise in 1901[275], present circumstances would not, in my view, permit senators and members of the House of Representatives to be described as "chosen by the people" within the meaning of those words in sections 7 and 24 of the Constitution if the franchise were to be denied to women or to members of a racial minority or to be made subject to a property or educational qualification. Similarly, the fact that the Constitution countenanced disparity in voting value at the time of federation provides no basis for a conclusion that significant disparity in the numbers of electors in single member electorates does not now offend section 24.

It does not follow from what has been said that section 24 requires complete or even practical equality of electorate size. A distinction which is reasonably capable of being viewed as an

appropriate and adapted means of taking account of geographic boundaries, community or minority interests[276] or some other matter which bears on effective parliamentary representation, such as the dispersed nature of the population in remote areas, would not, in my view, prevent it being said that members of the House of Representatives were "chosen by the people". However, subject to that consideration and the requirements of the Constitution which necessitate or which may necessitate inequality by reason of population differences between the States[277], persons elected under a system involving significant disparity in voting value, could not, in my view, now be described as "chosen by the people". To so describe them would be contrary to current democratic standards reflected in the electoral laws of the Commonwealth and, putting Western Australia to one side, the electoral laws of the States referred to in the judgment of Toohey J.

As already indicated, unless there is some relevantly different context, the words "chosen....by the people" in section 73(2)(c) of the 1889 Act must be interpreted consistently with those same words in sections 7 and 24 of the Constitution. There is one difference: when section 73(2)(c) was inserted in the 1889 Act[278], there was no constitutional provision which necessitated or, depending on population differences, might necessitate disparity in voting value, as is the case with sections 7 and 24 which, respectively, require that there be an equal number of senators for each of the Original States and that at least five members of the House of Representatives be chosen in each Original State. This means that there is no basis for any constitutional limitation in relation to voting equality of the kind necessary in relation to sections 7 and 24 of the Constitution. That aside, the words "chosen ... by the people" in section 73(2)(c) of the 1889 Act must, in my view, be applied in the same way as they are in sections 7 and 24 of the Constitution. More particularly, they must be viewed as constituting a guarantee of democracy entrenched in the 1889 Act unless and until amended in accordance with section 73(2). And they must be applied in the light of contemporary circumstances, having regard to developments which have taken place in democratic standards.

In applying the words "chosen ... by the people", it is relevant to have regard to the fact that, in 1978[279], when those words were inserted in the 1889 Act, the 1947 Act allowed for significant disparity in voting value both for Legislative Council and Legislative Assembly elections[280]. The extent of that disparity and the fact that it was countenanced until comparatively recent times militates, at least for the moment, against an approach to section 73(2)(c) which would require precisely the same standard as that now required by section 24 of the Constitution. Rather, that history provides a basis, at least for the moment, for a somewhat more generous margin of variation in voting value. But as with section 24 of the Constitution, the countenancing of voting inequality at one time does not, of itself, provide a basis for countenancing inequality at a later time. Ultimately, it is a question of what is required in the light of current democratic standards, including those which so recently applied in Western Australia.

In my view, the malapportionment which is detailed in the judgment of Toohey J is so great as to be distinctly at odds with democratic standards revealed in the electoral laws of the

Commonwealth and the other Australian States referred to in his Honour's judgment. Moreover, the distinction between metropolitan and non-metropolitan areas is, as his Honour points out, arbitrary and inflexible and, that being so, it cannot be justified on the basis that it is reasonably capable of being seen as appropriate and adapted to the dispersed nature of the population in the remote regions of Western Australia or to any other matter or circumstance which might bear on effective parliamentary representation.

It was not argued that section 6 of the 1899 Act and sections 2A(2), (6) and (9) of the 1947 Act were invalid when enacted in 1987 or, indeed, at any particular time thereafter. Rather, the plaintiffs' case was that, at some unspecified time, the provisions became invalid and remain so, in the same way, presumably, as laws which are validly enacted under the defence power may cease to be laws with respect to defence and become void when hostilities have ceased[281]. I am not convinced that is the proper approach to be taken with respect to electoral laws which are put into operation as and when elections have to be held.

The issue that arises with respect to section 6 of the 1899 Act and sections 2A(2), (6) and (9) of the 1947 Act is, in essence, whether they would have valid operation if elections were now held. Because that is the issue, the preferable course, in my view, is to answer the question in the case stated by saying, as earlier indicated, that if elections were now held, neither the members of the Legislative Council nor those words in section 73(2)(c) of the 1889 act. This is a minority view and it is thus unnecessary to consider what, if any, further relief is required by the answer I propose.

McHUGH J The question in this case stated is whether, in an election for the Legislative Council or Legislative Assembly for the State of Western Australia, the number of persons eligible to vote for or required to elect a member in one electorate should be approximately the same as the number of persons eligible to vote for or required to elect a member in another electorate.

The plaintiffs contend that, under the Commonwealth of Australia Constitution Act 1990 ("the Constitution") and the Constitution Act 1889 (WA) ("the Western Australian Constitution"), every legally capable adult person is entitled to vote in such an election and that each vote, so far as is reasonably practicable, should be equal in value. The plaintiffs contend that both Constitutions contain an implied principle of representative democracy and that principle entails the right of each individual elector to participate in the electoral process on an equal basis. They contend that section 6 of the Constitution Acts Amendment Act 1899 (WA) ("the 1899 Act") and sections 2A(2), 6 and 9 of the Electoral Distribution Act 1947 (WA) ("the 1947 Act") permit breaches of this right and that they are invalid.

Legislation

The Acts Amendment (Electoral Reform) Act 1987 (WA) ("the Amending Act") came into operation on 30th October 1987. It amended provisions of the 1899 Act and the 1947 Act which regulate the constitution of the Legislative Council and Legislative Assembly and which provide for the division of the State into electoral regions. Section 6 of the 1899 Act provides that the State shall be divided into six electoral regions under the 1947 Act. Section 2A of the latter Act requires the State to be divided into districts and regions in accordance with the Act. Section 9 of that Act directs Electoral Distribution Commissioners to divide the State into six regions. Three regions are to be known respectively as the North Metropolitan Region, the South Metropolitan Region and the East Metropolitan Region and are to "consist of complete and contiguous districts that together form the Metropolitan Area"[282]. The fourth region is to be known as the Mining and Pastoral Region and is to consist "of complete and contiguous districts that are remote from the capital and where the land use is primarily for mining and pastoral purposes". The fifth region is to be known as the Agricultural Region and is to consist of complete and contiguous districts "that together form an area that is generally south, or south and west, of and adjacent to the Mining and Pastoral Region". The remaining region is to be known as the South West Region and is to consist of complete and contiguous districts.

Under section 6 of the 1899 Act, the electoral regions known as the North Metropolitan Region and the South West Region are each to return seven members, and the electoral regions known as the south Metropolitan Region, the East Metropolitan Region, the Agricultural Region and the Mining and Pastoral Region are each to return five members, to serve in the Legislative Council. As a result, the Legislative Council consists of 34 members elected from six regions. Three regions are located in the Metropolitan Area and three outside that area. The Metropolitan regions return 17 members; so do the three regions outside the Metropolitan Area.

Section 19 of the 1899 Act also provides that, following the first dissolution of the Legislative Assembly or the expiry of its term after 31st December 1982, the State is to be divided into 57 electoral districts under the provisions of the 1947 Act, with each district to return one member to serve in the Legislative Assembly. Section 6(1) of the 1947 Act directs the Commissioners to divide the Metropolitan Area into 34 districts and to divide the remainder of the State into 23 districts. Section 6(2) directs the Commissioners to make the division of an area into districts "in accordance with the principle that the number of enrolled electors comprised in any district in the area must not be more than 15 per cent greater, or more than 15 per cent less, than the quotient obtained by dividing the total number of enrolled electors in the area by the number of districts into which the area is to be divided". As a result of these enactments and the distributions made under them, the Legislative Assembly consists of 57 members, each elected for a single district, 34 of whom are returned for districts in the Metropolitan Area and 23 for the rest of the State.

As at 6th November 1987, 669,293 people, constituting 74 per cent of the total voters in Western Australia, were enrolled in the Metropolitan Area and 240,081 voters, constituting 26 per cent of that total, were enrolled for the remainder of the State. Consequently, as at that date, 74 per cent of voters in the Metropolitan Area elected 60 per cent of the members of the Legislative Assembly while 26 per cent of voters outside the Metropolitan Area elected 40 per cent of its members. As the plaintiffs point out, the boundary of the Metropolitan Area is fixed for electoral purposes as at 1st January 1987, irrespective of the number of people who reside in it.

As far as the Legislative Council was concerned, the result of the legislation was that metropolitan electors, totalling 74 per cent of the State's voters, were to elect the same number of Legislative Council members as the non-metropolitan electors who comprised 26 per cent of the States's voters.

The 15 per cent tolerance from the average quotient, together with the inevitable changes in population, produces large divergences in the number of voters enrolled for districts in the metropolitan and non-metropolitan areas of the State. At the date of the 1993 election, the quotient for the Metropolitan Area was 21,988, with the 15 per cent tolerance giving a range of 18,690 to 25,286 voters for each district. In Belmont, the smallest district, 20,064 voters were enrolled, while in Wanneroo, the largest district, 26,580 voters were enrolled. In the non-metropolitan areas of the State, the quotient was 11,702, with the 15 per cent tolerance giving a range of 9,947 to 13,457 voters for each district. In Ashburton, the smallest district, 9,135 voters were enrolled for the 1993 election while in Murray, the largest district, 15,646 voters were enrolled.

Thus, at the 1993 State election, the electoral district of Wanneroo contained 291 per cent more voters than the electoral district of Asburton. Moreover, because the State was divided into the Metropolitan Area and the rest of the State, disparities in the number of voters in electoral districts existed even in respect of districts which were geographically close to each other. In the district

of Peel, for example, 25,547 voters were enrolled while only 11,045 voters were enrolled in the nearby district of Mandurah.

The elections for the Legislative Council disclosed even greater discrepancies between the numerical size of the regions that elect members. Thus the quotient for the North Metropolitan Region was 34,161 votes and for the Mining and Pastoral Region 9,097. In other words, the ratio between the number of votes required to elect a member in these two regions was 3.76 to 1.

It is beyond question that the distribution of voters in the electoral districts and regions of Western Australia, for both the Legislative Council and the Legislative Assembly, results in the vote of some voters, particularly non-metropolitan voters, having a greater value than that of others. If the principle of representative democracy is a principle of the Constitution or the Western Australian Constitution, and if representative democracy under either Constitution requires that the number of voters in electoral districts or regions should be equal so far as is reasonably practicable, the provisions of the 1899 Act and the 1947 Act are in breach of those Constitutions. The scheme set up by the two Acts arbitrarily distinguishes between metropolitan and non-metropolitan voters. On no rational basis can the special needs of electors in areas outside the non-metropolitan areas justify such large disparities as exist between particular electoral districts and regions. It is unnecessary, however, for me to develop these points because, contrary to the plaintiffs' submissions, I am of the opinion that neither the Constitution nor the Western Australian Constitution contains any requirement that the number of voters in electoral districts should be equal or equal so far as is reasonably practicable.

The Constitution

In *Attorney-General* (Commonwealth); *Ex rel McKinlay v The Commonwealth*[283], this Court (Barwick CJ, McTiernan, Gibbs, Stephen, Mason and Jacobs J. J., Murphy J. dissenting) held that the Constitution did not require the number of people or the number of electors in electoral divisions for elections to the Federal House of Representatives to be equal. In *McKinlay*, the plaintiff argued that equality of voters in electoral divisions was required by section 24 of the Constitution which provides, so far as material, that "[t]he House of Representatives shall be composed of members directly chosen by the people of the Commonwealth". The plaintiff in that case did not rely upon an implied principle of representative democracy to support his claim, no doubt for the reason that at that time it had not occurred to him or his advisers that the Constitution contained such a principle.

The plaintiffs in this case contend that the decision in *McKinlay* is no longer an authority on the meaning of section 24 of the Constitution because it has been overtaken by those decisions of this court which hold that the principle of representative democracy is inherent in the Constitution independently of the terms of any particular provision of that Constitution[284]. The plaintiffs contend that, once this principle is accepted, there is no reason for distinguishing those decisions[285]

of the United States Supreme Court that hold that the United States Constitution contains a principle of equality of voting power. They argue that the decisions of the United States Supreme Court on equality of electoral districts are directly relevant to Australia because the Constitution, like the United States Constitution, has adopted a structure of representative government. The plaintiffs also rely on the similarity between the terms of section 24 of the Constitution and Art 1, section 2 of the United States Constitution which enacts that the House of Representatives "shall be composed of Members chosen every second Year by the People of the several States". They point out that the words "chosen by the people" are common to both Constitutions.

In *Wesberry v Sanders*[286], Black J., speaking for the United States Supreme Court, said:

> "We hold that, construed in its historical context, the command of Article 1, section 2, that Representatives be chosen "by the People of the several States" means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's. To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected 'by the People'.
>
> While it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives." (footnotes omitted).

The equal representation for equal numbers principle has been rigorously applied by the Supreme Court. In *White v Weiser*[287], the Court invalidated a plan which allowed a difference of 4.2 per cent between the most populous and least populous congressional district in Texas. In *Karcher v Daggett*[288], the Court was even more rigorous. It invalidated a plan in which the difference between the largest district and the smallest districts in New Jersey was only 0.7 per cent.

The plaintiffs contend that the statement of Warren C. J. in *Reynolds v Sims* is equally applicable to our Constitution. His Honour said:

> "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

His Honour went on to say[290]:

> "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system. It could hardly be gainsaid that a constitutional claim had been asserted by an allegation that certain otherwise qualified voters had been entirely prohibited from voting for members of their state legislature. And, if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or ten times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavoured areas had not been effectively diluted."

The plaintiffs also rely on decisions[291] of the United States Supreme Court that hold that the equal protection clause in section 1 of the 14th Amendment to the United States Constitution requires that, whenever the members of a legislature are elected from districts within a State or city or local government area, each district, so far as practicable, should have an equal number of voters who elect a proportionately equal number of members. The plaintiffs assert that the notion of equal protection of the laws which is expressly enacted in the United States Constitution is implied in the Constitution.

In my opinion, the United States decisions do not govern the construction of the Constitution. The decisions on Art 1, section 2 were heavily influenced by United States history, particularly the intentions of the framers of the United States Constitution[292]. The Australian history is different. The equal protection clause which is the basis of the other decisions of the Supreme Court has no counterpart in the Constitution. Moreover, the applicability of *Baker v Carr*[293], *Reynolds v Sims* and *Wesberry v Sanders* to section 24 of our Constitution was considered and rejected by a majority of the Court in *McKinlay*[294] .

Representative Government

The Constitution contains no express requirement that the number of electors in electoral divisions for Federal or State elections should be numerically equal or numerically so far as is practicable, nor do the terms of the Constitution nor its structure, nor the history of elections at the time of Federation provide any foundation for such a conclusion. On the contrary, various provisions of the Constitution convincingly point to the conclusion that neither equality of voting power nor equal numbers of electors in divisions electing members to the Houses of the Federal or State Parliaments is a constitutional requirement. If the principle of representative government or representative democracy is part of the Constitution independently of the terms of sections 1, 7

24, 30 and 41 of that Constitution, that principle, because it arises from implication, must give way to the inferences to be drawn from other provisions of the Constitution. Those provisions show that neither equality of voting power nor equal numbers of electors in divisions within a State is a constitutional requirement for either Federal or State elections.

Interpreting the Constitution

The Constitution is contained in a statute of the United Kingdom Parliament. In the late twentieth century, it may be unpalatable to many persons to think that the powers, authorities, immunities and obligations of the Federal and State parliaments of Australia derive their legal authority from a statute enacted by the Imperial Parliament, but the enactment of that statute containing the terms of the constitution is the instrument by which the Australian people have consented to be governed. Since the passing of the Australia Act (UK) in 1986, notwithstanding some considerable theoretical difficulties[295], the political and legal sovereignty of Australia now resides in the people of Australia[296]. But the only authority that the people have given to the parliaments of the nation is to enact laws in accordance with the terms of the Constitution.

The Constitution contains no injunction as to how it is to be interpreted. Any theory of constitutional interpretation must be a matter of conviction based on some theory external to the Constitution itself. But since the people have agreed to be governed by a constitution enacted by a British statute, it is surely right to conclude that its meaning must be determined by the ordinary techniques of statutory interpretation and by no other means[297]. It must therefore be interpreted by late twentieth-century Australians according to the ordinary and natural meaning of its text, read in the light of its history, with such necessary implications as derive from its structure. Nevertheless, as Higgins J pointed out[298] in the first decade of this century:

> "[A]lthough we are to interpret the words of the Constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting – to remember that *it is a Constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be.*" (emphasis in original)

In similar vein in *Jumbunna Coal Mine NL* v *Victorian Coal Miners' Association*[299], O'Connor J stated a principle of constitutional interpretation which has frequently been approved[300] and applied in this Court. His Honour said[301]:

> "[I]t must always be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve.

> For that reason, where the question is whether the Constitution has used an expression in the wider or in the narrower sense, the Court should, in my opinion, always lean to the broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose."

The ordinary principles of statutory interpretation require that the text be the starting point of any interpretation of the Constitution. Part of the ordinary and natural meaning of the text is any implication which is "manifested according to the accepted principles of interpretation"[302]. Implications derived from the structure of the Constitution are also part of the Constitution's meaning but such implications may be drawn only when they are "logically or practically necessary for the preservation of the integrity of that structure"[303]. Thus, because the Constitution has prescribed a system for elections to the Houses of the Federal Parliament, no Australian government can pass laws which would undermine the efficacy of that system[304]. However, I cannot accept, as Deane and Toohey JJ held in *Nationwide News Pty Ltd* v *Wills*[305], that a constitutional implication can arise from a particular doctrine that "underlies the Constitution". Underlying or overarching doctrines may explain or illuminate the meaning of the text or structure of the Constitution but such doctrines are not independent sources of the powers, authorities, immunities and obligations conferred by the Constitution. Top-down reasoning[306] is not a legitimate method of interpreting the Constitution. As I pointed out in *Theophanous* v *Herald & Weekly Times Limited*[307] after the decision of this Court in the Engineers' Case[308], the Court had consistently held, prior to *Nationwide News and Australian Capital Television Pty Ltd.* v *The Commonwealth*[309], that it is not legitimate to construe the Constitution by reference to political principles or theories that are not anchored in the text of the Constitution or are not necessary implications from its structure. I pointed out that the *Engineers' Case* had made it plain that the Constitution was not to be interpreted by using such theories to control or modify the meaning of the Constitution unless those theories could be deduced from the terms or structure of the Constitution itself. It is the text and the implications to be drawn from the text and structure that contain the meaning of the Constitution. With all due respect to the Judges of this Court who have held that there is a free-standing principle of representative democracy in the Constitution, their conclusion necessarily involves a rejection of the principles of interpretation laid down in the *Engineers' Case*[310] although perhaps not with the philosophy that lies behind that decision[311].

One great difficulty with the implication of representative democracy that has recently been discovered in the Constitution is the nature of the implication. In a constitutional instrument, such as the Constitution, an implication will ordinarily confer a power or a right, or in some cases impose an obligation, on a legislature or person. Prior to the series of cases which commence with *Nationwide News* in 1992, implications drawn from the Constitution were seen as either conferring power on the Commonwealth or as restraining the exercise of power by the Commonwealth or the States. Thus, certain powers, were seen as implied in the Commonwealth from "the very nature and existence of the Commonwealth, as a political institution"[312], and certain restraints on the Commonwealth[313] or the States[314] were seen as implied from the structure of the

Constitution. But the implication of a principle of representative democracy is a different sort of implication.

After the decision in *Australia Capital Television* and prior to the decision in *Theophanous*, the precise implication might have been thought to be that no government, State or Federal, can legislate in a way that undermines or interferes with the system of representative government so far as the Constitution sets it up. In that respect, the implied principle of representative democracy would be a shorthand but inexact expression for an implication derived from the need to maintain the representative system of federal government that the Constitution sets up. It would be similar to the implied principle of the separation of powers which is a shorthand expression for saying that neither the legislature nor the executive can exercise judicial power nor can the legislature impose non-judicial functions on the judiciary. There was, however, difficulty in characterising the implication of representative democracy in this way because in *Australian Capital Television*, a majority of Justices took the view that the principle implied restricted the grant of affirmative powers in section 51 of the Constitution if those powers interfered with the *State* and *local government* systems of government. This was because the three tiers of government were seen to be closely tied together and it was regarded as unrealistic to attempt to distinguish the federal system from the other systems of government.

Since the decisions of the Court in *Theophanous and Stephens* v *West Australian Newspaper Limited*[315], however, it is plain that the implication cannot be likened to the implication of the separation of powers. Indeed in those two cases, the implication seems to have taken on another dimension, if it has not changed dramatically; for in those cases, the Court has held that the implied principle is not only a restraint on federal and state legislative power but it changes common law rights and duties. That would seem to mean that the Constitution directly changes the rights and duties of individuals. However, the majority of justices in *Theophanous*[316] expressly said that:

> "Whether the implied freedom could also conceivably constitute a source of positive rights was not a question which arose for decision in those cases and it is unnecessary to decide it in this case. For that reason we shall refer to the freedom of communication as an implication rather than as a guarantee of freedom, notwithstanding the use of the latter expression in some judgments in the two cases.
>
> It is also clear that the implied freedom is one that shapes and controls the common law. At the very least, development in the common law must accord with its content."

The result seems to be that the Constitution contains, by implication, a principle of representative democracy that is not confined to restricting the powers of the federal or State legislatures, nor

does it necessarily confer any rights on individuals. It appears to be a free-standing principle, just as if the Constitution contained a Chapter IX with a section 129 which read:

> "Subject to this Constitution, representative democracy is the law of Australia, notwithstanding any law to the contrary."

That does not mean, of course, that the implied principle of representative democracy trumps all other rights and obligations. Because the principle arises by implication, it must be subject to the express terms of the Constitution and be weighed in appropriate cases against other implications drawn from the text and structure of the Constitution. Nevertheless, when it is seen as the equivalent of the hypothetical section 129, it is plain that it is not an implication "logically or practically necessary for the preservation of the integrity of [the] structure" of the Constitution[317]. The "implication" has become a premise from which other implications are drawn. Thus, in *Theophanous and Stephens,* the majority held that the preservation of representative democracy required that the common law of defamation should be restricted in its application to federal and State politicians and certain other persons. By that stage, the text and structure of the Constitution have receded into the background and it is the concept of representative democracy, not the text or structure of the Constitution, that governs the application of the Constitution in such cases.

The plaintiffs seemed to accept that the principle was a free-standing, constitutional provision somewhat similar to the hypothetical section 129 because they argued that, although the connotation of the concept of representative democracy "may be constant, in terms of the purposes, goals and objectives that it entailed for the future of the people of Australia ... its denotation has been capable of adapting in an evolutionary way to new situations and standards in accordance with the growth of the Australian people". In other words, the content of the "implication" changes with the growth or contraction of the external political theory of representative democracy, irrespective of whether the outcome of the growth or contraction is necessary to maintain the system of government set up by the Constitution.

This argument of the plaintiffs may be the logical consequence of the way the majority of the Justices of this Court have now formulated the principle, but, to my mind, it only demonstrates that no such principle can be deduced from the Constitution by applying the standard techniques of statutory interpretation to the constitutional instrument.

The Authority of the Implied Principle of Representative Democracy

Judges as diverse in their approach to the Constitution as Barwich C. J. and Murphy J. have stated that it is the duty of justices of this Court to apply its text and not the judicial decisions on the text[318]. Judicial exposition of the Constitution does not replace the Constitution or its meaning. As Isaac J. declared in *Australian Agricultural Co* v *Federated Engine-Drivers and Firemen's Association of Australasia*[319]:

> "Our sworn loyalty is to the law itself, and to the organic law of the Constitution first of all. If, then, we find the law to be plainly in conflict with what we or any of our predecessors erroneously thought it to be, we have, as I conceive, no right to choose between giving effect to the law, and maintaining an incorrect interpretation. It is not, in my opinion, better that the Court should be persistently wrong than that it should be ultimately right."

But, as Gibbs pointed out in *Queensland* v *The Commonwealth*[320], in a passage to which I referred in Re *Tyle;* Ex parte *Foley*[321], no justice of this Court "is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank". As Gibbs J went on to say, it is only after the most careful consideration of the earlier decision and after giving due weight to all the circumstances, that a Justice can give effect to his or her own opinion in preference to the earlier decision of the Court.

I regard the reasoning in *Nationwide News, Australian Capital Television, Theophanous and Stephens,* in so far as it invokes an implied principle of representative democracy, as fundamentally wrong and as an alteration of the Constitution without the authority of the people under section 128 of the Constitution. Moreover, as much as I admire the noble vision of the Justices who have found, contrary to what the overwhelming majority of lawyers had always thought, that the Constitution contains a free-standing principle of representative democracy, principles of constitutional interpretation compel me to reject their reasoning. It may be that ultimately the representative democracy line of reasoning in *Nationwide News* and subsequent cases will be so widely followed and applied that, however erroneous one may think that reasoning is, it must be taken to reflect the meaning of the Constitution. But until that time arrives, I conceive that I have no option but to reject the authority of that reasoning.

To decide this case by reference to what the principles of representative democracy currently require is to give this Court a jurisdiction which the Constitution does not contemplate and which the Australian people have never authorised. Interpreting the Constitution is a difficult task at any time. It is not made easier by asking the Justices of this Court to determine what representative democracy requires. That is a political question for the judiciary, it should be left to be answered by the people and their elected representatives acting within the limits of their powers as prescribed by the Constitution.

However, even if, contrary to my view, the Constitution contains a free-standing principle of representative democracy, other provisions of the Constitution show that, whatever the content of representative democracy may be in the last decade of the twentieth century, the Constitution does not require an equal number of electors in electoral divisions. If representative democracy, as presently understood, requires that, so far as is practicable, no group of electors should be able to elect proportionately more elected representatives than a similar group, then our Constitution refuses to give effect to that requirements.

No Equality of Voting Power

Equality of voting power is not a fundamental feature of the Constitution. On the contrary, inequality of individual voting power is one of its striking features. Thus, under section 128 of the Constitution, an amendment cannot be made to the Constitution unless a majority of electors in a majority of States approve the proposed law to amend the Constitution. Accordingly, the votes of the persons living in one of the less populous States are equivalent to the votes of the persons living in one of the more populous States. If the majority of New South Wales voters approve a constitutional amendment but a majority of Tasmanians reject it, their votes cancel each other out, notwithstanding the enormous population difference between the two States. Thus, the share in the right to amend the Constitution of each Tasmanian voter can be more than 12 times as great as the share of each New South Wales voter.

Further, where an alteration of the Constitution would in any manner affect the provisions of the Constitution in relation to a State, section 128 of the Constitution provides that the alteration shall not be valid unless the majority of electors in the State concerned approved the proposed alteration. In that case of constitutional amendment, the votes of a majority of people in the State concerned are equivalent to the votes of the rest of the nation.

Under the Constitution, therefore, individual Australians do not have an equal share in the sovereignty of Australia. Lord Bryce asserted that, in a country governed by a right Constitution which limits the power of the legislature to certain subjects or forbids it to transgress certain fundamental doctrines, the sovereignty of the legislature is necessarily restricted. In that case, ultimate sovereignty resides in the body which made and can amend the Constitution[322]. On that view, the sovereignty of Australia originally resided in the United Kingdom Parliament. Since the *Australian Act* 1986 (UK), however, the sovereignty of the Australian nation has ceased to reside in the Imperial Parliament and has become embedded in the Australian people[323]. Only the people can now change the Constitution. They are the sovereign. But, because their rights to amend the Constitution are not equal, the Australian people do not have equal shares in that sovereignty.

Part II of Chapter 1 of the Constitution, which deals with the Senate, is also a powerful indicator that equality of individual voting power is not a feature, let alone a fundamental feature, of the Constitution. Section 7 provides for the equal representation of the States and declares "that equal representation of the several Original States shall be maintained and that no Original State shall have less than six senators". Thus the Senate vote of an elector in Tasmania is ten times more valuable than the Senate vote of an elector in Victoria[324]. At the Sydney session of the Constitutional Convention in 1897, New South Wales suggested that proportional instead of equal representation for a State should be rule, but the New South Wales proposal attracted only five supporters[325].

Representation of the Territories in the Federal Houses of Parliament also shows that equality of representation for equal numbers is not a requirement of the Constitution. The Constitution does not require the people of the Territories to be represented in the Parliament, but, if it thinks fit, Parliament "may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit"[326]. The Territories are not required to be represented in accordance with their population[327]. The words "chosen by the people of the Commonwealth" in section 24 of the Constitution do not include the people of the Territories[328].

Section 121 of the Constitution is another strong indication that equality of individual voting power is not a general requirement of the Constitution or section 24. It provides that the Parliament may admit new States to the Commonwealth upon "such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit". The words of section 24 must give way to this express provision in section 121 just as this Court held in the *Territorial Senators Cases*[329] that the words of section 7 of the Constitution must give way to the words of section 122, which are similar to section 121, in relation to the representation of the Territories in the Senate. Thus, under section 121 as under section 122, in the case of Territories, the Parliament may prescribe a number of representatives for a new State without reference to the population of the new State or the population of the rest of Australia. The House of Representatives may therefore be composed of members from States and Territories whose share of representation is not proportional to their population. In the face of sections 121, and 122, it is difficult to imply in section 24 a requirement that electoral divisions for elections to the House of Representatives must be equal in numbers.

When the share of individuals in the sovereignty of the nation, in the right to amend the Constitution, and in Senate voting is expressly made unequal, and when new States and Territories may have unequal representation in the Parliament, it is obvious that equality of individual voting power is not and has not been a fundamental feature of the Constitution. It is therefore unsurprising that the Constitution contains no express indication that each person in a State must have an equal share in electing the total number of members of the House of Representatives for that State.

However, the plaintiffs placed great reliance on the words "directly chosen by the people" in sections 7 and 24 of the Constitution as indicating that the Constitution requires that, within a State, there shall be equal representation for equal numbers. Section 7 provides:

> "The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate."

Section 24 provides:

> "The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth."

The ordinary and natural meaning of those words says very little about how the members are to be chosen. They disclose nothing as to whether voting is to be "first past the post" or preferential voting or whether the electorate is to vote as one electorate or by occupation or by locality. Recourse must be had to history and context to give meaning to the words "directly chosen by the people". For present purposes, it is sufficient to deal with the context and history of those words in section 24.

The Context of Section 24

Part III of Chapter 1 of the Constitution, dealing with "The House of Representatives" shows that the context of section 24 is inconsistent with the notion that the number of electors in the electoral divisions of a State must be equal. The provisions of Part III of Chapter 1 demonstrate that the Constitution intended that the manner in which members of the House of Representatives were to be elected was to be a matter for the State unless and until the Federal Parliament legislated on the matter. Section 29 of the Constitution provides:

> "Until the Parliament of the Commonwealth otherwise provides, the Parliament of any State may make laws for determining the divisions in each State for which members of the House of Representatives may be chosen, and the number of members to be chosen for each division. A division shall not be formed out of parts of different States.
>
> In the absence of other provision, each State shall be one electorate."

This section gave each State the power to determine the size of the electorates which were to elect the members elected for that State. It is impossible to construe the general words of section 29 as implied requiring a State to have electoral divisions with the same number of electors. There is even less ground for imposing such a restriction on the words "[u]ntil the Parliament otherwise provides" which is the source of the Federal Parliament's power to legislate with respect to electoral divisions.

Similarly, section 30 of the Constitution enacted that, until the Parliament otherwise provided, the qualifications of electors for the House of Representatives were to be in each State those which were prescribed by the law of that State as the qualification for the electors of the more numerous House of Parliament of the State. Section 30 also provides that, in the choosing of members, each elector should vote only once. Since the Constitution specifically prohibits an elector voting more than once, it is inconceivable that, if the Constitution intended that the number of electors electing a member for each electoral division should also be equal, it contains no provision to that effect.

The plaintiffs also relied on the requirement in section 24 that:

> "The number of members chosen in the several States shall in proportion to the respective numbers of their people."

But this requirement of section 24 shows no more than that there must be inter-state equality; it says nothing about equality of electoral divisions within a State. Moreover, because of the terms of section 121, this requirement of proportionality seems confined to the original States.

As Mason J pointed out in *McKinlay*[330], it is significant that:

> "[T]he second paragraph section 24 makes explicit provision for the ascertainment of a quota of people for the specific yet limited purpose of ascertaining the number of members to be chosen in each State. Had it been intended to provide that electoral divisions within a State should contain an equal or practically equal number of people or electors it is inconceivable that the quota provision would have been expressed to have such a limited application.

Electoral Equality Before Federation

The history of electoral distributions prior to Federation confirms the view that section 24 of the Constitution does not mandate equality of individual voting power in Federal Government elections. At Federation, equality of electoral populations was not basic to the political systems of England or Australia even though representative government was firmly established in England and in the colonies. Representative government was not perceived as requiring that electoral divisions should be numerically equal. Nor was representative government perceived as requiring that all adult persons should be entitled to vote.

Historically, parliamentary representatives were seen as representing communities and economic interests rather than individual electors[331]. Thus, James Mill thought that governments should be directed by a parliament that "must have an identity of interest with the community"[332]. During the course of the nineteenth century, however, it came to be seen more clearly that parliamentary representatives should represent individuals rather than communities and economic interests, a view with which Warren CJ agreed when he said in *Reynolds* v *Sims*[333]:

> "Legislatures represent people, not trees or acres. Legislatures are elected by voters, not farms or cities or economic interests."

In his essay *Considerations on Representative Government*, John Stuart Mill was a believer in the Hare system, or proportional representation system of voting[334], advocated by the radicals under Joseph Chamberlain [335]. Nevertheless, although radical groups continued to advocate for

numerical equality of constituencies throughout the nineteenth century, equality of numbers in electoral districts was not a strong issue in 1900. Once the view was accepted that the individual citizen and not the community or some economic interest was the unit of representation, "the extent of the franchise became the main subject of debate"[336]. As Birch says[337]:

> "The advocacy of equal electoral districts was the important part of the Radical programme in the 1830s but by the turn of the century most of the steam had gone out of this argument. As noted, the redistribution of 1885 had greatly reduced the inequality of constituencies and Liberals were prepared to accept that, up to a point, the principle of equality had to give way to the claims of local interests and administrative convenience."

In England, the ratio of constituencies differed by 40 to 1 before the Redistribution Act 1885 but remained at 7 to 1 until well into the twentieth century[338].

The Numerical Size of State Electorates at Federation

The numerical size of electorates in the States at the time of Federation and the terms of section 31 of the Constitution indicate that the view prevailing in England in 1900 also prevailed in Australia, and that the makers of our Constitution were content to allow it to continue unless and until the parliamentary representatives declared otherwise. Section 31 of the Constitution provides that, until the Parliament otherwise provided but subject to the Constitution, the laws in force in each State for the time being relating to elections for the more numerous House of Parliament of the State should as nearly as practicable apply to elections in the State of members of the House of Representatives. At the time of Federation, the electoral laws of each State did not provide for electorates with equal numbers of voters. On the contrary, those laws permitted very large differences in the number of electors in the electoral divisions in each State. The following were the electoral division ratios applying in elections for various parliaments of the colonies in the period 1897 to 1900:

House of Parliament	Year of Election	Electoral Ratio
Legislative Assembly (WA)	1897	38.52 to 1
Legislative Council (WA)	1900	22.22 to 1
Legislative Assembly (NSW)	1898	2.23 to 1
Legislative Assembly (Qld)	1899	5.84 to 1
Legislative Assembly (SA)	1899	8.32 to 1

Legislative Council (SA)	1900	2.11 to 1
Legislative Assembly (Tas)	1900	9.10 to 1
Legislative Assembly (Vic)	1900	3.54 to 1
Legislative Council (Vic)	1900	2.45 to 1

Members of the Legislative Councils of New South Wales and Queensland were appointed to office.

The Franchises at Federation

The extent of the franchise in the various colonies at the time of Federation also make it highly unlikely that the words "chosen by the people" were intended to imply equality of voting power for individual electors. As I have pointed out, until the Federal Parliament legislated, section 30 made the qualifications of electors in the more numerous Houses of Parliament of a State the qualifications for Federal elections for the House of Representatives in that State. There were very large differences in the franchises in each State. In New South Wales, only men were entitled to vote[339]. In Victoria, only men over the age of 21 who were natural-born British subjects or naturalised subjects of three years' standing, with at least one of those years spent in the State, were entitled to vote. It was also a condition of the entitlement to vote in that State that a voter should own land with an annual value of £10 or hold a lease of land that was rated with an annual value of twenty-five pounds. University graduates and members of certain occupations were also given a right to vote[340]. In Queensland, only male British subjects over the age of 21 were entitled to vote. A voter had to be resident in an electoral district or own land in the district valued at £100 or hold a lease or licence of land in the district of a clear annual value of at least ten pounds. While an elector could vote only once in a district, he was entitled to vote in more than one district if he was qualified. Military personnel and police officers were disqualified from voting, while aboriginals of Australia, India, China or the South Sea Islands had to meet a freehold property requirement[341] . In Western Australia, both men and women were entitled to vote but property qualifications applied[342]. In Tasmania, only British subjects over the age of 21 were entitled to vote. Property or other qualifications were additional requirements[343]. In South Australia, men and women over the age of 21 were entitled to vote but in elections for the Legislative Council only if certain property requirements were met[344].

These differences in the franchise show that, although the original States were to be represented in the House of Representatives proportionately to their populations, the Constitution laid down no requirements apart from section 41 as to which members of the population of a State were to elect its representatives. That being so, it seems unlikely that section 24 was concerned with equal representation for equal numbers of voters in each State. Thus, section 30 confirms the view that equality of voting power for the adult people of Australia is not a constitutional

requirement. The refusal of the Convention delegates to provide for universal suffrage in the Constitution is itself eloquent evidence that such matters as the franchise and the size of electoral divisions were matters for the States until the Parliament legislated.

No Implication of Equal Numbers in Electoral Divisions

Given the terms of Part III of Chapter 1 of the Constitution and the electoral laws that applied in Australia at the time of Federation, it is impossible in my view to conclude that the Constitution intended that either the Federal Parliament or, in the absence of federal legislation, a State was required to have equal numbers of electors in the electoral divisions (if any) in each State. In the light of history and context, the obvious purpose of the words "chosen by the people" in sections 7 and 24 was to prevent the use of such devices as the choosing of senators or members by an electoral college, or by nomination as was the case in New South Wales and Queensland with respect to their legislative Councils[345].

In so far as any notion of electoral equality is present in the Constitution, it applies only to the Original States in respect of representatives for those States in the House of Representatives and not to individual electorates which may constitutionally consist of an entire State, or of electorates whose size and population are determined by the Federal Parliament from time to time or, in the absence of legislation, by the Parliaments of the respective States. The plain meaning of the Constitution is that it was for the States to determine the size of electoral divisions within the States until the Federal Parliament decided to legislate on the question. If and when the Federal Parliament decided to legislate, sections 29, 30 and 31 gave it the power to determine the size and nature of the electoral divisions in each State and the nature of the franchise as well as other electoral matters[346].

Further, the provisions of Part II of Chapter 1 dealing with the Senate, section 121 dealing with new States, section 122 dealing with Territories, and above all section 128 dealing with the power to amend the Constitution, show that equality of individual voting power is not a fundamental requirement of "representative democracy" under the Constitution. If representative democracy, as understood outside the context of the Constitution, requires equality of electors in electoral divisions, it does not do so under the Constitution. The Constitution makes the Federal Parliament the final arbiter on this matter, just as it makes the Federal Parliament the final arbiter on whether there should be universal suffrage, secret ballot, preferential or proportional voting or first-past-the-post voting[347].

The plaintiffs' answer to all these textual, contextual and historical considerations is to accept that, for a long period, equal representation for equal numbers was not required by the Constitution, but also to assert that Part III of Chapter 1 is subject to the constitutional principle that the people have to be governed by the principles of representative democracy. Consequently, say the plaintiffs, as soon as representative democracy required an equal number of electors in each

division, the power of the Federal Parliament under section 29 or, in the absence of federal legislation, the power of State Parliaments under that section to legislate for the creation of electoral divisions was subject to the requirements of representative democracy.

But if a free-standing principle of representative democracy exists in the Constitution, it only arises from necessity, and an implication arising from necessity "must be limited by the extent of the need"[348]. Since the requirement of an equal number of voters in electoral districts was not seen as necessary for the preservation of the Constitution or its system of government at the time of Federation, it is difficult to see how it can be rationally concluded that it is necessary at the present time. If the political principle of representative democracy now requires that one vote have one value, then in so far as that principle is an implied part of the Constitution, its political meaning must give way to the natural and ordinary meaning of sections 24, 29 and 30 of the Constitution and the inferences that arise from sections 7, 121, 122 and 128 of the Constitution.

In the light of sections 29 and 30 of the Constitution, the electoral practices at the time of Federation in Great Britain and Australia, and those express provisions of the Constitution that requires or authorise unequal voting power, it is impossible to hold that the Constitution require equality of electoral districts.

Representative Democracy and Equal Representation for Equal Numbers

In any event, I do not think that it is established that in Australia, the requirements of equality in the numerical size of electoral districts is so universally conceived as a tenet of representative democracy that the Federal Parliament cannot legislate under section 29 of the Constitution without giving effect to it. If it is rationally open to the Federal or State Parliaments to conclude that, consistently with representative democracy, other factors concerning parliamentary representation must be weighed against the theory of equal representation for equal numbers, the plaintiffs' case based on representative democracy must fail.

Influenced by the United States Supreme Court decision, many political scientists see representative democracy as requiring equality of voting power[349]. But it is not a view that represents the consensus of opinion in the Australian community. Whether or not representative democracy in Australia requires equality of voting power is a controversial issue in this country[350]. Indeed, it appears that the Australian people do not regard one vote one value as an essential requirement of representative democracy. The issue was put to the people by referendum in 1974[351]. The "yes" vote attracted 47 per cent of the vote with a majority only in New South Wales[352]. The issue was again put to the people by referendum in 1988 when the people were asked to insert a section 124C[353] into the Constitution. The proposed amendment was overwhelmingly defeated. Every State voted against the referendum. The Australian Capital Territory was the only political unit which supported it. The total "no" vote was 62 per cent[354].

Further, Canadian courts[355] have rejected the argument that representative democracy in Canada requires equality of voters in electoral divisions for reasons that seem equally applicable to Australia. In *Dixon* v *British Columbia (Attorney-General)*[356], McLachlin J, while Chief Justice of the Supreme Court of British Columbia, said:

> "The American emphasis on a pure population standard for electoral apportionment may be seen as a product of that country's unique history and conception of democracy. The decisions upholding this standard are heavily influenced by the courts' understanding of the intentions of the framers of the US Constitution...
>
> Democracy in Canada is rooted in a different history. Its origins lie not in the debates of the founding fathers, but in the less absolute recesses of the British tradition. Our forefathers did not rebel against the English tradition of democratic government as did the Americans; on the contrary, they embraced it and changed it to suit their own perceptions and needs.
>
> What is that tradition? It was a tradition of evolutionary democracy, of increasing widening of representation through the centuries. But it was also a tradition which, even in its more modern phases, accommodates significant deviation from the ideals of equal representation. Pragmatism, rather than conformity to a philosophical ideal, has been its watchword."

A similar evolutionary tradition has developed in Australia. Although the gap between the largest and the smallest electoral divisions in all Australian States has narrowed considerably over the last century, the governments of Australia have consistently legislated for inequalities in representation, inequalities which have generally favoured the non-metropolitan areas[357]. Nevertheless, by 1984, only the electoral divisions of Queensland and Western Australia could be said to be significantly malapportioned[358]. Subsequently, the malapportionment of the Queensland electoral divisions, except for five special districts, has been brought into line with electoral distributions in other States. Even in Western Australia, the gap between the largest and smallest electorates, in terms of the number of electors, has been continually narrowing throughout this century, as the materials before the Court show.

The Australian people and their representatives appear to have accepted Birch's view[359] that:

> "A political system can properly be described as a system of representative government if it is one in which representatives of the people share, to a significant degree, in the making of political decisions... Most students of politics agree that the variety of interests and opinions within a society is too great for them to be adequately represented by any one man. The necessary condition of representative government is therefore said to be the existence of a fair number

> of representatives of the people, meeting together in some kind of council or assembly."

Stephen J expressed a similar view in *McKinlay*[360] when he said:

> "[R]epresentative democracy is descriptive of a whole spectrum of political institutions, each differing in countless respects yet answering to that generic description. The spectrum has finite limits and in a particular instance there may be absent some quality which is regarded as so essential to representative democracy as to place that instance outside those limits altogether; but at no one point within the range of the spectrum does there exist any single requirement so essential as to be determinative of the existence of representative democracy."

His Honour went on to say[361]:

> "It is no doubt true that something approaching numerical equality of electors within electorates is an important factor, together with much else, in the attainment of what many will regard as representative democracy in its purest form, just as adult suffrage, free of discrimination on the grounds of race, sex, property or educational qualification will likewise aid in its attainment. But neither of these in absolute form is necessarily imported into the Constitution by the selection of representative democracy as the chosen mode of government for the nation."

This statement was made in 1975. The result of the 1988 referendum shows that most Australians still think that representative democracy does not require equal representation for equal numbers, notwithstanding that the Constitutional Commission in its Final Report said that it saw "one vote one value [as] an essential principle of democracy"[362].

No doubt for a time in the nineteenth century, it may have seemed likely that public opinion would ultimately accept that equal representation for equal numbers was necessary if representative government was to be fully achieved. But the fact that that theory did not become the consensus in England and Australia is probably due to the growth of the party system. Once the party system became firmly established, voters' loyalties were to the parties and their leaders rather than to individual members of Parliament[363]. Not equality of voting power but the extent to which a political party's votes translate into seats in Parliament is now seen by many political scientists as the surest guide to the fairness of a particular political system[364]. Equality of numbers in electorates does not guarantee representative government. Because of the party system, electorates can be gerrymandered notwithstanding that they meet the equality standard[365]. Of course, that does not mean that equality of numbers in electoral divisions is not extremely important if an electorate is divided into divisions.

Conversely, inequality in the numerical sizes of electoral divisions does not necessarily mean a party is unfairly represented. Even when electoral divisions are skewed in the manner in which the electoral divisions are skewed in Western Australia, the number of seats obtained by the major political parties frequently represent a rough approximation of the first preference vote of the party. Thus, in the 1993 Western Australian election in the Legislative Assembly, the Liberal Party gained 26 seats, the Labor Party 24 seats, the National Party six seats, the Greens (WA) and Australian Democrats no seats and an Independent one seat. The Liberal Party gained 44.15 per cent of the first preference votes and 45.61 per cent of the seats, while the Labor Party gained 37.08 per cent of the vote and 42.11 per cent of the seats. Thus, although the electoral distribution in Western Australia is weighted against the metropolitan seats where the Labor Party might be expected to have the largest share of its votes, it gained a greater percentage of seats than its share of the vote. This was achieved even though the National Party, which gained 5.31 per cent of the vote, obtained 10.53 per cent of the seats. However, the Greens (WA) which obtained 4.31 per cent of the vote obtained no seats[366]. If a Statewide proportional representation system had been in use, the Liberal Party would have gained 47.4 per cent of the seats, giving that party an additional seat. The Labor Party would have gained 40.3 per cent of the vote, giving them one less seat. The National Party would have received 5.3 per cent of the seats, giving them three seats. The Green (WA) would have obtained 5.3 per cent, giving them three seats. The Australian Democrats would have gained 1.7 per cent of the seats giving them one seat[367]. A fairly similar result would have obtained by applying a Statewide proportional representation system to the Legislative Council election. This would have resulted in the Liberal Party gaining one seat, the Labor Party losing one seat, the National Party losing two seats and the Greens (WA) and the Australia Democrats gaining one seat each. Under the present system operating in Western Australia, the beneficiaries would seem to be the Labor Party and the National Party, notwithstanding that the Labor Party's voters are probably concentrated in the Metropolitan Area while the National Party's voters are probably concentrated in the non-Metropolitan area. The losers are the Liberal Party, the Greens (WA) and the Australian Democrats. A Statewide proportional system rather than equality of numbers in electoral divisions would seem necessary to obtain equality of representation in the Parliament of Western Australia because, whatever the size of those divisions, the minor parties seem unlikely to obtain their fair share of parliamentary representation.

Thus, the way that a party's voters are dispersed through the electorate is likely to have a greater effect on representation in the Houses of Parliament than is equality of electoral districts. In the 1990 federal election, for example, the Labor Party won 52.7 per cent of the seats in the House of Representatives (78 out of 148), although it only obtained 49 per cent of the national two-party preferred vote[368].

Only if the Court concluded that equal representation for equal numbers was an indispensable element of representative democracy would it be justified in holding that the parliaments of Australia cannot legislate inconsistently with that element. Notwithstanding the views of eminent political scientists and the Constitutional Commission, a very substantial number of Australian

electors, perhaps a majority, do not see equal representation for equal numbers as indispensable to representative government or democracy in Australia. When such a division of opinion occurs about what is essentially a political question, this Court should be slow to substitute its views for that of the Parliaments as to what representative democracy requires.

However, for reasons I have given, the Constitution does not require equal representation for equal numbers in elections in a State for the House of Representatives whatever the principles of representative democracy may currently require.

The Constitution and State Elections

If the Constitution does not require the electoral divisions for federal elections to be equal in numerical size, there is no ground for supposing that the Constitution requires that the electoral divisions for State elections be equal. In *Australian Capital Television*, *Theophanous* and *Stephens*, the majority Justices found that Chapter 1 and section 128 of the Constitution were the basis for an implication that the principle of representative democracy is part of the Constitution. If the principle of representative democracy is based on Chapter 1 and section 128 of the Constitution and applies to State Constitutions, it can surely only do so through the operation of section 106 of the Constitution[369]. However, in *Theophanous and Stephens,* the majority Justices seem to have seen the principle as an overarching and free-standing provision equivalent to a hypothetical section 129 of the Constitution. But even if this is the correct view of the implied constitution principle of representative democracy after those two cases, since it does not require equal representation for equal numbers in federal elections, it surely cannot shake off its foundations and require it in State elections.

No doubt the logic of the reasoning in *Theophanous and Stephens* would seem to imply that the principle of representative democracy applies generally throughout the Constitution and could require equality of electorate divisions for State elections even though other provisions of the Constitution demonstrate that such equality is not required in federal elections. In other words, the express provisions of the Constitution may confine representative democracy in its application to federal elections but, in the absence of some provision in the Constitution, the principle is not so confined in its application to State elections. If the logic of *Theophanous and Stephens* requires this result, it provides the strongest ground for overruling those decisions, as soon as possible. If that is the logic of those decisions their continued operation can only distort the meaning and application of the Constitution.

In my opinion, once it is held that the system of representative government set up by the Constitution does not require equal representation for equal divisions in federal elections, it must follow that the Constitution imposes no such obligation in State elections. It follows that the plaintiffs' claim based on the Constitution must be rejected.

The Western Australian Constitution

The plaintiffs assert, however, that independently of the Constitution, the Western Australian Constitution contains a principle of representative democracy which requires that elections to the Legislative Assembly and the Legislative Council be based on electoral districts and regions that contain an equal number of electors. They contend that this requirements of electoral equality is "more directly recognised and reflected in section 73 (2)(c) of the [Western Australian Constitution]" which is a "manner and form" provision within the meaning of section 6 of the *Australian Act 1986.* Consequently, so the plaintiffs contend, the 1987 Amending Act is invalid because it was a Law to which section 73(2)(c) applied and had not been submitted to the electors in accordance with that paragraph.

The effect of section 73 of the Constitution was summarised by Mason CJ and Toohey and Gaudron JJ in *Stephens*[370] as follows:

> "Section 73 of the Constitution Act 1889 (WA) provides that the legislature of the State 'shall have full power and authority, from time to time, by any Act, to repeal or alter any of the provisions of this Act'.
>
> However, it is not lawful to present to the Government for assent by the Queen[371]:
>
> any Bill by which any change in the Constitution of the Legislative Council or of the Legislative Assembly shall be effected, unless the second and third readings of such Bill shall have passed with the concurrence of an absolute majority of the whole number of the members for the time being of the Legislative Council and the Legislative Assembly respectively."

Section 73(2) was inserted into the Constitution by an amendment enacted in 1978. That sub-section further restricts the capacity of the legislature to enact a Bill which expressly or impliedly provides for the abolition of either the Council or the Assembly (section 73(2)(b) or provides that either House "shall be composed of members other than members chosen directly by the people" (section 73(2)(c). The sub-section requires that such a Bill should be presented for assent unless "the second and third readings of the Bill shall have been passed with the concurrence of an absolute majority of the whole number of the members for the time being of the Legislative Council and the Legislative Assembly, respectively" (section 73(2)(f) and the Bill has been approved by a majority of electors of the State at a referendum[372]".

Their Honours went on to say[373]:

> "[Section] 73(2) was plainly enacted with the object of reinforcing representative democracy and placing a further constitutional impending in the way of any attempt to weaken representative democracy. And, so long, at least, as the

> Western Australian Constitution continues to provide for a representative democracy in which the members of the legislature are "directly chosen by the people, a freedom of communication must necessarily be implied in that Constitution, just as it is implied in the Commonwealth Constitution, in order to protect the efficacious working of representative democracy and government."

It is not open to doubt, in my opinion, that section 73(2)(c) is a "manner and form" provision within the meaning of section 6 of the Australian Act 1986. Nor is it open to doubt that the Amending Act of 1987 was one "respecting the constitution, powers or procedure of the Parliament of the State" within the meaning of section 6 of the Australia Act or that the Amending Act of 1987, not having been submitted to a referendum as required by section 73(2), is invalid if it "expressly or impliedly provide[d] that the Legislative Council or the Legislative Assembly shall be composed of members other than members chosen directly by the people". However, it does not follow that, because the Court in *Stephens* saw section 73(2)(c) as reinforcing representative democracy in Western Australia, section 73(2)(c) requires equality of numbers in the electoral districts and regions of Western Australia.

The plaintiffs contend that the words "chosen directly by the people" necessarily import into the Western Australian Constitution a requirement of equality of electoral districts and regions. However, as I pointed out when discussing the similar words of section 24 of the Constitution, the ordinary and natural meaning of those words says nothing about how the members of the Legislative Council or Legislative Assembly are to be elected. If those words have the meaning for which the plaintiffs contend, it can only be because they were understood in that sense in Western Australian when section 73(2) was enacted. But not only is there no indication that the Western Australian Parliament understood the words in that sense, there are clear indications to the opposite effect.

When section 73(2)(c) was enacted, Western Australia was divided into electoral provinces and districts not dissimilar from those that resulted from the 1987 Amending Act. It is unnecessary to set out the details. It is sufficient to say that the relevant legislation authorised and resulted in considerable disparities in the number of electors who voted in the various districts and provinces of Western Australia. In the history of Western Australian electoral distributions there was nothing unusual about these disparities. Very significant disparities in the numbers of voters in electorates have always been a marked feature of electoral distributions in Western Australia. In the last election before Federation, the electoral disparities were as high as 38.52 to 1. Given this history, it would be surprising indeed if the words "the Legislative Council [and] Legislative Assembly shall be composed of members .....chosen directly by the people" (section 7 3(2)(c) were directly to equal representation for equal districts and provinces.

Thus, given the disparities in the districts and provinces at the time that section 73(2)(c) was enacted, the most likely conclusion is that the Parliament of Western Australia intended that the words "composed by members chosen directly by the people" meant what they said. They

required the members to be elected by the direct vote of the people as opposed to being appointed by the Crown or the Ministry or being elected by electoral colleges. That that was the intention of the Parliament was made plain by the Premier in the course of the parliamentary discussion when he said that one of the objectives of section 73(2)(c) was to prevent any attempt "to by-pass the right of the electors at large to elect the members of either House"[374]. That section 73(2)(c) was not concerned with the size of electorates or electoral quality was made plain in the Legislative Council. The second-reading speech expressly stated that section 73(2)(c) did not affect electoral boundaries[375].

In addition, three years earlier this Court had construed the similar words "directly chosen by the people" and had held that they did not import any notion of equal representation for equal groups of electors or of one vote one value[376]. It is a reasonable assumption that the words of section 73(2)(c) were chosen having regard to the interpretation placed on the similar words in section 24 of the Constitution in *McKinlay*.

In my opinion, having regard to the history of electoral divisions and provinces in Western Australia; the nature of those divisions and provinces in 1978; the decision in *McKinlay* and the statements in the Legislative Council and the Legislative Assembly, it is impossible to hold that section 73(2)(c) requires that a bill affecting electoral districts and regions must be submitted to a referendum to be valid unless it provides for the numerical equality of those districts or regions.

Once the conclusion is reached, the existence of any implied principle of representative democracy in the Western Australian Constitution is irrelevant. If section 73(2)(c) does not require equality of numbers in electoral districts or regions in Western Australia, then the Western Australian Constitution has no entrenched provision that prevents the Parliament of Western Australia from legislating for unequal numbers in electoral districts. It is legally and constitutionally irrelevant that such legislation is inconsistent with the principles of representative democracy. The Parliament of Western Australia has the constitutional power to alter the principles of representative democracy, or legislate inconsistently with those principles, unless it is prevented from doing so by an entrenched provision in the Western Australian Constitution or some provision in the Commonwealth Constitution. Because neither Constitution contains a provision that prevents the Parliament of Western Australia from legislating for unequal numbers in electoral divisions and regions, that Parliament may modify or legislate inconsistently with the principles of representative democracy in so far as those principles require equality of numbers.

The claim of the plaintiffs based on the Western Australian Constitution must be rejected.

Orders

Questions 1 and 2 of the case stated should be answered, No. It is unnecessary to answer Question 3.

GUMMOW J

The Nature of the Case

The first and second plaintiffs, Mr. McGinty and Mr. Gallop, are members elected to the Legislative Assembly of the Parliament of the State of Western Australia and the third plaintiff, Mr. Halden, is a member of the Legislative Council of that Parliament. By their action commenced in the original jurisdiction of this Court, they seek declaratory relief as to the invalidity of certain legislation of Western Australia. They complain that, in respect of voting for representatives to either chamber of the Parliament, the legislation brings about a gross malapportionment in favour of non-metropolitan voters.

The matter comes before this Court upon a case stated pursuant to section 18 of the Judiciary Act 1903 (Commonwealth).

A number of recent decisions in this Court, *Nationwide News Pty Ltd* v *Wills*[377]; *Australian Capital Television Pty Ltd* v *The Commonwealth*[378]; *Theophanous* v *Herald & Weekly Times Ltd*[379]; *Stephens* v *West Australian Newspapers Ltd*[380]; *and Cunliffe* v *The Commonwealth*[381], turned upon or involved some consideration of the consequences for validity of Federal and State statutes and for the continued operation of the common law, of recognition that the Federal Constitution and that of Western Australia establish and maintain systems of representative government. The subject matter of the statute law and common law at issue in those decisions was regulation or prohibition, with criminal or civil sanction, of the publication or dissemination of certain words and visual images. At stake was held to be the efficacious working of the system of representative government. What was not required for these decisions, but is necessary now, is a fuller consideration of those characteristics or elements of an electoral system which must be present to answer a constitutionally mandated system of representative government. In *Stephens* it was assumed that in Western Australia currently, there was in operation such a system[382]. This assumption the plaintiffs now dispute.

The effect of amendments made to the Electoral Distribution Act 1947(WA)("the 1947 Act") by the Acts Amendment (Electoral Reform) Act 1987 (WA) ("the 1987 Act")[383] upon representation in the Legislative Assembly has been the creation of electoral districts within the metropolitan zone based on Perth of approximately 23,000 electors, plus or minus 15 per cent per electoral district, and in the non-metropolitan zone of approximately 12,000 electors plus or minus 15 per cent. Thus, whilst there is relative equality within the two zones, there is a marked difference between them.

Changes made by sections 6 and 7 of the 1987 Act to the Constitution Acts Amendment Act 1899 (WA) ("the 1899 Act") altered the structure of the Legislative Council by providing for six multi-member "electoral regions", three in the metropolitan zone and three in the non-metropolitan zone.

The plaintiffs complain that, despite the concentration of the majority of the electors in the metropolitan zone, the distribution of seats is spread evenly between the two zones.

Section 83 of the 1987 Act inserted a new Schedule (headed "Counting Of Votes At Legislative Council Elections") in the Electoral Act 1907 (WA). A system of counting the votes known as the "single transferable vote" is used. A successful candidate for election to the Legislative Council must receive a particular quota of the total valid votes cast. This may be illustrated as follows. In the 1993 general election, the quota for the East Metropolitan Region was 32,822. This was determined by dividing the total number of valid votes cast in that region (196,927) by the number of members to be elected (five) plus one, and then adding one vote[384].

At the last general election, held on 6th February, 1993, the ratio of the highest to the lowest quota for election of a member of the Legislative Council, on the basis of the regions, was 3.76:1. The ratio between the largest number of electors in a single region of the Legislative Council and the smallest number of electors in another such region, when divided by the number of members in each of those regions, was 3.42:1. The ratio between the largest number and the smallest number of voters enrolled in each district for the Legislative Assembly at the 1993 general election was 2.91:1.

Put in short form, the plaintiffs' submissions are as follows. First, they contend that, even though a requirement of "one vote one value" is not found in the text of the Constitution, an essential characteristic of the system of representative government established by the constitution is a franchise conferring "one vote one value". This is to be achieved by the presence of "practical equality", or something close to it, in numbers of electors in electoral divisions. Then it is said that a law prescribing and regulating the federal franchise must not depart from that requirement. Further, the plaintiffs submit that, even if otherwise not an essential characteristic as described, this principle of "one vote one value" is implicit in the very term "directly chosen by the people" in sections 7 and 24 of the Constitution. As the final step, they contend that, by force of the Constitution, the laws of Western Australia which prescribe and regulate the franchise at the State level for each chamber of the legislature must satisfy (but fail to do so) the same requirement of "one vote one value" as is mandated by the Constitution for the laws of the Commonwealth.

In 1975, in Attorney-General (Commonwealth); *Ex rel McKinlay* v *The Commonwealth*[385], it was held (Barwick CJ, McTiernan, Gibbs, Stephen, Mason and Jacobs JJ; Murphy J dissenting) that section 24 of the Constitution does not require the number of people or the number of electors in electoral divisions for the House of Representatives to be equal. To the extent that this authority bars their path, the plaintiffs seek that it be overruled. They are, somewhat unusually, joined in that endeavour to overthrow a decision in favour of the Commonwealth by the Attorney-General for the Commonwealth, who is an intervener. The Attorney's submission appears to be that the present legislation of the Commonwealth (sections 59 and 73 of the Commonwealth Electoral Act 1918 (Commonwealth) ("the 1918 Act") sufficiently observes a requirement of "one

vote one value", in the sense contended for by the plaintiffs, and that this is not merely the work of a benign legislature, but observance of a constitutional imperative.

Alternatively, the plaintiffs rely upon the alleged failure of the 1987 Act to comply with what is said to be the requirement of prior approval by the electors of the State. That requirement was imposed by amendment in 1978[386] to section 73 of the Constitution Act 1889 (WA) ("the 1889 Act"). The requirement applies (section 73(2)(c) to a Bill which "expressly or impliedly" provides that either House shall be composed of members other than members "chosen directly by the people". The insertion of sub-section (2) into section 73 was made after the construction given to section 24 of the Federal Constitution in *McKinlay*. Hence, the importance of the plaintiffs, on each branch of the case, in overcoming *McKinlay*. The plaintiffs submit that the 1987 Act is invalid by reason of contravention of section 73(2) of the 1889 Act and they further submit that the 1987 Act amounted to an attempt to alter the Constitution of the State other than in accordance with that Constitution. In that latter regard, they rely upon section 106 of the Federal Constitution.

It may be said that, upon a consideration of any one constituency established under the present Western Australian electoral structure, no one elector has a vote of greater "value" than that of any other elector in that constituency. However, the complaint of the plaintiffs stems from the disparity in the number of electors between constituencies.

Their submissions reflect what was said by Powell J in *Davis Bandemer*[387]:

> "The concept of "representation" necessarily applies to a group: groups of voters elect representatives, individual voters do not. Gross population disparities violate the mandate of equal representation by denying voters residing in heavily populated districts, as a group, the opportunity to elect the number of representatives to which their voting strength otherwise would entitle them. While population disparities do dilute the weight of individual votes, their discriminatory effect is felt only when those individual votes are combined. Thus, the fact that individual voters in heavily populated districts are free to cast their ballot has no bearing on a claim of malapportionment."

In the Legislative Assembly, a consequence of this disparity may be that one representative has required for election the support of more voters than that required for the successful representative in another constituency. Governments are formed from one political party or a coalition of parties so as to command the support of the Lower House. The result of this disparity may be (although the State has provided statistics suggesting that this is by no means always so) that to a significant degree the majority, comprising members returned who support one major party or a coalition of parties, does not correspond to the overall party vote across the State. That state of affairs also may reflect a range of other circumstances, for example, the operation of preferential voting and the failure of each party to field candidates for each constituency. These matters illustrate the

point brought out in argument that the significance of the notion of "one vote one value" reflects the concerns of the established political parties as much as any doctrine solicitude for the true and proper nature of the franchise.

No mention was made in the text of the Constitution of political parties until the substitution of the new section 15 in 1977. Unstable factions had been a significant feature of colonial parliamentary government. For example, in New South Wales, in the years between 1856 and 1887, 23 ministries had been formed with an average life of a little over 16 months[388]. At the time of the adoption of the Constitution, these factions were yielding to modern party political structures with national organisations. Performance of the task of fashioning fully a system of representative self-government, left by many provisions of the Constitution to future Parliaments, fell to legislators subjected to the pressures of party politics. The interests of that party political system and of the established parties in a sense have come to be identified with those of representative government itself.

Experience in the United States demonstrates that to insist, on constitutional grounds, on equal numbers of electors in constituencies, does not necessarily avoid any skewing of the overall party vote away from party representation in the legislature. In *Davis* v *Bandemer*[389], the majority of the Supreme Court of the United States[390] held that a claim that the boundaries of the constituencies for a bicameral State legislature were distorted so as seriously to dilute or eliminate the voting power of electors affiliated with a particular party, raised an issue of equal protection under the Fourteenth Amendment. The Supreme Court rejected the submission that this was a political question and non-justiciable. Other decisions to like effect deal with issues of "racial gerrymander"[391]. Recently, a more restrictive view has been taken as to what is requisite for standing to institute such cases[392]. In the present case, the plaintiffs eschew any claim of "gerrymander". They rest upon that particular meaning of the principle of "one vote one value" which I have sought to describe above.

Before giving further consideration to the particular legislative provisions whose validity the plaintiffs attack, it is appropriate to refer briefly to the legislative components of the present Constitution of Western Australia.

The Constitution of Western Australia

The Imperial, Colonial and State legislation together comprising the written provisions of the Western Australian Constitution, as it then stood, were collected and analysed by Wilson J. in *Western Australia* v *Wilsmore*[393]. Then, as now, it was unnecessary to decide whether the Constitution of the State, particularly for the purposes of section 106 of the Australian Constitution, also includes other prerogative instruments or statutory and common law rules and principles which define and regulate the legislative, executive and judicial elements of government[394]. Wilson J. described the 1889 Act (which was the scheduled Bill to the Imperial

statute, the Western Australia Constitution Act 1890 (Imperial)[395]) as "[t]he keystone of the present constitution of Western Australia"[396] . Further provision was made by the Constitution Act Amendment Act 1893 (WA) but this in turn was repealed by the 1899 Act. The present case principally concerns the construction of the additions to section 73 of the 1889 Act made by section 6 of the 1978 Act. Wilsmore dealt with section 73 in its earlier form[397].

The constitutional changes made in Western Australia in the last decade of the nineteenth century took place at a time of rapid growth in population, from 48,500 in 1890 to 180,000 by 1900[398]. At that time, neither enrolment nor voting was compulsory. The method of counting votes was that known as "first past the post". In 1893, property qualifications for candidates and voters for the Legislative Assembly were abolished. Women received the franchise in 1899, but until 1920 remained ineligible to stand as candidates and, as with men, a property qualification was required for the exercise of the franchise in elections to the Legislative Council. In elections to the Council, property-owners received one vote for each region in which property of the requisite value was situated. The property qualification and plural voting ordained by section 15 of the 1899 Act were finally abolished by section 8 of the Constitution Acts Amendment Act (No 2) 1963 (WA). The right to vote at State elections was conferred on persons on attaining the age of 18 years by the Electoral Act Amendment Act (No 2) 1970 (WA).

From the commencement of representative government in Western Australia, there were considerable disparities between the number of electors in various constituencies. At the election held for the Legislative Assembly in 1897, of the 44 constituencies, each of which returned one member, one had 54 electors, 27 had less than 500, six had over 1,000 and only one had over 2,000. At the election held in 1900 for the Legislative Council, of the eight constituencies into which the colony then was divided, each of which was represented by three members serving staggered six-year terms, one had just 156 electors, whilst the Metropolitan-Suburban constituency had 3,467 electors.

One of the themes in the submissions to this Court for the State of Western Australia was that the expansion over the last century in the economy and population of Western Australia has been accompanied by legislative changes in the operation of the franchise for both chambers of the Parliament. The consistent tendency of these changes has been to lessen the imbalance between the metropolitan and non-metropolitan vote. Nevertheless, so it is submitted by the State, even though one may accept the concept of "equality of voting power" as understood by the plaintiffs, that cannot be the sole factor to be taken into account in the provision of representative government. Factors such as the geographical expanse of the State, variations in its typography, community interests, difficulty in ready communication between legislators and constituents and the like are said to be significant, and to be given appropriate significance in the legislation under attack, particularly by section 7 of the 1947 Act.

To further consideration of this legislation I now turn.

The State Legislation

Section 6 of the 1987 Act inserted a new section 5 in the 1899 Act. Section 5 of the 1899 Act now states:

> "The Legislative Council shall consist of 34 elected members who shall be returned and sit for electoral regions as defined under section 6."

Section 7 of the 1987 Act also inserted a new section 6 in the 1899 Act. Section 6 of the 1899 Act now provides:

> "(1) The State shall be divided into 6 electoral regions under the Electoral Distribution Act 1947
>
> (2) The electoral regions known, respectively, as the North Metropolitan Region and the South West Region shall each return 7 members to serve in the Legislative Council.
>
> (3) Region, the East Metropolitan Region, the Agriculture Region and the Mining and Pastoral Region shall each return 5 members to serve in the Legislative Council.

Sections 18 and 19 of the 1899 Act now provide that the Legislative Assembly shall consist of 57 members, each returned by an electoral district provided under the 1947 Act.

The 1987 Act made significant changes to the relevant provisions of the 1947 Act. Section 89 repealed section 2A of the 1947 Act and inserted a new section 2A. Section 2A(2), in the events that since have happened, requires the State to be divided into districts and regions in accordance with the 1947 Act. Section 92 substituted a new section 6. This requires the Electoral Distribution Commissioners to divide the Metropolitan Area (an expression defined in a new section 1A inserted by section 87 of the 1987 Act) into 34 districts (section 6(1)(a)) and to divide the area comprising the remainder of the State into 23 districts (section 6(1)(b)). The new section 6(2) should be set out in full. It states:

> "The commissioners shall make the division of an area mentioned in sub-section (1)(a) or (b) into districts in accordance with the principle that the number of enrolled electors comprised in any district in the area must not be more than 15 per cent greater, or more than 15 per cent less, than the quotient obtained by dividing the total number of enrolled electors in the area by the number of districts into which the area is to be divided."

Section 7 of the 1947 Act (also inserted by section 92 of the 1987 Act) specifies various matters to be given "due consideration" by the Commissioners in making the division of the State into regions and districts. These include "community of interest"[399]; "means of communication and distance from the capital"; "physical features"; "existing boundaries of regions and districts"; "existing local government boundaries"; and "the trend of demographic changes".

Section 94 of the 1987 Act inserted a new section 9 into the 1947 Act. This now states:

> The Commissioners shall divide the State into 6 regions so that:
>
> (a) 3 regions, to be known, respectively, as the North Metropolitan region, the South Metropolitan Region and the East Metropolitan Region, each consist of complete and contiguous districts that together form the Metropolitan Area;
>
> (b) one region, to be known as the Mining and Pastoral Region, consists of complete and contiguous districts that are remote from the capital and where the land use is primarily for mining and pastoral purposes;
>
> (c) one region, known as the Agricultural Region, consists of complete and contiguous districts that together from an area that is generally south, or south and west, of and adjacent to the Mining and Pastoral Region; and
>
> (d) the remaining region, to be known as the South West Region, consists of complete and contiguous districts.

The plaintiffs claim a declaration that section 6 of the 1899 Act and sections 2A(2), 6 and 9 of the 1947 Act are invalid. More precisely, as I would see it, their allegation is that the provisions of the 1987 Act which repealed the previous provisions of the 1947 Act and the 1899 Act are invalid. That is to say, the plaintiffs' complaint is directed against section 7, 89, 92 (in so far as it repealed the previous section 6 of the 1947 Act and inserted the new section 6) and 94 of the 1987 Act.

However, the questions which have been reserved on the case stated for the Full Court are:

> (i) Is Section 6 of the Constitution Acts Amendment Act 1899 (WA) invalid?
>
> (ii) Are Sections 2A(2), 6 and 9 of the Electoral Distribution Act 1947 (WA), or any of them, invalid?

(iii) If any of Sections 2A(2), 6 or 9 of the Electoral Distribution Act 1947 (WA) is or are invalid, is it or are they severable and, if so, to what extent?

The United States Decisions

The plaintiffs place considerable reliance upon what they submitted was authoritative guidance to be found in a series of decisions of the Supreme Court of the United States delivered over the past 30 years. The series commenced in 1962 with *Baker* v *Carr*[400] in which the Supreme Court held that the challenge by the plaintiffs to the Tennessee apportionment legislation of 1901 was within federal jurisdiction and presented a justiciable claim. Previous authority had treated the right to vote, even at federal level, as derived from the States[401].

The plaintiffs contend that *Baker* v *Carr* and the succeeding decisions give effect to a constitutional principle of equality of voting power. But, upon examination, they provide but limited assistance to the plaintiffs in the present litigation.

At the federal level in the United States, the focus of attention has been congressional districts and the statement in Article 1, section 2 of the Constitution:

> "The House of Representatives *shall be composed of Members chosen every second Year by the People of the several States*, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature. (Emphasis added.)

Section 4 of the Art 1 provides that:

> "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators"[402].

At the State level, the central provision has been the Equal Protection Clause in section 1 of the Fourteenth Amendment made to the Constitution in 1868. This states:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State* deprive any person of life, liberty, or property, without due process of law; nor *deny to any person within its jurisdiction the equal protection of the laws."* (Emphasis added.)

Before turning to the decisions, two points should be made. First, the concept or doctrine of representative democracy operates in the United States without compulsory registration of electors or compulsory voting by those so registered, yet at State and local level the range and variety of public offices filled by periodic popular election are far more extensive than has ever been the case in Australia. In the United States, this expands the need for restraint upon legislative interference with freedom of communication on matters relevant to political discussion.

Secondly, the difference between the constitutional base provided at federal and State level, on the one hand, by Article 1 section 2 and, on the other, in the Fourteenth Amendment has contributed to differential treatment by the Supreme Court of the requirement of equality of voting power.

In *Wesberry* v *Sanders*[403], the Supreme Court pointed out that, as late as 1842, seven States still conducted congressional elections with the State voting as one electorate, so that in such States each vote was worth as much as any of the others. Turning to the modern system of division into districts, the Court required the States to draw their congressional districts so that "as is practicable one man's vote in a congressional election is to be worth as much as another's". Then, in *Kirkpatrick* v *Preisler* [404], the Supreme Court held that, in drawing congressional districts for the House of Representatives, a State must "make a good-faith effort to achieve precise mathematical equality". What this meant then became apparent in *White* v *Weiser*[405]. There the Supreme Court rejected a plan in Texas for 24 districts in which the average deviation of all districts from the ideal was 0.745 per cent. The largest district exceeded the ideal by 2.43 per cent and the smallest district was under the ideal by 1.7 per cent[406].

In the present case, neither the plaintiffs nor those interveners who supported them, including the Commonwealth, advocated any requirement of mathematical precision in the sense demonstrated in the requirements for congressional districts. Indeed, the provision in federal law, section 73 of the 1918 Act, permitting a margin of allowance whereby the quota may be departed from up to one tenth more or one tenth less, would be unacceptable in the United States.

In the United States at the state level, the principle of one person one vote, flowing from the equal protection clause, does not prevent the election of the governor or a state by the state legislature rather than by direct popular election[407]. Nor is the election of state or local judges subjected to the principle of one person one vote; this is on the footing that, unlike the legislative function of government, the judicial function is to serve the people not by representing them but by administering the law for the benefit of all[408].

Otherwise, whenever a state or local government decides to select persons by popular election to perform "governmental functions", the Fourteenth Amendment requires giving to each qualified voter an "equal opportunity" to participate in that election. When members of an elected body are chosen from separate districts, each must be established on a basis that will ensure, so far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of

officials[409]. However, it appears that, whilst population alone is the primary criterion, a broader latitude is afforded to the States under the equal protection clause than that which applies at federal level. For example, multi-member legislative districts may be permitted if there are "persuasive justifications"[410]. The result of the decisions upon the Fourteenth Amendment is summarised as follows[411]:

> "When the Supreme Court examines population differences in voter districts, the court will compare the size of the most and least populous districts with the theoretically "ideal" district. For example, if a city has 5 million people and a city council composed of 5 city council persons, each of whom is elected from a separate geographic area of the city, the ideal population of each district would be 1 million persons. Let us assume that in our hypothetical city the 5 voting districts have populations of: 600,000; 800,000; 1,000,000; 1,200,000; 1,400,000. It would be common for courts (though not mathematicians) to describe the most and least populous districts as each having a 40 per cent variance from the ideal district and city as a whole having a total variation of 80 per cent...[T]he Court has found that a state or local legislative map that has total deviation of 10 per cent or less does not require special justification by the government. The Court has upheld state and local legislative maps with total deviations of almost 20 per cent, and it allowed one state to provide a guarantee of at least one representative in the legislature for each county."

In *Mahan* v *Howell*[412], the Supreme Court upheld a legislative apportionment plan of Virginia with a total percentage deviation of 16.4 per cent, one district being over-represented by 6.8 per cent and another under-represented by 9.6 per cent. On the other hand, in *Connor* v *Finch*[413], the Supreme Court held that a Mississippi legislative may with maximum deviations of 16.5 per cent for the districts for the upper house and 19.3 per cent for the lower house districts were invalid in part because there had been no demonstration of unique features of the political or governmental structure of the State which would have justified this deviation from voter equality. Finally, in *Brown* v *Thomson*[414], the Supreme Court upheld a system in Wyoming which guaranteed a representative in its legislature to all 23 counties, including the least populous county in the state, which had a population of 2,924, whilst the ideal county had a population of 7,337.

The effect of these decisions has been described in Rotunda and Nowak, *Treatise on Constitutional Law* in these terms[415]:

> "There will be fewer legitimate reasons for population variances between congressional districts than for variations in State of local legislative districts. States may have more legitimate reasons for wishing to keep voter groups in county or other political subdivisions when voting for state legislative positions. Such political divisions often have political powers as units of local government. States may also wish to guarantee representation to small counties because the

> state legislative system may act on matters which clearly effect different counties in different ways and in which legislative input from all counties or political subdivisions is important."

If regard is had in this way to the effect of the principle of equality of voting power at all levels in the United States, it will be seen that the result does not favour the present plaintiffs to anything like the degree their submissions suggested.

Further, there are more fundamental reasons why no great weight should be placed upon developments in the United States case law over the last 30 years. Those reasons were, to my mind and with respect, cogently expressed by McLachlin J in her judgments in *Dixon* v *British Columbia* (Attorney-General)[416], when her Ladyship was Chief Justice of the Supreme Court of British Columbia, and as a member of the Supreme Court of Canada in *Reference re: Electoral Boundaries Commission Act*[417].

In the first of these cases[418], her Ladyship summed up the position as follows:

> "In short, the development of Canadian democracy has different roots and followed a different course than has the American concept of democracy. The rationalist ideals embodied in the French revolutionary slogan "Liberty, Equality and Fraternity" dominated the thinking of the founding fathers of the American nation. Whatever the actual practice (slaves did not win the right to vote until 1870), the ideal of equal representation was present from the beginning in the United States. The fact that democracy in the United States sprang from a revolution ushering in a new regime, meant that at least in theory the ideals of equality can be seen as having been embraced from the outset in an absolute fashion, something that never occurred either in England or Canada, where gradual change and accommodation of other factors has been the norm. The historical and philosophical tradition upon which the post-1962 "One Man, One Vote" decisions in the United States are grounded, is absent in Canada. The American jurisprudence cannot be transported into the Canadian Legal context without careful consideration and, where necessary, modification."

Earlier in the judgement, after discussion of various of the United States decisions, it was said[419]:

> "The American emphasis on a pure population standard for electoral apportionment may be seen as a product of that country's unique history and conception of democracy. The decisions upholding this standard are heavily influenced by the courts' understanding of the intentions of the framers of the US Constitution; indeed in *Wesbery* v *Sanders*[420], the opinion of the majority of the Supreme Court focused almost exclusively on the debates and values related to pre-constitutional conventions and discussions.

> Moreover, the recent insistence on voting equality in its pure form may be seen in part, at least, as a reaction to marked and entrenched voting disparities, reflecting an acute departure from the ideals espoused by the founding fathers. In *Bakers* v *Carr*[421], the disparities were as high as 19 to 1 and in *Reynolds* v *Sims*[422] up to 41 to 1, being based on the 1900 census despite massive intervening population growth and urbanization.
>
> Democracy in Canada is rooted in a different history. Its origins lie not in the debates of the founding fathers, but in the less absolute recesses of the British tradition. Our forefathers did not rebel against the English tradition of democratic government as did the Americans; on the contrary, they embraced it and changed it to suit their own perceptions and needs.
>
> What is that tradition? It was a tradition of evolutionary democracy, of increasing widening of representation through the centuries. But it was also a tradition which, even in its more modern phases, accommodates significant deviation from the ideals of equal representation. Pragmatism, rather than conformity to a philosophical ideal, has been its watchword."

In Dixon, reference is made to the position as it then stood in Australia after *McKinlay*[423]. The Canadian decisions were concerned with the application of the terms of section 3 of the Canadian Charter of Rights and Freedoms: "[e]very citizen... has the right to vote in an election of members of the House of Commons or of a legislative assembly". The result has been to reject the contention that this requires absolute, or as near as practicable to absolute, equality of numbers of electors within electoral districts. The point of present significance is the emphasis in the Canadian decisions upon the different historical traditions in the United States and Canada which have shaped the concept or principle of representative government.

It should follow from what I seek to show later in these reasons as to the evolution of representative government in Australia that, in this respect, Australia has far more in common with Canada than the United States.

The Adaptation of Representative Government to Federalism by the Framers of the Constitution

One point of significance for the present case which does emerge from consideration of the United States' decisions is the need to consider the doctrine or principle of representative government not at large but in its adaptation to federalism. In Australia, the framers of the Constitution approached their task with this in mind. They performed their task in such a way as to allow room for further legislative evolution in the system of representative government. Constitutional rigidity was, to a significant degree, avoided. But, in a sense, the plaintiffs seek to assert and to

rely upon such rigidity. This is imposed, as their submissions would have it, upon the legislature as a matter of necessary implication from the constitutional text, and is to be lifted only by referendum passed under section 128 of the Constitution.

To reject that approach to the case is not to deny that, in significant respects, the framers of the federal system did leave much to inference[424].

Responsible government has been said in this Court to be a central feature of the system devised by the framers of the Australian instrument of government[425]. It appears not from express terms so much as from the requirement in the last paragraph of section 64 that a Minister be a member of the Senate or the House of Representatives. Other central features are the separation of the judicial power of the Commonwealth and the doctrine of judicial review of legislative act and executive decision for constitutional validity. These are essential elements of federalism, but again, to a significant degree, the result is to be seen as a matter of necessary inference from consideration of the text and structure of the Constitution[426].

The Constitution also established for the Commonwealth, and prescribes and gives effect to, a system of representative government. This was accepted by the whole Court in *Australian Capital Television*[427].

To adopt as a norm of constitutional law the conclusion that a constitution embodies a principle or a doctrine of representative democracy or representative government (a more precise and accurate term[428]) is to adopt a category of indeterminate reference. This will allow, from time to time, a wide range of variable judgement in interpretation and application[429]. That, of itself, may not be open to objection. However, difficulty can arise where the wide range for variable judgement depends upon, or at least includes as a significant element, matters primarily or significantly of political weight and estimation. It is this concern which, at bottom, founds the celebrated dissenting judgments of Frankfurter J in *Baker* v *Carr*[430] and of Harlan J in *Reynolds* v *Sims*[431].

At the heart of the submissions for the plaintiffs is the significance they seek to attach to the entrenched incidents of representative government, both as established by the Constitution for the new federal government and as, in their submission, carried forward by the Constitution, particularly by section 106, as a requirement for the Constitutions of the respective States. The position which the plaintiffs contend is established as regards the Commonwealth thus is the first, and vital, stepping-stone in their argument on this branch of the case.

However, in approaching the matter in this way, it should be kept steadily in mind that there is a fundamental difference involved in comparison between the system of government created for the Commonwealth and that which obtains for the States. As I have said, in the case of the Commonwealth, it was necessary to adapt notions of representative government to the requirements of federalism as hammered out in forming the federal compact. The framers of the

Constitution had before them the systems of government operating in the United States and Canada. It should not be overlooked that, at first hand, they had the example of the failed Federal Council of Australasia. This had been established pursuant to the Federal Council of Australasia Act 1885 (Imp)[432]("the 1885 Act"). It suffered from the absence of any directly elected legislative arm. The most obvious impact of federalism upon the federal legislature has been in the establishment and composition of the Senate. However, the States have been free to adapt representative government to bicameral or single legislatures without such federal constraints. These considerations suggest, at the outset, the need for some caution in any automatic translation to the States, through the prism of section 106 of the Constitution, of representative government as established for the Commonwealth.

The Constitution was framed against a background of differing mechanisms for the implementation in the Australian colonies of what in each colony would have been regarded as representative government. The minimum age for candidacy for the upper houses in Victoria, Tasmania and South Australia was 30 years, as against 21 for all the other chambers. Women were enfranchised only in South Australia and Western Australia and were eligible as candidates only in South Australia. Several states imposed property qualifications upon electors for one or both chambers of the legislature.

From this diversity the challenge was to produce uniformity at the new and federal level. There were two difficult and vital needs. The first was to adapt representative government to the central government of the federation. The second was to achieve this without denying room for further development in the institutions of representative government. These tasks were performed by setting down in the Constitution a variety of prescriptions about parliamentary elections, some of which were entrenched until the Constitution itself might be amended and others which were to prevail only until the Parliament otherwise provided.

The architects of the Australian federation shared an expectation that the Federal Parliament would embrace what were then advanced ideas of political representation. The Federal Council of Australia had not been an elected body. The Canadian Senate (then as now) and the upper houses in New South Wales and Queensland were nominated for life. Nor was the United States Senate then (before the ratification in 1913 of the 17th Amendment) directly elected by the people of the several states. The provisions of sections 7 and 24 of the Constitution providing in the former case that the senators of each state would be "directly chosen by the people of the state" and, in the latter, that members of the House of Representatives would be "directly chosen by the people of the Commonwealth" were thus of contemporary significance.

Learned commentators observing the situation from a vantage point outside Australia wrote of the extremely "democratic" nature of the new Constitution, representing "the high-water mark of popular government" [433]. The Canadian authority, Lefroy, and the British savant, Bryce, noted that the Australian Senate was to be more democratic in its composition than the American Senate which then was elected by the various State legislatures. They regarded as reflecting the same

democratic spirit the provision (section 28) that the House of Representatives was to continue only for three years from the first meeting of the House, whereas the Canadian House of Commons continued for five years (British North America Act 1867 (Imp), section 50[434]. Moreover, the provision in Article V for amendment of the United States Constitution, unlike that in section 128 of the Australian Constitution, does not require direct participation of the electors in a referendum.

In 1861, John Stuart Mill published his *Considerations on Representative Government* in which he re-stated opinions already put forward in articles and essays. Chapter III was headed "That the Ideally Best Form of Government is Representative Government" and contained the passage[435]:

> "There is no difficulty in showing that the ideally best form of government is that in which the sovereignty, or supreme controlling power in the last resort, is vested in the entire aggregate of the community; every citizen not only having a voice in the exercise of that ultimate sovereignty, but being, at least occasionally, called on to take an actual part in the government, by the personal discharge of some public function, local or general."

Chapter V, entitled "Of the Proper Functions of Representative Bodies", commenced[436]:

> "In treating of representative government, it is above all necessary to keep in view the distinction between its idea or essence, and the particular forms in which the idea has been clothed by accidental historical developments, or by the notions current at some particular period.
>
> The meaning of representative government is, that the whole people, or some numerous portion of them, exercise through deputies periodically elected by themselves the ultimate controlling power, which, in every constitution, must reside somewhere. This ultimate power they must possess in all its completeness. They must be masters, whenever they please, of all the operations of government. There is no need that the constitutional law should itself give them this mastery. It does not in the British Constitution. But what it does give practically amounts to this."

Mill continued:

> "But while it is essential to representative government that the practical supremacy in the state should reside in the representatives of the people, it is an open question what actual functions, what precise part in the machinery of government, shall be directly and personally discharged by the representative body. Great varieties in this respect are compatible with the essence of

> representative government, provided the functions are such as to secure to the representative body the control of everything in the last resort.

As Mill himself recognised, there is room for divergence between particular structures of government, all of which nevertheless might properly be said to constitute representative government. And, of course, those structures might be modified from time to time whilst still providing for representative government. Some incidents of representative government themselves might change from time to time. Any writer upon the British Constitution, a testimony to the forces of evolution, could not have expected otherwise. Against this background and understanding, the expression "representative government" was used by Mill as a "generic description"[437] of a range of political institutions. These had as their essence the placing of ultimate controlling power with the people, to be exercised by representatives of the people elected periodically in free elections to a legislative chamber or to the more powerful chamber of a bicameral legislature[438].

Mill acknowledged that his broad ideas required refinement in their application to a bicameral legislature[439]. This also is the case with a constitution which is written and rigid rather than fluid, and in particular with a federal system which includes a bicameral legislature established by a constitution containing its own mechanism for change. In Chapter 17 of his work, Mill wrote[440] that the fitting constitution of a federal government included a legislative branch, to the composition of which there might be adapted the general principles of representative government. He regarded the provisions of the American Constitution in this respect as "exceeding judicious", in particular in the representation in the Senate of each state, whether large or small, by the same number of legislators.

The Convention Debates[441], and the lengthy debates[442] on the Bill for the Commonwealth Electoral Act 1902 (Commonwealth) ("the 1902 Act") manifest a familiarity on the part of significant figures in the federal movement such as Barton, Deakin, O'Connor, Symon, Downer and Glynn with the writings of Mill Bryce, Thomas Hare and Jethro Brown and, in Australia, the writings of Professor E. J. Nanson, Catherine Helen Spence and others. Much of this literature concerned the appropriate method of representation in the legislature, the use of single or multi-member constituencies; "first past the post" voting; preferential voting and proportional representation.

Mr Hare's treatise, *The Election of Representatives*, was published in 1859, and drew the support of Mill in his work on representative government. The implementation of Hare's theories was to await the introduction by Inglis Clark of a Bill in Tasmania in 1896[443]. The Hare-Clark system, as it came to be called, was adopted (by regulations made under the Federal Elections Act 1900 (Tasmania)) for the elections held in March 1901 for the six senators and five members of the House of Representatives.

Mill, Hare and the other writers have been described as idealists who had a continuing influence upon the formulation of electoral laws in Australia[444]. There was concern lest the electoral system

fail to afford representation of minority opinion and groups by denying full "value" to the ballot cast by the individual. But there were also pressures of pragmatism. The concern here was with the "value" of the individual vote, not so much to the elector who cast it as to the political party whose candidate if favoured, and fear of "weak government" flowing from a legislature in which there were more than two principal parties represented.

One concludes that at the time of federation issues of "representative government" which concerned the franchise and the electoral system involved questions of political philosophy; of degree, and of experience of practical affairs. Senator Sir Josiah Symon said that John Stuart Mill had supported a great many things which were theoretical and that he should be sorry to accept any of the views of Mill and his supporters "in the face of the opinions of practical politicians"[445].

Sovereignty

Given the special adaption of principles of representative government to federalism, where in such a case does ultimate sovereignty reside? Writing in 1901, Bryce put the view that, in such a case, ultimate sovereignty resides with the authority or body which, according to the constitution, may amend the constitution[446].

In Australia, that ultimate authority to change the constitution itself, is reposed by section 128 in a combination of a majority of all the electors, and a majority of the electors in a majority of states. But the initiative to place before the electors any proposed change is vested in the Parliament, and a particular mechanism is provided in section 128 to resolve disagreement between the Houses as to the passage of a proposed law for the alteration of the constitution. Special provision is made in the final paragraph of section 128 in respect of proposed alterations (i) diminishing the proportionate representation of any state in either House, or the minimum number of Representatives of a state in the House of Representatives, (ii) altering the limits of a state, or (iii) "in any manner" affecting the provisions of the constitution in relation to a state. In such cases, the proposed law effecting the change is not to become law unless approved by the majority of electors voting in the state concerned.

It is to be observed that, in significant respects, section 128 does not provide for an equality of voting power at referendums. A negative power, in other words a power to reject changes, may be exercised by a minority of the total electors of the Commonwealth if that minority is geographically distributed such as to constitute a majority in a majority of states. Again, the electors in a particular state must approve a proposed law affecting that state in the ways outlined above. Thus, a majority of electors in that one state may resist a change otherwise approved by a majority of electors in a majority of states. In both cases, the value of each elector's vote is not equal in the sense for which the plaintiffs contend.

Broad statements as to the reposition of "sovereignty" in "the people" of Australia, if they are to be given legal rather than popular or political meaning, must be understood in the light of the federal considerations contained in section 128.

Those statements must also allow for the fact that none of the Australia Acts, Imperial, Commonwealth or State, followed approval at a referendum, in particular, any submission to the electors pursuant to section 128 of the Constitution. Moreover, in section 15 thereof, the Australian Acts provide their own mechanism for amendment or repeal by statue and without submission to the electors at state or Commonwealth level.

Limited Entrenchment

In certain respects, the Constitution was drawn so as to give mandatory effect to some elements of representative government. But this was done to answer the perceived needs of a federal structure of government. Section 24 of the Constitution reveals four elements of representative government which were perceived as "essential" to the federal structure – at least in the sense that to change them would require constitutional amendment[447].

(1) "The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth".

In *McKinlay*[448], Gibbs J said that the "obvious purpose" of these words was to ensure that members of the House were not to be chosen "by some direct means, such as by the Parliament or Executive Government of a State, or by an electoral college". In the same case, it was said by some members of the majority that this phrase was emphatic of a further factor, that there be a popular election or popular vote[449], so that a sufficient inequality of distribution of numbers between electoral divisions might mean that there was no choice by the people of the Commonwealth[450]. As I have indicated, the plaintiffs rely upon what was said on this point in *McKinlay*, and it will be necessary to return to their submissions.

(2) "[T]he number of such members shall be, as nearly as practicable, twice the number of the senators".

The Constitution pegs the number of members of the House of Representatives to the number of senators. Within that limitation, the Constitution gives to Parliament the power to make laws increasing or diminishing the number of senators for each State (section 7), and also the power to make laws for increasing or diminishing the number of members of the House of Representative (section 27).

(3) "The number of members chosen in the several States shall be in proportion to the respective numbers of their people".

The concern of the framers here was to ensure some equality of voting power by requiring proportionality between the population of each state and the number of members which that state could elect. In other words, as between the populations of each state, there was to be an equality of voting power, because the ratio of the number of members chosen in each state to the total number of members was to be the same as the ratio of the population of that state to the total population.

(4) "[F]ive members at least shall be chosen in each Original State".

The framers entrenched a requirement that the electors of each Original State, however small, should choose at least five members for the House of Representatives. The point may be made here that this effectively denied the possibility of "one vote, one value" at federation by arbitrarily boosting the value of votes in the smallest states[451]. (It may also be noted that the second paragraph of section 7 authorises the Queensland Parliament, until the Federal Parliament otherwise provides, to divide Queensland into divisions and to determine the number of senators for each division[452].)

These elements were thought by a majority of delegates to be sufficiently important to justify entrenchment as constitutional requirements. The entrenched matters concerned issues of federalism.

The pegging of the number of members of the House of Representatives to the number of senators was designed to preserve the integrity of the Senate in its relations with the House of Representatives in at least two senses. First, the ratio of members of the House to senators is of crucial significance in the event of any disagreement between the chambers and the engagement of the process laid down in section 57 to resolve such disagreement. Second, there was a perception amongst the delegates that any greater disparity between the number of members of the House of Representatives and senators was inimical to the prestige and standing of the Senate[453].

The requirement in section 24 that the number of members chosen for each state shall be in proportion to the respective number of its people is evidence of a concern for equality of voting power, but only in the limited sense of interstate equality. This was purely a matter of apportioning the number of members which were to be chosen by the electors of each state. There was no suggestion that, within each state, members were to be chosen from electoral divisions of equal numbers of electors. The concern was one of equality of voting power among states, not among people.

Some further insight is to be gained from a recognition that even those elements, which I have identified as having been deemed sufficiently important to justify constitutional entrenchment, were not universally accepted at the Conventions. There was concerted opposition at Adelaide to the constitutional requirement of a 2:1 ratio between members of the House of Representatives

and Senators[454]. Opposition to the requirement[455] was based upon a preference for an alternative method of calculating the number of members for the House of Representatives which were to be chosen by the electors of each state. Sir George Turner moved that the requirement of a 2:1 ratio be struck out and replaced with the words "and until the Parliament of the Commonwealth otherwise provides each State shall have one representative for every 50,000 of its people"[456]. This marked a return to the form of the requirement which had passed the Convention in 1891[457]. It is to be noted that this was only another requirement as to numerical apportionment of the number of members which were to be elected by the population of any one state. It was not a requirement that electoral divisions were to be such that each had 50,000 electors, thus ensuring, on one measure, equality of individual voting power. The issue was one of federalism, not equality.

Some opposition to the constitutional entrenchment of the four matters which I have mentioned was based upon the view that these matters, along with the rest of Part III of Chapter 1, were better left to Parliament. For example, in 1897, Mr Deakin said[458]:

> "We cannot possibly foresee the future, whether as to the gathering together or the dispersal of population in these colonies, or the division of colonies as they at present exist, nor define where the great and perhaps overwhelming accretions of population will be. Under these circumstances, why lay down an iron rule for changing conditions that will involve great expenditure and great difficulty in order that it may be altered [sic]. We are, as it seems to me, justified, and well justified, in embodying in this Constitution general principles which will relate to the permanent conditions of the Commonwealth, those which will obtain for all time, but this is distinctly a changing condition."

"Directly Chosen by the People"

What does appear in sections 7 and 24 of the Constitution is the phrase "directly chosen by the people". However, upon examination, this does not have the general significance sought to be drawn from it by the plaintiffs.

At Federation, the upper houses in the colonies of New South Wales and Queensland were nominated for life. Further, the framers of the Constitution had before them the spectre of the failed Federal Council of Australasia. This was despatched into history by covering clause 7 of the Constitution. Sections 5 and 6 of the 1885 Act, repealed by covering clause 7, had provided for each participating colony to be represented by two members to be appointed under provision made by the legislature of that colony. Queensland, Victoria, Tasmania and South Australia provided[459] for appointment by the Governor from members of either chamber of the legislature. In Queensland, where the upper house was a nominated body, representatives might also be selected from those who had been members of either house at some time within the last six

months. In Queensland and South Australia, members might also be appointed from the Executive Council, and in Western Australia[460], which did not then have responsible government, appointment was by the Governor from an unlimited field.

This contemporary background of a perceived deficiency in the structure which the Constitution replaced, provides strong support for the conclusion expressed by Gibbs J in *McKinlay*[461] that the obvious purpose of the opening words of section 24 (as well as the effect of the text) was to deny any method of indirect election by requiring direct selection by popular vote. The same, in my view, is true of section 7, as regards the Senate. In each case, the provision strengthened the new federal system by requiring that neither chamber be composed of members selected by or from any legislative chamber of a state or by the executive government of a state or (a remote possibility, given the unsatisfactory experience in the United States) by an interposed electoral college.

The phrase in section 24 "directly chosen by the people of the Commonwealth" is a broad expression to identify the requirement of a popular vote. Section 41 (considered later in these reasons) operated to secure in the federal franchise, the female franchise which had been acquired in South Australia and Western Australia. In other respects, the selection of those from among the population who were to be empowered to make the electoral choice was left by section 24 to section 30 of the Constitution. Subject to denial of plural voting, this left the matter at large for provision by the new Parliament. In the meantime, qualification was left to the miscellany of laws in the several states which dealt with elections for the lower houses. Section 29 provided for determination of electoral divisions by the Parliament in substitution for state laws upon the matter.

It follows that, in my view and contrary to that of Murphy J in *McKinlay*[462], the phrase in section 24 is not to be dissected in the way the plaintiffs would have it so as to provide a distinct component, "chosen by the people", with its own operation above that of section 24 as a whole and independently of sections 29 and 30. It also follows that *McKinlay* necessarily still stands for the somewhat narrower, or at least discrete, proposition, also negative in nature, that section 24 does not require equality in electoral divisions.

To reject this branch of the plaintiffs' case is not necessarily to reject their broader submission that malapportionment, if sufficiently serious, may deny the system of representative government established for the Commonwealth by the constitution, taken as a whole. Before further considering that submission, it is appropriate to consider the allowance for the evolutionary nature of representative government made by the constitution.

"Until the Parliament Otherwise Provides"

In many respects, the architects of the constitution "placed great faith in the capacity of the elected senators and members to design statute law for a system of representative self-government, notwithstanding that they would be legislating in their own interest"[463]. But, as a practical matter, it had been necessary to rely upon later provision by the Parliament because, upon many matters concerned with the system of representative government, the framers of the Constitution had been unable to achieve agreement. O'Connor[464] expressed the reality of the situation when, after referring to the "provisional condition of things" contemplated by various provisions of Chapter 1 of the Constitution, he said:

> "When we sat in Convention it would no doubt have been more in accordance with the wishes of the delegates, and more in accordance with the proper working of the Constitution, if we could at that time have arrived at some uniform method by which the people of Australia could be represented in the Parliament of Australia. But it was obviously impossible at that time to arrive at any system of the kind and, therefore, in order that a workable basis for the first Parliament might be created, we adopted the different franchises and methods of the different states and declared that, until the Parliament provided, that should be the working basis of our Constitution."

The point may be illustrated by an example germane to the present litigation. In *McKinlay*[465], Mason J said that it was significant that the second paragraph of section 24 of the Constitution made explicit provision for the ascertainment of a quota of people for the specific yet limited purpose of determining the number of members chosen in each state and pointed out that, had it been intended to provide that electoral divisions within a state should contain an equal or practically equal number of people or electors, it was "inconceivable that the quota provision would have been expressed to have such a limited application". In the draft adopted at the 1891 Sydney Convention, clause 24 provided that "until the Parliament of the Commonwealth otherwise provides, each state shall have one Representative for every thirty thousand of its people". That provision did not reappear in the draft brought up to the 1897 Convention and despite debate upon the matter was not reinstated[466].

Nevertheless, the recurrent phrase "until the Parliament otherwise provides" has a deeper significance. Its effect is to accommodate the notion that representative government is a dynamic rather than a static institution and one that has developed in the course of this century. The accommodation is effected in the Constitution itself by authorising the legislature to make appropriate provision from time to time. It is by this means that the Constitution continues to speak to the present and allows for development of the institution of government by changes which may not have been foreseen a century ago[467] or, if foreseen by some, were not then acceptable generally.

The phrase "until the Parliament otherwise provides" (thereby engaging the head of legislative power in section 51 (xxxvi)) appears throughout Parts II, III and IV of Chapter I of the Constitution. In respect of the Senate, it appears in section 7 (the people of the state to vote as one electorate until the Parliament otherwise provides and there to be six senators for each original state until the Parliament otherwise provides); section 10 (application to Senate elections of state laws until the Parliament otherwise provides); section 22 (one-third of the whole number of senators to be a quorum until the Parliament otherwise provides). As regards the House of Representatives, the phrase appears in section 24 (determination by a particular method of the number of members chosen in the several states until the Parliament otherwise provides); section 29 (electoral divisions); section 30 (qualification of electors); section 31 (application of State laws to elections for the House); section 34 (qualification of members); section 39 (quorum in the House of Representatives). Sections 46, 47 and 48 apply to both houses and specify, "[u]ntil the Parliament otherwise provides"; particular provisions dealing with penalties for sitting when disqualified; disputed elections and allowances to members. Further, the Parliament was empowered by section 49 to declare the powers, privileges and immunities of the Senate and the House of Representatives and (section 27) the Parliament was authorised to make laws increasing or diminishing the number of members of the House of Representatives. Section 51(xxxvi) empowers the Parliament to make laws with respect to matters in respect of which the Constitution makes provision until the Parliament otherwise provides.

What is of present significance is that, in some provisions of Chapter 1 of the Constitution, expressed choices were made as to particular incidents of that system of representative government which was to be established for the Commonwealth. I have referred already to the provisions in sections 7 and 24 that each House was to be composed of those "directly chosen by the people" of the state in the case of the Senate, and of the Commonwealth in the case of the House of Representatives. Further, in choosing members of the Parliament, it was ordained that "each elector shall vote only once" (sections 8 and 30). Whilst plurality of voting might today seem anachronistic, it should be noted that it existed at the time of the adoption of the Constitution in the franchises of Tasmania, Queensland and Western Australia[468] and that it lingered in Britain until removed by section 1(2) of the Representation of the People Act (UK)[469] ("the 1948 Act").

Section 43 rendered a member of one chamber ineligible to be chosen for or to sit in the other chamber. This was founded on the constitutional practice of the Imperial Parliament. The qualifications for a senator were to be the same as those for a member of the House of Representatives (section 16). The disqualification provisions of section 44 rendered certain persons incapable of being chosen or of sitting either as a senator or as a member of the House of Representatives. The method of choosing senators was to be uniform for all the states, whether prescribed by a law of the Commonwealth or by state law (section 9).

An electoral division was not to be formed out of parts of different states (section 29). However, section 29 contemplated laws which would provide for more than one member to be chosen for a division. As late as 1946, in the British House of Commons, 18 constituencies returned two

members and one returned three members[470]. Single member constituencies were made necessary in Britain by section 1(1) of the 1948 Act. Section 12 of the 1902 Act provided that one member of the House of Representatives should be chosen in each division. Multi-member constituencies for the lower houses existed in 1900 in Victoria, Queensland, South Australia (where all but two of 27 divisions returned two members) and Tasmania (where Hobart returned six members of a chamber of 30). In the debate on the Bill for the 1902 Act, Senator Sir John Downer and his supporters in the Senate favoured both multi-member constituencies and voting with proportional representation as means of avoiding the tyranny by bare majority and of advancing the interests of those voters who were in the minority[471]. Kingston's Draft Constitution prepared for the 1891 Convention in Sydney had provided in Part VII for a National Assembly with each district to return two members.

The existence of female franchise in South Australia and Western Australia was, at the federal level, protected by section 41 of the Constitution. The effect of section 41 was that no adult person who, before the establishment of the Federal franchise, had acquired a right to vote at a state election was to be prevented by any law of the Commonwealth from voting at elections for either House of the Federal Parliament[472]. Further, until the qualification of electors of members of the House of Representatives became uniform throughout the Commonwealth (by reason of the adult franchise conferred by section 3 of the Commonwealth Franchise Act 1902 [Commonwealth]), section 128 provided that in any state with adult suffrage, only one-half of electors voting for or against a referendum were to be counted.

However, the Constitution did not entrench the secret ballot; compulsory voting; preferential or proportional voting, nor any universal adult franchise. Nor did the Constitution prescribe any authority or body to determine from time to time the electoral divisions in each state.

Compulsory enrolment for federal elections and for referendums was introduced by section 8 of the Commonwealth Electoral Act 1911 (Commonwealth) and compulsory voting at referendums was introduced by the Compulsory Voting Act 1915 (Commonwealth). Compulsory voting in elections was introduced by section 2 of the Commonwealth Electoral Act 1924 (Commonwealth) and the validity of that law was upheld in *Judd* v *McKeon*[473]. Professor Crisp wrote that both major parties were in favour of the 1924 legislation though neither wished to take overt responsibility for it; hence it was introduced as a private member's bill on which no Minister spoke and no division was called in either House[474]. The Commonwealth Electoral Act 1918 provided (section 124) for the introduction of preferential voting for House of Representatives elections and this was achieved by the Senate by section 7 of the Commonwealth Electoral Act 1919 (Commonwealth). Finally, proportional representation in the Senate was introduced by section 3 of the Commonwealth Electoral Act 1948 (Commonwealth)[475].

There is considerable force in the recent statement by learned commentators[476]:

> "As numerous and as positive in expression as many of these [constitutional] provisions are, they constituted only the bare foundations of the electoral law for the representative Parliament of a new nation. The Constitution, for example, left unspecified, or open to change, a whole range of matters including: the method of voting to elect the members of the respective houses; the question of whether members of the House of Representatives would be elected by single-member or multi-member divisions; the length of time each State would continue to vote as one electorate in electing the Senate; who would be authorised to vote; the question of voluntary or compulsory registration of voters and of voting itself; the control of electoral rolls; the conduct of the ballot; the style of ballot papers; the use of postal votes; limitations on the electoral expenses of candidates; the financial deposits to be made by candidates and the conditions of their forfeiture; the role of political parties at elections; the question of financial support for political parties from public funds; the location of responsibility for the administration of the electoral law; and the extent of the delegation of authority in electoral decision-making."

Representative Government and Malapportionment

To conclude from an examination of the express provisions of the Commonwealth Constitution that it, or the Constitutions of the States, enshrines or at least adopts some of the principles of representative government is not of any immediate assistance in resolving the specific legal issue with which this case is concerned. This is the alleged invalidity of the legislation pursuant to which the State of Western Australia is divided geographically into districts and regions in such a manner as is said not to give "equal value" to the vote of each elector, whether for the Legislative Assembly or the Legislative Council.

This notion of "equal value" was not, in my view, an essential or inherent feature of the system of "representative government" as understood at Federation. It may properly be said (and this Court has held it to be the case) that the Constitution established and continues to prescribe such a system for the Commonwealth (as does the Constitution of Western Australia for the State).

The particular "entrenched" provisions of the Constitution to which I have referred gave effect to the essential character of representative government which Mill had identified. But, as McHugh J pointed out in *Theophanous*[477], the Constitution did not specify "the whole apparatus of representative Government". As to much of that, it was, as Barton had said in 1891, a case of "trust the parliament of the Commonwealth"[478]. The Constitution explicitly proceeds on that footing.

The Australian colonies in 1900 had determined, by various means, the geographical areas and numbers of persons or of electors in the electoral divisions, and none insisted on practical equality

in numbers of people or electors in those divisions[479]. The materials in the present case show considerable margins of deviation in those electorates. At that time, in the United Kingdom, there remained substantial inequality between electorates, as Gibbs J pointed out in *McKinlay*[480]. The legislation in force in New South Wales in 1900[481] permitted electorates to be larger or smaller than the average quota by a considerable margin. In Victoria in 1901 there were electorates of about 9,000 electors and at least one electorate of 16,000[482]. Western Australia, as I have indicated earlier in these reasons, presented a stark picture of great extremes.

At the federal level, section 16 of the 1902 Act provided that the quota of electors represented by the division of the whole number of electors in the state by the number of members of the House of Representatives to be chosen in the state was not to be departed from to a greater extent than one-fifth more or less. It should also be noted that the criteria adopted in section 16 of the 1902 Act for the drawing by the Commissioner of Boundaries of electoral divisions for the House of Representatives included physical features; means of communication and community of diversity of interest. Thus, from the outset, federal electoral law recognised the point later made with some force by Harlan J in *Reynolds* v *Sims*[483].

> "[P]eople are not ciphers and ... legislators can represent their electors only by speaking for their interests – economic, social, political – many of which do reflect the place where the electors live ... [C]onflicting interests within a State [cannot] be adjusted by disregarding them when voters are grouped for purposes of representation."

It does not follow from the prescription by the Constitution of a system of representative government that a voting system with a particular characteristic or operation is required by the Constitution. What is necessary is the broadly identified requirement of ultimate control by the people, exercised by representatives who are elected periodically. Elements of the system of government which were consistent with, albeit not essential for, representative government might have been constitutionally entrenched or left by the Constitution itself to the legislature to provide and modify from time to time. This is what was done.

Nor if, contrary to what was decided in *Leeth* v *The Commonwealth*[484], there is a doctrine of the underlying equality of the people of the Commonwealth before the law, would it apply so as to require a different outcome.

Looked at in this way, the task of the plaintiffs then becomes to demonstrate that the voting system of which they complain is so distorted as not to answer the broad identification (which they contend is implicit in the system of representative government established by the Constitution for the Commonwealth and carried by force of the Constitution into the Constitution of the State) of ultimate control by periodic popular election.

To analyse the issues in this case in such a manner is not to deny the important proposition established, as regards the Commonwealth, by *Australian Capital Television*[485]. This is that legislation otherwise within power will be invalid if it attacks the structure of the government of the Commonwealth by infringing in the requisite sense freedom of communication on matters relevant to political discussion, that freedom being an inherent characteristic of the system of representative government recognised and provided for in the Constitution. Although this principle is capable of limiting the exercise of the legislative powers of the State Parliaments, it is concerned with protection of the governmental structure of the Commonwealth[486].

The range of provisions in the Constitution which provide for particular incidents of representative government "until the Parliament otherwise provides", and the provision in section 128 for amendment of the Constitution by referendum approved by the electors, emphasise the central importance of communication on matters relevant to the efficacious working of the system of representative government established for the Commonwealth. It is hardly to be expected that the Constitution was framed so as to present an impermanent or incomplete statement of the incidents of responsible government on the footing that the Parliament, which would make changes and remedy deficiencies perceived from time to time, would be composed other than by the representatives of electors who had been free of legislative impediment in informing themselves and in receiving information and comment upon matters of political interest.

I do not regard *Australian Capital Television* as authority for any wider or more general propositions or principles.

Popular Election – the Commonwealth

In this litigation, no challenge is made, and I am far from suggesting that any well-based challenge might be made, to the system of electoral divisions, established by Part IV (sections 55 – 78) of the 1918 Act, on the footing that there has been a departure from the broad constitutional requirement of ultimate control of the composition of the House of Representatives by the people of the Commonwealth who exercise their control through the medium of popular elections.

I would accept that the variations in numbers of electors or people in single member divisions could be so grossly disproportionate as to deny ultimate control by popular election[487]. I would, with respect, also agree with the point made by McTiernan and Jacobs JJ in McKinlay[488] that, when it arises, such a question is to be determined by reference to the particular stage which then has been reached in the evolution of representative government. By way of example, for both Commonwealth and state elections, provision has been made for more than 20 years for 18 as the minimum age for voters[489]. An even plainer example is the now long-established universal adult suffrage. This has become a characteristic of popular election of senators and members of the House of Representatives which could not be abrogated by reversion to the system which

operated in one of more colonies at the time of federation. In my opinion, this is so notwithstanding that sections 8 and 30 of the Constitution, subject to the prevention of plural voting, permitted the qualification of electors to be ascertained in that way, until the Federal Parliament otherwise provided.

I agree also with the statement by McTiernan and Jacobs JJ in the same passage in *McKinlay* to the effect that the point at which there ceases to be a system of representative government because there is a failure in ultimate control by periodic popular election involves a question of degree and is one which cannot be determined in the abstract. A particular reason why this is so is provided in *Dixon* v *British Columbia (Attorney-General)*[490]. As I have indicated, McLachlin J was there applying the express provision in section 3 of the Canadian Charter of Rights and Freedoms. Nevertheless, the reasoning by which the Court determined that the British Columbia legislation establishing provincial electoral districts violated section 3 involved steps of present significance.

The first consideration is that the historical development of voting rights in Canada (and I would consider the same was true in Australia) leads to the conclusion that relative equality of voting power may be seen as the dominant principle underlying the system of representative government as it has evolved, so that relative equality in numbers of electors is the single most important factor in determining electoral boundaries[491]. The second, developed in McLachlin J's later judgement in the Supreme Court of Canada in *Reference re: Electoral Boundaries Commission Act*[492], is that "representation" comprehends not only a voice in the deliberations of government but also the right to bring one's grievances and concerns to the attention of a local member of the legislature. The third is that relative parity in numbers of electors in electoral divisions may detract from effective representation; to repeat what was said in *Reference re: Electoral Boundaries Commission Act*[493]:

> Factors like geography, community history, community interests and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic. These are but examples of considerations which may justify departure from absolute voter parity in the pursuit of more effective representation; the list is not closed.

Finally, whilst relative parity in numbers remains the single most important concern, determination of whether the legislation in question has, in a given case, operated to deny effective representation in the sense described above, requires recognition by the judicial branch of government that the legislative branch is in a better position to weigh, or to establish specialised administrative bodies to weigh, the various factors which are involved.

In that connection, I turn again to the judgement of McLachin J in *Reference re: Electoral Boundaries Commission Act* where her Ladyship said[494]:

> "I turn finally to the admonition that courts must be sensitive to practical considerations in interpreting Charter rights. The "practical living fact", to borrow Frankfurter J's phrase [in *Baker* v *Carr*[495]], is that effective representation and good government in this country compel those charged with setting electoral boundaries sometimes to take into account factors other than other parity, such as geography and community interests. The problems of representing vast, sparsely-populated territories, for example, may dictate somewhat lower voter populations in these districts; to insist on voter parity might deprive citizens with distinct interests of an effective voice in the legislative process as well as of effective assistance from their representatives in their "ombudsman" role. This is only one of a number of factors which may necessitate deviation from the "one person-one vote" rule in the interests of effective representation."

If the particular legislation under challenge establishes a system which requires a specialised body or tribunal to define electoral divisions in a manner which gives effect to these principles, then the legislation itself will not be open to challenge as denying the constitutional requirement for representative government of ultimate control by popular election. Rather, in any given case, it will be a question to be determined by reference to the circumstances of that case whether judicial review is required to ensure that the exercise in the particular case of the authority conferred by the legislature is confined within constitutional limits[496].

Popular Election – the States

That being the position as regards the Commonwealth, the question then is whether, by force of the Constitution, any (and if so what) restraint is imposed upon the legislative power of the States to provide for the manner of representation in their legislatures.

In my view, it is not an acceptable mode of argument to take the present electoral system in Western Australia and contend that it offends some restraint because, if it applied to elections for the House of Representatives (and, semble, the Senate), it would involve such gross disproportion between constituencies as to deny ultimate control by popular election and so entail legislative invalidity. Geographic and demographic factors apply at the national level and at the levels of the several states, with significant differences in scale and quality. Like is not being compared with like.

In addition, I have already referred to the caution required in translating to the state sphere any doctrine which springs from the adaption of representative government to the legislative branch of the Government of the Federation. I have also referred to the United States experience which is that the nature of the interests to be represented at state level may be more diverged and more parochial in nature than at the national level. That also, in my view, is true of Australia.

Further, no relevant restraint of the kind contended for by the plaintiffs applies by force of the Constitution to the legislatures of the states in the exercise of their power to provide for methods of voting and apportionment of electors between electoral districts or regions. In dealing further with this aspect of the case, it is necessary to have regard to a number of recent decisions of this Court in order to determine their immediate significance.

In *Stephens*[497], a majority of the Court expressly accepted that, from the text of the 1889 Act as it now stands, and the system of government for which it provides, there is to be drawn an implication of freedom of communication to discuss "government, governmental institutions and political matters" as Brennan J put it[498]. However, as will appear, that was not the only point on which the case turned.

In *Theophanous*[499], the majority of the Court proceeded on the footing (which appears to have been common ground to both the parties and the interveners) that, in the earlier decisions of *Nationwide News*[500] and *Australian Capital Television*[501], this Court had "distilled from the provisions and structure of the Constitution, particularly from the concept of representative government which is enshrined in the Constitution, an implication of freedom of communication"[502] or of political communication and discussion"[503]. The immediate issue in *Theophanous* was the applicability of that implication in the Constitution upon the common law and statute law of a state which imposed or defined civil liability for defamation. At the time of the publication in question, which criticised the plaintiff's views on immigration (a matter of federal legislative concern), he was a Member of the House of Representatives and, with other offices, held the chair of the Immigration Committee of the federal Caucus of the Australian Labour Party. Thus, there was no issue for decision in that case which required any conclusion as to extension of a federal constitutional implication to political communication and discussion at the state level.

However, in *Stephens*[504], the plaintiffs were members of the Legislative Council of Western Australia and sued for defamation in respect of publication of assertions by another Council member that their overseas study trip was "a rort which is costing taxpayers thousands of dollars". The case did not turn solely upon an implication of freedom of communication derived from the state Constitution. Deane J[505] accepted, for the purposes of that case, the views of the other members comprising the majority (Mason CJ, Toohey and Gaudron JJ). Their Honours[506] considered that "the freedom of communication implied in the Commonwealth Constitution extends to public discussion of the performance, conduct and fitness for office of members of a State legislature". Their Honours referred to judgements in *Nationwide News*[507] and in *Australian Capital Television*[508] and to observations in their joint judgment in *Theophanous*. In that case[509], Their Honours observed:

> "The inter-relationship of Commonwealth and State powers and the interaction between the various tiers of government in Australia, the constant flow of political information, ideas and debate across the tiers of government and the

> absence of any limit capable of definition to the range of matters that may be relevant to debate in the Commonwealth Parliament and to its workings make unrealistic any attempt to confine the freedom to matters relating to the Commonwealth government[510]. That said, the question is of little importance in the present case. The publication complained of relates to the views, performance and capacity of the plaintiff as a member of the Commonwealth Parliament."

Thus, various factors, taken together, and involving aspects of contemporary life and experience such as the constant flow of political information, ideas and debate, made it unrealistic or impracticable (but, semble, not impossible) to confine the implied freedom of political discussion to matters relating to the government of the Commonwealth, the result was to require extension of the constitutional principle of political discussion of matters relating to the government of the states.

Three points should be made. The first is that, as McHugh J explains in his judgement in the present case, the process of constitutional interpretation by which this principle was derived (being an implication at a secondary level); and the nature of the implication (which restrains not only the exercise of legislative, executive or judicial power but also what otherwise would be the operation of the general law upon private rights and obligations) departed from previously-accepted methods of constitutional interpretation. If it were now sought to apply the principle, then the need for further examination of it would arise.

However, and this is the second point, the present case does not involve any such principle of freedom of political discussion, whether derived from the Commonwealth or state Constitution. Rather, as I have indicated, it is concerned with the essential characteristics of the constitutionally-mandated system of representative government, albeit that it is in aid of this that the principle of freedom of political communication operates.

The third point is that there is nothing in the federal constitutional structure which renders it unrealistic or impractical to accept that, compatibly with the federal structure, from time to time the doctrine of representative government may have an adaption to one or more of the states which does not correspond to that for the Commonwealth.

I have referred to various matters which indicate that this is so. They perhaps begin with the position of the Senate as the "States' House" in the constitutional design, and various aspects of section 24 of the Constitution, including the reservation to Tasmania and Western Australia of at least five members of the House of Representatives at Federation.

The Constitution was adopted at a time when, in two of the colonies, the upper houses of the legislature were nominated for life. It may also be recalled that, as Quick and Garran put it[511]:

> "Queensland was tripartite in interest, the North and the Centre ... looked forward to Federation, not only for its own sake, but also as a step towards sub-division; whilst Brisbane and the South feared that their trade would suffer from open competition with New South Wales and its metropolis."

If the project of dividing Queensland had ever reached fruition, there would seem to have been nothing in the Constitution to prevent, for example, the adaption of the upper house of the Queensland legislature to a body representing the three regional divisions of the State[512]. I have already referred to the accommodation sought to be made in the second paragraph of section 7 of the Constitution, dealing with Senate representation of Queensland, to the internal separation of Queensland into divisions.

As it presently stands, the Constitution, in section 15, recognises, as has become the fact in Queensland, that a State legislature may comprise one chamber only. Thus, the first sentence of section 15 now states:

> "If the place of a senator becomes vacant before the expiration of his term of service, the Houses of Parliament of the State for which he was chosen, sitting and voting together, or, if there is only one House of that Parliament, that House, shall choose a person to hold the place until the expiration of the term."

But at no stage has the Constitution contained an implication denying to a state the power to change to a unicameral system, if such power otherwise existed[513].

On the other hand, the Constitution assumes the continued existence of the office of Governor of a state or other chief executive officer or administrator of the state (sections 12, 15 and 110) and the existence of "the Executive Government" of a state (section 119). Further, Chapter III of the Constitution brings the state court system within the ambit of the judicial power of the Commonwealth. It assumes the continued existence of State Supreme Courts and the delivery of judgements, making of orders and decrees, and imposition of sentences, of such a nature as in all instances (subject only to regulation prescribed by the federal Parliament) to be appropriate subject matter for the exercise by this Court of the judicial power of the Commonwealth in its appellate jurisdiction under section 73 of the Constitution. Section 77 presupposes the existence from time to time, and the operation of a system of, state courts in original states and in those later admitted into or established by the Commonwealth, the jurisdiction and powers of which under state law are compatible with the exercise of the judicial power of the Commonwealth upon investment by the Parliament with federal jurisdiction with respect to matters of the description in sections 75 and 76 of the Constitution.

Section 107 of the Constitution identifies the powers of what had been the Parliaments of the colonies as they stood at the establishment of the Commonwealth, and provided that they would continue as the powers of the Parliaments of the States unless by the Constitution exclusively

vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State. Section 108 deals with the saving of laws in force in the colonies before they became states. The Constitution operates, in various provisions[514], upon the footing that each state, whether an original state or a state formed under section 124, would have a Parliament, and accepts that those legislatures may make laws or other decisions (for example, to fill a casual vacancy in the Senate under section 15 or to consent to alteration of limits) which have an immediate effect upon the operation of the political and territorial composition of the Commonwealth and the composition of the federal legislature. Moreover, pars (xxxvii) and (xxxviii) of section 51 empower the Parliament to legislate upon reference or request, or with the concurrence of State Parliaments.

Accordingly, it may fairly be said that the framers of the Constitution accepted the structure of the governments of the colonies as they stood at Federation and, insofar as the doctrines of representative government and responsible government were treated as operating in the new states.

Nevertheless, in my view, and whatever otherwise might be the scope of section 106 of the Constitution (as to which it is unnecessary to express any view), there is nothing in the Constitution to bind the states to any particular subsequent stage of evolution in the system of representative government. In the events that have happened, there has been in the several states, development at various paces in that component of representative government which is concerned with the importance of relative parity in the distribution of electors between the constituencies from which members of the legislature are selected. No doubt, further changes in that process of evolution may be expected from time to time. But, in my view, that has not been and will not be in obedience to any imperative imposed upon state legislatures by the Constitution.

Finally, upon this branch of the case, it may be noted that, as regards the Commonwealth Parliament, such evolutionary change is contemplated, as discussed earlier in these reasons, by the phrase "until the Parliament otherwise provides". There is thus no entrenchment of a particular method of distribution of electors between electoral districts. The implication which the plaintiffs seek to draw from the Constitution presumably would apply unless varied or abrogated by the steps required by section 128 of the Constitution. Thus, the State would be denied the elasticity specifically allowed the Commonwealth itself".

The Legislature of the State of Western Australia

There remains for decision the question whether the submissions of the plaintiffs are to be supported on considerations flowing purely from the constitutional arrangements which exist in the State of Western Australia.

In *Stephens*[515], Mason CJ, Toohey and Gaudron JJ observed that the legislature of Western Australia consists of the Sovereign, the Legislative Council and the Legislative Assembly; that both chambers are popularly elected (the members of the Council being elected for electoral

regions), and that the electors of members of the Assembly are also the electors of members of the Council. Their Honours then summarised as follows the effect of section 73 of the 1889 Act[516]:

> "Section 73 of the Constitution Act 1889 (WA) provides that the legislature of the State 'shall have full power and authority, from time to time, by any Act, to repeal or alter any of the provisions of this Act'. However, it is not lawful to present to the Governor for assent by the Queen[517]:
>
> > 'any Bill by which any change in the Constitution of the Legislative Council or of the Legislative Assembly shall be effected, unless the second and third readings of such Bill shall have been passed with the concurrence of an absolute majority of the whole number of the members for the time being of the Legislative Council and the Legislative Assembly respectively.'
>
> Section 73(2) was inserted into the Constitution by an amendment enacted in 1978. That sub-section further restricts the capacity of the legislature to enact a Bill which expressly or impliedly provides for the abolition of either the Council or the Assembly (section 73(2)(b)) or provides that either House 'shall be composed of members other than member chosen directly by the people' section 73(2)(c)). The sub-section requires that such a Bill should not be presented for assent unless "the second and third readings of the Bill shall have been passed with the concurrence of an absolute majority of the whole number of the members for the time being of the Legislative Council and the Legislative Assembly, respectively" (section 73(2)(f) and the Bill has been approved by a majority of electors of the State at a referendum[518]."

It is common ground that the Bill for the 1987 Act was presented for assent without there having been taken the steps described in section 73(2) of the 1889 Act. Hence, the submission by the plaintiffs on this branch of the case.

Manner and Form

Before turning to the construction of section 73(2)(c), it is appropriate first to consider the authority of the legislature which enacted it to control the law-making processes of its successors.

It is necessary to begin with section 5 of the Colonial Laws Validity Act 1865 (Imperial) ("1865 Act"). So far as is relevant, this stated:

> "[Every] representative legislature shall, in respect to the colony under its jurisdiction, have and be deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, letters patent, Order in Council, or colonial law for the time being in force in the said colony."

The terms "representative legislature" and "colonial law" were defined respectively in section 1 as signifying "any colonial legislature which shall comprise a legislative body of which one have are elected by inhabitants of the colony" and as including "laws made for any colony either by such legislature as aforesaid or by Her Majesty in Council". It has been observed (by La Forest J) that the reference to "manner and form" appears in the proviso and that section 5 was aimed at validating, not invalidating, colonial laws[519], and (by French J) that, while giving colonial legislatures power to alter their Constitutions, section 5, paradoxically, also gave them a tool to bind their successors[520]. Observance of "manner and form" has been treated, notably in *AG (NSW)* v *Trethowan*[521], as a condition upon which the "full power" referred to in section 5 is exercisable.

Section 2(1) of the Statute of Westminster 1931 (Imp) provided that the 1865 Act "shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion", the latter expression including the Commonwealth of Australia but not the states. The Australia Acts, which came into operation on 3 March 1986, amended (by section 14) the 1889 Act, but not in any way presently relevant.

However, section 3(1) of the Australia Acts states:

> "The Act of the Parliament of the United Kingdom known as the Colonial laws Validity Act 1865 shall not apply to any law made after the commencement of this Act by the Parliament of a State."

The result is to remove any ground which might otherwise have existed for the submission that the 1987 Act was invalid for failure to meet any requirement of section 5 of the 1865 Act that its passage should have been in the manner and form required by the 1978 Act.

However, any gap left by the repeal of section 5 of the 1865 Act by section 3(1) of the Australia Acts was then filled by section 6 of the Australia Acts. This states:

> "Notwithstanding sections 2 and 3(2) above, law made after the commencement of this Act by the Parliament of a State respecting the constitution, powers or procedure of the Parliament of the State shall be of no force or effect unless it is made in such manner and form as may from time to time be required by a law made by that Parliament, whether made before or after the commencement of this Act."

It will be noted that, in contrast to the form taken by the old section 5, section 6 is a direct statement of the mandatory requirement to observe manner and form. In its opening phrase, it is expressed to apply notwithstanding the declaration and enactment in section 2 of plenary legislative competence (save as to preservation of the status quo concerning relations with countries outside Australia) and in section 3(2) of the power to repeal or amend Imperial law and to make laws repugnant to the law of England.

Further, it is submitted that the concluding words of section 106 of the Constitution, "until altered in accordance with the Constitution of the State", empower a State Parliament to insert into its Constitution a manner and form requirement, provided it is not inimical to the principles of representative democracy. This produces the result that the double entrenchment effected by section 73 is effective also by force of the statement in section 106 of the Constitution that the "Constitution of each State of the Commonwealth shall, subject to this Constitution, continue."

It may be accepted that the question whether a law of the state was enacted in a manner and form which did not satisfy section 73 would arise under the Australian Constitution, and in particular under section 106 thereof, for the reasons given by Burt CJ in *Western Australia* v *Wilsmore*[522]. This would be because the phrase in section 106 "altered in accordance with the constitution of the state" recognises or accepts requirements, such as section 73, which otherwise apply to the state constitutional changes. Accordingly, the sense of the phrase "altered in accordance with" would be "so altered as not to contravene any otherwise binding requirement". It would be a distinct question whether section 106 goes further so as to create any additional and binding category of restraint upon state constitutional alteration[523].

There is a conceptual difficulty, to my mind, with the legitimacy of a manner and form requirement which is inserted in a written constitution otherwise than by a law made with observance of that manner and form which is thereafter to apply, or by a law having paramount force. Nevertheless, it is contended, primarily by the Solicitor-General of New South Wales, that there is a principle reflected in *Bribery Commission* v *Ranasinghe*[524] that a legislature has no power to ignore the conditions for law-making imposed by the instrument which itself confers its power to make that law, and that a law which changes those conditions must observe them.

Ranasinghe concerned the then Constitution of Ceylon which was conferred not by Statute of the Imperial Parliament but by the Ceylon (Constitution) Order in Council 1946. This preceded the Ceylon Independence Act 1947 (Imperial)[525]. That statute denied the application of the 1865 Act to any law subsequently made by the Parliament of Ceylon but did not contain any equivalent of section 6 of the Australia Acts[526]. The case may stand for the propositions that a manner and form provision which appears in the written constitution of a unitary state where no paramount law, such as section 5 of the 1865 Act, remains in force, continues to place a restraint upon law-making, and that the question of the observance of the restraint is justiciable; see *Victoria* v *The Commonwealth* and *Connor*[527] *and West Lakes Ltd* v *South Australia*[528]. It is unnecessary to resolve the matter in the present case. This is because, as I have indicated, whilst section 2(2)

of the Australia Acts declares and enacts that the State Parliaments have plenary legislative power, it is further provided in section 6 that, notwithstanding this provision, manner and form requirements must be satisfied. This express treatment of the subject must leave no room for any greater operation which a principle derived from *Ranasinghe* might otherwise have had for any Parliament of an Australian State.

Accordingly, in my view, the presently binding effect of section 73 is derived from section 6 of the Australia Acts[529]. It was not, as I understand it, seriously contested first that the Bill of the 1987 Act was one respecting the Constitution, powers or procedure of the Parliament of the state, within the meaning of section 6 of the Australia Acts and, secondly, that section 73(2), again within the meaning of section 6, placed a requirement as to manner and form of the making of laws of the description identified in it[530]. In any event, I am prepared to approach the case on the footing that both propositions are satisfied.

Section 73(2)(c) of the Constitution Act 1889 (WA)

The central question then becomes whether, within the meaning of section 73(2)(c), the Bill for the 1987 Act was one which expressly or impliedly provided that either House should be composed of members other than members chosen directly by the people.

In *Stephens*[531], Mason CJ, Toohey and Gaudron JJ spoke as follows of section 73(2):

> "[Section] 73(2) was plainly enacted with the object of reinforcing representative democracy and placing a further constitutional impediment in the way of any attempt to weaken representative democracy. And, so long, at least, as the Western Australian Constitution continues to provide for a representative democracy in which the members of the legislature are "directly chosen by the people", a freedom of communication must necessarily be implied in that Constitution, just as it is implied in the Commonwealth Constitution, in order to protect the efficacious working of representative democracy and government."

Against that background, there is a certain irony in the submissions now made by the plaintiffs. Plainly, the effect of the 1987 Act was to ameliorate the alleged malapportionment of which they complain. But the effect of their submission is that section 73(2) made it more difficult after 1978 for the legislature to achieve such a result, by placing and doubly entrenching, an impediment in the path of the Bill for a statute such as the 1987 Act. The impediment was "doubly entrenched" because part (e) of section 73(2) adds to the list of Bills which require a particular majority in both Houses, and submission to referendum of a Bill which "expressly or impliedly in any way affects ... [section] 73".

Thus, the submissions for the plaintiffs would achieve a result opposite to that seen in *Stephens* as the object of section 73(2), namely, the object of placing a constitutional impediment in the way of any attempt to weaken representative democracy.

Further, the legislative intent in enacting section 73(2)(c) was not to affect the question of redistribution of electoral boundaries. This point was made on the second-reading speech in the Legislative Council[532]. In the second-reading speech on the Bill in the Legislative Assembly, the Premier had identified as one of the objectives of the legislation the forestalling of attempts "to by-pass the right of the electors at large to elect the members of either House"[533].

It may readily be conceded, and the contrary is not contested, that the Constitution of the State of Western Australia provides for representative government. However, in the absence of any relevant entrenchment, effect is given to that doctrine by a fluid rather than a fixed constitution. In that respect, there is a marked difference in the position in Western Australia and that which obtains under the Australian Constitution.

The thrust of the submissions for the state is that this fluidity permits a process of legislative change to the franchise and to the methods for composition of each chamber of the Parliament. There remains the Parliament of the State, the mere continued existence of which says nothing as to the nature of the franchise of the method of representation of the electors in the legislature.

I have referred earlier in these reasons to the taking of various steps over the last century by which the Parliament has pursued a path of change to the franchise and methods of representation. The point may further be illustrated as follows. At the elections for the Legislative Assembly held in 1897, the last before Federation, the ratio (defined in the case stated as "the electoral ratio") between the largest number of electors in a constituency and the smallest number of electors in a constituency, divided by the number of members ordinarily returned by the constituencies was 38.52:1. The last election for the Legislative Assembly before the enactment of the 1978 Act took place in 1977. By then, there were 55 constituencies, each returning one member, and the electoral ratio was 8.93:1. At the 1993 general election, conducted pursuant to the legislation under challenge in these proceedings, the electoral ratio was 2.91:1.

In *Dixon* v *British Columbia (Attorney-General)*[534], the Court considered comparable issues by looking at deviations per constituency from a norm representing the average populations for each elected representative. I have earlier referred to the similar method adopted in the United States cases with deviations from "the ideal". The case stated does not give these figures upon an ideal (using either population at large or electors), but it may be supposed that, had it done so, a like trend over the last century would have appeared.

The last election for the Legislative Council held before Federation took place in 1900. The electoral ratio was 22.22:1. At the 1977 election for the Legislative Council, the last before the

introduction of the 1978 Act, the electoral ratio was 14.79:1, and at the 1993 general election the electoral ratio was 3.42:1.

Counsel for the State submits that the result of acceptance of the submissions for the plaintiffs would be to establish section 73(2)(c) as a barrier to further such development as regards apportionment of constituencies and electoral regions between the electors. This result, so the state contends, will be avoided and effect be given to the true interpretation of part (c) of section 73(2) if it be construed as "entrenching" only so much of the full elements of the system of representative government in the State of Western Australia as provide for popular election of members of each chamber in contrast to a process of nomination by the executive or of indirect election.

These submissions should be accepted. Section 73(2)(c) was not designed to restrict further change after 1978 to what the plaintiffs complain of as electoral malapportionment. The legislation assumed that the constitutional arrangements then in force in Western Australia were those for a representative government. It sought to protect this state of affairs (including the Office of Governor, and the preservation of the bicameral legislature) in various respects as specified in section 73(2). But the legislature did not impose a manner and form requirement upon changes to the electoral system such as those later brought about by the 1987 Act. The phrase "chosen directly by the people" was selected rather than "directly chosen by the people" as it appears in sections 7 and 24 of the Australian Constitution. This emphasises that the phrase is inseverable and conveys the one concept. That is entrenchment of the present system of popular selection of legislators by direct vote rather than by other indirect methods.

Conclusion

The questions reserved should be answered:

(i) No.
(ii) No.
(iii) Unnecessary to answer.

The costs of the case stated should be reserved.

FOOTNOTES

1. section 86 of the 1987 Act
2. 1899 Act, section 18(b)
3. established under the 1947 Act: 1899 Act, section 19(b)
4. 1947 Act, section 6(1)(a)
5. 1947 Act, section 6(1)(b)
6. 1947 Act, section 6(2)
7. by section 1A of the 1947 Act
8. 1899 Act sections 5 and (6)(1)
9. 1899 Act, section 6(2) and (3)
10. 1947 Act, section 9
11. 1947 Act, section 9(a)
12. 1947 Act, section 9(b)
13. section 9(c) and (d) of the 1947 Act
14. See the observations of Isaacs J on "The Advancing Frontiers of Public Thought" in *The Commonwealth* v *Kreglinger & Fernau Ltd. and Bardsley* (1926) 37 CLR 393 at 412-413
15. (1975) 135 CLR 1 at 57
16. (1975) 135 CLR 1 at 21, 36, 45, 57, 61, cf 70
17. See Reference re *Electoral Boundaries Commission Act* (1991) 81 DLR (4th) 16 at 35-36; *Mackinnon* v *Prince Edward Island* (1993) 101 (4th) 362 at 389
18. See the Constitution, sections 1, 7, 24, 30, 41
19. *Nationwide News Pty* v *Wills ("Nationwide News")* (1992) 177 CLR 1 at 47, 70, 73, 74-95, 105; *Australian Capital Television Pty Ltd.* v *The Commonwealth* ("ACTV)(1992)177 CLR 106 at 130-140, 149, 168, 187-188, 211-212, 231-232; *Stephens* v *West Australian Newspapers Ltd.* (1994) 182 CLR 211 AT 232
20. See Nationwide News (1992) 177 CLR 1 at 41-45 and ACTV(1992) 177 CLR 106 at 133-136 and the cases cited in those passages
21. *Amalgamated Society of Engineers* v *Adelaide Steamship Co. Ltd. ("the Engineers Case")* (1920) 28 CLR 129 at 145, 155; *Melbourne Corporation* v *The Commonwealth* (1947) 74 CLR 31 at 83; ACTV(1992) 177 CLR 106 at 135, 209-210
22. ACTV (1992) 177 CLR 106 at 158-159
23. (1992) 177 CLR 106 at 135
24. (1992) 177 CLR 1.
25. (1971) 122 CLR 353 at 401-402
26. (1945) 71 CLR 29 at 85
27. *Nationwide News* (1992) 177 CLR 1 at 47
28. (1994) 182 CLR 104
29. (1994) 182 CLR 211
30. *Victoria* v *The Commonwealth* (1971) 122 CLR 353 at 371
31. *China Ocean Shipping Co* v *South Australia* (1979) 145 CLR 172 at 182
32. (1975) 135 CLR 337 at 372; *see also Victoria* v *The Commonwealth* (1971) 122 CLR 353 at 371-372; *China Ocean Shipping Co* v *South Australia* (1979) 145 CLR 172 at 182
33. section 107

34. See *Southern Centre of Theosophy Inc* v *South Australia* (1979) 145 CLR 246 at 257
35. *Attorney-General (NSW)* v *Trethowan* (1931) 44 CLR 394 at 429
36. See section 5 of the *Colonial Laws Validity Act* 1865 (Imp) and section 6 of the *Australia Act* 1986. And note the specific power conferred on the legislature of Western Australia by section 5 of the *Western Australian Constitution Act* 1890 (Imp)
37. *Clayton* v *Heffron* (1960) 105 CLR 214 at 251
38. Commonwealth Constitution, section 106; *The Bribery Commissioner* v *Ranasinghe* [1965] AC 172 at 197
39. *Australian Railways Union* v *Victorian Railways Commissioners* (1930) 44 CLR 319 at 390-392; *Melbourne Corporation* v *The Commonwealth* (1947) 74 CLR 31 at 56, 60, 66, 74, 82; *(The Commonwealth* v *Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 139-140, 213-215, 280-281; *Queensland Electricity Commission* v *The Commonwealth* (1985) 159 CLR 192 at 217-218, 226-227, 231, 232, 248, 260; Re *Australian Education Union; Ex parte Victoria* (1995) 69 ALJR 451 at 464; 474; 128 ALR 609 at 629, 643
40. (1994) 182 CLR 211 at 232
41. (1975) 135 CLR 1
42. (1975) 135 CLR at 21
43. (1975) 135 CLR at 44
44. (1975) 135 CLR 1 at 61
45. (1975) 135 CLR 1 at 75
46. (1975) 135 CLR 1 at 36-37
47. (1975) 135 CLR 1 at 57 cited above
48. (1992) 1771 CLR 1
49. (1992) 177 CLR 1 at 72
50. See, in particular, sections 7 ("equal representation of the several Original States [in the Senate] shall be maintained") and 128 ("a majority of the States" as well as "a majority of all the electors")
51. See, generally, *Attorney-General (Cth) (Ex rel McKinlay)* v *The Commonwealth* (1975) 135 CLR 1 at 36
52. A disparity in voting power as among the voters in the several States in the election of members of the Senate is the inevitable consequence of "equal representation of the several Original States" prescribed by section 7 of the Constitution
53. Acts Amendment (Constitution) Act 1978 (WA) ("the 1978 Act"), section 6
54. (1994) 182 CLR 211 at 236
55. See 1889 Act, section 38
56. section 5, inserting section 6 into the 1947 Act
57. section 2(b), amending section 3(1) of the 1947 Act
58. section 7(1) of the 1947 Act
59. section 7 of the 1947 Act amended by section 6 of the 1975 Amendment
60. section 7 of the 1975 amendment, inserting a new section 9 into the 1947 Act
61. *Victoria* v *The Commonwealth* (1971) 122 CLR 353 at 371, and *New South Wales* v *The Commonwealth.* The Incorporation Case (1990) 169 CLR 482 at 501-503
62. sections 5 and 6
63. sections 18 and 19
64. see *Constitution Act* 1889 (WA), especially section 73(2)(c) (inserted by Acts Amendment (Constitution) Act 1978 (WA), section 6), and the *Constitution Acts Amendment Act* 1899 (WA)

65. See *Constitution Acts Amendment Act* 1899 (WA), sections 18 and 19 and *Electoral Distribution Act* 1947 (WA), section 6(1). The current requirements for the division of the State's electorates were enacted by the *Acts Amendment (Electoral Reform) Act* 1987 (WA)
66. Electoral Distribution Act 1947 (WA), section 6(2)
67. *Constitution Acts Amendment Act* 1899 (WA), sections 5 and 6, and *Electoral Distribution Act* 1947(WA), section 9
68. (1975) 135 CLR 1. Previously, in 1974, a proposal to amend the Constitution pursuant to section 128 to require that the number of people in each electorate be as nearly as practicable the same was rejected by referendum. A similar proposal in 1988, which required equality of electors in each electorate, was also rejected. See *Constitution Alteration (Democratic Elections)* 1974; *Constitution Alteration (Fair Elections)* 1988
69. *Nationwide News Pty Ltd* v *Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd.* v *The Commonwealth* (1992) 177 CLR 106; *Theophanous* v *Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens* v *West Australian Newspapers Ltd* (1994) 182 CLR 211; *Cunliffe* v *The Commonwealth* (1994) 182 CLR 272
70. See sections 20, 12, 29, 30
71. See, for example, *Theophanous* (1994) 182 CLR 104 at 189-190
72. (1994) 182 CLR 104 at 120-121
73. cf the First Amendment to the Constitution of the United States which reads: "Congress shall make no law... abridging the freedom of speech, or of the press."
74. *Australian Capital Television* (1992) 177 CLR 106 at 138, 142 per Mason CJ
75. *Nationwide News* (1992) 177 CLR 1 at 50 per Brennan J
76. *Australian Capital Television* (1992) 177 CLR 106 at 169 per Dean and Toohey JJ
77. *Australian Capital Television* (1992) 177 CLR 106 at 214 per Gaudron J
78. Australian Capital Television (1992) 177 106 at 227 per McHugh J
79. (1994) 182 CLR 104 at 123
80. (1992) 177 CLR 106 at 168
81. (1994) 182 CLR 104 at 199
82. See *Theophanous* (1994) 182 CLR at 189 per Dawson J and at 199-201 per McHugh J
83. See *Theophanous (*1994) 182 CLR 104 at 201 per McHugh J, and Birch, *Representative and Responsible Government: An Essay on the British Constitution*, (1964) at 15
84. (1975) 135 CLR at 56
85. See sections 7, 8, 9, 16, 22, 24, 29, 30, 31, 34, 39, 46, 47, 48, 49
86. See sections 7, 9, 29
87. Bogdanor, *The People and the Party System*, (1981) at 209
88. Constitution, section 29. See also Reeves and Ware, *Electoral Systems: A Comparative and Theoretical Introduction*, (1992) at 117-122
89. See *Australian National Airways Pty Ltd* v *The Commonwealth* (1945) 71 CLR 29 at 81 per Dixon J
90. (1971) 122 CLR 353 at 402
91. See *Queensland Electricity Commission* v *The Commonwealth* (1985) 159 CLR 192 at 231; *Amalgamated Society of Engineers* v *Adelaide Steamship Co. Ltd.* (1920) 28 CLR 129 at 145
92. See *Australian Capital Television* (1992) 177 CLR 106 at 135 per Mason CJ
93. J Godsworthy, "Implications in Language, Law and the Constitution" in *Future Directions in Australian Constitutional Law*, Lindell (ed), (1994) at 178-179

94. Section 7 requires that no Original State have less than six senators. Section 24 requires five members at least to be chosen in each Original State. These requirements are irrespective of the number of people in the Original States
95. (1975) 135 CLR 1 at 20
96. See Brugger and Jaensch, *Australian Politics Theory and Practice*, (1985) at 208-214 and Lijphart, *Electoral Systems and Party Systems*, (1994) at 15
97. See Bagger, *"The Supreme Court and Congressional Apportionment: Slippery Slope to Equal Representation Gerrymandering"*, (1985) 38 *Rutgers Law Review* 109 at 109-110, 113, 116-118, 134-137; *Davis* v *Bandemer* (1986) (478) US 109 at 124, 127, 132; *Shaw* v *Reno* (1993) 125 L Ed 2d 511
98. See Wesberry v Sanders (1964) 376 US 1 at 8
99. (1975) 135 CLR 1 at 25
100. (1991) 81 DLR (4th) 16
101. (1991) 81 DLR (4th) 16 La Forest, Gonthier, Stevenson and Iacobucci JJ concurring, Sopinka J agreeing with the result; Lamer CJC, L'Heureux-Dube´ and Cory J dissenting
102. (1991) 81 DLR (4th) 16 at 36; cf *MacKinnon* v *Prince Edward Island* (1993) 101 DLR (4th) 362
103. See also the cases concerning the requirement that electorates in State Legislatures be drawn so that they represent a "good faith" effort to achieve equality in numbers. This requirement has been drawn from the Fourth Amendment: *Reynolds* v *Sims* (1964) 377 US 533; *Gaffney* v *Cummings* (1973) 412 US 735; *Mahan* v *Howell* (1973) 410 US 315; and *Davis* v *Bandemer* (1986) 478 US 109
104 ((1964) 376 US 1. See also *Baker* v *Carr* (1962) 369 US 186; *Wells* v *Rockefeller* (1969) 394 US 542; *Kirkpatrick* v *Preisler* (1969) 394 US 526; *White* v *Weiser* (1973) 412 US 783; *Karcher* v *Daggett* (1983) 462 US 725; *Shaw* v *Reno* (1993) 125 L Ed 511
105. *Wesberry* v *Sanders* (1964) 376 US 1 at 24
106. (1991) 81 DLR (4th) 16 at 37
107. (1975) 135 CLR 1 at 22-25, 45-47, 59, 62-63
108. (1975) 135 CLR 1 at 63
109. (1975) 135 CLR at 45
110. See sections 46, 47, 48, and 50 which concern the ascertainment of numbers of people and members; sections 55 and 56, which concern electoral divisions; and sections 57, 58, 59, 65 and 66 which make provision for quotas in electorates and a plus or minus 1/10 margin
111. (1975) 135 CLR 1 36-37
112. (1975) 135 CLR 1 at 61
113. Inserted into the *Constitution Act* 1889 (WA) by the *Acts Amendment* (Constitution) Act 1978 (WA), section 6
114. The section was substituted by the Acts Amendment (Electoral Reform) Act 1987 (WA) No 40, of 1987, section 7
115. Sections 2A, 6 and 9 were substituted by Act No 40 of 1987, sections 89, 92, 94, respectively
116. Section 73 was amended by s 6 of the Acts Amendment (Constitution) Act 1978 (WA), No 59 of 1978 ("the 1978 Act"). The amendment relevantly added sub-section (2) and expressed sub-section (1) to be subject to the succeeding provisions of the section
117. Western Australia, Legislative Assembly, Parliamentary Debates (Hansard), 22 March 1978 at 309
118. (1975) 135 CLR 1
119. Judgment was delivered on 1 December 1975. The second reading speech in the Legislative Assembly was on 22 March 1978

120. (1994) 181 CLR 96 at 106
121. Barras v *Averdeen Steam Trawling & Fishing Co* [1933] AC 402 at 446 per Lord Macmillan. See also *D'Emden* v *Pedder* (1904) 1 CLR 91 at 110; *Pillar* v *Arthur* (1912) 15 CLR 18 at 22, 25, 29-30; *Platz* v *Osborn* (1943) 68 CLR 133 at 141, 146, 146-147
122. *Salvation Army (Victoria) Property Trust* v *Shire of Fern Tree Gully* (1952) 85 CLR 159 at 174, 182; *R* v *Reynhoudt* (1962) 107 CLR 381 at 388; *Flaherty* v *Girgis* (1987) 162 CLR 574 at 594
123. [1982] WAR 248
124. [1982] WAR 248 at 252
125. Western Australia, Legislative Council, *Parliamentary Debates* (Hansard), 19 October 1977 at 2347
126. Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 September 1977 at 1055
127. Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 September 1977 at 1054
128. Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 September 1977 at 1054
129. Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 September 1977 at 1055
130. Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 September 1977 at 1056
131. Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 11 October 1977 at 2034-2036. The disproportionality between rural and metropolitan seats was even greater than now.
132. Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansad), 11 October 1977 at 2034-2036
133. Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansad), 11 October 1977 at 2048
134. Except for the time period for having referendums - Western Australia, Legislative Assembly, *Parliamentary Debate* (Hansard), 22 March 1978 at 309
135. Western Australia, Legislative Council, *Parliamentary Debates* (Hansard), 17 August 1978 at 2412
136. *Wilsmore* v *State of Western Australia* (1981) WAR 159
137. *Western Australia* v *Wilsmore* (1982) 149 CLR 79
138. (1994) 182 CLR 211 at 233-234
139. (1982) WAR 248 at 252-253
140. (1992) 177 CLR 1
141. (1992) 177 CLR 106
142. (1994) 182 CLR 104
143. (1994) 182 CLR 211
144. (1992) 177 CLR 106 at 185, 188
145. ACTV (1992) 177 CLR 106 AT 187. See also, *Cunliffe* v *The Commonwealth* (1994) 182 CLR 272 at 360
146. ACTV(1992) 177 CLR 106 at 184
147. *Theophanous* (1994) 182 CLR 104 at 189
148. Which he sees as only effected through sections 1, 7, 24, 30, 41 of the Constitution: *Theophanous* (1994) 182 CLR 104 at 199
149. *Theophanous* (1994) 182 CLR 104 at 201
150. ACTV (1992) 177 CLR 106 AT 230; *Theophanous* (1994) 182 CLR 104 AT 197
151. ACTV (1992) 177 CLR 106 at 137

152. ACTV (1992) 177 CLR 106 at 138. See also, *Nationwide News* (1992) 177 CLR 1 at 47 per Brennan J
153. ACTV (1992) 177 CLR 106 at 138 per Mason CJ, cf 182 per Dawson J. See also *Nationwide News* (1992) 177 CLR 1 at 47 per Brennan, J, 70–72 per Deane and Toohey JJ; *Theophanous* (1994) 182 CLR 104 at 171-173 per Deane J
154. (1992) 177 CLR 1 at 71
155. (1992) 177 CLR 1 at 72. See also ACTV (1992) 177 CLR 106 at 139-140 per Manson CJ
156. (1975) 135 CLR 1 at 36
157. Kirk, "Constitutional Implications from Representative Democracy", (1995) 23 *Federal Law Review* 37 at 50
158. T*heophanous* (1994) 182 CLR 104 at 173 per Deane J
159. Garran, *The Coming Commonwealth* (1897) at 149, quoted in Kirk, "Constitutional Implications from Representative Democracy", (1995) 23 *Federal Law Review* 37 at 50
160. *Jumbunna Coal Mine, No Liability* v *Victorian Coal Miners' Association* (1908) 6 CLR 309 at 367–368
161. *Australian National Airways Pty Ltd* v *The Commonwealth* (1945) 71 CLR at 81
162. *Lansell* v *Lansell* (1964) 110 353 at 366 per Taylor J; *R* v *Federal Court of Australia*; E*x parte WA National Football League* (1979) 143 CLR 190 at 233-234 per Mason J; *Attorney-General* (Vict); *Ex rel Black* v *The Commonwealth* (1981) 146 CLR 559 at 578 per Barwick CJ; *Street* v *Queensland Bar Association* (1989) 168 CLR 461 at 537 per Dawson J
163. *Cheatle* v *The Queen* (1993) 177 CLR 541 at 560
164. See the decisions on the power under s 51(v) of the Australian Constitution: *R* v *Brislan*; Ex parte Williams (1935) 54 CLR 262; Jones v The Commonwealth [No 2] (1965) 112 CLR 206
165. (1993) 177 CLR 541 at 549
166. (1993) 177 CLR 541 at 560
167. (1993) 177 CLR 541 at 560–561
168. *Nationwide News* (1992) 177 CLR 1 at 72 per Deane and Toohey JJ
169. The franchise varied from State to State, but women, Aboriginal and persons of particular racial groups, non-propertied persons, non-professional persons or those without university degrees were amongst those excluded from the franchise. For a discussion of State franchises, see McKinlay (1975) 135 CLR 1 at 19 per Barwick CJ
170. *McKinlay* (1975) 135 CLR 1 at 36 per McTiernan and Jacobs JJ; 69 per Murphy J
171. (1975) 135 CLR 1 at 36
172. *Commonwealth Electoral Act* 1918 (Cth)
173. *Constitution Act* 1902 (NSW); *Parliamentary Electorates and Elections Act* 1912 (NSW)
174. *Electoral Boundaries Commission Act* 1982 (Vic)
175. Except for five special electorates: *Electoral Act* 1992 (Q)
176. Constitution Act 1934 (SA)
177. *Legislative Council Electoral Boundaries Act* 1995 (Tas); *Constitution Act* 1934 (TAS)
178. (1975) 135 CLR 1 at 62
179. Commonwealth, Constitutional Commission, *Final Report of the Constitutional Commission*, (1988), vol 1 at par 4.145
180. (1945) 71 CLR 29 at 85
181. *Victoria* v *The Commonwealth* (1971) 122 CLR 353 at 402
182. Wesbery v *Sanders* (1964) 376 US 1; *Kirkpatrick* v *Preisler* (1969) 394 US 526; *White* v *Weiser* (1973) 412 US 783; *Karcher* v *Daggett* (1983) 462 US 725

183. (1975) 135 CLR 1 at 40 per McTiernan and Jacobs JJ, 47 per Gibbs J, 63 per Mason J
184. See also *Dixon* v *British Columbia (Attorney-General)*(1989) 59 DLR (4th) 247 at 262-263 per McLachlin CJSC; Reference re: *Electoral Boundaries Commission Act* 1991 81 DLR (4th) 16 at 37 per McLachlin J
185. *Dixon* v *British Columbia (Attorney-General)* (1989) 59 DLR (4th) 247 at 260 per McLanchlin CJSC
186. *Dixon* v *British Columbia (Attorney-General)*(1989) 59 DLR (4th) 247; *Reference re: Electoral Boundaries Commission Act* (1991) 81 DLR (4th) 16; *Reference re: Electoral Boundaries Commission Act* (Alberta) (1991) 86 DLR (4th) 447; *MacKinnon* v *Prince Edward Island* (1993) 101 DLR (4th) 362; *Reference re: Electoral Divisions Statutes Amendment Act,* 1993 (Alta) 1994 119 DLR (4th) 1
187. (1991) 81 DLR (4th) 16 at 26
188. (1991) 81 DLR (4th) 16 at 35
189. Creighton, "Apportioning Electoral Districts in a Representative Democracy", (1994) 24 *University of Western Australia Law Review* 78 at 83
190. *O'Donovan* v *The Attorney-General* [1961] IR 114 at 137
191. *Reference re: Electoral Boundaries Commission Act* (1991) 81 DLR (4th) 16 at 36
192. section 24
193. section 7
194. Quick and Garran, *The Annotated Constitution of the Australian Commonwealth,* (1901) at 414
195. (1975) 135 CLR 1 at 22 and 45 respectively
196. Quick and Garran, *The Annotated Constitution of the Australian Commonwealth,* (1901) at 455
197. See also sections 8 and 30 with their requirement that in the choosing of senators and members "each elector shall vote only once".
198. See Creighton, "Apportioning Electoral Districts in a Representative Democracy", (1994) 24 *University of Western Australia Law Review* 78 at 89.
199. (1975) 135 CLR 1 at 16-17 per Barwick CJ, 35 per McTiernan and Jacobs JJ, 43 per Gibbs J, 55 per Stephen J, 61 per Mason J
200. (1975) 135 CLR 1 at 45-46 per Gibbs J, 56-57 per Stephen J
201. (1992) 177 CLR at 75
202. Nationwide News (1992) 177 CLR 1 at 75-76 per Deane and Toohey JJ; ACTV (1992) 177 CLR 106 at 142 per Mason CJ, 168-169 per Deane and Toohey JJ, 217 per Gaudron J; Theophanous (1994) 182 CLR 104 at 122 per Mason CJ, Toohey and Gaudron JJ; Stephens (1994) 182 CLR 211 at 232 per Mason CJ, Toohey and Gaudron JJ, 257 per Deane J, cf 235 per Brennan J
203. sections 7, 9, 10, 15, 25, 29, 30, 31, 41
204. sections 7, 9, 10, 29, 30, 31
205. Section 15, in its current form, was substituted by the Constitution Alteration (Senate Casual Vacancies) Act 1977 (Cth)
206. By sections 7, 9, 10, 24, 27, 29, 30, 31, 34 and 51 (xxxvi)
207. *Clayton* v *Attorney-General for NSW* [1960] NSWR 592 at 618-619; *Clayton* v *Heffron* [1961] SR (NSW) 768 at 821, 833 and 855; *Clayton* v *Heffron* (1960) 105 CLR 214 at 248-249
208. (1960) 105 CLR 214 at 248-249
209. (1994) 182 CLR 104 at 202
210. (1907) 5 CLR 201 at 216
211. Craven, "A Few Fragments of State Constitutional Law", (1990) 20 University of Western Australia Law Review 353 at 367

212. Quick and Garran, *The Annotated Constitution of the Australian Commonwealth,* (1901) at 931
213. *Victoria* v *The Commonwealth* (1971) 122 CLR 353 at 371; *New South Wales* v *The Commonwealth* (1975) 135 CLR 337 at 372
214. *Victoria* v *The Commonwealth* (1971) 122 CLR 353 at 371–372; *New South Wales* v *The Commonwealth* (1975) 135 CLR 337 at 372; *China Ocean Shipping Co.* v *South Australia* (1979) 145 CLR 172 at 182; *The Commonwealth* v *Queensland* (1975) 134 CLR 298 at 336–337; *Bistricic* v *Rokov* (1976) 135 CLR 552 at 566; *Western Australia* v *Wilsmore (1982) 149 CLR 79 at 86; cf Western Australia* v *Wilsmore [1981]* WAR 179 at 182–183
215. Whatever affect the laws of the United Kingdom Parliament might have continued to have on the former colonies was removed by the Australia Act 1986
216. (1930) 44 CLR 319 at 391–392
217. (1989) 166 CLR 518
218. (1989) 90 ALR 263
219. (1995) 12 WAR 392
220. (1982) 149 CLR 79 at 86
221. *Western Australia v Wilsmore* [1981] WAR 179 at 184. See also, *Western Australia* v *Wilsmore* (1982) 149 CLR 79 at 96; *Boath* v *Wyvil* (1989) 85 ALR 621 at 636
222. (1994) 182 CLR 104 at 155–156 per Brennan J, 164–167 per Deane J, cf 201–202 per McHugh J
223. *Australian Railways Union* v *Victorian Railways Commissioners* (1930) 44 CLR 319 at 353 per Isaacs CJ, 389 per Starke J
224. As per Deane J in *Theophanous* (1994) 182 CLR 104 at 164–167. See also, *Attorney-General for Queensland* v *Attorney-General for the Commonwealth* (1915) 20 CLR 148 at 172; *New South Wales* v *The Commonwealth* (1975) 135 CLR 337 at 372
225. *Jones* v *Metropolitan Meat Industry Board* (1925) 37 CLR 252 at 259 per Isaacs J; *Permanent Finance Corporation Limited* v *Tornabene* [1968] Qd R 236 at 242
226. (1994) 182 CLR 104 at 166. And whilst, as pointed out by Deane J in Stephens (1994) 182 CLR 211 at 257, the majority of the Court in Theophanous (1994) 182 CLR 104 at 122 per Mason CJ, Toohey and Gaudron JJ, 164–166 per Deane J, held that the constitutional implication identified in ACTV applied to restrict the legislative powers of the States as well as the Commonwealth, Mason CJ, Toohey and Gaudron JJ did so on the basis of the indivisible nature of political discussion, not because of the operation of section 106
227. Lane's Commentary on the Australian Constitution, (1986) at 565. And see Gilbert, "Federal Constitutional Guarantees of the States: Section 106 and Appeals to the Privy Council from State Supreme Courts", (1978) 9 Federal Law Review 348 at 359–361
228. ACTV (1992) 177 CLR 106 at 137 per Mason CJ, 184 per Dawson J, 209 per Gaudron J, 209 per Gaudron J, 229 per McHugh J
229. *Constitution Act* 1889 (WA), section 2
230. ACTV (1992) 177 CLR 106 at 211 per Gaudron J; *Nationwide News* (1992) 177 CLR 1 at 71 per Deane and Toohey JJ
231. *Constitution Act* 1889 (WA), section 73
232. ACTV (1992) 177 CLR 106 at 137 per Mason CJ, 184 per Dawson J, 209–210 per Gaudron J, 229 per McHugh J; *Nationwide News* (1992) 177 CLR 1 at 46 per Brennan J, 71–72 per Deane and Toohey JJ
233. (1994) 182 CLR 211 at 232-234 per Mason CJ, Toohey and Gaudron JJ, 236 per Brennan J
234. Stephens (1994) 182 CLR 211 at 233 per Mason CJ, Toohey and Gaudron JJ; see also 236 per Brennan J

235. (1982) WAR 248 at 252-253
236. (1975) 135 CLR 1 at 61. See also at 57 per Stephen J
237. (1989) 59 DLR (4th) 247 at 266-267
238. The Metropolitan Area is defined as the region that was, at 1 January 1987, described in the Third Schedule to the Metropolitan Region Town Planning Scheme Act 1959 (WA) and Rottnest Island (section 1A of the 1947 Act)
239. *Dixon* v *British Columbia (Attorney-General)* (1989) 59 DLR (4th) at 247 at 268
240. (1989) 59 DLR (4th) 247 at 267
241. See, for instance, the *Electoral Act* 1992 (Q)
242. (1989) 59 DLR (4th) 247
243. See *Dixon* v *British Columbia* (Attorney-General) (1989) 59 DLR (4th) 247 at 284
244. (1975) 135 CLR 1
245. See (1975) 135 CLR 1 at 18-20, 23 per Barwick, 44, 46-47 per Gibbs J
246. Article 1, section 2 of the Constitution of the United States of American provides inter alia as follows: "The House of Representatives shall be composed of Members chosen ...by the People of the several States....." "Representatives ... shall be apportioned among the several States which may be included within this Union, according to their respective Numbers..." See *Wesberry* v *Sanders* (1994) 376 US 1. See also *Baker* v *Carr* (1962) US 186; *Wells* v *Rockefeller* (1969) 394 US 542; *Kirkpatrick* v *Preisler* (1969) 394 US 526; *White* v *Weiser* (1973) 412 US 783; *Karcher* v *Daggett* (1983) US 725; *Shaw* v *Reno* (1993) 125 L Ed 2d 511
247. (1975) 135 CLR 1 at 25; see also at 33
248. (1975) 135 CLR 1 at 46
249. See (1975) 135 CLR 1 at 61-62, 62-63
250. (1975) 135 CLR 1 at 61
251. (1975) 135 CLR 1 at 61
252. (1975) 135 CLR 1 at 57
253. (1975) 135 CLR 1 at 57
254. (1975) 135 CLR 1 at 36-37
255. (1975) 135 CLR 1 at 36
256. Section 30 of the Constitution is as follows: "Until the Parliament otherwise provides, the qualification of electors of members of the House of Representatives shall be in each State that which is prescribed by the law of the State as the qualification of electors of the more numerous House of Parliament of the State; but in the choosing of members each elector shall vote only once."
257. (1975) 135 CLR 1 at 56
258. See (1975) 135 CLR 1 at 35
259. (1975) 135 CLR 1 at 57 per Stephen J, at 61 per our Mason J, at 69 Murphy J
260. Section 8 of the Constitution is as follows: "The qualification of electors of senators shall be in each State that which is prescribed by this Constitution, or by the Parliament, as the qualification for electors of members of the House of Representatives; but in the choosing of senators each elector shall vote only once."
261. See fn **256**
262. For precise details, see McKinlay (1975) 135 CLR 1 at 19 per Barwick CJ; see also at 58 and 69
263. See McKinlay (1975) 135 CLR at 19
264. Section 7 of the Constitution is relevantly as follows: "Until the Parliament otherwise provides there shall be six senators for each original State. The Parliament may make laws increasing or

diminishing the number of senators for each State, but so that equal representation of the several Original States shall be maintained and that no Original State shall have less than six senators."

265. See also sections 29, 121 and 122 of the Constitution.

266. See (1975) 135 CLR 1 at 44 per Gibbs J; see also at 35-36 per McTiernan and Jacobs JJ

267. Sections 9, 15 and 29 of the Constitution

268. Sections 8, 30 and 41 of the Constitution

269. Sections 7, 24, 26, 27 and 128 of the Constitution

270. (1975) 135 CLR 1 at 57

271. See (1975) 135 CLR 1 at 65 per Murphy J. As to Art 1, section 2 of the Constitution of the United States of America, see *Wesberry* v *Sanders* (1964) 376 US 1; *Reynolds* v *Sims* (1964) 377 US 533; *Wells* v *Rockefeller* (1969) 394 US 542; *Kirkpatrick* v *Preisler* (1969) 394 US 526; *White* v *Weiser* (1973) 412 US 783; *Karcher* v *Daggett* (1983) 462 US 725

272. *Jumbunna Coal No Liability* v *Victorian Coal Miners' Association* (1908) 6 CLR 309 at 367-368 per O'Connor J. See also *Australian National Airways Pty Ltd* v *The Commonwealth* (1945) 71 CLR 29 at 81; *R* v *Public Vehicles Licensing Appeal Tribunal* (Tas); *Ex parte Australian National Airways Pty Ltd.* (1964) 113 CLR 207 at 225-226; *R* v *Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297 at 313-314; *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 127-128.

273. *James* v *The Commonwealth* (1936) 55 CLR 1 at 43 per Lord Wright MR. See also *Theophanous* v *Herald & Weekly Times Ltd.* (1994) 182 CLR 104 at 174 per Deane J where it is said that "in its application to contemporary conditions and exigencies, the Constitution must be treated as 'a living force' and not as 'a declaration of the will and intention of men long since dead'. "

274. (1975) 135 CLR 1 at 36

275. For a discussion of the relevance of community and minority interests, see *Reference re: Electoral Boundaries Commission Act* (1991) 81 DLR (4th) 16 at 26, 36, 38

276. For a discussion of the relevance of community and minority interests, see *Reference re: Electoral Boundaries Commission Act* (1991) 81 DLR (4th) 16 at 26, 36, 38

277. See particular sectionss 7 and 24 of the Constitution. See also sectionss 9, 27, 29, 121 and 122 of the Constitution

278. See 73(2)(c) of the 1889 Act was inserted by s 6 of the *Acts Amendment (Constitution) Act* 1978 (WA)

279. Section 6 of the *Acts Amendment (Constitution) Act* 1978 (WA) received Royal Assent and became operative on 15 November 1978

280. See sections 7, 8, 9 which, respectively, allowed for division into unequal electoral areas, electoral districts and electoral provinces

281. See *R* v *Foster* (1949) 79 CLR 43

282. The Metropolitan Area is defined as the region that was described as at 1 January 1987 in the Third Schedule to the *Metropolitan Region Town Planning Scheme Act* 1959 (WA) and Rottnest Island; see section 1A of the 1947 Act

283. (1975) 135 CLR 1

284. *Nationwide News Pty Ltd.* v *Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd.* v *The Commonwealth* (1992) 177 CLR 106; *Theophanous* v *Herald & Weekly Times Ltd.* (1994) 182 CLR 104; *Stephens* v *West Australian Newspapers Ltd* (1994) 182 CLR 211

285. See, for example, *Wesberry* v *Sanders* (1964) 376 US 1; *Reynolds* v *Sims* (1964) 377 US 533; *Kirkpatrick* v *Preisler* (1969) 394 US 526; *White* v *Weiser* (1973) 412 US 783; *Karcher* v *Daggett* (1983) 462 US 725

286. (1964) 376 US 1 at 7-8, 18
287. (1973) 412 US 783
288. (1983) 462 US 725
289. (1964) 377 US 533 at 555
290. (1964) 377 US 533 at 562
291. *Baker* v *Carr* (1962) 369 US 186; *Gray* v *Sanders* (1963) 372 US 368; *Reynolds* v *Sims* (1964) 377 US 533; *Hadley* v *Junior College District* (1970) 397 US 50; *Davis* v *Bandemer* (1986) 478 US 109
292. *Dixon* v *British Columbia (Attorney-General)* (1989) 59 DLR (4th) 247 at 262
293. (1962) 369 US 186
294. (1975) 135 CLR 1
295. See Zines, "The Sovereignty of the People", (paper delivered at the Conference on The Constitution and Australian Democracy, Canberra, 9-11 November 1995)
296. *Australian Capital Television* (1992) 177 CLR 106 at 138 per Mason CJ
297. cf *State of Tasmania* v *The Commonwealth of Australia and State of Victoria* (1904) 1 CLR 329 at 338
298. *Attorney-General for NSW* v *Brewery Employees Union of NSW* (1908) 6 CLR 469 at 611-612; cf *Windeyer J in Victoria* v *The Commonwealth* ("the Payroll Tax Case") (1971) 122 CLR 353 at 394-395

"Our task is simply to interpret and apply the provisions of the Constitution as a statute of the Imperial Parliament. That does not mean that it is not a statute of a special kind. It is. It is the instrument of government for Australia. It was enacted because, as the preamble to the Constitution Act states, the people of the Australian Colonies had agreed to unite in one indissoluble Federal Commonwealth under the British Crown and under the Constitution that the Act established."

299. (1908) 6 CLR 309
300. *R* v *Public Vehicles Licensing Appeal Tribunal* (Tas); *Ex parte Australian National Airways Pty Ltd.* (1964) 113 CLR 207 at 225-226; *R* v *Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297 at 313-314; *The Commonwealth* v *Tasmania* (*"the Tasmanian Dam Case"*) (1983) 158 CLR 1 at 128
301. *Jumbunna Coal Mine* (1908) 6 CLR 309 at 367-368
302. *Australian Capital Television* (1992) 177 CLR 106 at 135 per Mason CJ
303. *Australian Capital Television* (1992) 177 CLR at 135 per Mason CJ
304. *Australian Capital Television* (1992) 177 CLR 106
305. (1992) 177 CLR 1 at 70
306. Judge Posner, (1992) 59 *University of Chicago Law Review* 433), has explained top-down and bottom-up reasoning as follows: "In top-down reasoning, the judge or other legal analyst invents or adopts a theory about an area of law - perhaps about all law - and uses it to organise, criticise, accept or reject, explain or explain away, distinguish or amplify the existing decisions to make them conform to the theory and generate an outcome in each new case as it arises that will be consistent with the theory and with the canonical cases, that is, the cases accepted as authoritative within the theory. The theory need not be, perhaps never can be, drawn 'from' law; it surely need not be articulated in lawyers' jargon. In bottom-up reasoning, which encompasses such familiar lawyers' techniques as 'plain meaning' and 'reasoning by analogy', one starts with the words of a statute or other enactment, or with a case or a mass of cases, and moves from there - but doesn't move far, as we shall see. The top-downer and the bottom-upper do not meet."

Although Judge Posner said that he was associated with several top-down theories and that

he did not think there was "much to bottom-up reasoning" ((1992) 59 *University of Chicago Law Review* 433 at 435), he accepted that "legal reasoning from the bottom up is the more familiar, even the more hallowed, type" ((1992) 59 *University of Chicago Law Review* 433 at 434).

307. (1994) 182 CLR 182 CLR 104 at 198
308. *Amalgamated Society of Engineers* v *Adelaide Steamship Co. Ltd.* (1920) 28 CLR 129
309. (1992) 177 CLR 106
310. cf Williams, "*Engineers is Dead, Long Live the Engineers!*" (1995), 17 *Sydney Law* Review 62
311. cf Fraser, "In Defence of Republicanism: A Reply to George Williams", (1995) 23 *Federal Law Review* 362 at 372-373
312. *R* v *Sharkey* (1949) 79 CLR 121 at 148 per Dixon J
313. *Melbourne Corporation* v *The Commonwealth* (1947) 74 CLR 31
314. *The Commonwealth* v *Cigamatic Pty Ltd.* (In Liquidation) (1962) 108 CLR 372
315. (1994) 182 CLR 211
316. (1994) 182 CLR 104 at 125-126
317. Australian Capital Television (1992) 177 CLR 106 at 135 per Mason CJ
318. *Damjanovic & Sons Pty Ltd* v *The Commonwealth* (1968) 117 CLR 390 at 396 *Buck* v *Bavone* (1976) 135 CLR 110 at 137
319. (1913) 17 CLR 261 at 278
320. (1977) 139 CLR 585 at 599
321. (1994) 181 CLR 18 at 38
322. Bryce, *Studies in History and Jurisprudence*, (1901), vol 2 at 53
323. *Australian Capital Television* (1992) 177 CLR 106 at 138. There are, of course, important differences between the legal sovereignty of the Imperial Parliament and the legal sovereignty of the Australian people, the most important of which is that the people cannot initiate change to the Constitution. They can only approve what the Parliament of the Commonwealth proposes (Constitution, section 128)
324. Brugger and Jaensch, *Australian Politics: Theory and Practice*, (1985) at 212
325. Quick and Garran, The Annotated Constitution of the Australian Commonwealth (1901) at 189; Official Report of the *National Australasian Convention Debates* (Adelaide), 15 April 1897 at 668
326. Section 122 of the Constitution; *Western Australia v The Commonwealth* (1975) 134 CLR 201 at 271-272, 274-275; 283; 286-287; *Queensland* v *The Commonwealth* (1977) 139 CLR 585
327. *Western Australia* v *The Commonwealth* (1975) 134 CLR 201 at 271 per Mason J
328. *Attorney-General* (NSW); *Ex rel McKellar* v *the Commonwealth* (1977) 139 CLR 527
329. *Western Australia* v *The Commonwealth* (1975) 134 CLR 201; *Queensland* v *The Commonwealth* (1977) 139 CLR 585
330. (1975) 135 CLR 1 at 62
331. Birch, *Representative and Responsible Government: An Essay on the British Constitution*(1964) at 23-24; Maitland, *The Constitutional History of England*, (1908) at 363; Reeve and Ware, *Electoral Systems; A Comparative and Theoretical Introduction*, (1992) at 49
332. *An Essay on Government*, (1820) at 35 quoted in Birch, *Representative and Responsible Government: An Essay on the British Constitution*, (1964) at 46
333. (1964) 377 US 533 at 562
334. Birch, *Representative and Responsible Government: An Essay on the British Constitution*(1964) at 62-63
335. Chamberlain et al, *The Radical Programme* [1885], edited with an introduction by D.A. Hamer, (1971) at 21

336. Birch, *Representative and Responsible Government: An Essay on the British Constitution,* (1964) at 24
337. Birch, *Representative and Responsible Government: An Essay on the British Constitution*, (1964) at 70
338. Birch, *Representative and Responsible Government: An Essay on the British Constitution*, (1964) at 67, 70
339. *Parliamentary Electorates and Elections Act* 1893 (NSW), section 23
340. Constitution Act Amendment Act 1890 (Vic), sections 43-45, 50-51
341. *Elections Act* 1885 (Q), sections 6 and 8
342. *Constitution Acts Amendment Act* 1899 (WA), sections 15 and 26
343. *Constitution Acts Amendment Act* 1899 (No 2) (Tas), sections 3 and 4
344. Electoral Code 1896 (SA), sections 14-18
345. cf *McKinlay* (1975) 135 CLR 1 at 44 per Gibbs J
346. Section 41 of the Constitution provided, however: "No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth."

    Because of federation, women were entitled to vote in South Australia and Western Australia, section 41 gave women in those two States a right to vote in federal elections which was denied to women in other States. The discrimination was abolished by section 3 of the Franchise Act 1902 (Cth). But it is further evidence that it was the federal Parliament and not the Constitution that concerned itself with the equality of individual voters. The operation of section 41 is now spent. This Court has held that the "right to vote" in section 41 is the right (if any) that was possessed under State law when the federal franchise was established and that section 41 does not confer a right to vote in a federal election on any person who from time to time has the right to vote at a State election; *R* v *Pearson*; Ex parte Sipka (1983) 152 CLR 254
347. cf Reid and Forrest, *Australia's Commonwealth Parliament 1901-1988*, (1989) at 86-87
348. *Board of Fire Commissioners (NSW)* v *Ardouin* (1961) 109 CLR 105 at 118 per Kitto J
349. See, for example, Bogdanor (ed), The Blackwell Encyclopædia of Political Institutions, (1987) at 532-534
350. See Australia, *Final Report of the Constitutional Commission*, (1988), vol 1 at 154: "We recognise that one vote one value is a controversial issue in Australia. As the evidence suggests, perceptions of the democratic process vary considerably. However, we believe one vote one value is right in principle. Further, we are concerned with what is appropriate for Australia. We appreciate the problems of distance experienced in isolated areas. But these are less significant now and can be overcome largely by such things as providing elected representatives with appropriate transport and communication facilities and electoral allowances. Besides, the same arguments could be used on behalf of those Australian citizens who suffer other disadvantages, such as poverty. The fundamental principle is that Parliamentary democracy is concerned with the representation of electors."
351. Referendum held on 18 May 1974 on the proposed law for the alteration of the Constitution entitled "Constitution Alteration (Democratic Elections) 1974".
352. Brugger and Jaensch, *Australian Politics: Theory and Practice*, (1985) at 214; Australian Government Gazette, No 50C, 19 June 1974
353. The proposed section 124 C provided:

> "(1) Where a law provides for electoral divisions in an electoral region, the divisions shall be determined so that the number of electors in each division does not depart to a greater extent than one-tenth more or one-tenth less from the number calculated under sub-section (2)
>
> (2) For the purposes of subsection (1), a number, in relation to a particular electoral division, shall be calculated by:
>
> (a) dividing the total number of electors in all the electoral divisions in the electoral region by the total number of members to be chosen in all those divisions; and
>
> (b) multiplying the result by the numbers of members to be chosen for that electoral division".

354. Australian Electoral Commission, *1988 Referendums: Statistics* (1988) at 1
355. *Dixon* v *British Columbia (Attorney-General)* (1989) 59 DLR (4th) 247; *Reference re: Electoral Boundaries Commission Act* (1991) 81 DLR (4th) 16
356. (1989) 59 DLR (4th) 247 at 262
357. Brugger and Jaensch, *Australian Politics: Theory and Practice*, (1985) at 208
358. Brugger and Jaensch, *Australian Politics: Theory and Practice*, (1985) at 209–210
359. Birch, *Representative and Responsible Government: An Essay on the British Constitution*, (1964) at 13–14
360. (1975) 135 CLR 1 at 57
361. (1975) 135 CLR 1 at 57
362. Australia, *Final Report of the Constitutional Commission*, (1988) vol 1 at 155
363. Birch, *Representative and Responsible Government; An Essay on the British Constitution,* (1964) at 74–75, 76–78
364. Rose, "Elections and electoral systems: choices and alternatives" in Bogdanor and Butler (eds), *Democracy and Elections: Electoral systems and their political consequences (1983) at 40–43; Lijphart, Electoral System and Party Systems: A Study of Twenty-Seven Democracies* 1945–1990, (1993) at 124–130
365. Bagger, *The Supreme Court and Congressional Apportionment: Slippery Slope to Equal Representation Gerrymandering*, (1985) 38 Rutgers Law Review 109 at 110–111. In *Karcher* v *Daggett* (1983) 462 US 725 at 765, Stevens J said:

> "[I]f population equality provides the only check on political gerrymandering, it would be virtually impossible to fashion a far and effective remedy in a case like this. For if the shape of legislative districts is entirely unconstrained, the dominant majority could no doubt respond to an unfavourable judgment by providing an even more grotesque-appearing map that reflects acceptable numerical equality with even greater political inequality."

The Constitutional Commission in its final report also accepted that a plus or minus 10 per cent tolerance from a quota would not ensure the principle of equal suffrage and would not address the

problem of gerrymanders (Australia, *Final Report of the Constitutional Commission* (1988) Vol 1 at 155)

366. Western Australian Electoral Commission, 1993 *State General Election Report,* (1993) at 67
367. Western Australia, Commission on Government, *Discussion Paper No 3, ElectoralSystem – Legislative Council: Electoral System – Legislative Assembly*; March 1995 at 9, 19
368. Rydon, "Electoral Inequalities in the 1990 Federal Elections", (1993) 28 *Australian Journal of Political Science* 142 at 143
369. Section 106, which is found in Ch V of the Constitution, provides: "The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State."
370. (1994) 182 CLR 211 at 233
371. section 72(1), first proviso; see *Western Australia* v *Wilsmore* (1982) 149 CLR 79 esp at 93–98 per Wilson J
372. section 73(2)(g); see also section 73(2)(e) and section 73(3), (4), (5), (6)
373. (1994) 182 CLR 211 at 233–234
374. Western Australia, Legislative Assembly *Parliamentary Debates* (Hansard) 22 March 1978 at 308
375. Western Australia, Legislative Council *Parliamentary Debates* (Hansard), 17 August 1978 at 2412
376. *McKinlay* (1975) 135 CLR 1
377. (1992) 177 CLR 1
378. (1992) 177 CLR 106
379. (1994) 182 CLR 104
380. (1994) 182 CLR 211
381. (1994) 182 CLR 272
382. (1994) 182 CLR 211 at 232–234, 236, 257, 257–258
383. The short title of the 1947 Act was changed from *Electoral Districts Act* 1947 (WA) to *Electoral Distribution Act* 1947 (WA) by section 86 of the 1987 Act
384. *Commission on Government Report*, No 1, August 1995 at 329
385. (1985) 135 CLR 1
386. Acts Amendment (Constitution) Act 1978 (WA), section 6
387. (1986) 478 US 109 at 167
388. Loveday and Martin, *Parliament Factions and Parties*, (1966) at 1
389. (1986) 478 US 109
390. Brennan, White, Marshall, Blackmun, Powell and Stevens JJ; Burger CJ, Rehnquist and O'Connor JJ Dissenting
391. *Shaw* v *Reno* (1993) 125 L Ed 2d 511
392. See *United State* v *Hays* (1995) 132 Ed 2d 635
393. (1982) 149 CLR 79 at 93–96. See also the paper by the Hon. Justice French, "Manner and Form in Western Australia: An Historical Note", (1993) 23 University of Western Australia Law Review 335 at 340–343
394. *See McCawley* v *The King* (1918) 26 CLR 9 at 28, 31, 51–52, 82–83; The*Commonwealth* v *Limerick Steamship Co. Ltd. and Kidman* (1924) 35 CLR 69 at 101–103; The *Commonwealth* v *Kreglinger & Fernau Ltd and Bardsley* (1926) 37 CLR 393 at 418–420, 425–426; *Australian Railways Union* v *Victorian Railways Commissioners* (1930) 44 CLR 319 at 353, 389–390, 391–392; *Stuart-Robertson* v *Lloyd* (1932) 47 CLR 482 at 491; Gilbert, "Federal Constitutional Guarantees of the States: Section 106 and Appeals to the Privy Council from State Supreme

Courts", (1978) 9 Federal Law Review 348 at 350–357; Thomson, "State Constitutional Law: The Quiet Revolution", (1990) 20 *University of Western Australia Law Review* 311 at 316

395. 53 & 54 Vict c 26
396. (1982) 149 CLR 79 at 93
397. (1982) 149 CLR 79 at 105 per Brennan J. See also Stephens (1994) 182 CLR 211 at 232–234 per Mason CJ, Toohey and Gaudron JJ
398. Commission on Government Report, No 1, August 1995 at 277
399. Section 92 of the 1987 Act inserted the words "community of interests". However, the words in the 1947 Act, reprinted as at 26 November 1987, are "community of interest". Under section 8 of the Reprints Act 1984 (WA), pursuant to which the 1947 Act was reprinted, the reprinted Act should be taken to be correct.
400. (1962) 369 US 186
401. Lardy, "The American Supreme Court and the Right to Vote: Early Doctrine and Developments", (1992) 23 Cambrian Law Review 69
402. See *US Terms Limits Inc* v *Thornton* (1995) 131 L Ed 2d 881, which holds that the States may not impose limits on the length of time a representative may serve in Congress
403. (1964) 376 US 1 at 7–8
404. (1969) 394 US 526 at 530–531
405. (1973) 412 US 783
406. See also *Karcher* v *Daggett* (1983) 462 US 725 where, in the invalidated plan for 14 districts in New Jersey, the disparity between the largest district (with a population of 527,472) and the smallest district (with 523,798) was 0.6984 per cent
407. *Fortson* v *Morris* (1966) 385 US 231
408. *Wells* v *Edwards* (1972) 347 F Supp 453 at 455–456; summarily affd (1973) 409 US 1095; *Chisom* v *Roemer* (1991) 115 L Ed 2d 348 at 359–360, 373
409. *Hadley* v *Junior Collect District* (1970) 397 US 50. The plaintiffs were residents and tax-payers of the Kansas City School District and elected officials were trustees who conducted and managed the affairs of that District
410. Chapman v *Meiser* (1975) 420 US 1 at 26-27. See also *Davis* v *Mann* (1964) 377 US 678 at 686; *Mahan* v *Howell* (1973) 410 US 315; *Connor* v *Finch* (1977) 431 US 407 at 415
411. Rotunda and Nowak, *Treatise on Constitutional Law*, 2nd ed (1992), vol 3 §18.36 at 452
412. (1973) 410 US 315
413. (1977) 431 US 407
414. (1983) 462 US 835
415. 2nd ed (1992), vol 3, §18.36 at 449
416. (1989) 59 DLR (4th) 247
417. (1991) 81 DLR (4th) 16. These decisions were applied by the Supreme Court of Prince Edward Island in *McKinnon* v *Prince Edward Island* (1993) 101 DLR (4th) 362
418. (1989) 59 DLR (4th) 247 at 263
419. (1989) 59 DLR (4th) 247 at 262
420. (1964) 376 US 1
421. (1962) 369 US 186
422. (1964) 377 US 533
423. (1989) 59 DLR (4th) 247 at 264
424. Quick and Garran recognised that this was so and gave examples; see the passage set out in *Theophanous* (1994) 182 CLR 104 at 170

425. *R* v *Kirby; Ex parte Boilermakers' Society of Australia* (19560 94 CLR 254 at 275; affd (1957) 95 CLR 529
426. (1956) 94 CLR 254 at 276–278. See also *R* v *Sharkey* (1949) 79 CLR 121 at 148
427. (1992) 177 CLR 106 at 137–138, 150, 168, 184–185, 210–211, 229
428. *Theophanous* (1994) 182 CLR 104 at 189 per Dawson J, 199–200 per McHugh J
429. cf Stone, Legal System and Lawyers' Reasoning, (1964) at 263–267
430. (1962) 369 US 186 at 283–297
431. (1964) 377 US 533 at 620–625
432. 48 & 49 Vic c 60
433. Bryce, Studies in History and Jurisprudence, (1901), vol 1 at 536
434. Lefroy, "The Commonwealth of Australia Bill", (1899) 15 *Law Quarterly Review* 155 (Pt 1) at 158, 281 (Pt 2) at 283–284
435. Mill, *Utilitarianism, Liberty and Representative Government, Everyman Edition*, (1957) at 207
436. Mill, *Utilitarianism, Liberty and Representative Government, Everyman Edition,* (1957) at 228–229
437. McKinlay (1975) 135 CLR 1 at 57 per Stephen J
438. See *Theophanous* (1994) 182 CLR 104 at 200 per McHugh J; cf *Cheatle* v *The Queen* (1993) 177 CLR 541 at 560 in the judgment of the Court
439. See Uhr, "Proportional Representation in the Australian Senate: Recovering the Rationale", (1995) 30 Australian Journal of Political Science 121 at 129
440. Mills, *Utilitarianism, Liberty and Representative Government*, Everyman Edition, (1957) at 373
441. vol 3 at 673–674
442. *Parliamentary Debates* (Hansard), 1902, vol 7 at 9529–9543, 9745–9764; vol 8 at 9765–9770, 10325–10352, 10405–10444, 10493–10527, 10595–10637, 10674–10716, 10737–10766, 10788–10819, 10855–10877, 10922–10960, 11006–11032, 11069–11098, 11151–11156; vol 9 at 11157–11163; vol. 10 at 13353–13361, 13783–13796, 13841–13879
443. *The Electoral Act* 1896 (Tas). See also Jethro Brown, "The Hare system, with special reference to its application in Tasmania", (1899) 15 *Law Quarterly Review* 51
444. Reid and Forrest, *Australia's Commonwealth Parliament 1901–1988*, (1989) at 94
445. Senate, *Parliamentary Debates* (Hansard), 1902, vol 8 at 10426. See also Uhr, "Proportional Representation int he Australian Senate: Recovering the Rationale", (1995) 30 *Australian Journal of Political Science* 121 at 127–132; Hunt, *American Precedents in Australian Federation*, (1968) at 168–172
446. Bryce, *Studies in History and Jurisprudence*, (1901), Vol 2 at 53
447. See Quick and Garran, The *Annotated Constitution of the Australian Commonwealth*, (1901) at 453–454
448. (1975) 135 CLR 1 at 44. See also at 21 per Barwick CJ, 56 per Stephen J, 61 per Mason J
449. (1975) 135 CLR 1 at 21 per Barwick CJ, 44 per Gibbs J
450. (1975) 135 CLR 1 at 35 per McTiernan and Jacobs, 61 per Mason J
451. McKinlay (1975) 135 CLR 1 at 22 per Barwick CJ, 45 per Gibbs J
452. The federal Parliament has provided that the Queensland Parliament may not make such laws: *Commonwealth Electoral Act* 1918, section 39
453. Quick and Garran, The *Annotated Constitution of the Australian Commonwealth*, (1901) at 452
454. This ratio had only appeared in the draft Bill which was presented to the Convention on 12 April 1897 in Adelaide. See *Convention Debates*, vol 3 at 435
455. See *Convention Debates*, vol 3 at 683–710; vol 5 at 1829–1837
456. *Convention Debates*, vol 3 at 701

457. *Convention Debates*, vol 1 at 612–613. It had provided for one member for every 30,000 people
458. *Convention Debates,* vol 3 at 701–702
459. *The Federal Council (Adopting) Act* 1885 (Q), section 3; *The (Victorian) Federal Council Act* 1885 (Vic), section 3; *The (Tasmanian) Federal Council Act* 1885 (Tas), section 3; *The Federal Council Adopting Act* 1888 (SA), section 3
460. *The Federal Council (Adopting) Act*, sectiom 2
461. (1975) 135 CLR 1 at 44
462. (1975) 135 CLR 1 at 68–69
463. Reid and Forrest, Australia's Commonwealth Parliament 1901–1988, (19890??? at 87.
464. Speaking as the Minister with the carriage in the Senate of the Bill for the *Commonwealth Electoral Act* 1902, *Parliamentary Debates* (Hansard), 1902, vol 8 at 10702
465. (1975) 135 CLR 1 at 62
466. *Convention Debates*, vol 3 at 683–710
467. cf *Missouri* v *Holland* (1920) 252 US 416 at 433 per Holmes J, quoted by Windeyer J in *Spratt* v *Hermes* (1965) 114 CLR 226 at 272
468. See McKinlay (1975) 135 CLR 1 at 19
469. 11 & 12 Geo 6 c 65. See also the *Representation of the people Act* 1949 (UK), section 1(1)
470. Wade and Phillips, *Constitutional Law*, 3rd ed. (1946) at 73
471. Senate, *Parliamentary Debates*, (Hansard), 7 March 1902, vol 8 at 10747
472. *R* v *Pearson; Ex parte Sipka* (1983) 152 CLR 254 at 264–265, 277–279
473. (1926) 38 CLR 380
474. Crisp, "*Compulsory Voting in Australia*", (1950) 4 Parliamentary Affairs 84
475. See Reid and Forrest, *Australia's Commonwealth Parliament* 1901–1988, (1989) at 118–122
476. Reid and Forrest, *Australia's Commonwealth Parliament* 1901–1988, (1989) at 86–87
477. (1994) 182 CLR 104 at 203
478. *Convention Debates*, vol 1 at 619
479. *McKinlay* (1975) 135 CLR 1 at 20 per Barwick CJ
480. (1975) 135 CLR 1 at 45
481. (1975) 135 CLR 1 at 45–46 per Gibbs J
482. House of Representatives, *Parliamentary Debates* (Hansard), 1902 vol 10 at 13867
483. (1964) 377 US 533 at 623–624
484. (1992) 174 CLR 455
485. (1992) 177 CLR 106. The various terms in which the proposition was formulated by the members of the Court are set out by Brennan J in Cunliffe (1994) 182 CLR 272 at 326
486. Stephens (1994) 182 CLR 211 at 235
487. cf McKinlay (1975) 135 CLR 1 at 61 per Mason J
488. (1975) 135 CLR 1 at 36
489. *Commonwealth Electoral Act* 1973 (Cth); *Parliamentary Electorates and Elections (Amendment) Act* 1970 (NSW); *Constitution Act Amendment Act* (No 2) 1970–1971 (SA); *Electoral Act Amendment Act* (No 2) 1970 WA); *The Constitution Act Amendment (Qualifications) Act 1973 (Vic); Elections Act and the Criminal Code Amendment Act* 1973 (Q); *Age of Majority Act* 1973 (Tas). See also *King* v *Jones* (1972) 128 CLR 221 at 263–264
490. (1989) 59 DLR (4th) 247
491. (1989) 59 DLR (4th) 247 at 266
492. (1991) 81 DLR (4th) 16 at 35
493. (1991) 81 DLR (4th) 16 at 36

494. (1991) 81 DLR (4th) 16 at 38
495. (1992) 369 US 186
496. See *Miller* v *TCN Channel Nine Pty Ltd.* (1986) 161 CLR 556 at 614–615 per Brennan J
497. (1994) 182 CLR 211 at 232–233 per Mason CJ, Toohey and Gaudron JJ, 236 per Brennan J
498. (1994) 182 CLR 211 at 236
499. (1994) 182 CLR 104
500. (1992) 177 CLR 1
501. (1992) 177 CLR 106
502. (1994) 182 CLR 104 at 120–121 per Mason CJ, Toohey and Gaudron JJ
503. (1994) 182 CLR 104 at 163 per Deane J
504. (1994) 182 CLR 211
505. (1994) 182 CLR 211 at 257
506. (1994) 182 CLR 211 at 232
507. (1992)177 CLR 1 at 75–76 per Deane and Toohey JJ
508. (1992) 177 CLR 106 at 142 per Mason CJ, 168–169 per Deane and Toohey JJ, 216–217 per Gaudron J
509. (1994) 182 CLR 104 at 122
510. (1992) 177 CLR 106 at 142, 168–169, 215–217
511. The Annotated Constitution of the *Australian Commonwealth*, (1091) at 162
512. Such a proposal had been made in 1892 in the Queensland Constitution Bill introduced in the Legislative Assembly by *Sir Samuel Griffith* but defeated in the Legislative Council. See *Joyce, Samuel Walker Griffith,* (1984) at 147, 173–175, 191; *Legislative Council, Parliamentary Debates* (Hansard), 26 May 1892, vol 68 at 792–795; Legislative Council, 25 and 26 October 1892, vol 66 at 162–167, 169–177
513. *Clayton* v *Heffron* (1960) 105 CLR 214 at 248–249
514. sections 7, 9, 29, 123 and 124
515. (1994) 182 CLR 211 at 232–233
516. (1994) 182 CLR 211 at 233
517. section 73(1), first proviso; see *Western Australia* v *Wilsmore* (1982) 149 CLR 79, so at 93–98 per Wilson J
518. section 73(2)(g); see also section 73(2)(e) and section 73(3), (4), (5), (6)
519. *Mercure* v *The Queen* (1988) 48 DLR (4th) 1 at 65
520. The Hon. Justice French, "Manner and Form in Western Australia; An Historical Note", (1993) 23 *University of Western Australia Law Review* 335 at 338
521. [1932] AC 526 at 539–540
522. [1981] WAR 179 at 184
523. Differing views are expressed in Godlsworthy, " Manner and Form in the Australian States", (1987) 16 *Melbourne University Law Review* 403 at 426–428
524. [1965] AC 172 at 197
525. 11 Geo 6 c 7
526. *Ibralebbe* v *The Queen* [1964] Ac 900 at 922–923; *Liyanage v The Queen* [1967] 1 AC 259 at 283–286
527. (1975) 134 CLR 81 at 162–164
528. (1980) 25 SASR 389 at 420-422; see also Chander, "Sovereignty, Referenda, and the Entrenchment of a United Kingdom Bill of Rights", (1991) 101 Yale Law Journal 457 at 463–467

529. Section 73(2)(c) of the 1889 Act imposes a manner and form requirement upon any Bill of the Western Australian legislature which expressly or impliedly in any way affects, inter alia, so 50 and 51 of the 1889 Act. Section 14 of the Australia Acts amended so 50 and 51 and presumably was effective to do so at least as a step taken by and pursuant to the Australia Act 1986 (Imp)

530. cf *Clydesdaly* v *Hughes* (1934) 51 CLR 518 at 528–529; *Western Australia* v *Wilsmore* (1982) 149 CLR 79 at 102–103

531. (1994) 182 CLR 211 at 233–234

532. Parliamentary Debates (Hansard), 17 August 1978 at 2412

533. Parliamentary Debates (Hansard), 22 March 1978 at 308

534. (1989) 59 DLR (4th) 247 at 253–255

THEME 3

REGISTRATION OF VOTERS

THE GAUHATH HIGH COURT

(High Court of Assam, Nagaland, Meghalaya, Manipur, Tripura Mizoram & Arunachal Pradesh)

Civil Rule No 1566, 1616, 1836 & 2814 OF 1993

Mr HA Choudhury	**Petitioner in CR 1566 of 1993**
Md Rustam Ali & others	**Petitioners in CR 1616 of 1993**
Md Mustafa K Passah & others	**Petitioners in CR 1836 of 1993**
Sri Sajal Kr Roy & others	**Petitioners in CR 2814 of 1993**

versus

Election Commission of India	**Respondents & others**

PRESENT

THE HON. CHIEF JUSTICE MR MANISANA
THE HON. JUSTICE SMTI M SARMA

For the Petitioners	:	Mr B Sen Mr B K Das Mr AFG Osmani Mr BM Mahanta Mr A Sharif Mr MH Rajbarbhuyan
For the Respondents	:	Mr SN Bhuyan, AG. Assam, Mr DN Choudhury Mr BP Kataky Mr KP Sarma Mr B Choudhury Mr RP Sarma, Advocates
Dates of Hearing	:	17. 12. 93; 21. 12. 93; 5. 1. 94; 6. 1. 94; 7. 1. 94
Date of Judgement & Order	:	28 January 1994

Before: *Manisana, CJ and S MT. M. Sharma, J*

Elections *– Registration of voters, citizenship qualification – Procedure for ascertaining citizenship for purpose of preparation of electoral roll – Whether Election Commission had power to exclude certain categories of individuals, namely, encroachers VGR/PGR/Forest Lands/Khas lands or other government lands, from the preliminary roll – Ordinary resident in a constituency – Whether preparation of electoral roll was part of election process – Whether Court had jurisdiction to issue directions to Election Commission.*

Background Facts: *The Election Commission, from time to time, issued instructions to the Chief Electoral Officer, Assam, and other concerned authorities in connection with the revision of the electoral rolls. Special Revised Instructions were issued by the Election Commission on 18.5.93, partly superseding earlier instructions. The petitioners challenged certain clauses of the Instructions on the grounds that they were violative of Article 14 of the Constitution and the Representation of the People Act, 1950, and the rules made thereunder.*

Held: *That the instruction under clause 7.4 was violative of Article 14 of the Constitution and of the 1950 Act and the Rules; that the classification of individuals in the Instructions was vague and unreasonable and was against the provisions of the Representation of the People Act, 1950, and the Rules; that the Court had jurisdiction to issue directions to the Election Commission.*

Cases cited in Judgement:

Hari Prasad v *V. B. Raju (1973) AIR SC 2602*

Pampakavi Rayappa v *B. D. Jatti (1971) AIR SC 1348*

Indrajit Barua v *Election Commission (1986) AIR SC 103*

JUDGEMENT AND ORDER

MANISANA, CJ

1. These writ petitions, namely Civil Rule Nos 1566 of 1993, 1616 of 1993, 1836 of 1993 and 2814 of 1993, were heard together and are disposed of by a common judgement as the facts and law involved in all the petitions are common. Civil Rule Nos 1836 of 1993 and 2814 of 1993 were taken up for final disposal at the stage of admission as agreed by the learned counsel on both sides. In these petitions, the petitioners have challenged clauses 7, 9 and 10 of Part – VI, and clauses 3 and 4 of Part – VII of the "Special Revised Instructions" issued by the Election Commission on 18. 5. 93 in connection with the intensive revision of electoral rolls in the State of Assam on the grounds that the instructions are violative of Article 14 of the Constitution and the Representation of the People Act, 1950, and rules made thereunder.

2. The Election Commission, from time to time, issued instructions to the Chief Electoral Officer, Assam, and other concerned authorities in connection with revision of electoral rolls. The Special Revised Instructions were issued partly superseding earlier instructions. The Special Revised Instructions contains ten (10) parts under different heads or titles. They are thus: Part I – Identification of areas having substantial presence of foreign nationals; Part 11 – House-to-house enumeration; Part – III – Supervisory checks; Part IV – Checks by senior officers; Part V – Preparation of the list of enumerated persons; Part VI – Verification of the list by the District Magistrate; Part VII – Preparation and printing of draft electoral rolls; Part VIII – Draft publication of rolls; Part IX – Disposal of claims and objections; and Part X – Additional/supplementary directions and instructions.

Clause 4 of Part V, clauses 1, 2, 5, 7, 8, 9 and 10 of Part VI and clauses 3 and 4 Part VII are in the following terms:

> "5.4 – Immediately after the said consolidated list has been prepared list in respect of a polling area, two copies of the list shall be furnished by the Electoral Registering Officer to the District Magistrate for verification of the status as Indian citizens of persons included in the lists."
>
> "6.1 – The District Magistrate shall cause each and every name included in the list furnished under para 5.4 to be verified by employing or utilising such agencies as the State Government/District Magistrate may consider appropriate having regard to all applicable laws."
>
> "6.2 – While making such verification, the status as Indian citizens of every person included in the list shall be verified having regard to all relevant laws as applicable in the State of Assam. These laws include, among others, Part II of the Constitution of India; Citizenship Act, 1955 (particularly section 6A as inserted

by the Citizenship (Amendment) Act, 1985); Foreigners Act, 1946; Illegal Migrants (Determination by Tribunals) Act, 1985 and the rules and orders made thereunder. The provisions of all these Acts should be fully applied harmoniously."

"6.5 – The verification should be done strictly on the basis of relevant documents, while doing so section 6A of the Citizenship Act, 1955, in particular, has to be taken into consideration as such, the names of persons appearing in 1966 electoral rolls and of their adult descendants shall be considered as Indian citizens. If names of any Indian citizens are missing in 1966 or earlier rolls, the names, if appearing in the National Register of Citizens (NRC), can be taken into consideration."

"6.7 – As soon as a list in respect of any polling area has been verified by the District Magistrate, he shall prepare two lists. List I containing the names of persons who are verified by the District Magistrate to be Indian Citizens, and List II containing those names which are not considered as Indian citizens by the District Magistrate. Both such lists shall be duly authenticated by the District Magistrate and shall be returned to the Electoral Registration Officer for further necessary action."

"6.8 – It must be scrupulously ensured by the District Magistrate that no name of any of those persons who have been declared/detected as foreigners or illegal migrants by the Tribunals constituted under the Foreigners Act, 1946 or Illegal Migrants Determination by Tribunals Act, 1983 is included in List I in any circumstance. All such names must necessarily be included in List II and suitable remarks shall be made against the name of each such person in the said List II."

"6.9 – Where any proceedings are pending before any such tribunal in respect of any person, the name of every such person must also be included in the List II and no such name shall be included in List I in any circumstance."

"6.10 – Where the police have initiated enquiries in respect of any person with a view to filing cases under Foreigners Act, 1946 or Illegal Migrants (Determination by Tribunals) Act, 1983, the name of every such person shall also be included in List II and not in List I."

"7.3 – The Electoral Registration Officer shall also take every possible care to ensure that names of persons in whose cases objections were filed and upheld, as well as names of persons whose claims were rejected during any earlier revision of 1990, 1985, etc. on the grounds that they were not citizens of India are not included in the draft roll. He should also ensure that cases where enquiries have

been initiated by the police with a view to filing cases under the Foreigners Act, 1946 or IMDT Act 1983 are also excluded."

"7.4 – Similarly, the Electoral Registration Officer should ensure that the names of encroachers on VGR/PGR/Forest Lands/Khas Lands or any other Government lands are not included in the draft rolls.

Provided that the above instruction will not apply in relation to such eligible Indian citizens whom the State Government of Assam does not propose or plan to remove from the lands under their encroachment immediately and at least up to the end of the year 1993."

As already stated, clauses 6.9, 6.10, 7.3 and 7.4 of the Instructions have been challenged in these cases.

3. Article 324(1) of the Constitution provides that the superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President held under this Constitution, shall be vested in a Commission (referred to in the Constitution as the Election Commission). In view of Article 324(1), the superintendence, direction and control of the preparation of the electoral rolls for the elections to Parliament and to the Legislature of every State are entrusted to the Commission. The power of the Election Commission to make direction is wide enough to include all the powers necessary for ensuring the electoral rolls not suffering from any legal infirmity.

4. Articles 326 of the Constitution provides that the elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage, that is to say, every person who is a citizen of India and who is not less than eighteen years of age on such date as may be fixed in that behalf by or under any law made by the appropriate legislature and is not otherwise disqualified under the Constitution or any law made by the appropriate legislature on the grounds of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election.

5. Article 327 states that, subject to the provisions of the Constitution, Parliament may 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 delimitation of constituencies and all other matters necessary for securing the due constitution of such House or Houses. Therefore, it is open to the Parliament to prescribe the mode of the preparation of the electoral roll and say that it is not liable to be challenged except in the manner provided under the law made by the Parliament. Accordingly, the Parliament enacted the Representation of the People Act, 1959, ('1950 Act', for short).

6. From the above discussion, it follows that the power of the Election Commission to make direction in respect of preparation and maintenance of electoral rolls, whether it has legislative flavour or not, flows from Article 324(1). Every person who is a citizen of India and is not otherwise disqualified under the relevant provisions of the Constitution and the law made by Parliament shall be entitled to be registered as a voter. It is open to the Parliament to prescribe the mode of preparation of the electoral rolls and say that it is not liable to be challenged except in the manner provided under the law made by the Parliament.

It is not disputed that the Election Commission has jurisdiction to issue instructions in respect of preparation and maintenance of electoral rolls. The dispute is whether the impugned clauses of the instructions are violative of Article 14 of the Constitution, the 1950 Act and the rules made under the Acts.

7. The relevant provisions under the 1950 Act are as follows: section 16 of 1950 Act lays down the disqualifications for registration in an electoral roll; sub-section (1) runs:

> "A person shall be disqualified for registration in an electoral roll if he –
>
> (a) **is not a citizen of India:** or
>
> (b) is of unsound mind and stands so declared by a competent Court; or
>
> (c) is, for the time being, disqualified from voting under the provisions of any law relating to corrupt practices and other offences in connection with elections." (emphasis added).

Sub-section (2) of section 16 provides that the name of any person who becomes so disqualified after registration shall forthwith be struck off the electoral roll in which it is included. Section 19 of the 1950 Act lays down the conditions of registration. It reads:

> "Subject to the foregoing provisions of this Part, every person who –
>
> (a) is not less than eighteen years of age on the qualifying date; and
>
> (b) **is ordinarily resident in a constituency** shall be entitled to be registered in the electoral roll for that constituency." (emphasis supplied).

Section 20 deals with the meaning of "ordinarily resident". The preparation and revision of electoral rolls have to be made in accordance with section 21. Under section 21(1), the electoral roll for each constituency shall be prepared in the prescribed manner by reference to the qualifying date and shall come into force immediately upon its final publication in accordance with the rules made under the Act. The correction of entries is provided by sections 22 and 23.

Section 24 contains a provision for an appeal which can be filed to the Chief Electoral Officer from any order of the Electoral Registration Officer under section 22 or section 23. Under section 30, no civil court shall have jurisdiction to entertain or adjudicate upon any question whether any person is or is not entitled for registration in an electoral roll for a constituency. There are elaborate rules which have been promulgated for preparation and revision of the electoral rolls, namely the Registration of Electors Rules, 1960 ('Rules' for short).

8. Rule 8 of the Rules provides that the Registration Officer may, for the purpose of preparing the roll, send letters of request in Form 4 to the occupants of dwelling houses in the constituency or any part thereof; and every person receiving any such letter shall furnish the information called for therein to the best of his ability. Instruction No 2 under Form 4 indicates that only the names of citizens of India should be entered. Rule 9 empowers the Registration Officer to access to certain registers stated thereunder for the purpose of preparing any roll or deciding any claim or objection to a roll. Under rule 10, as soon as the roll of a constituency is ready, the Registration Officer shall **publish it in draft.**

Rules 17, 18, 19, 20, 21 and 21A relate to claim or objection for inclusion in, or exclusion from, the **draft electoral rolls** and procedures for inquiry into claims and objections. Rule 23 provides the authority to whom appeals shall lie from orders of the Registration Officer deciding claims and/or objections under rules 20, 21 and 21A and the procedure for disposal of the appeal. Rule 22 deals with **final publication of roll**, viz the electoral roll of the constituency.

9. It may be mentioned here that in Article 326, the word 'voter' has been used, and section 2(1)(e) of the Representation of the People Act, 1951 defines an '**elector**':

> "2(1)(e) – 'elector' in relation to a constituency means a person whose name is entered in the electoral roll of that constituency for the time being in force and who is not subject to any of the disqualifications mentioned in section 16 of the Representation of the People Act, 1950."

10 At this stage, it would be helpful to refer to the following decisions of the Supreme Court. In *Hari Prasad* v *V.B. Raju*, AIR 1973 SC 2602, a five-Judge Bench of the Supreme Court, at para 23, stated in the following terms:

> "We think that the 1950 Act provides a complete code so far as the preparation and maintenance of electoral rolls are concerned. The Act enacts a complete machinery to enquire into claims and objections as regards registration as voter and for appeals from the decision of the registration officer (see sections 21 to 24 of the 1950 Act both inclusive). Elaborate rules have also been made for inquiry into claims to be registered as voters and for considering and disposing of objections thereto (see rules 12 to 24 of the Registration of Electoral Rules). The definition of the word 'elector' in section 2(1)(e) of the 1951 Act would indicate

> that a person whose name is actually entered and who is not subject to any of the disqualification is S. 16 would be an elector".

In *Pampakavi Rayappa* v *BD Jatti,* AIR 1971 SC 1348, the Supreme Court held:

> "It may be noted that the conditions about being ordinarily resident in a constituency for the purpose of registration are meant for that purpose alone and have nothing to do with the disqualification for registration which are prescribed by s.16 of the Act of 1950 which alone are relevant to the definition of an 'elector' as given in S 2(1)(e) of the Act. The entire scheme of the Act of 1950 and amplitude of its provisions show that the entries made in an Electoral Roll of a constituency can only be challenged in accordance with the machinery provided by and not in any other manner or before any other forum unless some question of violation of the provisions of the Constitution is involved."

11. The effect of the decisions of the Supreme Court above is that 1950 Act is a complete Code so far as the preparation and maintenance of electoral rolls are concerned. The definition of the word 'elector' will indicate that the person whose name actually entered in the electoral roll for the time being in force and who is not subject to any disqualification under section 16 would be an elector. The expression 'ordinarily resident' in a constituency for the purpose of registration is meant for that purpose alone and has nothing to do with the disqualifications for registration which are prescribed under section 16 of the 1950 Act which alone are relevant to the definition of 'elector'. The electoral roll is never conclusive or final in respect of these matters or citizenship. The entries made in an electoral roll of a constituency can only be challenged in accordance with the machinery provided by it and not in any other manner or before any other forum unless some questions of violation of the Constitution are involved.

12. Let us now examine the case on hand. The impugned instructions are in respect of preparation and publication of draft electoral rolls. The summary of the impugned instruction is thus: A consolidated list of enumerated persons is to be prepared polling station-wise based on the information furnished by the head of the household under Form 4 in terms of rule 8. The consolidated list is to be prepared as soon as the enumerator pads are duly completed by the enumerators and checked by the Supervisor. Two of the consolidated list shall be furnished by the Registration Officer to the District Magistrate for verification of the status as Indian citizens of the persons included in the list by considering the relevant provisions of the laws relating to foreigners. The District Magistrate shall, after verification, prepare two lists – List I containing the names of persons who are verified by the District Magistrate to be Indian citizens, and List II containing names of those persons who are not considered as Indian citizens by the Magistrate. Both the lists (List I and List II) shall be returned to the Registration Officer by the District Magistrate for further necessary action. The names of the persons against whom any proceedings are pending before the Tribunal constituted under the Foreigners Act or the Illegal Migrants (Determination by Tribunals) Act, 1983 as well as against whom police have initiated enquiries

in respect of any person with a view to filing cases under the aforesaid two Acts, the name of such person shall also be included in List II and not in List I. The names of encroachers in village grazing reserve (VGR), public grazing reserve (PGR), forest land, khas land or any government land shall not be included in the draft rolls; provided that this instruction will not apply in relation to such eligible Indian citizens whom the State Government of Assam does not propose or plan to remove from the land in their encroachment till the end of 1993. List I shall be published as electoral rolls and not List II.

13. The impugned clauses, except the main clause 7.4, of the instruction classify persons or people of Assam into two groups, namely – (i) names of persons verified by the District Magistrate to be Indian citizens, and (ii) names of persons not considered as Indian citizens by the District Magistrate (which we shall refer to as 'suspects'). The suspects shall be in List II referred to above, and their names are not to be entered in the draft electoral rolls published in accordance with law. The classification has been made on the basis that national origins are suspect.

14. The question which arises for consideration is whether classification is violative of Article 14 of the Constitution of India or any of the provisions of 1950 Act and rules framed thereunder. On a reading of the preamble of the Illegal Migrants (Determination by Tribunals) Act 1983, together with section 6A of the Indian Citizenship Act, 1955, it indicates that a good number of foreigners migrated to the North Eastern Region of India. The Election Commission was aware of the migration as is seen from the instruction and, therefore, the Election Commission directed that utmost care should be taken to ensure that no foreigner is enrolled as an elector or voter keeping in view "republic and election". But the classification should be reasonable. The Court will not accept every purpose as sufficient to support a classification and will insist to show that it is pursuing a "compelling" or "overriding" end or interest, that is to say, the Court will not uphold the classification unless the classification is necessary to promote that compelling interest or end. In the present case, the classification distinguishes between two groups of persons upon some "suspect" basis. In such a case, the Court may exercise strict scrutiny standard of judicial review.

15. Under Article 326 of the Constitution of India, any person who is a citizen of India and who has attained the age as prescribed by law is entitled to be registered as a voter or elector in the electoral roll, subject to any of the disqualifications prescribed under section 16 of the 1950 Act. It has already been stated that the electoral roll is never conclusive or final in respect of citizenship, and the definition of the word "elector" indicates that person whose name is actually entered in the electoral roll for the time being in force and who is not subject to any disqualifications under section 16 would be an "elector".

16. That being the position, the disqualifications for being a voter or elector for not being a citizen of India is referable only to the final electoral rolls, not the draft roll, because, on final publication of rolls, it shall be the electoral roll of the constituency. It may be stated here that

at the time of scrutiny of the nominations, the returning officer can decide whether a candidate is qualified or disqualified, that is to say, whether he is an Indian citizen or not (see section 36 of the 1951 Act); and that the question whether a person whose name is entered in the electoral roll is qualified under the Constitution and whether he suffers from any disqualification specified under section 16 of 1950 Act, can be gone into by the court trying any election petition (see *Hari Prasad's* case (supra)).

17. We reiterate once again that the Supreme Court has, in *Pampakavi's* case (supra), held that the expression "ordinary resident" in a constituency for the purpose of registration is meant for that purpose alone and has nothing to do with the disqualifications for registration as prescribed under section 16 of the 1950 Act. Therefore, the draft rolls are to be prepared on the basis of the statements submitted by the heads of the households in a constituency in Form 4 under Rule 8. Under section 31 of 1950 Act, if any person makes in connection with the preparation of an electoral roll a statement in writing which is false and which he either knows or believes to be false or does not believe to be true, he shall be punishable with imprisonment for a term which may extend to one year or with fine, or with both. Therefore, the statement made by a head of the household in Form 4 has its own value and cannot be lightly brushed aside. Rules do not contemplate any inquiry into the question of citizenship at the stage of preparation of draft roll, although there is provision for objection after the draft roll is published on the grounds that a person who is not a citizen of India has been erroneously included.

The 1950 Act provides a complete machinery for enquiring into the claims and objections as regards the registration as voter and appeals from the decisions of the Registration Officer after the publication of draft roll. The objection and claims are to be decided by the Registration Officer, and not by the District Magistrate, after complying with the procedure laid down under the Rules. The District Magistrate is foreign to the 1950 Act and the Rules. The Electoral Registration Officer is the only authority referred to in the Act of 1950 and the Rules with regard to the preparation of draft rolls. In the present case, what has been questioned is the instruction in respect of the manner of preparation of draft electoral roll. Therefore, the impugned instructions involve an entirely different system of preparation of draft electoral roll which is applicable to the suspects only. It is true that no foreigner should be entered in the electoral roll, but the electoral roll is to be prepared and published strictly complying with the requirements of law. For these reasons, the classification is vague and unreasonable, or, in any event, it is against the provisions of the 1950 Act and the Rules.

18. Coming to impugned clause 7.4 (main) of the instruction, it provides that the names of the encroachers in VGR, forest land, Khas land or any government land shall not be included in the draft electoral rolls. Under this instruction, an Indian citizen who is otherwise eligible for registration is not to be entered in the electoral rolls, if he is an encroacher. The Election Commission have , perhaps, considered that the foreigners who came to Assam might have occupied VGR, PGR, forest land or other government land and, therefore, issued instruction as a safeguard for not entering the name of any foreigner in the draft rolls. It has already been stated

that the consolidated list for preparing and publishing draft electoral rolls are to be prepared on the basis of the statements submitted by the households in Form 4 under Rule 8; and that the condition about ordinarily resident in a constituency for the purpose of registration is meant for that purpose alone and has nothing to do with the disqualifications for registration prescribed under section 16 of the 1950 Act which alone is relevant to the definition of an 'elector'. Section 21(7) of 1950 Act provides that "if in any case a question arises as to whether a person is ordinarily resident at any relevant time, the question shall be determined with reference to all the facts of the case and to such rules as may be made in this behalf by the Central Government in consultation with the Election Commission". Therefore, the statement made in Form 4 has its own value and cannot be lightly brushed aside, and, the question whether an encroacher is an ordinarily resident is to be decided in terms of section 21(7). There is no provision under the 1950 Act and the Rules that an encroacher shall not be entered in the electoral roll if he is otherwise eligible.

19. In the above view of the matter, the instruction under clause 7.4 (main) is also violative of Article 14 of the Constitution, or, in any event, is violative of the 1950 Act and the Rules.

20. The next question which arises for consideration is whether this Court has jurisdiction to issue directions to the Election Commission. In *Indrajit Barua* v *Election Commission*, AIR 1986 SC 103, the Supreme Court held:

> "We are not prepared to take the view that preparation of electoral rolls is also a process of election. We find support for our view from the observations of Chandrachud, CJ in *Lakshmi Charan Sen's* case, (AIR) 1985 SC 1233) (supra) that 'it may be difficult, consistently with that view, to hold that preparation and revision of electoral roll is a part of 'election' within the meaning of Art 329(b)'. In a suitable case challenge to the electoral roll for not complying with the requirements of the law may be entertained subject to the rule indicated in *Ponnuswami's* case (AIR 1952 SC 64) (supra)".

21. In *Pampakavi's* case (supra), the Supreme Court has held that entries made in the electoral roll of the Constituency can be challenged if there is violation of the provisions of the Constitution. *Indrajit Barau* v *Election Commission*, AIR 1984 SC 1911, the Supreme Court held that Election Commission can be directed to carry out a revision of the electoral rolls in accordance with the procedure prescribed under the 1950 Act and the Rules.

22. The above decisions of the Supreme Court make it clear that the preparation of the electoral rolls is not a part of the election process, the preparation of electoral rolls can be challenged, and the Election Commission can be directed to comply with the relevant laws in respect of preparation of electoral rolls.

23. The question which, therefore, arises for consideration is what reliefs should be given to the petitioners. Paragraph 7 of the affidavit in Msc Case No 971 of 1993 filed on behalf of the Election Commission reads: "That the respondent – 1 states that in fact there were about 1,576,000 names in List II, out of which about 1,373,000 filed the claim and about 9,000,000 claims were accepted." The affidavit goes to show that, after the publication of the draft electoral rolls, a large number of objections and claims were made based on the grounds that qualified persons have not been entered in the electoral rolls, and objections and claims were disposed of by the appropriate electoral authorities allowing claims of about 9,000,000 persons.

24. As already stated, names of persons entered in List II are not to be published. Under clause 6.8 of the instruction, in respect of persons who had been declared by the Tribunal as foreigners, their names are to be included in List II and suitable remarks are to be made against the name of each of such persons. This Court stayed the publication of draft electoral rolls but the Supreme Court vacated the order and sent back the matter with a direction to dispose of the writ petitions. The draft rolls were accordingly published during the pendency of these writ petitions. This Court made an order on 7.1.94 to the effect that the publication of the final electoral rolls shall be subject to the result of the writ petitions. It appears that the final electoral rolls of all the constituencies in Assam have not been published. Considering the overall circumstances, it will be appropriate if we direct the Election Commission to publish the names of the persons in List II (except the names of those persons who have been declared or detected by the Tribunal as foreigners and the names of those persons whose claims and objections have been disposed of by the appropriate Electoral Officers).

25. Learned counsel for the respondents has submitted that, if the names of the suspects are not included in the draft electoral roll published in accordance with law, the suspects have right to lodge claim or objection to the appropriate Registration Officer. Therefore, there is no alternative remedy and, as such, jurisdiction under Article 226 may not be invoked. In the present case, the instructions of the Commission in respect of the preparation of draft roll have been questioned, not the draft electoral roll published. It has already been stated how the draft electoral roll was prepared under the instruction. If draft electoral rolls are prepared without complying with the requirements of the law the writ petitions can be entertained, as already stated. Therefore, the submission of the learned counsel for the respondents cannot be accepted.

26. In the result, the petitions are disposed of with the direction to the Election Commission to publish the names of the persons in List II (except the names of those persons who have been declared or detected by the Tribunal as foreigners and the names of those persons whose claims and objection have been disposed of by the appropriate Electoral Officers).*

* as draft electoral rolls and to prepare draft electoral rolls in respect of all eligible persons from amongst the encroachers on the Government land, VGR, PGR or forest land in accordance with law and publish the same. It is made clear that, if final electoral rolls have been published, the electoral roll of a constituency as is provided under rule 22 of the Rules shall be final electoral rolls which had already been published together with the final electoral rolls published in terms of this order.

THE GAUHATI HIGH COURT

(HIGH COURT OF ASSAM NAGALAND MEGHALAYA MANIPUR

TRIPURAMIZORAM & ARUNACHAL PRADE SH)

CIVIL RULE NO 1566, 1616, 1836 & 2814 OF 1993

Mr HA Choudhury...Petitioners in CR
No. 1566 of 1993

Md Rustam Ali & Others...Petitioners in CR
No. 1616 of 1993

Md Mustafa K Passah & Others...Petitioners in CR
No. 1836 of 1993

Sri Sajal Kr Roy & Others...Petitioners in CR
No. 2814 of 1993

V

Election Commission of India
& Others...Respondents

PRESENT

THE HON. CHIEF JUSTICE, MR MANISANA
THE HON. JUSTICE SMT M SHARMA

For the petitioners	:	**Mr B Sen** **Mr BK Das** **Mr AFG Osmani** **Mr BM Mahanta** **Mr A Sharif** **Mr MH Rajbarbhuyan** **Mr SN Bhuyan, AG, Assam**
For the respondents	:	**Mr DN Choudhury** **Mr BP Kataky** **Mr KP Sarma** **Mr B Choudhury** **Mr RP Sarma, Advocates.**
Date of Order	:	**1.2.94**

ORDER

The matter is taken up *suo motu* in order to make the operative portion of the order clear. Accordingly, in para 26 of the judgement the last words "No Costs" and the marks (.) are to be deleted and the following words are added:

> "as draft electoral rolls and to prepare draft electoral rolls in respect of all eligible persons from amongst the encroachers on the Government land, VGR, PGR or forest land in accordance with law and publish the same. It is made clear that, if final electoral roll of a constituency as is provided under rule 22 of the Rules shall be final electoral rolls which had already been published together with the final electoral rolls published in terms of this order."

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

WRITE PETITION (CIVIL) NO. 731 0F 1994

Lal Babu Hussein & Others — **Petitioners**

V

Electoral Registration Officer & Others — **Respondents**

WITH

CIVIL APPEAL NO. 1319 OF 1995
(Arising out of SLP (Civil) No. 21961 of 1994)

Husain Dalwai & Others — **Appellants**

V

Union of India & Others — **Respondents**

And

WRIT PETITION (CIVIL) NO 56 OF 1995

P. U. C. L. & Others — **Petitioners**

V

Electoral Registration Officer & Others — **Respondents**

Before: *Ahmadi, CJI, Sujata V. Manohar J and N. P. Sing J*

Elections *– Register of Voters – Preparation of Register – Qualification for registration – Procedure for dealing with persons suspected as foreigners – Ordinarily resident in constituency – Whether the Election Commission had power to lay down procedure for strict proof of citizenship as condition precedent to including names on the preliminary electoral roll.*

Background facts: *The petitioners filed an action in the Bombay High Court challenging the directive of the Election Commission dated 21st August, 1992 empowering Collectors of all districts in India to determine if any person was or was not a foreigner. Accordingly to the directive, the information collected by the enumerators had to be consolidated and furnished to the Collectors who in turn were expected to get the same verified through the police/intelligence agencies and then decide the question whether the person or persons concerned were citizens of India. The Electoral Registration Officers were then expected to prepare a draft electoral roll on the basis therefore and publish it, inviting objectors. Any person enumerated but not entered on the roll could apply for the inclusion of his name in the roll.*

On 9th September 1994, another directive was issued by which power was vested in the Electoral Registration Officers to identify and declare the names of foreign nationals and delete their names from the electoral roll. It was stated in the guidelines of the Election Commission that the onus of proof of citizenship shall lie on the person seeking to have his name on the electoral roll. Pursuant to the directives of the Election Commission, an extensive search was undertaken in 39 police stations of Greater Bombay and letters were issued to the police to as many as 1.67 lakh persons calling upon them to produce (i) birth certificate; (ii) passport issued by the Government of India; (iii) certificate of citizenship; and (iv) entry made in the register of citizenship by the Government of India. This led to a virtual commotion, more particularly because it was believed to be a move to harass the minority community and to defranchise them.

Held: *that in all three cases, the proceedings were quashed and the Election Commission directed, if it so desired, to initiate fresh proceedings by issuance of a notice under the relevant provision disclosing the material on the basis whereof he had reason to suspect that the person concerned was not a citizen of India. The Court also allowed the appeal arising from SLP (C) No. 21961 of 1994 and set aside the impugned judgment and order of the Division Bench of the Bombay Bay High Court dated 17th November 1994, except the undertakings given by the learned Advocate-General. The Court further issued certain guidelines to assist Electoral Registration officers in the preparation of the preliminary roll.*

Cases cited in Judgement:

Andhra Pradesh v *Syed Mohd Khan (1962) Supp. 3 SCR 288 State of UP* v *Rehametullah (1971)(2) SCC 113.*

AHMADI CJ: These three cases, two writ petitions under Article 32 and one special leave petition under Article 136 of the Constitution of India, raise certain vital issues regarding an individual's eligibility for inclusion of his/her name in the electoral rolls of a given constituency. Article 325 of the Constitution envisages one general electoral roll for every territorial constituency for election to either House of Parliament or the Legislature of a State and under Article 326 elections to the House of the People and to the Legislative Assembly of every State must be on the basis of adult suffrage; that is to say, every person who is a citizen of India and who is not less than 18 years of age on such date as may be fixed in that behalf by or under any law made by the appropriate Legislature and is not otherwise disqualified under the Constitution or any law on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election. Articles 327 and 328 empower Parliament/State Legislatures respectively to inter alia make provision with respect to all matters relating to, or connected with the preparation of electoral rolls by enacting an appropriate law. The superintendence, direction and control of the preparation of the electoral rolls has been vested in the Election Commission by virtue of Article 324 of the Constitution. These are the relevant constitutional provisions bearing on the question of preparation of the electoral rolls and eligibility of every person to be included therein to which our attention was drawn.

The Representation of the People Act, 1950 (hereinafter called 'the 1950 Act'), inter alia, provides for the preparation of electoral rolls, qualification of voters etc. Part III thereof comprising Sections 14 to 25A provides for 'Electoral Rolls for Assembly Constituencies'. Section 15 envisages an electoral roll for every Assembly Constituency. Section 16 prescribes the disqualifications for registration in an electoral roll. It says: a person shall be disqualified for registration in an electoral roll if he (a) is not a citizen of India; or (b) is of unsound mind and stands so declared by a competent court, or (c) is for the time being disqualified from voting under the provisions of any law relating to corrupt practices and other offences in connection with elections. It further provides for striking off the name of any person who becomes disqualified after registration but if the disqualification is removed at any subsequent point of time, the proviso lays down that the name of such person shall forthwith be reinstated in that roll. Section 19 lays down the conditions of registration. It, inter alia, provides that every person who is not less than 18 years of age on the qualifying date and is ordinarily resident in a constituency, shall be entitled to be registered in the electoral roll for that constituency, shall be entitled to be registered in the electoral roll for that constituency. Section 20 gives the meaning to the expression "ordinarily resident". Then comes Section 21 which provides for the preparation and revision of electoral rolls. It envisages that the electoral roll of each constituency shall be prepared in the prescribed manner and shall come into force immediately upon its final publication. It contemplates revision of the electoral roll before each general election to the House of the People or to the Legislative Assembly of a State and before each by-election to fill a casual vacancy in a seat allotted to the constituency. It further provides for the revision of the electoral roll in any year in the prescribed manner if such revision has been directed by the Electoral Commission. The proviso to that sub-section lays down that if the electoral roll is not revised the validity or continued operation of the

said electoral roll shall not thereby be affected. Sub-section (3) of Section 21 which begins with a *non obstante* clause says that the Election Commission may at any time, for recorded reasons, direct a special revision of the electoral roll for any constituency or part of a constituency in such manner as he may think fit. Section 22 deals with the correction of entries in electoral rolls. According to that section, if the Electoral Registration Officer for a constituency is satisfied after inquiry that any entry in the electoral roll of the constituency is erroneous or defective in any particular or it is necessary to be transposed to another place in the roll on account of the person concerned having changed his place of ordinary residence within the constituency or is required to be deleted because the person concerned is dead or has ceased to be ordinarily resident in the constituency or is otherwise not entitled to be registered in that roll, the Electoral Registration Officer shall, subject to such general or special directions, if any, given by the Electoral Commission in that behalf, amend, transpose or delete the entry. The proviso to that section introduces the principle of natural justice, in that, it enjoins the Electoral Registration Officer to give the person concerned a reasonable opportunity of being heard in respect of the action proposed to be taken in relation to him. Section 23 provides for the inclusion of names in electoral rolls. It says that any person whose name is not included in the electoral roll of a constituency may apply to the Electoral Registration Officer for the inclusion of his name in that roll. On receipt of such an application, the Electoral Registration Officer is enjoined by sub-section (2) thereof to direct his name to be included therein on being satisfied that the applicant is entitled to be registered in the electoral roll. An appeal is provided against the decision of the Electoral Registration Officer under Section 22 or 23 to the Chief Electoral Officer. Lastly, Section 28 empowers the Central Government to make Rules. These are some of the provisions of the 1950 Act which have a bearing on the questions at issue.

Reference may now be made to the Registration of Electors Rules, 1960 (hereinafter called 'the 1960 Rules'), which came into force on January 1, 1961. Part II thereof concerns 'Electoral rolls for Assembly Constituencies'. Rule 5 provides that the roll shall be divided into convenient parts. Rules 10 and 11 contemplate the publication of draft rolls in the first place and inviting of objections, if any, thereto. Rules 12 to 16 deal with the lodging of claims and objections to the draft rolls. Rule 17 provides that claims or objections not lodged within the time allowed or in the specified form and manner shall be rejected. Rule 18 provides for acceptance of claims and objections without any inquiry if the registration officer is satisfied about the validity of any claim or objection. In all other cases, Rule 19 giving of notice of hearing, Rule 20 envisages a summary inquiry into the claims and objections in respect of which show cause notice under rule 19 had been given, recording of evidence and then recording of decision thereon. Rule 21 provides for inclusion of names inadvertently omitted in the rolls. Rule 21A as amended with effect form 3rd September 1987, lays down that if it appears at any time that owing to inadvertence or error or otherwise, the names of dead persons or person who have ceased to be, or are not entitled to be registered in the rolls, have been included therein, the registration officer shall exhibit the names, etc. of such electors on the notice board and also publish them in the manner prescribed and after considering the objections, decide whether or not the names of all or any of them should be deleted from the roll. This decision must be taken only after the concerned

person has been accorded a reasonable opportunity to show cause against the proposed action. After all these requirements are over, Rule 22 contemplates the publication of the final list together with amendments. In such a publication, the roll, together with the list of amendments, shall be the electoral roll of the constituency. Rule 23 provides for an appeal from any decision of the registration officer taken on the claims or objections filed against the draft list. Rule 25 says that the roll of every constituency shall be revised either intensively or summarily or partly intensively and partly summarily, as the Election Commissioner may direct. This, in brief, is the procedure laid down for the preparation of the electoral rolls.

It may also be advantageous to notice the provisions in regard to citizenship at this stage. Articles 5 to 7 of the Constitution read as under:

> "5. Citizenship at the commencement of the Constitution. – At the commencement of this constitution every person who has his domicile in the territory of India and –
>
> (a) who was born in the territory of India; or
>
> (b) either of whose parents was born in the territory of India; or
>
> (c) who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement, shall be a citizen of India.
>
> 6. Rights of citizenship of certain persons who have migrated to India from Pakistan: notwithstanding anything in Article 5, a person who has migrated to the territory of India from the territory now included in Pakistan shall be deemed to be a citizen of India at the commencement of this Constitution if:
>
> (a) he, or either his parents or any of his grandparents, was born in India as defined in the Government of India Act, 1935 (as originally enacted); and
>
> (b) (i) in the case where such a person has so migrated before the nineteenth day of July, 1948, he has been ordinarily resident in the territory of India since the date of his migration; or
>
> (ii) in the case where such a person has so migrated on or after the nineteenth day of July 1948, he has been registered as a citizen of India by an officer appointed in that behalf by the Government of the Dominion of India on an application made by him therefore to

> such officer before the commencement of this Constitution in the form and manner prescribed by that Government: Provided that no person shall be so registered unless he has been resident in the territory of India for at least six months immediately preceding the date of his application.

7. Rights of citizenship of certain migrants to Pakistan: Notwithstanding anything in Articles 5 and 6, a person who has, after the first day of March, 1947, migrated from the territory of India to the territory now included in Pakistan shall not be deemed to be a citizen of India:

> "Provided that nothing in this article shall apply to a person who, after having so migrated to the territory now included in Pakistan, has returned to the territory of India under a permit for resettlement or permanent return issued by or under the authority of any law and every such person shall for the purposes of clause (b) of Article 6 be deemed to have migrated to the territory of India after the nineteenth day of July, 1948."

Article II empowers Parliament to regulate citizenship rights by law.

The Citizenship Act, 1955 was enacted to provide for the acquisition and determination of India citizenship. It received the assent of the President on 30th December, 1955 and was published in the Gazette on the same day. Section 3 to 7 thereof provide for acquisition of citizenship. Section 3 says that every person born in India on or after 26th January, 1950 but before the commencement of the Citizenship (Amendment) Act, 1986 and those born in India on or after such commencement and either of those parents is a citizen of India at the time of his birth, shall be citizen of India by birth. Sub-section (2) of that section, however, states that the person shall not be such a citizen by virtue of this section if at the time of his birth his father possesses such immunity from suits or legal process as is accorded to an envoy of a foreign sovereign power accredited to the President of India and is not a citizen of India or his father is an enemy alien and the birth occurs in a place then under occupation by the enemy. Section 4 provides for citizenship by decent. This section (which has undergone changes) as it presently stands provides that a person born outside India on or after 26th January, 1950, but before the commencement of the Citizenship (Amendment) Act, 1992 shall be a citizen of India by descent if his father is a citizen of India at the time of his birth or a person born outside India on or after such commencement shall be citizen of India by descent if either of his parents is a citizen of India at the time of his birth provided that in the latter case if either of the parents of such a person was a citizen of India by descent only, that person shall not be a citizen of India by virtue of this provision unless his birth is registered at an Indian consulate within the given timeframe or either of his parents is, at the time of his birth, in service under Government of India. Section 5 deals with citizenship by registration. It empowers the prescribed authority to register a person as a citizen of India who is not already such citizen by virtue of the Constitution or any other

provisions of the Citizenship Act and belongs to any one of the five categories set out in Clauses (a) to (e) thereof. Section 6 deals with citizenship by naturalisation. Section 6A was enacted by Act 65 of 1985 to give effect to the Assam Accord. Section 7 is also not relevant for our purpose as it provides for citizenship by incorporation of territory. Sections 8 to 10 provide for termination of citizenship. Section 8 states that if any citizen of India who is also a citizen or national of another country, makes a declaration renouncing his Indian citizenship, the declaration shall be registered whereupon the person shall cease to be a citizen of India. Section 9 is relevant and may be reproduced:

> "9. Termination of citizenship – (1) Any citizen of India who by naturalisation, registration or otherwise voluntarily acquires, or has at any time between the 26th January, 1950 and the commencement of this Act voluntarily acquired, the citizenship of another country shall, upon such acquisition or, as the case may be, such commencement, cease to be citizen of India:
>
> Provided that nothing in this sub-section shall apply to a citizen of India, who, during any war in which India may be engaged, voluntarily acquires the citizenship of another country, until the Central Government otherwise directs.
>
> (2) If any question arises as to whether, when or how any person has acquired the citizenship of another country, it shall be determined by such authority, in such manner, and having regard to such rules of evidence, as may be prescribed in this behalf."

Section 10 provides that a citizen of India who is such by naturalisation or by virtue of marriage to a citizen of India or by registration otherwise then under clause b (ii) of Article 6 of the Constitution or clause (a) of sub-section (1) of section 5 of the Act shall cease to be a citizen of India if he is deprived of the citizenship by an order of the Central Government under this section. It will be seen from sub-section (2) of Section 9 that if any question arises as to whether, when and how any person has acquired the citizenship of another country, it shall be determined by such authority, in such manner and having regard to such rules of evidence as may be prescribed in that behalf. If we turn to the Citizenship Rules, 1966 we find detailed provisions with regard to the procedure to be followed for the acquisition of citizenship Rules, 1966 we find detailed provisions with regard to the procedure to be followed for the acquisition of citizenship and for the termination thereof. It will thus be seen that if a person has acquired citizenship of India and a question arises whether or not he/she lost the citizenship by acquisition of the citizenship of another country, that question has to be resolved by the authority prescribed under the Act. Thus, the question whether a person is a foreigner is a question of fact which would require careful scrutiny of evidence since the enquiry is quasi-judicial in character. This question has to be determined by the Central Government, *vide* Government of *Andhra Pradesh* v *Syed Mohd Khan* 1962 Supp 3 SCR 288 and *State of U.P* v *Rehametullah* 1971 (2) SCC 113.

From the resumé of the aforementioned provisions of the Constitution and the Citizenship Act, it becomes clear that whenever any authority is called upon to decide even for the limited purpose of another law, whether a person is or is not a citizen of India, the authority must carefully examine the question in the context of the constitutional provisions and the provisions of the Citizenship Act extracted hereinbefore. In the instant case, Article 325 of the Constitution provides for one general electoral roll for every territorial constituency; so does Section 15 of the 1950 Act. This has to be done under the superintendence, direction and control of the Election Commission as per the mandate of Article 324 of the Constitution. Section 16 of the 1950 Act in terms states that a person shall be disqualified for registration in an electoral roll if he is not a citizen of India. Put positively, a person must be a citizen of India to be entitled to inclusion in the electoral roll. Sub-section (2) of the said section empowers striking off the name of a person who incurs a disqualification set out in clauses (a), (b) or (c) of sub-section (1) after his name is entered in the register of electoral rolls. Otherwise every person who is not less than 18 years of age on the qualifying date and is ordinarily resident in a given constituency is entitled to be registered. Section 22 empowers the Electoral Registration Officer for a constituency to delete any entry already made if on enquiry he is satisfied that it is erroneous or defective in any particular or needs to be transposed to another place in the roll or the concerned person has died or has ceased to be ordinarily resident in that constituency or that he is otherwise not entitled to be registered. Of course, before any such action is taken the person concerned, except in the case of death, must be given an opportunity to be heard. Similar is the provision in Rule 21A of the 1960 Rules which empowers the registration officer before final publication of the roll to delete the name or names of any person or persons which have been entered owing to inadvertence or error if the person concerned is dead or has ceased to be ordinarily resident in that constituency or is otherwise not entitled to be registered. The procedure for exercise of the said power is set out therein and conforms to the requirements of the principles of natural justice. It is obvious from the above that two situations arise; the first where the name is to be entered on the rolls for the first time and the section where the name already entered is required to be deleted. In the first-mentioned situation before the name is entered on the rolls, the concerned officer must be satisfied that the person seeking to have his name entered is not disqualified by reason of his not being a citizen of India. Therefore, he would be justified in requiring the concerned person to show evidence that he is a citizen of India. In the second situation, since the name is already entered, it must be presumed that before entering his name the concerned officer must have gone through the procedural requirements under the statute. This would be so even if we invoke section 114(e) of the Evidence Act. But then possibilities of mistakes cannot be ruled out. These mistakes, if any, would have to be corrected. Even if we are to assume (without deciding) that the words "is otherwise not entitled to be registered in that roll" used in Section 22 of the 1950 Act or Rule 21A of the 1960 Rules are wide enough to cover the question relating to citizenship, the issue would have to be decided after giving the concerned person a reasonable opportunity of being heard. If the opportunity of being heard before deletion of the name is to be a meaningful and purposive one, it goes without saying that the concerned person whose name is borne on the roll and is intended to be removed must be informed why a suspicion has arisen in regard to his status as a citizen of India so that he may be able to show that the basis for the suspicion is ill-

founded. Unless the basis for the doubt is disclosed, it would not be possible for the concerned person to remove the doubt and explain any circumstance or circumstances responsible for the doubt.

We now briefly deal with the factual matrix of each case.

SLP(C) NO. 21961 OF 1994:

Three writ petitions bearing No. 2429, 2452 and 2330 of 1994 were filed in the Bombay High Court challenging the directive of the Election Commission dated 21st August, 1992 empowering Collectors of all Districts in India to determine if any person was or was not a foreigner. According to the said directive the information collected by the enumerators had to be consolidated and furnished to the Collectors who in turn were expected to get the same verified through the police/intelligence agencies or the like and then decide the question whether the person or persons concerned were citizens of India. The Electoral Registration Officers were then expected to prepare a draft electoral roll on the basis thereof and publish it inviting objections, if any. Any person enumerated but not entered in the roll could apply for the inclusion of his name in the roll. The Electoral Registration Officer was to consider the request for inclusion of his name in the roll and decide thereon. This was followed by yet another directive dated 9th September, 1994 by which power was vested in the Electoral Registration Officers to identify and declare the names of foreign nationals and delete their names from the electoral roll. It was stated in the guidelines of the Election Commission that the onus of proof of citizenship shall lie on the person seeking to have his name in the electoral roll. Pursuant to the directives of the Election Commission, extensive search was undertaken in 39 police stations of Greater Bombay and letters were issued by the police to as many as 1.67 lakh persons calling upon them to produce (i) birth certificate; (ii) passport issued by the Government of India; (iii) certificate of citizenship; and (iv) entry made in the register of citizenship by the Government of India. This led to a virtual commotion, more particularly because it was believed to be a move to harass the minority community and to defranchise them. Thereupon the aforesaid writ petitions came to be filed challenging the police action. In the course of the hearing of these petitions, several concessions were made by the learned Advocate General to save the action and even the Commissioner of Police filed an affidavit clarifying the fact that it was not the function of the police to delete any name from the draft electoral roll on the grounds that the concerned person is not a citizen of India. That was the function of the Electoral Registration Officer under Rule 21A of the 1960 Rules. However, it was conceded that pursuant to the directives of the Election Commission, the police had identified the areas having substantial presence of foreign nationals on the basis of intelligence reports. The notices issued to the persons suspected to be foreigners carried a statement to the effect that the addressee was or was not a citizen of India. The learned Advocate General clarified that, in all letters issued in future, such a statement would not be printed or typed on the reverse of the notice. It was also clarified that the documents in support of proof of citizenship will not be confined to those mentioned hereinabove. Other documents

having a bearing on the question of citizenship would also be entertained. The submission that a Ration Card cannot be received in evidence was spurned by the Division Bench. On the basis of these concessions the Division Bench of the High Court dismissed the writ petitions. Against the said order the petitioners of Writ Petition No. 2452 of 1994 have preferred this petition seeking special leave to appeal. We grant special leave.

The other two writ petitions have been moved on more or less similar allegations. In Writ Petition No 731 of 1994 the petitioners are residents of the area known as Motia Khan, Paharganj, New Delhi. They are poor, ignorant and illiterate slum-dwellers. Their grievance is that members of the minority community have been called upon by the Electoral Registration Officer, Delhi, by communication dated 10th October, 1994 to prove their Indian Citizenship. The petitioners contend that they and other residents of the said slum are migrants from U.P. and Bihar who came to Delhi in search of livelihood and have settled in the said area since a number of years and although they may not have the documents required to be produced as per the communication, they have several other documents, such as, ration cards, electoral rolls of the past elections, school records, etc., to show that they are bona fide residents of the said locality but they have been brushed aside with the oblique motive of deleting their names as voters. They have questioned the authority of Election Commission to undertake any such exercise. The specimen copy of the notice issued to the petitioners and others similarly situated dated 10th October, 1994 has been produced and reads as under:

"NOTICE"

> Whereas report has been received indicating that you may not be a citizen of India and a such your name appears to be fit for deletion from the Electoral Rolls of this Assembly Constituency.
>
> You are, therefore, hereby called upon to appear in person with such evidence as you may like to adduce in proof of your being an Indian Citizen before the undersigned on 13.10.1994 at 'D' Block, Vikas Bhawan, New Delhi – 110 002.
>
> sd/-
> K. C. Agrwal
> Electoral Registration Officer
> 69, Ram Nagar (SC) Assembly
> Constituency, 'D' Block, Vikas
> Bhawan, New Delhi – 110 002"

It is clear that the doubt regarding the petitioner's citizenship is based on a report. Admittedly, a copy of the said report was not furnished to the addressee. The action proposed is to delete the name from the electoral rolls. The petitioners who had sought more time as they had to collect material from their villages were not granted time as in the opinion of the Electoral Registration

Officer nearly a month's time could not be said to be inadequate. It is further observed that the verification report prepared by the police 'is generally reliable', it was for he addressee to prove that they were Indian citizens and ordinary residents of the constituency. The order of 25th October, 1994 shows that even though the police had not reported the time of the visit or the names of the independent witnesses or neighbours examined, the Electoral Registration Officer placed implicit reliance on the said document and raised a presumption in regard to its correctness; It will, thus be seen that the Electoral Registration Officer totally abdicated in favour of what the police had done during verification. No effort was made to evaluate the evidence produced by the petitioners. Instead, without holding any enquiry worth the name, total and absolute reliance was placed on the police report which did not even indicate the time of visit, the witnesses examined, etc. That, too, when the said officer himself had felt the necessity of re-verification which the police expressed its inability to undertake. Could the fate of a voter whose name had figured in the earlier rolls be sealed on such evidence? That is the moot question.

Writ Petition No. 56 of 1995 has been filed by a few residents of Sanjay Amar Jhuggi Jhompri Colony also falling within the Matia Mahal constituency representing 18,000 residents of that locality. They too contend that they had shifted to Delhi in search of livelihood from U.P. and Bihar more than a decade back. They have been voters in this constituency for the last over 10 years. They contend that in the process of making the electoral rolls and the issuance of voters' identity cards, the Electoral Registration Officer of Matia Mahal constituency issued a general notice stating that all the residents of that colony were suspected to be foreigners and called upon them to appear with concrete proof in support of their claim of citizenship. They contend that when they went to the office of the Electoral Registration Officer with documentary evidence such as, ration cards, identity cards issued by the Delhi Administration, certificates from their village Pradhans and affidavits, they were told that these documents were of no avail. The petitioners and their colleagues thereafter approached the Peoples Union for Civil Liberties, Delhi, pointing out those difficulties. The said body sent a representation on behalf of the residents to the said Officer as well as the Chief Election Commissioner protesting against what they described as a wholly humiliating, unfair and unreasonable demand but received no reply to the said representation. Some of the residents had filed claims in Form No 6 for the inclusion of their names in the electoral roll. They were asked to appear before the Electoral Registration Officer on 16th and 17th December, 1994 with proof of their being Indian nationals. On their re-appearing before the said officer with the afore-mentioned documentary evidence, once again they were told that the same were of no avail. On the petitioners' learning that the revised electoral rolls had been published and out of 18,000 voters registered in the previous electoral rolls in polling stations Nos 87–108, names of only 300 persons figured, thus, leaving out almost 98 per cent of the voters, thereby depriving them of their democratic right to elect their representatives. Thereupon the present petitions came to be filed.

If we turn to the specimen notice dated 20th September, 1994, it shows that all persons included in the draft electoral rolls of Matia Mahal AC 58 polling stations Nos 87–108 were suspected not to be citizens of India. The notice contemplated an inquiry under Rule 21A of the 1960 Rules

and required the persons concerned to appear on the dates mentioned in the schedule. Some of these persons had, as stated earlier, submitted their claim in Form No.6 for inclusion of their names in the electoral roll. As stated earlier, they produced documentary evidence in the form of ration cards, identity cards issued by the Delhi Administration, Certificate of Registrar of Societies, affidavits, etc., but to no avail. Left with no alternative, they filed the present writ petition invoking this Court's jurisdiction under Article 32 of the Constitution.

Like in the previous case, in the present case also the claims were rejected solely on the report of the police without furnishing copies. It will be seen from the above averments that the notice under the Rule 21A of the 1960 Rules was a sweeping notice covering the entire populace of the area without there being any inquiry as to the citizenship of an individual.

From what we have stated hereinbefore it is clear that inhabitants of certain constituencies in Bombay and Delhi were treated as suspect foreigners and enumerators were appointed to verify if persons residing in certain polling stations were not citizens. The police was employed for this purpose and as observed earlier in Bombay they addressed as many as 1.67lakh notices calling upon the addressees to produced (i) birth certificates; (ii) Indian passports, if any; (iii) citizenship certificates; and/or (iv) extracts of entry made in the register of citizenship. In Delhi also, similar notices were addressed to hundreds of residents of Matia Mahal constituencies requiring them to produce the aforestated documents. The time given was short and requests for extension of time were refused, presumably because the work had to be completed within a given time and date. Except the documents stated in the notices, no other proof, documentary or otherwise, was entertained. The fact that the addresses were, by and large, uneducated and belonged to the working class, particularly those who lived in Jhuggi Jhompris, was overlooked. Perhaps the instructions issued from time to time by the office of the Election Commission created a atmosphere which gave wrong signals that the verification had to be completed within the time-frame failing which they would incur the displeasure of the Election Commission exposing them to disciplinary action. This is evident from the fact that the police refused to accept any other document and prepared stereotype reports which betray non-application of mind and the Electoral Registration officers abdicated their functions and merely super-added their seals to such reports. This, notwithstanding the fact that these persons were voters in previous elections and hence it would ordinarily appear that their cases were verified before their names were entered in the electoral rolls. That is because it may be presumed that official acts performed under the provisions of the 1950 Act or the 1960 Rules were regularly done. Their names were already on the rolls and since they were sought to be removed by undertaking a special revision, whether intensive or otherwise, the procedure for removal had to be followed. Besides, as stated earlier, the atmosphere was fairly charged and because of the statements made time and again by the Election Commission the police went about its task with a mindset which gave practically no opportunity to the addresses to place the relevant material for whatever it was worth because no other documentary evidence, save and except that mentioned in the show cause notices, was entertained. Even the Electoral Registration Officers merely acted on the police report, copies whereof were admittedly not supplied to the addresses thereby making mockery of the reasonable

opportunity of being heard requirement contemplated under the 1950 Act and the 1960 Rules. Since neither Mr.Tulsi nor Mr. Ramaswamy for the Election Commission and the Chief Election Commissioner even attempted to defend the action impugned in these proceedings we need not dilate on the question. In fact, at the very first hearing on 16th January, 1995, Mr. Tulsi very fairly stated that a fresh exercise guidelines would have to be undertaken. We had on that occasion requested Mr. Tulsi to come up with a draft of the proposed guidelines for the perusal of the court. The petitioners'/appellants' counsel were also requested to apply their minds and suggest broad guidelines. Accordingly, at the last hearing on 25th January, 1995 Mr. Tulsi came up with the proposed guidelines prepared in consultation with the Election Commission. Mr Soli J Sorabjee, learned counsel in Writ Petition No. 731 of 1994 also submitted a set of guidelines for consideration. We heard Mr. Tulsi and Mr. G.Ramsawamy on the draft guidelines submitted by Mr. Tulsi and heard their submissions on the guidelines presented by Mr. Sorabjee. We also heard Mr. Wad, senior counsel for the appellants and Mr. Prashant Bhushan, counsel for the petitioners in the other writ petitions on the proposed guidelines. Having taken the guidelines suggested by either side into consideration and having heard counsel, we proceed to dispose of all the three matters by giving the following directions:

1. We allow the appeal arising from SLP(C) No 21961 of 1994 and set aside the impugned judgement and order of the Division Bench of the Bombay High Court dated 17th November, 1994, except the undertakings given by the learned Advocate General;

2. In all the three cases we quash the proceedings and direct that the Election Commission may, if so desired, initiate fresh proceedings by issuance of a notice under the relevant provision disclosing the material on the basis whereof he has reason to suspect that the person concerned is not a citizen of India;

3. If any person whose citizenship is suspected is shown to have been included in the immediately preceding electoral roll, the Electoral Registration Officer or any other officer inquiring into the matter shall bear in mind that the entire gamut for inclusion of the name in the electoral roll must have been undertaken and hence adequate probative value be attached to that factum before issuance of notice and in subsequent proceedings;

4. The Officer holding the enquiry shall bear in mind that the enquiry being of a quasi-judicial nature, he must entertain all such evidence, documentary or otherwise, the concerned affected person may like to tender in evidence and disclose all such material on which he proposes to place reliance, so that the concerned person has had a reasonable opportunity of rebutting such evidence. The concerned person, it must always be remembered, must have a reasonable opportunity of being heard;

5. Needless to state that the Officer inquiring into the matter must apply his mind independently to the material placed before him and without being influenced by extraneous considerations or instructions;

6. Before taking a final decision in the matter, the Officer concerned will bear in mind the provisions of the Constitution and the Citizenship Act extracted hereinbefore and all related provisions bearing on the question of citizenship and then pass an appropriate speaking order (since an appeal is provided);

7. The directive issued by the Election Commission on 9th September, 1994, prohibiting the Officer from entertaining certain documents will stand quashed and the documents will be received, if tendered, and its evidentiary value assessed and applied in decision-making;

8. These guidelines not being exhaustive, the officer concerned must, where special situations arise, conduct themselves fairly and in a manner consistent with the principles of natural justice and should not appear to be acting on any pre-conceived notions; and

9. We deem it appropriate to clarify that the final electoral roll with regard to others whose names were not sought to be deleted on the suspicion that they were not citizens of India shall remain undisturbed but in respect of the petitioners and others similarly situated, these being petitions in the nature of public interest litigations, if the revision of the roll is not possible on account of paucity of time, they will be governed by the previous roll.

The appeal and the two writ petitions will stand disposed of accordingly with no order as to costs.

.....CJI

.....J
(N.P. Singh)

.....J
(Sujata V. Manohar)

New Delhi
February 6, 1995

THEME 4

NOMINATION

IN THE SUPREME COURT OF INDIA

ORIGINAL JURISDICTION

ELECTION PETITION NO. 3 OF 1992

Kaka Joginder Singh *alias* — **Petitioner**

V

K. R. Narayanan
Vice-President of India — **Respondent**

Before: *J. S. Verma, J, K. Jayachandra Reddy, J., Yogeshwar Dayal, J*
G. N. Ray, J and S. P. Bharacha, J.

Elections *– Nominations – Whether nomination void for mistakes in nomination papers – Technical defect not of a substantial nature – Whether commission of offence of undue influence at the election grounds to invalidate nomination – Undue influence must take place by or with consent of candidate.*

Background facts: *The petitioner raised objection to the validity of the nomination papers filed by the respondent at the time of scrutiny, but the objections were rejected. These two persons alone were declared to be validly nominated candidates; and the polling was held on 19.8.92 as a result of which the respondent, Shri K. R. Narayanan, was declared duly elected as the Vice-President of India.*

The petitioner challenged the election on two grounds, namely (i) wrong acceptance of the nomination of the returned candidate and (ii) commission of the offence of undue influence at the election by issuance of a whip by the Congress (I) Party to vote for the respondent of the election.

Held*: That the pleadings relating to the ground of undue influence did not disclose any cause of action to raise a triable issue on the point; that the mistake or defect, if any, in the nomination paper of the respondent was not a substantive character and, therefore, it could not be a ground to permit rejection of the nomination paper.*

Cases Cited in Judgement:

Mithilesh Kumar v *Sr R. Venkataraiman & Others [1986] 1 SCR 525*
Karnail Singh v *Election Tribunal, Hissor and Others 10 ELR 189 (SC)*
Awadesh Singh v *Sumitra Devi & Others (1972) 2 SCR 674*
Davis v *Elsby Brothers, Ltd. [1960] 3 A11 ER 672.*

JUDGEMENT

VERMA J : This Election Petition calls in question the election of Shri K. R. Narayanan as the Vice-President of India. A Notification dated 17th July 1992 was issued by the Returning Officer for the election of the Vice-President of India, specifying 31st July 1992 as the last date for filing the nominations. Petitioner Kaka Joginder Singh alias Dharti Pakad and respondent Shri K. R. Narayanan filed their nomination papers; and in the scrutiny held on 1st August 1992, the nomination papers of both of them were found to be valid by the Returning Officer. The petitioner raised objection to the validity of the nomination papers filed by the respondent, at the time of scrutiny, but the objections were rejected. These two persons alone were declared to be validly nominated candidates; and the polling was held on 19.8.1992 as a result of which the respondent, Shri K. R. Narayanan, was declared duly elected as the Vice-President of India. On 17.9.1992, this election petition was filed challenging the election.

The election of the returned candidate is challenged by the petitioner on two grounds, namely, (i) wrong acceptance of the nomination of the returned candidate, a ground under Section 18(1)(c) of the Presidential and Vice-Presidential Elections Act, 1952 called (the Act); and (ii) commission of the offence of undue influence at the election, a ground under Section 18(1)(a) of the Act, by issuance of a whip by the Congress (1) Party to vote for the respondent at the election. The material part of Section 18, for the purpose of the present election petition, is as under:

> "18. (1) If the Supreme Court is of opinion –
>
> (a) that the offence of bribery or undue influence at the election has been committed by the returned candidate or by any person with the consent of the returned candidate; or
>
> xxx xxx xxx
>
> (c) that the nomination of any candidate has been wrongly rejected or the nomination of the successful candidates has been wrongly accepted; the Supreme Court shall declare the election of the returned candidate to be void.
>
> (2) For the purposes of this section, the offences of bribery and undue influence at an election have the same meaning as in Chapter IX–A of the India Penal Code."

The facts relevant for the aforesaid two grounds on which the election petition has been filed are now stated. The competence of the petitioner to file this election petition as a candidate is not in dispute. The only question is: whether both or any of the grounds on which the election petition has been filed have been made out?

To support the ground in Section 18(1)(c) of wrong acceptance of the nomination of the returned candidate – the respondent, the petitioner alleges that there was substantial defect in all the nomination papers of the returned candidate which require their rejection in accordance with Section 5E(3)(e) of the Act by the Returning Officer, at the time of scrutiny. It is alleged that there was a failure to comply with the requirement of sub-sections (1) and (2) of Section 5B, in as much as the nomination papers of the returned candidate were not completed in the prescribed form, and no nomination paper was accompanied by a certified copy of the entry relating to the candidate in the electoral roll for the parliamentary constituency in which the candidate is registered as an elector. These provisions have to be read along with Rule 4 of the Presidential and Vice-Presidential Election Rules, 1974 (called the Rules) and Form 3 therein which prescribes the form of the nomination paper for election to the office of the Vice-President of India. Form 3 requires mention of the name of the parliamentary constituency in the electoral roll for which the candidate is registered as an elector. In the nomination papers of the respondent, the name of the parliamentary constituency in the electoral roll for which the returned candidate is shown to be registered as an elector is mentioned as *'Ottapalam (SC)'*. To each of the nomination papers, to satisfy the requirement of sub-section (2) of Section 5B, a certificate is attached, as under:

"CERTIFICATE"

Certified that the name of Shri K. R. Narayanan, Kocheril House, Ward No. VIII of Uzhavoor Panchayat, Meenachil Taluk, Kottayam District, Kerala State is included in the voters list 1989 of 94 Palai Assembly Constituency, Part No. 101. The true extract of which is reproduced below:

S1 No.	House No.	House Name	Name of the Voter
192	61	(Kocharial)	K. R. Narayanan

Name of the Guardian	Sex	Age as on 1.1.1989
Raman	Male	68

The age of Sri K. R. Narayanan as on 1.1.1992 is 71 (seventy-one). Certified further that voter's list 1989 of which extract has been quoted above is the latest and the current list.

Talul Office
Meenachi

sd/-
Electoral Registration Officer and
Tahsildar – Meenachil."

Dated: 29. 7. 1992

The petitioner's contention is, that the above certificate annexed to each nomination paper of the returned candidate does not satisfy the requirement of sub-section (2) of Section 5B, inasmuch as it is not 'a certified copy of the entry relating to the candidate in the electoral roll; and this certificate shows that the returned candidate was registered as an elector in the electoral roll of '94 Palai Assembly Constituency' which is not in *'Ottapalam (SC)'* parliamentary constituency mentioned in the nomination paper but in 'Muvattupuzha' parliamentary constituency. The petitioner further contends that the certificate shows the 'Name of the Guardian of the elector as 'Raman', whereas in the prescribed form the heading of the corresponding column is 'Name of the Father/Mother/Guardian/Husband. These defects, according to the petitioner, rendered invalid all the nomination papers filed for the candidature of the respondent, and, therefore, liable to rejection.

The other ground taken in the election petition to challenge the election, is of 'undue influence' under Section 18(1)(a) of the Act. In view of a strong objection on behalf of the returned candidate that there are no requisite pleadings in the election petition to constitute the ground under Section 18(1)(a), it would be appropriate to quote the entire pleadings relating to this group, on which the petitioner has relied for this purpose. The only pleading in the election petition relating to the ground in Section 18(1)(a) of the Act is in paras 10, 11 and grounds (1) and (III) on para 14 thereof, which are as under:

> "10. That the returning officer unconstitutionally, illegally accepted the nomination paper's of respondent under pressure or undue hope of profit in future, without passing any order on the written objections.
>
> 11. That the ruling party in power, competent to change the future, issued the whip in favour of returned candidate, the respondent affecting the election is violative of the provisions of the Constitution. A copy of whip is attached and marked as Annexure 'D'."
>
> xxx xxxx xxx
>
> 14. That the petitioner is approaching this Hon'ble Court on the following amongst other.
>
> **GROUNDS**
>
> 1. That the whip Annexure 'D' is violative to Article 66 of the Constitution of India in view of Antidefection Act as the proposes of five M.Ps. of B. J. P. were facing disciplinary action during the period of Election hence all the political parties and their leaders made a mockery of the Election of the Vice-President of India by proposing the returned candidate Shri K. R. Narayanan as a representative

of Scheduled Caste candidate which is against the preamble of the Constitution of India hence it is violative of Articles 14, 21 and 38 of the Constitution of India.

xxx xxx xxx

III. That all sorts of undue influences by way of whip by the Ruling Party and opposition parties have been used which amounts to corrupt practices in the Election as the 80 proposers violates Article 66 of the Constitution of India in view of Antidefection Act."

In reply, it was contended by Shri Soli J. Sorabjee, learned counsel for the returned candidate that no triable issue relating to the ground of commission of the offence of undue influence contained in Section 16(1)(a) of the Act arises in the absence of the requisite pleadings for that purpose; and the grounds contained in Section 18(1)(c) is not made out since the defect, if any, in the nomination papers of the returned candidate is not of a substantial character. On this basis it was contended, that the returning officer could not reject the nomination papers, as clearly provided in sub-section (5) of Section 5E of the Act. Shri Sorabjee also submitted that the objection now taken in the election petition for raising the ground under section 18(1)(c) of the Act was not even raised before the returning officer at the time of scrutiny, the objection taken being merely of mis-description of the proposers and seconders, and not the returned candidate, in the nomination papers. Learned counsel submitted that the ground raised now is a clear afterthought and of no consequence since there was never any ambiguity in the identity of the returned candidate from his description given in the nomination papers, the only object of the particulars required in the nomination paper being to clearly identify the candidate and to determine his eligibility for the election. It was also submitted that such an objection, if raised, at the time of scrutiny would have enabled correction of the technical defect in the nomination papers. It was lastly urged by Shri Sorabjee that the minor defect in the nomination papers of the returned candidate can, at the most, be only a mis-description of the candidate whose identity was clear and unambiguous and, therefore, the defect, if any, is not of a substantial character to permit rejection of the nomination papers on the ground. The learned Attorney General supported the submissions of Shri Sorabjee.

It was common ground before us that no evidence was required to be adduced in the election petition which could be decided on admitted facts and the documents produced by the parties, the contents of which were admitted. The arguments of both sides were, therefore, heard on that basis.

The ground of 'undue influence' contained in Section 18 (1)(a) of the Act is taken up first for consideration. As the above-quoted provision clearly shows, to constitute the ground, the essential ingredients are: (1) commission of the offence of undue influence at the election; and (2) its commission by the returned candidate or by any person with the consent of the returned candidate. Thus, the offence of undue influence at the election, as defined in Section 171–C contained in Chapter IX–A of the Indian Penal Code, must have been committed; and that offence must have

been committed either by the returned candidate himself or by any person with the consent of the returned candidates. Unless both these ingredients to constitute the ground under Section 18 (1)(a) are pleaded and proved, this ground for declaring the election to be void cannot be made out. The entire pleading relating to this ground in the election petition has been quoted above. A bare perusal of the same is sufficient to indicate that at least one of the two essential ingredients of the ground is not even pleaded in the election petition.

There is no averment anywhere in the election petition that the offence of undue influence alleged to have been committed by issuance of the whip by the Congress (1) Party was committed either by the candidate himself or by any person with the consent of the returned candidate. There is not even a whisper or casual assertion that the returned candidate was in any manner associated with, involved or instrumental in issuance of the whip by the Congress (1) Party or any other political party to its members, at the election. The letter dated 14.8.1992 (Annexure – D to the election petition) issued by the Chief Whip of the Congress (1) Party also nowhere mentions any role of the returned candidate in the issuance of the whip, while describing the returned candidate K. R. Narayanan as 'a consensus candidate', obviously meaning that he was the candidate chosen by consensus of several political parties. It may also be mentioned that the respondent in his counter-affidavit has, even without any such pleading in the election petition, expressly denied that he had any role in the issuance of the whip by the Congress (1) Party to its members. There is no rejoinder to this denial. It is significant that no other candidate had been set up by any political party and the respondent had the support of all the political parties, being the candidate chosen by consensus of the political parties. The petitioner, who was the only other candidate, obtained only one vote, as stated by him at the hearing.

The question whether, even in such a situation, the issuance of a whip by a political party can amount to undue influence does not arise for decision in the present case, on account of the absence of requisite pleadings to raise a triable issue on the point.

It is sufficient to refer to a recent Constitution Bench decision of this Court in *Mithilesh Kumar* v *Sri R. Vankataraman & Others,* [1988] 1 SCR 525 to indicate that such deficiency in pleadings in the election petition is fatal; and the ground contained in Section 18(1)(a) of the Act does not arise for consideration on merits, in such a situation. In a similar situation where the ground of undue influence contained in Section 18 (1)(a) of the Act was raised by reason of the fact that a whip had been issued by the Congress (1) Party, but there was no allegation that any act amounting to undue influence was committed either by the returned candidate himself or by any other person with his consent, it was held that it was unnecessary to examine whether issuance of such a whip by any political party amounts to undue influence vitiating the election. This aspect, with reference to the earlier decisions of this Court, was considered at length therein and, therefore, it is unnecessary to reiterate the same herein. Following that decision, it must be held that the pleadings relating to the ground contained in Section 18(1)(a) do not disclose any cause of action to raise a triable issue on this point; and, therefore, the election petition, in so far as it relates to the ground contained in Section 18(1)(a), must be rejected for this reason alone.

The only question remaining for consideration now is whether the nomination of the returned candidate was wrongly accepted, to make out the ground for setting aside the election under Section 18 (1) (c) of the Act.

The provisions in the Act relevant for this ground are the following:

"5B. (1) On or before the date appointed under clauses (a) of sub-section (1) of section 4, each candidate shall, either in person or by any of his proposers or seconders, between the hours of eleven o'clock in the forenoon and three o'clock in the afternoon, deliver to the Returning Officer at the place specified in this behalf in the public notice issued under section 5, a nomination paper completed in the prescribed form and subscribed by the candidate as assenting to the nomination, and

(a) in the case of Presidential election, also by at least ten electors as proposers and at least ten electors as seconders;

(b) In the case of Vice-Presidential election, also by at least five electors as proposers and at least five electors as seconders;

provided that no nomination paper shall be presented to the Returning Officer on a day which is public holiday.

(2) Each nomination paper shall be accompanied by a certified copy of the entry relating to the candidate in the electoral roll for the parliamentary constituency in which the candidate is registered as an elector.

xxx xxx xxx

5E. (1).....

xxx xxx xxx

(5) The Returning Officer shall then examine the nomination papers and shall decide all objections which may be made to any nomination paper and may, either on such objection or on his own motion, after such summary inquiry, if any, as he thinks necessary, reject any nomination on any of the following grounds:

(a) .....

xxxx xxxx xxxx

(e) that there has been a failure to comply with any of the provisions of Section 5B or Section 5C.

xxxx xxxx xxxx

(5) The Returning Officer shall not reject any nomination paper on the ground of any defect which is not of a substantial character.

xxx xxx xxx

(8) For the purposes of this section, a certified copy of an entry in the electoral roll for the time being in force shall be conclusive evidence of the fact that the person referred to in that entry is an elector for that constituency, unless it is proved that he is subject to any of the disqualifications mentioned in section 16 of the Representation of the People Act, 1950."

The defect in the nomination papers of the returned candidate, on which this ground is based, has already been indicated. The undisputed fact, on the basis of the affidavits filed by both sides, is that the respondent, K. R. Narayanan, son of Raman was registered as an elector in the electoral roll of '94 Palai Assembly Constituency' which falls within Muvattupuzha parliamentary constituency and not Ottapalam (SC) parliamentary constituency. There is no inaccuracy or defect in the description of the respondent as an elector in the certificate issued by the Electoral Registration Officer and Tahsildar', Meenachil, which was annexed to the nomination paper when it was filed. The certificate clearly says that the name of the respondent was included in the electoral roll of '94 Palai Assembly Constituency, Part No. 101'. It further contains the 'true extract' of that electoral roll of 1989 and certifies it to be the extract from the latest and current electoral roll.

Section 5B (2) requires that 'a certified copy of the entry relating to the candidate in the electoral roll for the parliamentary constituency in which the candidate is registered as an elector' shall accompany each nomination paper. The contents of the certificate, so annexed to each nomination paper, fully satisfy the requirement of 'a certified copy of the entry relating to the candidate in the electoral roll' for the assembly constituency in which the respondent was registered as an elector. The certificate does not name the parliamentary constituency and the nomination paper mentions the parliamentary constituency as Ottapalam (SC) instead of Muvattupuzha. The question is whether this difference is of a substantial character to warrant rejection of the nomination paper.

Section 13D of the Representation of the People Act, 1950 is in Part 11B thereof relating to 'Electoral Rolls for Parliamentary Constituencies' and Section 15 is in Part III relating to 'Electoral Rolls for Assembly Constituencies', which read as under:

"13D. Electoral rolls for parliamentary constituencies –
(1) The electoral roll for every parliamentary constituency, other than a parliamentary constituency in the State of Jammu and Kashmir or in a Union Territory not having a Legislative Assembly, shall consist of the electoral rolls for all the assembly constituencies comprised within that parliamentary constituency; and it shall not be necessary to prepare or revise separately the electoral roll for any such parliamentary constituency:

xxx xxx xxx

15. Electoral roll for every constituency –
For every constituency, there shall be an electoral roll which shall be prepared in accordance with the provisions of this Act under the superintendence, direction and control of the Election Commission."

It is clear from the above provisions that there is no separate electoral roll for a parliamentary constituency and the electoral roll for the parliamentary constituency consists of the electoral rolls for all the assembly constituencies comprised within that parliamentary constituency. Thus, the parliamentary constituency of which '94 Palai Assembly Constituency' forms a part would be the parliamentary constituency in which the respondent was registered as an elector; and his name had to be found in the electoral roll of the assembly constituency therein in which he was so registered. The respondent, in the present case, was registered as an elector in the electoral roll of '94 Palai Assembly Constituency' as clearly mentioned in the certificate annexed to each nomination paper. There was thus no ambiguity in the description of the respondent as an election on reading the nomination paper along with the certificate annexed to it. The mistake, however, was in mentioning the name of the corresponding parliamentary constituency for '94 Palai Assembly Constituency' as 'Ottapalam (SC)' instead of 'Muvattupuzha' in the nomination paper of the respondent. This mistake did not mislead anyone, not even the petitioner, which is evident from the fact that such an objection was not taken at the time of the scrutiny even by the petitioner, since there was no doubt in the mind of anyone about the correct description of the respondent as a candidate at the election. The other mistake pointed out is that the name of respondent's father, 'Raman', is written under the column 'Name of the Guardian' when the heading of that column according to the petitioner, should have been 'Name of Father/Mother/Guardian/Husband'. In our opinion, this can hardly be called a defect, since the omission, if any, is in giving the full heading of that column and not in mentioning the name of respondent's father thereunder.

The ultimate question is whether this discrepancy in describing the parliamentary constituency corresponding to '94 Palai Assembly Constituency' in which the respondent was registered as an elector, and the deficiency in the heading of the column under which the name of respondent's father is written, are defects of substantial nature which required rejection of the nomination on the ground contained in Section 5E (3) (e) of the Act. We do not think so.

The decision of a Constitution Bench of this Court in *Karnail Singh* v *Election Tribunal, Hissar, and Others*, 10 ELR 189 (SC) holding that the rejection of nomination is not permissible only for a technical defect which is not of a substantial character, has been consistently followed. In that case, the nomination paper did not record the name of the part of the electoral roll in which the name of the candidate appeared but there was no difficulty in identifying the candidate. It was held by the Election Tribunal that rejection of the nomination paper on that ground was improper. This Court affirmed the view of the Election Tribunal and held thus:

> "..... The only defect pointed out was that the name of the sub-division was not stated therein, but on the evidence it was quite clear that there was no difficulty in identifying the candidate and the candidate himself pointed out to the Returning Officer the entry of his name in the electoral roll. The defect, in these circumstances, was a technical one and the Tribunal was perfectly right in holding that the defect was not of a substantial character and that the nomination paper should not have been rejected....."

It is sufficient to refer to the decision in *Ram Awadesh Singh* v *Sumitra Devi & Others*, [1972] 2 SCR 674 in which the decisions of this court, starting with *Karnail Singh*, are referred, indicating the object of such a provision and the nature of a substantial defect which permits rejection of the nomination paper. The ground taken there was of improper acceptance of nomination paper of the returned candidate, inasmuch as the name of the constituency in which the returned candidate was registered as an elector was wrongly mentioned in the nomination paper. The earlier decisions of this Court were referred to, and it was held that a mis-description as to the electoral roll number of the candidate or of the proposer in the nomination paper is not to be considered as a material defect in the nomination paper. It was also pointed out that the returning officer while scrutinising the nomination papers can permit the correction of any mistake therein, which indicates that every mistake in filling the nomination paper is not to be treated as substantial in nature. In our opinion, sub-section (5) of Section 5E, which inhibits the returning officer and does not permit rejection of any nomination paper on the ground of any defect which is not of a substantial nature, expressly provides for such a situation. We have no doubt that rejection of any nomination paper of the respondent in the present case on the ground alleged by the petitioner would have been an improper rejection of the nomination paper, and in violation of Section 5E (5) of the Act. It is, therefore, erroneous to contend that the nomination papers of the respondent were wrongly accepted by the returning officer.

The nature of mistake or defect in the nomination papers of the respondent, viewed from a different angle, also leads to the same conclusion. The object of the particulars required to be filled in the nomination paper, in accordance with sub-sections (1) and (2) of Section 5B of the Act read with Rule 4 and Form 3 of the Rules, is to correctly and unambiguously identify the candidate, and to indicate that the conditions of eligibility for being a candidate at the election are satisfied. The returning officer is also required to permit correction of any discrepancies, to remove any ambiguity or mis-description. It is, therefore, clear that unless the defect in the

nomination paper or the deficiency therein is of a substantial character, Section 5E (5) enjoins the returning officer not to reject the nomination paper. It is, therefore, obvious that if there be any mistake or defect in the nomination paper which is a mere mis-description of the candidate, but the mis-description is such that it does not mislead anyone, and the identity of the candidate is not in doubt to enable the returning officer to perform his duty of scrutinising the nomination paper to find out whether the candidate has been validly nominated, then the mistake, if any, is not of a substantial character.

The requirements for a valid nomination in sub-section (1) and (2) of Section 5B are: the nomination by specified number of proposers and seconders, assent of the candidate to the nomination, a certified copy of the entry in the electoral roll showing the candidate to be a registered elector, representation of the nomination paper completed in the prescribed form within the specified time to the returning officer at the specified place, and fulfilment of the conditions of eligibility as a candidate. For this purpose, correct identification of the candidate is necessary. There is not even a remote suggestion in the present case that there was any difficulty or doubt in identifying the respondent as the candidate nominated by the nomination papers filed for his candidature, due to any mistake in describing the parliamentary constituency corresponding to '94 Palai Assembly Constituency' in which the respondent was registered as an elector or showing the name of his father 'Raman' under the column written as 'Name of Guardian' instead of 'Name of Father/Mother/Guardian/Husband. Even the petitioner was not misled by these defects, and it is for this reason that no such objection was taken by the petitioner to the nomination of the respondent even though the petitioner did raise objection at the time of scrutiny for other reasons.

The mistake in mentioning the name of the parliamentary constituency as Ottapalam (SC) instead of Muvattupuzha when the assembly constituency in which the respondent was registered as and elector therein was correctly described as '94 Palai Assembly Constituency' was at best a misnomer which misled no one, not even the petitioner, and it was, therefore, not a defect of substantial nature. The true test for determining whether a misdescription is a mere misnomer or defect of substantial nature was indicated in *Davies* v *Elsby Brothers, Ltd.*, [1960] 3 A11 ER 672 at p. 676 as under:

> .....In English law as a general principle the question is not what the writer of the document intended or meant, but *what a reasonable man reading the document would understand it to mean; and that is the test which ought to be applied as a general rule in cases misnomer* – which may embrace a number of situations apart from misnomer on a writ, for example mistake as to identity in the making of a contract. *The test must be: How would a reasonable person receiving the document take it? If, in all the circumstances of the case and looking at the document as a whole he would say to himself: "Of course it must mean me, but they have got my name wrong", then there is a case of mere misnomer.* If, on the other hand, he would say; "I cannot tell from the document itself whether they

mean me or not and I shall have to make inquiries", then it seems to me that one is getting beyond the realm of misnomer....." (Emphasis supplied.)

Viewed in this manner also, there can be no doubt that the mistake or defect, if any, in the nomination paper of the respondent was not of a substantial character and, therefore, it could not be a ground to permit rejection of the nomination paper in accordance with Section 5E (3) (e) of the Act. Had the defect been pointed out by anyone at the time of scrutiny, the Returning Officer would have certainly, and rightly, permitted correction of the same, since it was only a technical defect. However, no one, not even the petitioner, had any such doubt, as the identify of the respondent and his eligibility as a candidate was undisputed. For this reason, this objection was not even raised at the time of scrutiny, but only as an afterthought in the election petition."

The fact, however, remains that this technical defect crept into the nomination papers of the respondent in spite of the association of a galaxy of men drawn from the top echelons of several political parties in the filing of his nomination papers. The election petition does serve the purpose of revealing this discrepancy which that galaxy of men completely missed. It is in a different matter that the defect is merely technical and not substantial in nature, so that it has no adverse consequence.

Accordingly, the ground contained in Section 18 (1)(c) of the Act is also not available to challenge the validity of the election of the respondent.

Consequently, the election petition is dismissed. – No costs.

.....J.
(J. S. VERMA)

.....J.
(K. J. AYACHANDRA REDDY)

.....J.
(YOGESHWAR DAYAL)

.....J.
(G. N. RAY)

New Delhi:
July 16, 1993

.....J.
(S. P. BHARUCHA)

IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gachuhi, Kwach & Cockar, J. J. A)

CIVIL APPLICATION NO NAI. 253 OF 1992 (UR 102/92)

BETWEEN

1. RICHARD CHIRCHER
(RETURNING OFFICER KABARTONJO. BARINGO NORTH)

2. ELECTORAL COMMISSION.....APPLICANTS

AND

3. HENRY RONG'UNO CHEBOIWO

WILLY KAMUREN INTERESTED PARTY RESPONDENTS

(Application for stay of execution in an intended appeal from a ruling of the High Court of Kenya at Nairobi (Lady Justice Aluoch) dated 21st December, 1992)

Elections *– Nominations – Forcible prevention of prospective candidate filing nomination papers – Injunction granted to prevent returning officer publishing first respondents name as sole nominated parliamentary candidate for Boringo North constituency – Whether injunction should stand.*

Background facts: *The relief sought in the Notice of Motion is an Order to stay the order of Mrs Justice Aluoch given on 21st December 1992. Whereby she granted an injunction against the Returning Officer and the Commission pending an appeal to the Court of Appeal.*

Held: *That the application failed.*

Cases cited in Judgement:

Thande Y. Manteamers (1970) EA 343

Stanley Munga Githunguri v *Jimba Credit Corpr. Ltd. (1988) Civil application No. NAI 161.*

IN

HC MISC. APPLIN NO 1077 OF 1992

.....

RULING OF THE COURT

This is an application under Rule 5 (2) (b) of the Court of Appeal Rules brought under a certificate of urgency by Richard Chirchir, Returning Officer, Kabartonjo, Baringo North Constituency (The Returning Officer) and the Electoral Commission (the Commission). The respondent is Henry Ronguno Cheboiwo (the respondent) and Willy Kamuren has been joined as the interested party (Mr. Kamuren).

The relief sought in the Notice of Motion is an order to stay the order of Mrs Justice Aluoch given on 21st December 1992 in Misc. Civil Application No. 1077 of 1992 whereby she granted an injunction against the Returning Officer and the Commission pending an appeal to this Court.

In his application to the superior court the respondent sought a number of reliefs the second one of which was:

> (2) "That the second defendant be and is hereby restrained from publishing in the Kenya Gazette or otherwise acting on or giving effect to the declaration by the first respondent that the third respondent has been nominated as the sole parliamentary candidate for Baringo North Constituency."

The respondent's motion was supported by his own affidavit in which he deponed *inter alia*:

> (17) That I was validly nominated by the Democratic Party of Kenya to contest for the Baringo North Parliamentary seat during the General Elections scheduled for 29th December 1992.
>
> (18) That since my announcement of my affiliation to and membership of the Democratic Party of Kenya, my entire family and I have been subjected to threats of violence and harassment from the supporters of the KANU Nominee who is the third respondent.
>
> (19) That I left Nakuru on 9th December 1992 at 5.30 am on route to Kabartonjo Baringo North to present my nomination papers.
>
> (20) That at Marigat, I found an unlawful road block erected using huge stones and logs and manned by about one thousand five hundred people wearing YK 92T-Shirts and caps and some plain cloths policemen armed with pangas simis and stones.

(21) That at the aforementioned road block, I was asked to identify myself, state where I was coming from where I was heading to and produce my KANU Card.

(22) That my driver did the needful on my behalf and misled the youths as to my identify.

(24) That I only managed to reach 10 km from Marigat where I encountered a third road block which was manned by vicious and menacing-looking KANU youth wingers at Kamungai.

(25) That I was forced to turn back at Kamungai road-block as those who manned it were armed with bows and arrows and rungus and I feared for my life.

(26) That I reached Nakuru Town at around 11 a.m. after my efforts to present my nomination papers at Kabartonjo were badly frustrated.

(30) That on the same day 9th December, 1992 I was informed by my agent, Mr. Mutua Mboya, Advocate, that he was violently blocked by agents of the third respondent from presenting my nomination papers."

The averments contained in the respondent's affidavit were also repeated in his accompanying statement of facts. There was also an affidavit by Francis Mutua Mboya in which he explained how his efforts to reach Kabartonjo on 9th December, 1992 to deliver the nomination papers of the respondent were thwarted by members of an organisation called Youth for Kanu 92 and youths wearing T-Shirts, they deponed *inter alia*:

(18) That I was escorted by Mr. Michael Buluma the O.C.S. Kabartonjo. The District Officer (D.O) Baringo North Division Mr. Earrah and several policemen to present Mr Cheboiwo's nomination papers to the Returning Office.

(19) That on arrival, I found outside the Returning Officer's Office one Mr Willy Kamuren the third respondent herein with a group of about one thousand five hundred (1,500) armed men who formed a human shield (barricade) around the Returning Officer's offices and dared me to come out of my vehicle.

(20) That I had been violently and unlawfully assaulted before by the same group of people and since the policemen who had escorted me did nothing to disperse the crowd, I could not come out of my vehicle for I feared for my life.

(21) That I sat in my car until 1.15 p.m. when the crowd milled away and I started my journey back having been denied the opportunity to present the nomination papers on behalf of the applicant.

(22) That between 12.30 and 1.15 p.m. Mr Willy Kamuren, the third respondent herein repeatedly addressed the vicious crowd in an inciting and war-like manner.

As at the time the motion came before the Judge, the respondents to the motion (the present applicants) had not filed any affidavit in reply but had filed grounds of objection.

The objections taken on behalf of the Returning Officer and the Commission were that the Commission was not a body capable of being sued or ruling except through the Attorney-General: that an injunction could not be granted on a prerogative writ; that the application was premature as under Section 19 of the National Assembly and Presidential Election Act a question in relation to an election should be by way of a petition; that the court had no jurisdiction; and that the Returning Officer having prepared the necessary certificate under regulation 20 of the National Assembly and Presidential Elections Regulations was *functus officio* and the court had no power to inquire into his decision.

In the case of Mr Kamuren, the grounds of objection were that the application was misconceived and did not lie; that the only remedy, if any, of the applicant (respondent herein) is by way of an election petition after the result of the election has been gazetted; and that the application was premature.

All these grounds of objection were taken before the Judge as a preliminary objection. On 21st December, 1992, the Judge delivered her ruling and dismissed the preliminary objection raised on behalf of the Commission, the Returning Officer and Mr Kamuren. She did not deal with the application on the merits because counsel who appeared for the Commission, the Returning Officer and Mr Kamuren, quite properly, decided to contest the Judge's ruling on the preliminary objection, on appeal. She stayed further proceedings but granted an injunction restraining the Commission from publishing in the Kenya Gazette or otherwise acting or giving effective to the declaration by the Returning Officer that Mr Kamuren had been nominated as the sole parliamentary candidate for Bringo North constituency.

Before us on this application both Mr Ransley and Mr A. B. Shah for the Commission, the Returning Officer and Mr Kamuren, repeated the same submissions they made in the superior court. Basically the submission is that, even if what the respondent alleges happened did happen, his remedy lies in a petition under Section 19 of the National Assembly and Presidential Elections Act (Cap 7) on the grounds that once the Returning Officer had issued a certificate in form 12 under regulation 20 (2) of the National Assembly and Presidential Elections Regulations, the election process was complete and the Commission was obliged to gazette the election of Mr Kamuren. Whether this submission is correct or not, it is not our duty to decide at this stage that

being a matter to be canvassed in the appeal. All we say at the moment is that before a nomination can become the subject of regulation 20 it must first come within the preview of regulation 15 of the National Assembly and Presidential Elections Regulation which stipulates that:

> 15 (1) For the purpose of nomination of candidates at a parliamentary election every candidate *shall be*
>
> > (b) *nominated by the delivery by the returning officer of the constituency* between the hours of eight o'clock in the morning and one o'clock in the afternoon of the nomination day of election of a nomination paper in Form 9. (Emphasis added).

Both Mr Ransley and Mr Shah relied heavily on the case of *Thande Y Manteamers* (1970) E. A. 343 where the Court of Appeal for East Africa held that a preliminary election is part of a parliamentary election and the High Court has jurisdiction to determine any question in respect of a preliminary election. One only needs to read Section 17 (3) of the National Assembly and Presidential Election Act. 1969 (Act No. 13 of 1969) and the definition of preliminary election under the 1969 Act to appreciate that *Thande's* case is now only of historical importance. It has been overtaken by the tide of time.

For this application to succeed, the applicants must satisfy the test laid down in the case of *Stanley Munga Githunguri* v *Jimba Credit Corporation Ltd.* (Civil Application No. NAI 161 of 1988). They must show that they have an arguable appeal, or put another way, that their appeal is not frivolous and that the appeal, if successful, would be rendered nugatory unless a stay was granted.

As regards the first condition, we entertain a degree of doubt having regard to our reading of the law as it stands today. The law of Kenya contemplates that a Kenyan seeking nomination as a candidate in a parliamentary election shall be entitled to unimpeded access to the Returning Officer of the constituency of his choice.

If this application is refused, the only possible prejudice Mr. Kamuren will suffer if you can call it prejudice, is that his purported election as the Member of Parliament for Baringo North constituency will be lightly delayed but he can take some consolation from the fact that such a temporary setback is not too heavy a price to pay for democracy. Soon after the general election, the Speaker will issue the necessary writ for an election to be held according to the Law.

On the other hand, If we allow this application, we shall be giving a seal of approval to unbridled use of violence and strong arm tactics in the election process. That cannot be the function of a court of law.

The fact that the High Court bench is split right down the middle on the correct legal position on the issues to be canvassed in the appeal only goes to show that the point is not free from difficulty. The elections of this year are not ordinary elections and those who have a genuine interest to participate should be given every encouragement to do so. The Commission has got that power.

In the upshot, the application fails and is dismissed with costs. We are grateful to counsel for their assistance.

Dated and delivered at Nairobi this 24th day of December 1992.

IN THE HIGH COURT OF JUDICATURE: ANDHRA PRADESH: AT HYDERABAD
TUESDAY THE TWENTY-NINTH DAY OF NOVEMBER
ONE THOUSAND NINE HUNDRED AND NINETY-FOUR

PRESENT

The Honourable Mr. S. S. Ahmad, Chief Justice
and
The Honourable Mr. Justice P. Venkatarama Reddi

WRIT APPEAL NO. 1395 OF 1994

(Writ Appeal Under Clause 15 of the Letters Patent against the Order in W.P. No 20283/94 dt 17.11.94 on the file of the High Court.)

1. P. Ravindra Reddy
2. Indrajit Reddy
3. P. Bayyapa Reddy

...APPELLANTS

V

1. The Election Commission,
represented by its Secretary,
Nirvachan Sadan, New Delhi – 1

2. The Chief Electoral Officer,
Andhra Pradesh, Secretariat,
Hyderabad.

3. The District Election
Officer-District Collector,
Anantapur District,
Anantapur.

4. The Returning Officer-cum-
Revenue Divisional Officer,
163, Gorantla Assembly
Constituency, Penukonda,
Anantapur District.

5. The State of Andhra Pradesh,
represented by the Chief Secretary,
Secretariat, Hyderabad.

...RESPONDENTS

Counsel for Appellants:	M/s Seshagiri Rao & C Kodanda Ram, & R. Sudheer
Counsel for Respondent No.1	Mr C P Sarathy Advocate
Counsel for Respondents 2 to 5	Advocate-General

Elections *– Nominations – Kidnapping of prospective candidate – Forcible prevention of filing nomination papers – Impact on purity of the election process – Whether results of the election would reflect true choice of electorate of constituency – Power of Election Commission to recommend rescission election notice in circumstances.*

Background facts: *The official Congress (I) candidate, Sri Siddaiah, for 163, Gorantha Assembly Constituency was kidnapped by the rebel Congress faction with the intention of preventing him from filing his nomination paper. The matter was investigated by the superintendent of Police, Anantapur, who submitted his report to the Election Commission two days after the kidnapping. The Election Commission took the view that the purity of the election process was irretrievably sullied in the constituency concerned and recommended to the Governor of the State to rescind the notification of election in that constituency. The Governor acted accordingly, and his notification, dated 11.11.1994, cancelling the election was challenged by two writ petitions on the ground, inter alia, that the Election Commission did not have the power to recommend rescission of the notification which initiated the election process in the constituency.*

Held: *That the notification cancelling the election was properly issued by the Governor of the State.*

Cases Cited in the Judgement:

Mohinder Singh Gill & Another v *Chief Election Commissioner & Others*(1978)*AIR SC 851*
A. C. Jose v *Sivan Pillai & Others (1984) AIR SC 921*
Election Commission of India v *State of Haryana (1984) AIR SC 1406*
N.P. Ponnuswami v *Returning Officer, Namakkal (1952) AIR SC64*
S. Narayanaswami v *G. Pannerselvamn (1972) AIR SC 2284*
Dhoon Singh v *Prekash Chandra Sethi & Others (1975) AIR SC 1012*
Thakur Vishweshwar Sharan Singh v *State Transport Appellate Tribunal, Gwalior (1981) AIR Madhya Pradesh, 121*

The Court delivered the following judgement:

ORAL JUDGEMENT (Per The Hon. Chief Justice)

This Writ Appeal arises out of a common judgement dated 17th November 1994, passed by Mr Justice Motilal B. Naik, by which Writ Petition Nos 20130 and 20283 of 1994 were dismissed at the admission stage.

In order to constitute a new Legislative Assembly for the State of Andhra Pradesh, the Governor of Andhra Pradesh issued a Notification No. 597/Elec.F/94 dated 1st November 1994 under Section 15 of the Representation of People Act, 1951 calling upon all the Assembly Constituencies of Andhra Pradesh, including 163, Gorantla Assembly Constituency, to elect their members for the State Assembly.

This was followed by the Notification issued by the Electoral Commission of India under Section 30 of the Act setting out the following election programme for the Assembly elections in Andhra Pradesh:

8.11.1994	:	Last date for making nomination;
9.11.1994	:	Scrutiny of nominations;
11.11.1994	:	Last date of withdrawal of candidature;
1.12.1994	:	Date of Poll;
9.12.1994	:	Counting of Votes.

Many persons filed their nominations for contesting the election of the State Assembly from 163, Gorantla Assembly Constituency. On 8th November 1994 a fax message was sent by the Chief Electoral Officer, Andhra Pradesh, to the Secretary, Election Commission of India, that he, namely the Chief Electoral Officer, was informed by the Collector and District Election Officer, Anantapur, by telephone that a complaint had been lodged with him, namely, the Collector, that the official Congress (1) candidate, Sri Siddaiah, for 163, Gorantla Assembly Constituency was kidnapped in the morning by the rebel Congress faction with the intention of preventing him from filing his nomination paper and that, he was being searched for by the police so that he could file his nomination before 3.00 pm on the day which was the last day for filing nominations. The Chief Electoral Officer further stated in his fax message that he had instructed the Collector and had also made a request to the Chief Secretary and the Director General of Police to locate the kidnapped person, namely, Sri Siddaiah, so that he could file his nomination paper before 3.00 pm on that day. It was also recited in the fax message that a more detailed report would be submitted on receipt of the report from the Collector. The next day, i.e. on 9th November 1994, the Secretary, Election Commission of India, issued a fax message to the Chief Secretary, Government of Andhra Pradesh, saying that the message of the Chief Electoral Officer, the message of the District Election Officer and the message of the Superintendent of Police quoted in the message of the District Election Officer, did not clearly and specifically state whether Sri

Siddaiah and his proposer were ultimately prevented from filing the nomination paper. The Commission also wanted to know by fax whether nomination papers were in the personal possession of Sri Siddaiah at the time of kidnapping, and wanted a more detailed report whether Sri Siddaiah was physically prevented from filing his nomination paper, either personally or through his proposer. Thereupon, the Chief Secretary, by fax message dated 10th November 1994 informed the Commission that the Collector and District election Officer, Anantapur, had reported that Sri Siddaiah did not carry the nomination paper with him at the time of kidnapping, but he was to go to the office of the Mandal Revenue Officer, Gorantla, to obtain the blank nomination paper and after filling up the same he was to hand over the nomination papers to the Assistant Returning Officer at Gorantla, but this could not be done on account of his kidnapping and he could not reach the office of the Mandal Revenue Officer, nor could he file the nomination paper.

The Superintendent of Police, Sri A Sivanarayana, IPS submitted a report about the incident of 8th November 1994 and set out therein that Sri K Siddaiah, who was a practising Advocate of Anantapur, was given Congress (1) Ticket to contest from 163, Gorantla Assembly Constituency and the sitting M.L.A., Sri Ravindra Reddy of Pamudurthi, who was aspiring for Congress (1) Ticket, could not get it. He, therefore, decided to file his nomination as an independent candidate and for that purpose he and his followers assembled at the office of Mandal Revenue Officer on 8th November 1994. In the meantime, at about 1.00 pm on 8th November 1994, the Inspector of Police, Sri Satya Sai Rural Circle, got information that Sri K Siddaiah, Congress (1) candidate, along with his followers, while proceeding from Anantapur to Gorantla via Puttaparthi to file his nomination paper got abducted at about 11.30. am by Sri P Ravindra Reddy, sitting M.L.A., who could not get Congress (1) Ticket, by his men who took him and his follower Sri G. Narasimhulu, Advocate, away to unknown destination. This information was passed on to superior officers and District S. B. Control of VHF Set and a case was registered as Crime No. 93/1994 under Sections 147, 148, 342, 323, 365 and 149, I. P. C. at Police Station, Gorantla, at 1.15 P.M. on 8.11.1994. All border Police Stations were alerted and search parties were deputed to different directions. During the course of investigation, it was ascertained that Commander Jeep No. AP 04 6336 was used in abducting the Congress (1) candidate and his follower. The Jeep was traced at 1.00. am on 9th November 1994 near Gorantla Town and was seized. In the meantime information was received by the police in the early hours of 9th November 1994 that both the abducted persons had reached their houses at Anantapur at about midnight. Sri K. Siddaiah and his friend and follower Sri G. Narasimhulu were examined by the Deputy Superintendent of Police, Penukonda, and they stated that they were abducted on the instigation of Sri P. Ravindra Reddy, sitting M. L. A. by his men and were detained in the hillocks of Pamudurthi hilly area from 1.00 pm to 7.00 pm, which prevented Sri K. Siddaiah from filing his nomination paper by 3.00 pm on 8th November 1994.

The above report of the Superintendent of Police, Anantapur, was considered by the Election Commission of India on 10th November 1994 and being of the view that the purity of the election process was irretrievably sullied in 163, Gorantla Assembly Constituency in the State of Andhra Pradesh, and in those circumstances the result of the election in the said constituency would not

be reflective of the true choice of the electorate of that constituency, it recommended to the Governor of the State to rescind the notification dated 1st November 1994 issued by him under Section 15 (2) of the Representation of the People Act, 1951 in so far as it related to 163, Gorantla Assembly Constituency, so that the entire election process may be commenced anew in that Constituency. Acting upon the above recommendation, the Governor of Andhra Pradesh, by notification dated 11th November 1994, cancelled the notification dated 1st November 1994 issued under Section 15 (2) of the Act. The notification dated 11th November 1994 was challenged by means of two writ petitions, namely, *W.P. No. 20130/1994 (N. Kristappa* v *The Chief Election Commission & Others)* and *W. P. No. 20283/1994 (P. Ravindra Reddy* v *Election Commissioner & Others)*, filed in this Court on the ground, *inter alia*, that the Election Commission was not vested with any power to recommend rescission of the notification issued under Section 15 (2) of the Act by which the election process was initiated in the State and that the power, in any case, had been exercised in an unfair and arbitrary manner on the biased reports of the Chief Electoral Officer, Andhra Pradesh and, therefore, its recommendation to rescind the notification dated 1st November 1994 is vitiated. The writ petitions were dismissed by a common judgement and order dated 17th November 1994, and the present appeal is directed against this judgement.

Sri Seshagiri Rao, appearing on behalf of the appellants has contented that recission of a notification issued under Section 15 of the Act, by which the election process was set in motion, is not contemplated by the Act and, therefore, the Election Commission was in error in recommending to the Governor that the said notification may be rescinded. It is also contended that the Election Commission has to act within the ambit and scope of the Representation of the People Act, 1950 and the Representation of the People Act, 1951 as both the Acts have been made by Parliament under Article 327 of the Constitution and provide for all matters relating to, or in connection with elections to either House of Parliament or either House of the Legislature of a State. It is contended that the Election Commission cannot traverse beyond the scope of the aforesaid two enactments, and since recommendation to rescind the notification issued under Section 15 of the Act is not covered by any provision of the Act nor is contemplated by the Act, the impugned Notification issued by the Governor in pursuance of the said recommendation was liable to be set aside and the earlier notification issued under Section 15 was liable to be restored, so that the electorate of 163, Gorantla Constituency could also exercise their franchise in the General Elections proposed to be held in December 1994 for constituting a new State Legislative Assembly.

The relevant provision of Article 324 of the Constitution is quoted below:

> "324 Superintendence, direction and control of elections to be vested in Election Commission.
>
> (1) The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every

State and of elections to the offices of President and Vice-President held under this Constitution shall be vested in a Commission (referred to in this Constitution as the Election Commission).

(2)	xxx	xxx	xxx
(3)	xxx	xxx	xxx
(4)	xxx	xxx	xxx
(5)	xxx	xxx	xxx
(6)	xxx	xxx	xxx

Articles 327, 328 and 329 which are also relevant for purposes of the present case, are also quoted below:

"327 Power of Parliament to make provision with respect to elections to Legislatures:

> 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 Legislature of a State including the preparation of electoral rolls, the delineation of constituencies and all other matters necessary for securing the due constitution of such House or Houses".

"328 Power of Legislature of a State to make provision with respect to elections to such Legislature:

> 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."

"329 Bar to interference by courts in electoral matters:

Notwithstanding anything in this Constitution –

> (a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies,

made or purporting to be made under Article 327 or Article 328, shall not be called in question in any court;

b) no election to either House of Parliament or to the 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."

Learned Advocate-General appearing on behalf of the respondents, as also Sri C. P. Sarathy, appearing on behalf of the Commission, have contended that the writ petition was not maintainable on account of the bar to interference by Court created by Article 329 of the Constitution and, therefore, this appeal which is continuation of the writ petition, is also liable to be dismissed at the threshold as not maintainable. It is contended that on account of the provisions contained in Article 329 this Court need not go into the merits of the question raised in the writ petition or in this Writ Appeal, and that the appeal may be dismissed at the admission stage itself.

Since all the parties are represented before us, we propose to hear and dispose of the appeal at the initial stage itself as the usual exercise of first admitting the appeal and then allowing it to come up for hearing in its turn in the normal course would unnecessarily delay the disposal of a matter which requires to be disposed of at the earliest, so that the question whether the electorate of 163, Gorantla Constituency will at all exercise their right of franchise in the present election may be settled before the date of the poll which, we are informed, will be held either on 1st of December or on 5th of December, 1994. In disposing of the appeal on merits we would also, if necessary, consider the question of maintainability of the writ petition as also this appeal, at the appropriate stage of this judgement.

A perusal of Article 324 extracted earlier will show that the Election Commission is clothed with very wide powers. In the matter of Election to Parliament and to the State Legislatures, as also to the offices of the President and Vice-President, it has vested in it the superintendence, direction and control of the preparation of electoral rolls. The power to conduct all the above elections is also vested in it. The Commission has also the power to advise the President or the Governor of a State, as the case may be, on the question of disqualification of any Member of Parliament or of a State Legislature. While superintendence, direction and control of the preparation of Electoral rolls and conduct of all elections to Parliament and State Legislatures are vested in the Commission, the Parliament, under Article 327, has been given the power to make law for all matters relating to, or in connection with, election to either House of Parliament or to either House of the Legislature of a State. In exercise of the power under this Article, the Parliament has, as already pointed out earlier, enacted the Representation of the People Act, 1950 and the Representation of the People Act, 1951. But this does not mean that the Commission, on account of the aforesaid two Parliamentary enactments, is divested of its power of superintendence,

direction or control of preparation of electoral rolls, or conduct of all elections to Parliament or State Legislatures, or to the offices of the President and the Vice-President of India.

The effect of the law made by Parliament under Article 327 or by the State Legislature under Article 328 was considered by the Supreme Court in *Mohinder Singh Gill & Another* v *Chief Election Commissioner & Others* and it was laid down that:

> ".....Article 324 (1) vests in the Election Commission the superintendence, direction and control of the preparation of the electoral rolls, for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of the President and Vice-President held under the Constitution. Article 324 (1) is thus couched in wide terms. Power in any democratic set-up, as is the pattern of our polity, is to be exercised in accordance with law. That is why Articles 327 and 328 provide for making of provisions with respect to all matters relating to or in connection with elections for the Union Legislatures and for the State Legislatures respectively. When appropriate laws are made under Article 327 by Parliament as well as under Article 328 by the State Legislatures, the Commission has to act in conformity with those laws and the other legal provisions made thereunder. Even so, both Articles 327 and 328 are "subject to the provisions" of the Constitution which include Article 324 and Article 329. Since the conduct of all elections to the various legislative bodies and to the offices of the President and the Vice-President is vested under Article 324 (1) in the Election Commission, the framers of the Constitution took care to leaving scope for exercise of residuary power by the Commission in its own right as a creature of the Constitution, in the infinite variety of situations that may emerge from time to time in such a large democracy as ours. Every contingency could not be foreseen, or anticipated with precision. That is why there is no heading in Article 324. The Commission may be required to cope with some situation which may not be provided for in the enacted laws and the rules. That seems to be the raison d'être for the opening clause in Article 327 and 328 which leaves the exercise of powers under Article 324 operative and effective when it is reasonably called for in a vacuous area. There is, however no doubt whatsoever that the Election Commission will have to conform to the existing laws and rules in exercising its powers and performing its manifold duties for the conduct of free and fair elections.....".

It is thus clear that the Election Commission still retains its jurisdiction as also all its plenary powers under Article 324, except in respect of matters for which specific provisions have been made in the Act made either by Parliament under Article 327, or by a Legislature under Article 328.

It may be stated that in *Mohinder Singh Gill's* case *supra*, election to a particular constituency was cancelled and a re-poll was ordered by the Commission, which was challenged before the Supreme Court, and the Supreme Court held that the Commission, notwithstanding the law made by the Parliament in the form of the Representation of the People Act, 1950 and that of 1951, still had the jurisdiction and power under Article 324 to cancel an election and to order a re-poll in a situation which was not foreseen by the Act and for which no provision was made therein. The Election Commission is, therefore, entitled to exercise its plenary power under Article 324 in an area not covered by the Act, or the Rules made thereunder.

In *A. C. Jose* v *Sivan Pilai & Others* (2) it was held that when there is no Parliamentary or State legislation, or where there does exist a Parliamentary or State legislation or the Rules made thereunder but they are silent with regard to a particular situation, the Election Commission will have plenary power to give appropriate directions in respect of the conduct of election. It was also held that the Commission cannot override the express provisions in the Act, or pass orders in direct disobedience to their mandate. The Supreme Court observed that the Commission's powers are meant to supplement and not supplant the law.

In *Election Commission of India* v *State of Haryana* (3) it was laid down by the Supreme Court that the ultimate decision whether at a given time it would be possible and expedient to hold the elections must rest with the Election Commission. It was also laid down that the Election Commission also has the power to review its decision as to the expediency of holding the poll on the notified date. It was also provided that it was the duty and obligation of the Commission to keep the situation under constant scrutiny so as to adjust the decision to the realities of the ground situation, and until the elections are held the Commission has jurisdiction, for good reasons, to alter its decision to hold the poll on a particular day.

In view of the above decisions of the Supreme Court it is clear that the law with regard to the power of the Commission under Article 324 has not undergone any change from the date of first decision in *N.P. Ponnuswami* v *Returning Officer, Namakkal* (4) till the more recent decisions on the point.

We have already set out the facts leading to the issuance of the impugned notification earlier part of this judgement, which would show that the Commission had intervened in the matter only on being satisfied that the candidate set up by a national political party had been abducted so as to prevent him from filing his nomination paper. The Commission was of the opinion that election, if held, would not be reflective of the true will of the people and, therefore, it decided to recommend to the Governor to issue a fresh notification for cancelling the notification dated 1.11.1994 issued under Section 15 of the Act, so as to discontinue the process of election in 163, Gorantla Assembly Constituency and pave way for initiation of a fresh process of election. The abduction of a candidate is a situation which is not foreseen by any of the provisions contained in the Representation of the People Act, 1951 or the Rules made thereunder and, therefore, when the Commission recommended to the Governor of Andhra Pradesh to cancel the notification dated

1st November 1994, it purported to operate in a field which was not covered by any parliamentary legislation. It could therefore exercise its plenary power under Article 324 for getting the process of election stalled or cancelled altogether by appropriate action.

Learned Counsel for the appellants has contended that once the process of election is commenced by issuing the requisite notification under Section 15 of the Act, it cannot be stopped or interfered with at any subsequent stage by any authority, including the Election Commission, as the process is irreversible under law. He has, in this connection, drawn our attention to Section 153 of the Act which provides that it shall be competent for the Election Commission, for reasons which it considers sufficient, to extend the time for the completion of an election by making necessary amendments in the notification issued by it under Section 30, or sub-section (1) of Section 39, and has contended that if a situation as happened in 163, Gorantla Assembly Constituency occurs, the Election Commission can extend the time fixed in the notification issued under Section 30 of the Act, but it cannot altogether cancel the process of election commenced by the notification issued under Section 15 of the Act. Section 153 contains an enabling provision which empowers the Election Commission to extend the time for the completion of any election. Under Section 30, or for that matter, under Section 39 of the Act, various dates constituting the election programme are fixed by the Election Commission. The purport of Section 153 is only to give power to the Commission to alter that programme by extending the time for the completion of the election. Under Section 52 of the Act, a poll can be countermanded on the death of a candidate if other conditions set out in the Section are fulfilled.

Section 57 contemplates adjournment of poll in certain situations, while Section 58 contemplates fresh poll in the case of destruction etc. of ballot boxes. A situation arising out of abduction of a prospective candidate so as to prevent him from filing the nomination paper is not contemplated by the provisions referred to above, or any other provision in the Act. So far as the statutory provisions, to which a reference has already been made, are concerned, the Election Commission cannot transgress over those provisions, nor can it act in defiance or disobedience or in violation of the said provisions. But, where the statutory provisions are silent, as in the case of abduction of a prospective candidate the Commission can exercise its plenary power under Article 324 and issue appropriate directions, or make recommendation to the Governor for the cancellation of the notification requiring the Assembly constituency concerned to elect its representative. In doing so, it would not over-step any statutory provision, nor would such a direction or recommendation be in defiance thereof.

In view of the above situation, the learned Single Judge was, in our opinion, justified in holding that the Election Commission was justified in recommending to the Governor to cancel the notification issued under Section 30 by the impugned notification dated 11th November 1994.

Learned Counsel for the appellants contended that by holding that in order to overcome a situation caused by the abduction of a prospective candidate, the Commission could recommend cancellation of the process of election, the learned Single Judge has added or legislated a new

provision in the Representation of the People of the People Act which is not permissible, as laid down by the Supreme Court in *S. Narayanaswami* v *G. Panneerselvam* and *Dhoom Singh* v *Prakash Chandra Sethi & Others*. In the first Supreme Court decision, it was laid down that what was not in the statute could not be supplemented, while in the second case the Supreme Court held that, on the principles of interpretation of statutes, a statute cannot be extended to meet a case for which provision has clearly and undoubtedly not been made. Both these decisions are not applicable to the particular circumstances of the present case.

In the instant case, we are considering the scope, width and extent of the power of the Election Commission available to it under Article 324 of the Constitution. Apart from Article 324, the Parliament by making laws under Article 327 has invested the Commission with many other powers, and we have found that, if the statute made by Parliament under Article 327 is silent with regard to a particular situation, the Commission can exercise its powers under Article 324 and issue appropriate directions. It is not a case where the source of power was available only under the Representation of the People Act, 1951, and not under the Constitution. The learned Single Judge, by his decision, has not added to the Parliamentary legislation as contended by the learned counsel for the appellants, but has held, and in our opinion correctly, that, apart from the provisions of the Representation of the People Act, 1951, the Commission still had the power under Article 324 to issue appropriate directions in relation to the election in question. Nor has the learned Single Judge extended the provision of any statute to meet a situation for which no provision was made in the statute. Once it was noticed by the learned Single Judge that the situation as created by the abduction of the candidate was not covered by the Representation of the People Act, he immediately adverted his mind to the plenary powers of the Commission under Article 324 of the Constitution and held that, in the aforesaid, situation, the Commission could appropriately take necessary action.

Learned Counsel for the appellants then contended that the impugned notification has been issued with the aid of Section 21 of the General Clauses Act, and since the provisions of General Clauses Act cannot be invoked in the instant case, the notification is liable to be quashed. Elaborating his arguments, learned counsel contended that the Governor becomes *functus officio* on issuing a notification under Section 15 of the Act and his powers are exhausted. The Governor, having set in motion the election process, cannot legally retreat his steps and interfere with the election process by issuing a subsequent notification.

By a notification issued under Section 15 of the Act, the Governor calls upon the constituencies in the State to elect their representatives for constituting a new Assembly. Sub-Section (2) of Section 15, which is the relevant provision, is quoted below:

> "15. Notification for General election to State Legislative Assembly:
>
> (1) xxx xxx xxx

> (2) For the said purpose, the Governor or Administrator, as the case may be, shall, by one or more notification published in the Official Gazette of the State on such date or dates as may be recommended by the Election Commission, call upon all Assembly constituencies in the State to elect members in accordance with the provisions of this Act and of the rules and orders made thereunder:
>
> Provided that where a general election is held otherwise than on the dissolution of the existing Legislative Assembly, no such notification shall be issued at any time earlier than six months prior to the date on which the duration of that Assembly would expire under the provisions of Clause (1) of Article 172 or under the provisions of Section 5 of the Government of Union Territories Act, 1963 (20 of 1963), as the case may be."

The provision contemplates that the Governor can call upon all the constituencies to elect new members either by one notification or by more than one notification. The provision also contemplates recommendation of the Commission as to the date or dates when such notifications are to be published.

The Representation of the People Act is a Central Act made by Parliament under which the Governor of the State, as pointed out earlier, has been given the power to issue notification calling upon the constituencies to elect new representatives. Since the power to issue notification is available under the Central Act, the provisions of Section 21 of the General Clauses Act, which is quoted below, would be available to the Governor in rescinding the notification, as it is specifically provided that:

> "Where, by any Central Act or Regulation, a power to issue notifications, orders, rules, or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions, if any, to add to, amend, vary or rescind any notifications, orders, rule or bye-laws so issued".

It requires no effort of interpretation to understand the meaning of Section 21 of the Act, as the provisions are clear and specific and there is no ambiguity involved. The power to issue a notification also includes the power to vary or rescind such notification provided the conditions for the exercise of that power, while issuing that notification, are complied with at the time of issuing the notification of rescission.

There is nothing in Section 15 or any other provisions of the Representation of the People Act which, by context or by implication excludes the availment of power conferred by Section 21 of the General Clauses Act. On the other hand, the exercise of power under Section 21 in a case of this nature advances the purpose of the enactment dealing with elections.

The notification under Section 15 was issued by the Governor on 1st November 1994 on the recommendation of the Election Commission. The impugned notification dated 11th November 1994 by which the earlier notification was rescinded has also been issued on the recommendation of the Election Commission which was of the opinion that the kidnapping and subsequent prevention from filing nomination by Sri K. Siddaiah was proved and that, the purity of the election process had been irretrievably sullied in 163, Gorantla Constituency. Thus, all the conditions which were required to be complied with at the time of issuance of notification under Section 15 have also been complied with at the time of issuance of the impugned notification for rescinding the earlier notification.

Learned Counsel for the appellants referred us to a decision of the Madhya Pradesh High Court in *Thakur Vishweshwar Sharan Singh* v *State Transport Appellate Trivunal, Gwallor*, in which it was laid down that if an Act is brought into force by notification issued by the State Government, the latter, namely the Government, cannot cancel or modify the notification so as to repeal a provision of the Act which has been brought into force. This decision, in our opinion, does not apply to the facts of the case. In that decision certain provisions of the Motor Vehicles Act were amended which were enforced from a particular date by a Notification issued under Section 1(2) of the Act by the State Government. This notification was subsequently sought to be modified by a subsequent notification, and it was in that connection held by the Madhya Pradesh High Court that no other notification could be issued with the aid of Section 21 of the General Clauses Act, as it would have the effect of repealing the amended provision of the Act brought into force by the earlier notification.

In the instant case, the substantive provisions of the Representation of the People Act, 1951 are not affected, and it is only the direction issued to the constituency to elect its representative which has been withdrawn with the promise to start the election process anew in 163, Gorantla Constituency.

Lastly we shall advert to an argument advanced by the learned Counsel for the appellants that Sri Siddaiah was not nominated as a candidate, that he does not come within the definition of 'candidate' and therefore the powers under Article 324 of the Constitution and Section 21 of the General Clauses Act should not have been invoked to protect the interests of a non-candidate.

Assuming that he is not a candidate within the meaning of the Act or the Conduct of Election Rules, undisputedly he is a person who was authorised to contest the election on behalf of a national party. The physical disability of such candidate to file nomination by reason of his abduction is certainly a factor which has inevitable bearing on the purity and fairness of election. It cannot be said that in the circumstances, the power has been exercised for any extraneous purpose, particularly as the Commission had acted after obtaining full details of the incident from various sources and had proceeded in the matter only on being satisfied that the election process in 163, Gorantla Constituency had been "irretrievably sullied".

No other point was urged before us. Since we have found on the merits of the case that the impugned notification does not suffer from any of the defects pointed out by the learned Counsel for the appellants and we are of the opinion that the said notification was properly issued by the Governor of the State, we need not decide the preliminary objection raised by the learned Advocate-General as also by Sri C. P. Sarathy on behalf of the Election Commission that the present petition, or for that matter, the present appeal is not maintainable in view of Article 329 of the Constitution.

The appeal is dismissed without any order as to costs.

Sd/-M. V. Subba Rao,
Addl. Dy Registrar

// TRUE COPY //

for Asst. Registrar.

To:

1. The Secretary, Election Commission, Nirvanchan Sadan, New Delhi
2. The Chief Electoral Officer, A.P., Secretariat, Hyderabad
3. The District Election Officer/District Collector, Anantapur Dt. Anantapur
4. The Returning Officer-cum-Revenue Divisional Officer, 163 Gorantla Assembly Constituency, Penukonda, Anatapur District
5. The Chief Secretary, State of A.P., Secretariat, Hyderabad
6. One C. D. copy
7. One cc to Mr. C. P. Sarathy, Advocate (OPUC)

K. U. R. R.
Dated: 29. 11. 1994

JUDGEMENT:
W. A. NO. 1395 OF 1994

Dismissing the W. A.
without costs.

Footnotes

(1) AIR 1978 SC 851

(2) AIR 1984 SC 921

(3) AIR 1984 SC 1406

(4) AIR 1952 SC 64

(5) AIR 1972 SC 2284

(6) AIR 1975 SC 1012

(7) AIR 1981 Madhya Pradesh, p. 121

THEME 5

THE VOTE

Record No. 52619

THE SUPREME COURT OF MAURITIUS

1. Jaya Rama VALAYDEN
2. Serge Gaston LADEGOURDIE
3. Marie Joseph Immanuel Guy OLLIVRY

PLAINTIFFS

V

1. **H. E. The President of the Republic of Mauritius**
2. **The Hon. The Attorney-General**
3. **Mr. S. Moosun, The Electoral Commissioner**
4. **Mr. S. Runghen, The Returning Officer for the Constituency of Stanley/Rose Hill (No.19)**

DEFENDANTS

In the presence of:

The Electoral Supervisor Commission & 26 Others

CO-DEFENDANTS

***Before**: Rajsoomer Lallah, C J, V Boolell, J. and Y. K. J. Yeung Sik Yuen, J*

Elections *– Manner of Voting at by-election – Whether requirement to cast more than one vote is constitutional.*

Background facts: *Two vacancies occurred in the National Assembly among members representing the constituency of Stanley/Rose Hill. A writ of election was issued to the returning officer, the fourth defendant, requiring him to cause an election to be held for the return of two members to serve in the National Assembly for that constituency. The 21st of December 1994 was appointed as the nomination day and polling day, if a poll became necessary, was set for the 29th of January 1995.*

On 21 December 1994, a new regulation for voting at a by-election was issued. It required an elector who was registered in a constituency in which a by-election was being held, to cast as many valid votes as there were members to be elected at that by-election.

The first and second plaintiffs sought a declaration that, as electors, they should be able to cast a valid vote for only one candidate instead of two as the new regulation required them to do.

Held: *That the new regulation was not unconstitutional or* ultra vires *or illegal in any other way.*

Cases cited in the Judgement:

Sir Gaetan Duval v *E. François (1982) MR 84*

JUDGEMENT

Two vacancies recently occurred in the National Assembly among members representing the constituency of Stanley/Rose Hill (No. 10). A writ of election was issued to the Returning Officer, the fourth defendant, requiring him to cause an election to be made for the return of two members to serve in the National Assembly for that constituency. In consequence, the 21st of December, 1994 was appointed as the nomination day, the day of election, and the 29th of January, 1995 for the taking of a poll, if a poll became necessary. Some twenty-eight candidates were nominated for election, with the result that the taking of a poll has become necessary. The first and second plaintiffs are electors in the constituency. The second plaintiff is also a candidate as well as the third plaintiff. Twenty-six other persons, co-defendants Nos. 4 to 29, are also candidates for election.

Regulation 33 of the National Assembly Elections Regulations 1958 originally read as follows:

> 33. **How to mark a vote**
>
> The elector shall mark his vote upon the ballot paper by placing a cross opposite the name of each candidate for whom he wishes to vote.

On the 21st of December 1994, the very date appointed as nomination day, that Regulation was amended by G. N. No. 209 of 1994 by the addition of a new second paragraph, the existing paragraph being numbered as

> (1) That new second paragraph reads as follows:
>
> > (2) Where, at a by-election, a writ of election directs a returning officer to cause election of more than one member to be made for a particular constituency, an elector registered in that constituency desiring to record his vote shall cast as many valid votes as there are members to be elected at that by-election.

The three plaintiffs have entered an action under section 83 of the Constitution which empowers a person to seek a declaration or other relief from the Supreme Court where he alleges that his interests are being or are likely to be affected by a contravention of a provision of the Constitution. What are, in practice, the interests which the plaintiffs allege are being affected in relation to them? Mr. Valayden and Mr. Ladegourdie, the first and second plaintiffs, are seeking a declaration that, as electors, they may validly cast a vote for only one candidate instead of two as the new paragraph of Regulation 33 requires them to do. Presumably, this is the right or interest which they seek to maintain, that is to say, the right which they claim to enjoy under the Constitution to vote for only one candidate to the exclusion of any other candidate even though there are two vacancies to be filled.

We are not quite clear about the particular interest of Mr Ollivry, the third plaintiff. This was not made explicit in the Plaint with Summons. He is not an elector as the two other plaintiffs but he is a candidate. Presumably the interest which, in practice, he wishes to safeguard and which he claims, in the words of section 83 (1) of the Constitution, is "being or is likely to be affected" is that if electors cast a vote for him alone, that vote should be counted as valid. We will proceed on that assumption as otherwise he would have no *locus standi* in the case. Needless to add, Mr. Ladegourdie, as a candidate, also claims the same right as Mr. Ollivry.

Two basic points have been put forward by the plaintiffs to challenge the constitutionality or legality of the new paragraph of Regulation 33. First, it is said that the new paragraph is contrary to sections 1 and 31 (2) of the Constitution and the First Schedule thereto. Secondly, it is said that the new paragraph of Regulation 33, having been made under section 84 of the Representation of the People Act, is void in that it purports to amend regulations originally made under section 85 of the Act, which embodies the general regulation-making power to give effect to that Act and that, in any event, regulations under section 84 of the Act or any other provision cannot be resorted to with a view directly or indirectly to amend sections 1 and 31(2) of the Constitution and paragraph 1 of the Schedule. It is further contended that section 84 was only designed to remove difficulties and was of a provisional nature and that, in any event, no difficulty has arisen.

The stand of the Attorney-General, the second defendant, is in substance to the following effect. Two vacancies having arisen simultaneously in the constituency, a single writ was validly issued for the return of two members. Given the absence of legislative provisions governing the number of votes which an elector could validly cast in respect of by-elections either under section 44 of the Constitution or in the First Schedule or in the Representation of the People Act or the Regulations, the electorate and the election officers might have doubts in the matter. With a view to removing this unforeseen difficulty, the powers conferred under section 84 of the Representation of the People Act were resorted to. The Attorney-General also contends, in this connection, that section 84 of the Representation of the People Act was not intended to be merely of a provisional nature and that, in any event, the object of the new paragraph is consistent with the principle laid down in the Constitution whereby electors are compelled, when exercising their right to vote at a general election, to vote for three candidates in constituencies in the island of Mauritius and for two candidates in the constituency of Rodrigues.

The stand of the Electoral Supervisory Commission, the first co-defendant, is to the effect that, a single writ having been issued for the return of the two members, the question arose as to whether there should be two separate by-elections or a single by-election. The difficulty arose as to whether an elector was entitled to cast his vote for at least one candidate but not more than two or for not less and not more than two candidates. The Commission further contends that it was fair and reasonable, for practical reasons and to avoid needless multiplicity of procedures and expenditure, that a single by-election be held for the return of two members. That difficulty had to be resolved before the day of election. It was envisaged at one stage to seek the guidance of

the Supreme Court on the matter. The problem, however, arose as to whom the parties to a proposed action in the Supreme Court should be as candidates had not yet been nominated. And, since the first defendant was ready and willing to make regulations to resolve the difficulty and since the solution proposed was consistent with the general policy of the First Schedule to the Constitution, the Electoral Supervisory Commission subscribed to the proposed solution.

We need to refer to the stand of the remaining parties to the present action. The first defendant and the second co-defendant, that is to say, the President of the Republic and the Rt. Hon. the Prime Minister, have moved to be put out of cause and, in any event, would be abiding by our decision as indeed the third and fourth defendants and all the other co-defendants have indicated that they would.

We will first examine the question whether the new paragraph of Regulation 33 is unconstitutional as contended by Sir Gaetan Duval Q.C. for the plaintiffs. In this regard, Sir Gaetan referred to the past electoral systems of Mauritius to suggest that electors were free to cast no more than one vote, "plumpers" as he called it, even though a greater number of vacancies required to be filled.

The electoral history of Mauritius, with regard to the question for how many candidates a vote can be validly cast, has been rather unusual. Our researches have shown that there had always been, at any rate since 1886 starting with Port Louis and later extended to other districts until the general elections of 1953, multi-member constituencies based on the nine districts of Mauritius where an elector could vote for less than the number of seats requiring to be filled. By virtue of an Order in Council in 1958 (S.I. 1958 II p. 2924 section 29) 40 single-member constituencies were for the first time created where an elector's vote could be validly cast for only one candidate.

In 1966, however, by virtue of an Order in Council (1966 S.I. III p.5191 section 7 and G.N. 82 of 1966) the forty constituencies were paired in order to create twenty constituencies for the island of Mauritius each returning three members and a single constituency for Rodrigues returning two members. For the first time, the principle of block-voting was established in the First Schedule to the Constitution imposing a civic duty on the elector, who wished to exercise his vote at a general election, to cast votes for not less and not more than three candidates in the island of Mauritius and two candidates for Rodrigues.

The creation of this new electoral system followed various proposals for electoral systems made by Professor S. A. de Smith who became Constitutional Commissioner for Mauritius in the latter stages of our constitutional evolution from colonialism to independence (Sessional Paper No. 2 of 1965 of the Mauritius Legislative Assembly) and by the Banwell Commission (Sessional Paper No.5 of 1966). Some aspects of the Report of Professor de Smith have been considered in the case of *Sir Gaetan Duval* v *E. François 1982 MR p. 84.*

The system which was eventually adopted in the Constitution of 1966 and maintained in our present Constitution is somewhat complicated. It consists essentially of a method of direct election of sixty-two members on the basis of first-past-the-post rules, supplemented by a method of indirect election consisting in the allocation of either further seats on the basis of community and party considerations and not necessarily on the relative success of the candidates in their quality as candidates.

The system adopted would appear to have attempted to reconcile, in some measure, certain communal considerations with wider political considerations, to encourage multi-communal parties, while at the same time ensuring that the result of the elections would not thereby be frustrated. Block-voting was made an integral feature of the system, if only with relative possibilities of success as a device to eliminate, completely, communal voting, since electors were not bound to vote for the candidates of the same party. The device could, however, be looked upon as an encouragement to vote on party lines and registered parties have the same symbol.

We must bear in mind that the method of indirect election, by the electorate itself, with compulsory block-voting in the electoral process, was designed to replace an essentially undemocratic feature in Colonial Legislatures where the colonial power had reserved the right to nominate more than a third of the membership of the Legislature whether those persons had taken part in the election or not (*vide* e.g. section 27 of the Schedule to the Mauritius Constitution Order of 1964, G. N. 24 of 1964). So we are not prepared to follow Sir Gaetan's reasoning by looking blindly at previous Constitutions in conjuring up an implied right to vote for only one candidate when more than one vacancy exists.

Undoubtedly the electoral system, which was designed for a sovereign Mauritius, was different from previous systems. Admittedly, the system of block-voting was expressed in the Constitution to apply to general elections and no specific mention was made of by-elections. With regard to the replacement of the members who were not directly elected by the electorate but were allocated seats on considerations of their community and political party, a particular system of replacement, other than a by-election, was resorted to, as continues to be the case under paragraph 5 (7) of the First Schedule to our present Constitution. The method of a by-election was, nevertheless, preserved for the replacement of members who had been directly elected, although this method disappeared for a time (The Constitution [Amendment] Act [No. 40 of 1973]) but was re-established following the general elections of 1982 (The Constitution [Amendment] Act [No. 2 of 1982]).

No particular express provision was, however, made in the First Schedule, whether in the Constitutions of 1966 or 1967 or indeed in the amendment of 1982, to the number of candidates for which an elector could validly vote in a by-election where more than one vacancy occurred. The result is that we must look rather closely at the very wording of the First Schedule for guidance.

The relevant provision in so far as by-elections are concerned is to be found in paragraph 1 (2) which, incidentally, is not mentioned in the Plaint with Summons. The Provision reads as follows:

> (2) Every member returned by a constituency shall be directly elected in accordance with this Constitution at a general election or *by-election held* in such manner as may be prescribed. (The emphasis is ours.)

This provision clearly indicates that power is conferred on the Legislature to make provision for the manner in which a by-election should be held. "Prescribed" as defined in section III (1) of the Constitution means "prescribed in any law". There is, however, a proviso that, in relation to anything that may be prescribed only by Parliament, "prescribed" means "prescribed in an Act of Parliament". That proviso applies only in the case where the Constitution itself, in explicit terms, requires that the prescription is to be made by Parliament. An example is section 78 (7) where the retiring age is one fixed by the sub-section or such other age "as may be prescribed by Parliament".

Obviously, where the Constitution does not specifically say so, Parliament may prescribe in an Act a number of things and use its general and sovereign law-making power under section 45 to delegate the exercise of specified powers by way of subordinate legislation. In paragraph 1 (2) of the First Schedule, the expression used is simply "as may be prescribed" and not as in section 78 (7) "as may be prescribed by Parliament", with the result that in by-elections it is the duty and responsibility of Parliament, by way of an Act or subordinate legislation, to prescribe the manner in which members may be directly returned by a constituency, whether in general elections or by-elections. We also note that the Constitution itself recognises that regulations in electoral matters may be made as is clear from section 41 (3) where proposed regulations, among other enactments, should be submitted to the electoral authorities.

With regard to *general elections*, Parliament could not prescribe a method of voting by an elector at a general election which would be contrary to paragraph 1 (3) of the Schedule which requires electors to cast valid votes for three candidates in the island of Mauritius and two with regard to Rodrigues. That system of block-voting, as earlier indicated, became an essential part of our electoral system. But paragraph 1 (2) of the Schedule has left Parliament free, in its wisdom, to prescribe, in respect of a *by-election,* the number of valid votes which an elector could cast, depending on the number of vacancies, with no restrictive constitutional provision with regard to the number of votes that should be cast where there is more than one vacancy. Requiring an elector to cast as many votes as there are vacancies to be filled is, in our view, quite consonant with the method of block-voting which the Constitution has made an integral part of the electoral system.

We conclude, therefore, by upholding the submissions of the Solicitor-General, who appeared for the Attorney-General, and of Sir Hamid Moollan Q.C., for the Commission, that, in the absence

of specific provisions in the Schedule or elsewhere in the Constitution, paragraph 1 (2) of the First Schedule to the Constitution gives power to Parliament to make appropriate provision with regard to the number of votes for which an elector could validly cast his vote at a by-election.

One of two solutions could equally have been resorted to: either the conduct of separate by-elections for each vacancy or a singly by-election to fill all the vacancies coupled with a requirement that the elector must cast a vote in respect of each of the vacancies that have occurred. The choice of either solution was the responsibility of those on whom the Constitution and the law have imposed that duty and not the responsibility of the Judiciary. Others may, however, marvel at the extravagance of imposing on the country and its Exchequer three separate by-elections in a constituency where three vacancies have occurred.

We need to address two further points raised by Sir Gaetan. First, it was suggested that requiring an elector to cast a vote for more than one candidate at a by-election when there is more than one vacancy would be undemocratic. We understood Sir Gaetan to have retreated from that position in his closing address. In our view, he was not wrong in doing so. A compulsory provision in the Constitution itself, to vote for three candidates cannot be undemocratic in the context of the kind of democracy which the Constitution proclaims in Section One. What is democratic at a general election does not, in our view, become undemocratic at a by-election.

Secondly, Sir Gaetan suggested that making the impugned Regulations on the same day as nomination day, when potential candidates could not have known about the Regulations, amounted to unfairness as potential candidates could have sought a fellow candidate to benefit from the two compulsory votes. It was said that the Regulations amounted to changing the rules in the middle of the game. Sir Gaetan could not have been really serious. First of all, we have no such complaint in the Plaint with Summons from either Mr Valayden or Mr Ladegourdie or Mr. Ollivry. The suggestion amounts to seeking unsolicited briefs from imaginary persons. Secondly, all candidates knew that there were two vacancies which required to be filled. Thirdly, the rules were not changed as no rules existed on the question at issue. Fourthly, as pointed out by Sir Hamid, there have always been independent candidates elections whether to fill more than one vacancy or not.

We move on to the second point raised in the case, that is to say, whether section 84 of the Representation of the People Act is provisional or otherwise *ultra vires* in the sense that an Act cannot be amended by Regulations.

Since we have already ruled that it is not undemocratic or against any provision of the Constitution to require an elector to cast his vote for as many candidates as there are vacancies at a by-election, we cannot say that an enactment, whether by way of an Act or subordinate legislation, which requires an elector to do so is inconsistent with the Constitution.

There remain two further points. First, whether section 84 is provisional. We see nothing in section 84 which indicates that it was designed to be merely provisional. A power of the kind granted under section 84 is not unusual. No Legislature can pretend to have made provisions for all the situations that require to be regulated by law. We note that even in the Mauritius Constitution Order 1966 [section 8 (2) and (3) of G. N. 7 of 1967], the most extensive power was given to the then Governor, by regulations, to amend or revoke any law relating to the elections to the then Legislative Assembly. We may also bear in mind that Parliament may stand dissolved at any time or for one reason or another may not be sitting or else that time limits imposed in the electoral process may be an impediment. It is perfectly open to the Legislature to give power to certain authorities even to amend the Act subject to certain safeguards.

Indeed, various safeguards are in-built in the Constitution itself as to the exercise of powers under section 84 which enables the President to exercise the power. A pre-condition of the exercise of that power is that the President should act on the advice of the Prime Minister and after consultation with the leader of the Opposition. Furthermore, the overriding provisions of section 41(3) of the Constitution also require him to refer the matter to the Electoral authorities to give their views thereon. There is no suggestion in the Plaint before us that this was not done. Indeed, in the defence presented by the Electoral Supervisory Commission, there is a clear indication that the Commission itself had foreseen the difficulty which had arisen and, assuming its constitutional responsibility, had subscribed to the proposed Regulations. The Electoral Commissioner, for his part, is abiding by the decision of the Court. There has been no suggestion that the Regulations had not been referred to him.

We have noted that, at least on another previous occasion, section 84 has been resorted to for the enactment of Regulations governing the electoral process (*vide* G.N. 16 of 1987). It would appear that in 1982 when by-elections were re-established for members directly elected, it escaped everyone's notice that the electoral law required to be equally amended to provide for the re-established situation and only became a matter of practical concern in 1987. And section 84 was prayed in aid to resolve difficulty.

For the above reasons, we are unable to declare that the amendment brought to Regulation 33 is either unconstitutional, *ultra vires* or suffers from any other illegality. The Plaint with Summons is dismissed with costs. We must add that the Plaint amounted to an application which is described in section 81(4) of the Constitution.

Given the decision that we have arrived at, it would not strictly have been necessary to pronounce on the motion of defendant No. 1 and co-defendant No. 2 to be put out of cause. If only for future guidance, we nevertheless do so. What was being challenged was the legality or constitutionality of an enactment as such. When a law is being challenged, Parliament or the Members constituting Parliament are not put into cause. It would have been quite sufficient to

put the Attorney-General into cause as a defendant. We, therefore, rule that both parties be put out of cause with costs.

Rajsoomer Lallah
Chief Justice

V. Boolell
Judge

Y.K.J. Yeung Sik Yuen
Judge

January 1995

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
CIVIL APPEAL, NO. 1745 OF 1991

Subhash Desai ... **Appellant**

V

Sharad J. Rao & Others ...**Respondents**

(With Civil Appeal No. 2194 of 1991)

Before: *A.M. Ahmadi J, M. M. Punchhi J and N. P. Singh, J*

Elections *– False statements published by candidate – Corrupt practice – Bogus voting – Improper inclusion of names on voters' roll.*

Background facts: *The election of the appellant for Goregaon Legislative Assembly Constituency, was set aside by the High Court on an election petition filed on behalf of the respondent No. 1 (referred to as 'the respondent'). The appellant had contested the election as a candidate of Shiv Sen, and the respondent as of Janata Dal.*

The respondent in his election petition stated that several thousand persons were included on the electoral roll, many of them bogus voters. Thereafter, the details of the corrupt practices committed by the appellant, Shiv Sena, Bhartiya Janata Party, between 18.1.1990 and 27.2.1990 were stated.

Held: *That the appeal against the order of the High Court, declaring the election of the appellant void, was dismissed; that the appeal against the direction given by the High Court to scrutinise the valid votes for the purpose of recount and to declare the result afresh was allowed.*

Cases cited in the Judgement:

Azher Hussain v *Rajiv Gandhi (1986) 2 SCR 782*
Handwari Lal v *Kanwal Singh (1972) 2 SCR 742*
F. A. Sapa v *Singora (1991) 3 SCC 375*
Jagdev Singh Sidhanti v *Pratap Singh Daulta (1964) (6) SCR 750*
Jumuna Prasad Mikhariya v *Lachhi Ram (1955)(1) SCR 608*
Indira Nehru Gandhi v *Raj Narain (1975) (Supp) SCC 1*
Mohan Rawale v *Damodor TaTyaba & Dadasaheb (Special Leave Petition (Civil) No. 5594 of 1992*
Haji C. H. Mohammad Koya v *T. K. S. M. A. Muthukoya (1979) 1 SCR 664*
Kumar Nand v *Brijmohan Lal Sharma (1967) 2 SCR 127*
Gadakh Yashwantrao Kankarro v *E. V. alias Balasaheb Vikhe Patel & Others JT (1993) (6) SC 345*
Baidyanath Panjira v *Sita Ram Mahto, AIR (1970) SC 314*

JUDGEMENT

N. P. SINGH J: The election of the appellant from Goregaon Legislative Assembly Constituency, has been set aside by the High Court, on a election petition filed on behalf of the respondent No. 1. (hereinafter referred to as the "respondent"). The appellant had contested the election as a candidate of Shiv Sena, whereas the respondent as of Janata Dal.

The respondent in his election petition stated that between 18th December 1989 and 2nd January 1990 about 12,000 applications for the inclusion of names in the electoral roll were received and ultimately on 15th January 1990 the final electoral roll was published with the inclusion of the names of several thousand persons, many of whom were bogus voters. Thereafter the details of the corrupt practices committed by the appellant, Shiv Sena, Bhartiya Janta Party, between 18th January 1990 and 27 February 1990 were stated. It was also alleged that they falsely propagated in February, 1990 that Pandal, erected specifically for the offering of prayers by Hindu women at the cost of Rs.50,000, was demolished at the instance of socialists, *viz* Mrinal Gore and K. R. Nevrekar, and as such, the Hindu traitors should be shown their place, for that reason it was necessary to vote for the appellant, who had brought the message of "Hindu Hridaya Samrat" Shri Balsaheb Thackeray. The aforesaid statements were exhibited on several boards in different localities in Goregaon constituency between 21st January 1990 and 27 February 1990.

It was then alleged that there is a Sankalpasiddhi Ganesh Mandir at Goregaon. On 14th February 1990, between 11.00 a.m. and 3.00 p.m., Mahaprasad ceremony was to be celebrated. The trustees had invited thousands of prominent citizens of Goregaon for that celebration including the respondent and his colleagues. The respondent visited the said temple at about 1.00 p.m. with Shri K. R. Nevrekar (PW-3) and fifty workers. The respondent met the trustees and offered his obeisance to the deity. The respondent learnt that the appellant had also attended the said function with his workers an hour before. After accepting the Mahaprasad, the respondent along with his workers left the function at about 2.30 p.m. To the utter surprise of the respondent, the appellant, who was the printer and publisher of the Marathi daily "Samana", published a false report of respondent's visit to the said function, in the issue of "Samana" dated 15th February 1990. The heading of the publication was: " *Riotous behaviour of Janata Dal 'green' Goondas during Shri Ganesh Mahaprasad function at Goregaon.*" The relevant part of the news item translated in English is as follows:

> "During the ceremony of Mahaprasad of Sankalpasiddhi Ganesh Temple at Motilal Nagar in Goregaon, the Janata Dal workers wearing green scarf created a mess by shouting 'Allah Ho Akbar' repeatedly and indulged in indecent gestures. ... The volunteers of Ganesh Mandir Trust, accompanied by the Shiv Sena and B. J. P. workers, were distributing Mahaprasad. There were woman

> workers of the Mahila Front also present at that time. At this moment the Janata Dal candidate Sharad Rao came there with his followers. The supporters accompanying him had tied green scarfs around their heads. These workers came as if dancing in a fair, while the devotees of Ganesh were dining during the Manprasad ceremony. These devotees were made to vacate highway ... 'Allah Ho Akbar' slogan-shouting, these people came to this most disciplined function of the Hindus capable of provoking an evil eye, repeatedly shouting 'Allah Ho Akbar', performing indecent dances in an ugly manner and left after creating a pandemonium. It is understood that this Janata Dal gang also included a Muslim Goonda extended from the Kurla area."

The respondent in the election petition asserted that the aforesaid publication was false, deliberately published to blackmail the said respondent and his party. This was an attempt to create communal division between Hindus and Muslims and to promote the feeling of enmity or hatred between different classes of citizens of India on grounds of religion for the furtherance of the prospects of the election of the appellant and for prejudicially affecting the election prospects of the respondent. Copies of the news report aforesaid in Marathi as well as with English translation, were annexed to the election petition. It was stated by the respondent that aforesaid publication had an impact, in view of the conditions prevailing in Jammu and Kashmir and in the background of the dispute regarding Ram Janma Bhoomi and Babri Masjid.

Lastly, it was alleged that a public meeting was held at Shivaji Park, Dadar, on 24th February 1990 in which the appellant and all other candidates of Shiv Sena-B.J.P. alliance were present. The said meeting was addressed by Bal Thackeray and other leaders, at which Bal Thackeray reiterated that he was "contesting the election in the name of Hindu religion (Hindutva)". The proceedings of the said meeting were reported in various dailies, and even the voters of the constituency in question read the press reports.

In the written statement, a stand was taken on behalf of the appellant that the charge that the appellant had contested the election on the grounds of Hindutva or Hinduism was of no consequence because, since time immemorial, this country was known as Hindustan and the inhabitants of this country were known as Hindus. It was further asserted that Shiv Sena B. J. P. were never against any religion and the said parties had always considered all people "faithful to this country as Hindus, irrespective of their religion. The said parties have always been against anti-nationals whether they are Hindus or not". The appellant denied that Shiv Sena and/or B.J.P. at any time propounded the cause of Hinduism as their goal for the election. He also denied that he or B.J.P. and/or Shiv Sena at any time propagated religious hatred amongst the communities, as alleged, or that he had made any statement, saying "show these Hindu traitors their place, vote in the interest of Hindus for Subhash Desai".

In respect of the allegation of the respondent regarding publication of the false report in the issue of "Samana" dated 15th February 1990 about the visit of the respondent to the function of 14th February 1990, it was said:

> "With reference to paragraph 50A of the petition, this respondent categorically denies that this respondent has published any false and/or perverted and/or incriminatory account of the petitioner's alleged visit to the said function as alleged. This respondent states that this respondent published a News Item submitted to him by his News Reporter. This respondent categorically denies that the News Item published in the Daily Newspaper "Samana" was in any manner and/or perverted and/or incriminatory as alleged. This respondent in good faith published the said News Item submitted to him by News Reporter."

It was further stated in the said written statement:

> "...this respondent categorically denies that the report published in the Newspaper "Samana" on 15th February 1990 was a false and/or fraudulent report and/or that the same was deliberately published to blackmail the petitioner and/or his party Janata Dal as alleged ..."

The High Court, on the materials produced before it, held that the appellant had committed corrupt practices: (i) under Section 123 (3) of the Representation of the People Act, 1951 (hereinafter referred to as the "Act") by making appeal to the voters to vote in his favour, because he was a Hindu; (ii) under Section 123 (3A) of the Act by creating feeling of hatred between the different classes of electors, on the grounds of religion; (iii) under Section 123 (4) of the Act, by publishing statements of fact, which were false, which the appellant believed to be false or did not believe to be true, in relation to the personal character and conduct of the respondent, calculated to prejudice the prospects of the election of the respondent. The High Court also examined the grievance made by the respondent regarding the registration of electors in the electoral roll in contravention of the provisions of the Representation of the People Act, 1950 and held that those who had been mechanically added to the electoral roll, without following the procedure prescribed for inclusion of the names of the electors, could not have exercised their right to vote and, as such, those votes had to be treated as void. After setting aside the election of the appellant, the High Court appointed one Mr. Ajitlal Pranlal Yajnik, Ex-Prothonotary and Senior Master, as Commissioner, to ascertain the names of the persons, whose names were added in the electoral roll on 15th January 1990. The Commissioner thereafter was to find out the persons who had voted from that list, after scrutinising their ballot papers. A direction was given to recount the votes after eliminating all those votes by persons, who had been included in the electoral roll on 15th January 1990. After recount, it was to be ascertained as to whether the appellant or the respondent had

secured the highest number of valid votes at the said election. However, the direction for recount was stayed by this Court during the pendency of the appeal.

Mr. Sanghi, the learned Senior Counsel appearing for the appellant, referred to different paragraphs of the election petition as well as the affidavit, supporting the statements made therein. According to him, the election petition was liable to be dismissed at the threshold because it neither contains statements of material facts nor full particulars of the corrupt practices alleged to have been committed by the appellant, as required by Section 83(1) of the Act. The statements had not been verified in the manner transcribed by the Code of Civil Procedure, and by proviso to sub-section (1) (c) of Section 83 of the Act.

Section 86 vests power in the High Court to dismiss an election petition which has not been properly presented as required by Section 81; or where there has been non-compliance of Section 82, i.e. non-joinder of the necessary parties to the election petition; or for non-compliance of Section 117, i.e. non-deposit of the required amount as security for the costs of the election petition. Section 86 does not contemplate dismissal of the election petition for non-compliance of the requirement of Section 83 of the Act. But Section 83 enjoins that an election petition shall contain concise statement of material facts, and shall set forth full particulars of any corrupt practice that the petitioner alleges, which should be verified and supported by affidavit, so far the allegations of corrupt practices are concerned. This provision is not only procedural, but has an object behind it so that a person declared to have been elected, is not dragged to court to defend and support the validity of his election, on allegations of corrupt practice which are not precise and details whereof have not been supported by a proper affidavit. Apart from that, unless the material facts and full particulars of the corrupt practices are set forth properly in the election petition, the person whose election is challenged is bound to be prejudiced in defending himself of the charges which have been levelled against him. In view of the repeated pronouncements of this Court, the charge of corrupt practice is quasi-criminal in nature. The person challenging an election on the ground of corrupt practice cannot take the liberty of making any vague or reckless allegation, without taking the responsibility for the correctness thereof. Before the Court proceeds to investigate such allegations, the Court must be satisfied that the material facts have been stated along with the full particulars of the corrupt practice alleged by the petitioner which have been duly supported by an affidavit. In cases where the Court finds that neither material facts have been stated, nor full particulars of the corrupt practice, as required by Section 83, have been furnished in the election petition, the election petition can be dismissed, not under Section 86, but under the provisions of the Code of Civil Procedure, which are applicable, read with Section 83(1) of the Act, saying that it does not disclose a cause of action. This aspect has been examined by this Court in detail in the cases of *Azhar Husain* v *Ajiv Gandhi (1986) 2 SCR 782; Handwari Lal* v *Kanwal Singh* (1972) 2 SCR 742.

From the perusal of the election petition, it shall appear that the respondent has stated the corrupt practices alleged to have been committed by the appellant in paragraphs 47 to 52. It has been alleged that the appellant was a candidate of Shiv Sena and had the support of B.J.P. and Vishwa Hindu Parishad at the election in question. He has stated the atmosphere created because of the Ayodhya and Babri Masjid dispute. The statement has been made regarding putting up of boards in different places in the constituency in question, requesting the voters to vote in the interest of Hindus and to show the traitors their place. Then the details of the celebration on 14th February 1990 at the aforesaid Sankalpasiddhi Ganesh Mandir, where the respondent is alleged to have come to receive Prasad with his workers, have been stated. Thereafter, the respondent has stated about publication in "Samana" the next day, 15th February 1990, relevant part whereof has been quoted above. Lastly, about the public meeting, held at Shivaji Park on 24th February 1990, which was attended by the appellant and other candidates of Shiv Sena-B.J.P. alliance, where Bal Thackeray reiterated that the said alliance was contesting the election in the name of the Hindu religion, has been stated.

The scope of Section 83 (1) has recently been examined in the case of *F. A. Sapa* v *Singora (1991) 3 SCC 375*, where it was pointed out that the underlying idea in requiring the election petition to set out in a concise manner all the 'material facts' as well as the 'full particulars' where the complaint is in respect of the commission of corrupt practice, is to 'delineate the scope, ambit and limits of the inquiry at the trial by the election petition'. In the present case, the allegations made, in the election petition, may be true or false, but it is not possible to hold that the election petition does not disclose any material fact or give the material particulars of any of the corrupt practices. It need not be pointed out that even if the Court is satisfied that, in respect of one of the corrupt practices alleged, material facts and full particulars thereof have not been stated, still the election petition cannot be dismissed if, in respect of another corrupt practice, the material facts and full particulars have been stated in accordance with the requirement of Section 83(1) of the Act.

In respect of the contention that the affidavit, supporting the corrupt practices alleged to have been committed by the appellant, is not as required by Section 83(1)(c) proviso, it was pointed out that reference was made in the affidavit to Paragraph 74G, which contains the grounds for declaring the election of the appellant to be void and has no relation to the paragraphs giving particulars of corrupt practices. It is true that instead of saying that the statements made in Paragraph 74G of the election petition about the commission of corrupt practices, were true to the knowledge of the appellant, it should have been stated that the statements, made in Paragraphs 49, 50, 50A, 51 and 52 of the said petition were true to his knowledge. But, from bare reference to the other part of the affidavit, it shall appear that it has also been said that making of a religious appeal to the people and the particulars of the corrupt practices mentioned in Paragraphs 49, 50, 50A, 51 and 52 of the said election petition and the exhibits referred thereto, were true to the knowledge of the appellant. According to

us, it cannot be held, in the facts and circumstances of the present case, that there was no affidavit supporting the allegations of corrupt practices, as required by Section 83(1)(c) proviso.

Coming to merit, according to the appellant, any call given to the voters to vote for a candidate who serves the interest of the Hindus, cannot be held to be a corrupt practice. It was urged that if it is held to be a corrupt practice within the meaning of sub-section (3) or (3A) of Section 123 of the Act, then those sub-sections have to be declared *ultra vires* Article 25 of the Constitution. According to the appellant, Article 25 of the Constitution, subject to the public order, morality and health and other provisions of the said part of the Constitution, guarantees all persons right "freely to profess, practice and propagate religion". As such when a candidate at an election propagates his religion and asks the voters to profess and practice a particular religion, which may include Hinduism, that right cannot be restricted by any Act or statute. If the framers of the Constitution have guaranteed that right to every citizen of this country, then any person who is a candidate at any election, can also propagate his religion and ask the voters to do or not to do an act which may be in the interest of such religion, including not to vote for a person whose election will prejudicially affect the propagation of the religion in question.

When the framers of the Constitution guaranteed every citizen, right to freely profess, practice and propagate his religion, that right does not extend to creating hatred amongst two groups of persons, practising different religions. Sub-section (3) and sub-section (3A) of Section 123, never purport to curb the right guaranteed by Article 25 of the Constitution. They only purport to curb the appeal on the grounds of religion, or propagating religion, to create a feeling of enmity or hatred between different classes of citizens of India during the election campaign by the candidate or his agent or any person with his consent for furtherance of the prospects of the election of that candidate, or for prejudicially affecting the election of any other candidate. Sub-sections (3) and (3A) of Section 123, in no way are in conflict with Article 25 of the Constitution – both can co-exist. Article 25 enables every citizen of India to profess, practice and propagate his religion, whereas sub-sections (3) and (3A) of Section 123 purport to ensure that an election is not influenced by considerations for religion, race, caste community or language. Sub-sections (3) and (3A) of Section 123 merely prescribe the conditions, which must be observed if a candidate wants to enter in Parliament or Legislative Assembly. The right to stand for an election is a special right created by a statute and can be exercised on the conditions laid down by the said statute. Keeping in view that the election should not be contested on the grounds of religion, race, caste, community, or language and the result of an election is not affected by promoting feelings of enmity or hatred between different classes of citizens of India on grounds of religion, race, caste, community, or language, the framers of the Act have declared an appeal on the grounds of religion, races, caste, community or language and propagating religion, race, caste, community

or language for creating feeling of enmity or hatred between different classes of citizens as corrupt practices, which shall vitiate the election.

On behalf of the appellant, reference was made to the case of *Jagdev* v *Singh Sidhandi* v *Pratap Singh Daulta,* 1964(6) SCR 750, where this court had to consider whether an appeal made to the electorate to vote for a particular candidate on the grounds of his language was covered by Section 123 (3). It was said that the expression "on the ground(s) of his language" must be read in the light of the fundamental right which is guaranteed by Article 29 (1) of the Constitution. It was pointed out that the said expression cannot be read as trespassing upon the fundamental right guaranteed by Article 29 (1); political agitation for conservation of the language of a section of the citizens cannot therefore be regarded as corrupt practice within the meaning of Section 123 (3) of the Act. But at the same time, it was said:

> "The corrupt practice defined by cl. (3) of s. 123 is committed when an appeal is made either to vote or refrain from voting on the ground of a candidate's language. It is the appeal to the electorate on a ground personal to the candidate relating to his language which attracts the ban of s. 100 read with s.123 (3). Therefore it is only when the electors are asked to vote or not to vote because of the particular language of the candidate that a corrupt practice may be deemed to be committed. Where however for conservation of language of the electorate appeals are made to the electorate and promises are given that steps would be taken to conserve that language, it will not amount to a corrupt practice."

In the case of *Jumuna Prasad Mukhariva* v *Lachhi Ram* 1955 (1) SCR 608, Section 123(5) of the Act, as they then stood, were challenged as infringing the fundamental right of freedom of expression under Article 19 (1) of the Constitution. This Court rejected the contention, saying that the provisions of the Act do not stop a man from speaking: they merely prescribed conditions which have to be observed for being elected.

On behalf of the appellant, it was then pointed out that in the election petition, while alleging corrupt practices, references were made in respect of the speeches and publications, of the period prior to 31st January 1990, which was the date when nomination papers were filed. The publications and speeches alleged to have been made prior to 31st January 1990 have to be ignored because the framers of the Act require the High Court to judge the conduct of the candidate, his agent or persons with the consent of the candidate or his election agent, only after a person becomes a candidate for the particular election. A person becomes a candidate for the election in question only after filing the nomination paper. In this connection, reference may be made to Section 79 (b) of the Act which defines 'candidate' to mean a person who has been or claims to have been duly nominated as a candidate at any election.

Section 34 of the Act says that a candidate shall not be deemed to be duly nominated for election from a constituency unless he deposits or causes to be deposited the amounts prescribed in the said section. When a person becomes a candidate was examined by this Court in the well-know case of Indira *Nehru Gandhi* v *Raj Narain*, 1975 (Supp.) SCC 1. and it was held:

> "The 1951 Act uses the expression "candidate" in relation to several offences of the purpose of affixing liability with reference to a person being a candidate. If no time be fixed with regard to a person being a candidate it can be said that from the moment a person is elected he can be said to hold himself out as a candidate for the next."

Recently, this Court in the case of *Moham Rawale* v *Damodar Tatyaba @ Dedasaheb.* (Special Leave Petition (Civil) No.5594 of 1992 disposed of on August 6, 1972), has said:

> "We hold that all the averments in paragraphs 1 to 20 of the memorandum of election petition in so far as they refer to a period prior to 23.4.1991 cannot amount to allegations of corrupt practice."

This cut-off date 23rd April 1991 was fixed with reference to the date when nomination papers were filed by the appellant concerned, because since that date the appellant will be deemed to have legally acquired the status of a candidate. According to us, any allegation of corrupt practice against the appellant, made by the respondent in respect of the period prior to the filing of nomination by the appellant on 31st January 1990, cannot be taken into consideration for judging the legality or validity of his election.

The corrupt practices alleged against the appellant after the filing of the nomination paper are (i) appellant published a News Item in the issue of "Samana" on 15.2.1990 which was a statement of fact, which was false and appellant believed it to be false or did not believe it to be true in respect of personal character and conduct of the respondent to prejudice his prospect at the said election, which is covered by Section 123 (4) of the Act; (ii) Bhartiya Janta Party, the election ally of Shiv Sena, propagated in last week of February, 1990 that authorised Pandal erected for offering prayers by Hindu women was demolished at the instance of Mrinal Gore and K. R. Nevrekar, and several boards in different localities in Gorgaon between 21st January 1990 and 27th February 1990 were exhibited saying show these Hindu traitors their place; (iii) a public meeting was held at Shivaji Park, Dadar, on 24th February 1990 in which the appellant and other candidates of Shiv Sena-B.J.P. alliance were present. That meeting was addressed by Bal Thackeray and others. Bal Thackeray reiterated that the said alliance was 'contesting the election in the name of Hindu religion (Hindutva)'. The proceedings of the said meeting were reported in various dailies.

We propose first to examine the charge regarding publication by the appellant in the issue of "Samana" dated 15th February 1990, the relevant part of the said publication has already been quoted above. In the said publication, it was said that during the ceremony of Mahaprasad of Sankalpasiddhi Ganesh Temple, the Janata Dal workers, wearing green scarfs, created a mess and shouted 'Allah Ho Akbar' and repeatedly indulged in indecent gestures; these workers came as if dancing in a fair. The devotees of Ganesh, who were dining during the Manaprasad ceremony, had to vacate the highway. These people came to the most disciplined function of the Hindus, shouting 'Allah Ho Akbar' slogan repeatedly, in which a Muslim Goonda, externed from the Kurla area, was also there.

Section 123 (4) is as under:

> "123. *Corrupt practices* – The following shall be deemed to be corrupt practices for the purposes of this Act:
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> ....
>
> (4) The publication by a candidate or his agent or by any other person with the consent of a candidate or his election agent, of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate, or in relation to the candidature, or withdrawal, of any candidate, being a statement reasonably calculated to prejudice the prospects of that candidate's election."

On a plain reading, the requirements of Section 123 (4) shall be satisfied when the publication is held: (i) a statement of fact; (ii) which was false; (iii) which the appellant either believed to be false or did not believe to be true; (iv) which relates to the personal character or conduct of the respondent; (v) the statement was reasonably calculated to prejudice the prospect of the election of the appellant.

If the publication is held to be false and it is established that it was the appellant who published the same believing it to be false or not believing it to be true, then for the other two ingredients: relating to personal character or conduct and that it was calculated to prejudice the prospects of the election of the respondent, not much evident is required. During the election tempo, because of the serious nature of the charge levelled against the respondent, in respect of his conduct, the effect of the said publication on his election prospects can be easily assumed. It cannot be disputed that the publication aforesaid must have prejudicially affected the election prospect of the respondent, because he is alleged to have entered with his workers, dancing and shouting 'Allah Ho Akbar', during a solemn religious ceremony of Mahaprasad of Sankalpasiddhi Ganesh Mandir. This publication has direct reflection on the

character and conduct of the respondent, at whose instance pandemonium was created in the temple of Sankalpasiddhi Ganesh, during Mahaprasad ceremony.

It has been asserted on behalf of the respondent that the statement of fact, published in the said issue of "Samana", was false. The respondent or his workers never shouted slogans of 'Allah Ho Akbar', during the Mahaprasad ceremony of Sankalpasiddhi Ganesh Mandir. They did not create any pandemonium by indecent dances or ugly gestures. He has also denied that when he had gone to attend the said Mahaprasad ceremony, any Muslim Goonda externed from the Kurla area had accompanied him.

The object of sub-section (4) of Section 123 is not only to protect any candidate at the election from character assassination and vilification, but to maintain the purity and fairness of the selection. The framers of the Act were conscious of the fact that some candidate, or his agent or persons on his behalf, may publish facts in respect of the personal character of the candidate concerned, which are false, with an object to malign such candidate in public during the election in order to affect his prospect at the election. The momentum, the mood and the emotional upsurge during the elections are well known and even small things which in normal times may not assume much significance, have serious consequences during the election and affect the minds of the electors and in some cases may be a decisive factor, to seal the fate of one candidate or the other. Sub-section (4) of Section 123 maintains the delicate balance between the freedom of speech of an individual, the interest of the public to get full information about the candidate concerned, but not to affect the prospect of the candidate concerned by publishing facts about his personal character or conduct which are false.

The charge of the corrupt practice being quasi-criminal in nature, had to be proved to the satisfaction of the court by the election petitioner-respondent. In the present case, the controversy can be: (i) whether the appellant published the statement of fact referred to above in the issue of "Samana"on 15th February 1990; (ii) whether that statement of fact was false; (iii) whether appellant either believed it to be false or did not believe it to be true. So far as the other ingredients of sub-section (4) of Section 123, i.e. (i) whether it relates to the personal character or conduct of the appellant; (ii) whether such statement was reasonably calculated to prejudice the prospect of the election of the appellant, according to us, there should not be much controversy, because in view of the allegation that the appellant, along with his workers during Mahaprasad celebration of Sankalpasiddi Ganesh Mandir, created ugly scenes with repeated shouting of 'Allah Ho Akbar' along with a Muslim criminal, it will amount to a statement relating to the personal character and conduct of the appellant, and in the atmosphere prevailing during the election, it was calculated to prejudicially affect the prospect of the election of the appellant. As such, it has only to be examined as to whether the respondent has been able to prove: (i) that the statement of fact, regarding the Mahaprasad

ceremony of Sankalpasiddhi, had been published by the appellant or his agent or any person with his consent; (ii) that such publication was false, because no such incident had taken place; (iii) that the appellant published it, believing it to be false or not believing it to be true. The onus of proving the ingredients of sub-section (4) of Section 123 is on the respondent, who alleged the commission of the corrupt practice under said sub-section.

The respondent has stated on oath not only in his election petition, but also in his evidence that the report in the issue of "Samana" dated 15th February 1990, that he, along with his workers, had shouted 'Allah Ho Akbar' in the Ganesh temple, was a false report and the said news had been printed and published by the appellant to malign him in the eyes of the Hindu voters who were in majority in his constituency. He has further stated that he, on the invitation given by the Sankalpasiddhi Ganesh Mandir Trust, along with his election agent and few other activists, at about 1.00 p.m., went to the Ganesh Mandir. He was received warmly by the trustees. He had Darshan and Mahaprasad and after an hour left with Nevrekar (PW-3), his election agent, and others. He was surprised to see the publication in the "Samana" of 15th February 1990 containing the report about his visit to Ganesh temple. It appears, a protest was lodged by a communication dated 17th February 1990 to "Samana" in respect of the publication aforesaid, saying that it was incorrect and false. Nevrekar (PW-3) has fully supported respondent in his evidence in respect of the visit of the respondent to the Sankalpasiddhi Ganesh Mandir.

On behalf of the appellant, a stand was taken before this Court that merely because the appellant was the publisher of "Samana", he shall not be deemed to have published the news item and, in this connection, reference was made to the Press Act and Rules framed thereunder. It was urged that names of the editor, printer and publisher on the newspaper in question only raises a presumption. The contrary can be proved in facts and circumstances of a case. Reliance was placed on the judgement of this Court in the case of *Haji C. H. Mohammed Koya* v *T. K. S. M. A. Muthukoya* (1979) 1 SCR 664. But the remarkable aspect of the present case is that the appellant admitted that he had published the report aforesaid in the "Samana" on 15th February 1990 as alleged by the respondent. He also asserted that the facts stated in the publication in question were correct. He said in the written statement that "he published a News Item submitted to him by his News Reporter ... This respondent in good faith published the said News Item submitted to him by his News Reporter." The appellant categorically denied in the written statement "that the report published in the Newspaper "Samana" on 15th February 1990, was a false and/or fraudulent report ... " Having admitted in the written statement that he had published that news item, in his evidence he stated:

> "On 1.2.1990 I had gone to Sankalpa Siddhi Ganesh Mandir festival on invitation, I went there at about 12.00 noon. I took Darshan. I took Mahaprasad. I went away at about 12.30. p.m.. I do not know what happened

> thereafter. On that day, in the evening as I was coming from the Fort area, Bombay, I dropped in the office of Samna. One reporter by name Sanjay Dahale showed me a handwritten copy of a news item. He showed me this in the corridor as he was about to go out. That news about Sankalpa Sidhi Ganesh Mandir festival. Since I was in hurry, I could not read the same fully. I told him to verify and if it is true, have it printed. I then went away."

In the written statement he admitted the fact that he had published the news item in question, submitted to him by his news reporter, but in the evidence he has taken a stand, saying that he had seen that news item before publication in hurry and could not read the same fully and he asked the reporter, namely Sanjay Dahale, to verify whether it was true and then to print it. In the written statement he categorically denied that the report published in the newspaper "Samana" on 15th February 1990 was false report. In other words, he took a stand that what was published was a correct statement of fact; in evidence he never asserted that the publication regarding the respondent's going to the temple with his workers and creating an ugly scene was not false or at least he believed it to be true. He simply pleaded ignorance about the alleged report and publication regarding the respondent's going to the said temple with his workers. There is no suggestion given on behalf of the appellant to the respondent or to his witnesses, who had challenged the correctness and had asserted the falsity of the report published in "Samana" on 15th February 1990 that the news item published was correct and not false. So far, the burden of proving to the satisfaction of the court that the publisher thereof believed to be false or believed not to be true, was on the respondent being the election petitioner. But in the facts and circumstances of the present case, according to us, once the respondent asserted and stated on oath that the statement of facts published in the "Samana" was false and the said statement had been published by the appellant, knowing it to be false or believing it not to be true, it will be deemed that the respondent has discharged the initial onus which rests on him. Then the onus shifts to the other side, i.e. to the appellant. In the case of *Kumar Nand* v *Brijmohan Lal Sharma* (1967) 2 SCR 127, it was pointed out that the onus to prove the charge of a corrupt practice under Section 123 (4) was on the election petitioner, but the onus on him to prove that the maker of the statement believed it to be false or believed it not to be true, is very light and can be discharged by complaining candidate swearing to that effect; once that is done, the burden shifts to the candidate making a false statement of fact to show what was his belief. Wanchoo, J (as he then was), speaking for the Said:

> "... But though the onus is on the election petitioner to show all these things, the main things that the election petitioner has to prove are that such a publication was made of a statement of fact and that that statement is false and is with respect to the personal character or conduct of the election petitioner. The burden of proving that the candidate publishing the statement believed it

> to be false or did not believe it to be true though on the complaining candidate is very light and would be discharged by the complaining candidate swearing to that effect. Thereafter it would be for the candidate publishing the statement to prove otherwise."

Recently in the case of *Gadakh Yashwantrao Kankarrao* v *E.V. alia Balasaheb Vikhe Patil & Others, JT* 1993 (6) SC 345, it was pointed out that it is very difficult for the election petitioner to prove by any direct evidence that the person, who is alleged to have made a false statement or published the same, believed it to be false or believed it to be not true, because belief of the maker is related to the state of mind of the maker which can be found to have been established only on the basis of the surrounding circumstances and the materials on the record. When a charge has been levelled that while publishing the statement of fact which was false, the appellant either believed it to be false or did not believe it to be true, he should have come out with the justification for publishing such a news item. In the instant case, no justification has been given by the appellant, except what has already been mentioned above, that the news item was shown to him by the reporter while he was in hurry and he told him to print and publish the same after verifying the correctness thereof. This statement in his evidence runs counter to or is at variance with the statement made by him in his written statement, admitting that he had published that news item, submitted to him by his news reporter. He also denied that the said news report was false, meaning thereby that it was a correct report. But, at the stage of evidence, neither the appellant has asserted nor any witness on his behalf has come forward to state before the court that any such incident, as mentioned in the news item, had actually happened. In such a situation, the irresistible conclusion is that the respondent has been able to establish that the publication by the appellant of the statement of the fact regarding his personal conduct at the Sankalpasiddhi Ganesh Mandir was not only false, but the appellant believed it to be false or did not believe it to be true. In view of the serious nature of the allegations published, it was not even urged before us that they do not relate to the personal character or conduct of the appellant or that such publication was not reasonably calculated to prejudice the prospect of the election of the respondent. Once it is proved that the aforesaid news item was published by the appellant and it was false and the appellant believed it to be false or did not believe it to be true, then certainly it related to the personal character or conduct of the respondent, calculated to prejudice his prospects at election. Because of that publication, the appellant has not only committed a corrupt practice under Section 123 (4) but also under sub-section (3A) of Section 123. By publishing the news item, he shall be deemed to have promoted feeling of enmity and hatred between different classes of citizens on ground of religion for the furtherance of his prospects at the election and for prejudicially affecting the prospects of the election of the respondent.

We are in agreement with the finding of the High Court that, of the materials on record, the charge of corrupt practices under sub-section (3A) and sub-section (4) of Section 123, has

been established against the appellant, vitiating his election to the Legislative Assembly. In view of the finding aforesaid, we do not consider it necessary to examine as to whether corrupt practice under sub-section (3) of Section 123 of the Act, has also been established.

Now the question which remains to be considered is as to whether the High Court was justified in examining the acts and omissions on the part of the Electoral Registration Officer before the final publication of the electoral roll and in directing to verify whether the names of several persons had been included in the electoral roll before final publication of the electoral roll, in accordance with the provisions of the Representation of the People Act, 1950 or not, and to recount the votes polled in favour of the appellant and the respondent, after ignoring the votes of persons who were not entitled to be included in the electoral roll and then to declare the result of the election afresh. In the election petition from paragraph 8 to 46, grievance has been made regarding the preparation of the electoral roll, alleging that the authorities entrusted with the preparation of electoral roll and revision thereof have failed to perform their duties as enjoined by the Representation of the People Act, 1950. According to the respondent, the draft electoral roll was published on 17th December 1989. Between 18 December 1989 and 2nd January 1990 about 12,000 applications were received, for inclusion of names in the electoral roll. The objections were to be filed up to 9th January 1990. On 15th January 1990, the final electoral roll was published including the names of 11,057 persons. It appears that on 24th January 1990 a writ petition was filed on behalf of PW-3, the election agent of the respondent, challenging the inclusion of 11,057 persons in the electoral roll. On 1st February 1990, the said writ petition was disposed of by the High Court, directing the Assistant Registration Officer to verify the list of 5,002 voters, submitted by the writ petitioner. Pursuant to that direction, the names of the persons who had been included in the electoral roll were verified and 1,499 names were deleted. The names of 1,499 persons were deleted before the last date of filing the nomination papers. Against this background, we do not appreciate as to how, in an election petition, challenging the election of the appellant, the respondent could have raised the same issue regarding the inclusion of the names of the electors, contrary to the provisions of the Representation of the People Act, 1950. Apart from that, Section 62 (1) of the Act says 'No person who is not, and except as expressly provided by this Act, every person who is, for the time being entered in the electoral roll of any constituency shall be entitled to vote in that constituency'. In sub-section (2) to (5) restrictions have been provided when the right to vote under sub-section (1) of Section 62 of the Act can not be exercised. Section 100(1) (d) (iii) says, that the result of the election, in so far as it concerns a returned candidate has been materially affected, by improper reception, refusal or rejection of any vote or the reception of any vote which is void. While hearing an election petition, on the aforesaid ground, the High Court has to examine as to whether there has been improper reception, refusal or rejection of any vote or reception of any vote which is void. In the case of *Baidyanath Panjira* v *Sita Ram Mahto* AIR 1970 SC 314, in spite of the bar prescribed under Section 23 (3) of the Representation

of the People Act, 1950 that no amendment shall be made or direction for inclusion of a name in the electoral roll of a constituency shall be given after the last date for making nominations, names of several persons were included after filing of the nomination papers. An objection was taken in the election petition that such persons were not entitled to vote. While referring to Section 62 (1) of the Act it was said:

> "That provision no doubt stipulates that every person who is for the time being registered in the electoral roll of any constituency except as expressly provided by the Act shall be entitled to vote in that constituency. The question is which is the electoral roll referred to in that section? It is the electoral roll that was in force on the last date for making nominations for an election or is it the electoral roll as it stood on the date of the polling? For answering that question we have to go back to Section 23(3) of the 1950 Act. In view of that provision the electoral roll referred to in Section 62 (1) of the Act must be understood to be the electoral roll that was in force on the last day for making the nominations for the election."

According to the aforesaid judgement of this Court, reference in Section 62 (1) to the electoral roll shall mean electoral roll in force on the last day for making the nominations for the election and votes by persons added after the last day for making nominations, in contravention of Section 23 (3) of the Representation of the People Act, 1950, shall be deemed to be void and as such covered by Section 100 (1) (d) of the Act. In the present case, the names that had been included in the final publication had been made before making the nominations. As such, the direction by the High Court, after declaring the election of the appellant to be void, to verify as to whether the final publication of the electoral roll on 15th January 1990 with inclusion of names of electors was in accordance with law and if the said inclusion was not in accordance with the procedure prescribed by the Representation of the People Act, 1950, then to exclude their votes after opening the ballot boxes and to recount the valid votes polled in favour of the respondent and the appellant for purpose of fresh declaration of the election result, cannot be upheld.

Accordingly, the Civil Appeal No. 1745 of 1991 against the order of the High Court, declaring the election of the appellant void is dismissed. The Civil Appeal No. 2194 of 1991 against the direction given by the High Court, to scrutinise the valid votes for purpose of recount and to declare the result afresh is allowed. In the facts and circumstances of the case, there will be no order as to costs.

Before we part with this judgement, we may point out that of late, it has been noticed that many applications for inclusion of names in the electoral roll of the constituency concerned, are made on the eve of the election. It need not be impressed that names of only such

persons are to be included who satisfy the Electoral Registration Officer that they are entitled to be included in the in the electoral roll. If proper verification and scrutiny is not done while revising the electoral roll, the process of revision may vitiate the sanctity and the purity of the election itself. Let a copy of this judgement be forwarded to Election Commission.

.....J
(A. M. AHMADI)

.....J
(M. M. PUNCHA)

.....J
(N. P. SINGH)

New Delhi
31 March 1994

Court File No.35272/89
Newmarket File No.7138/90

SUPREME COURT OF ONTARIO

IN THE MATTER OF THE Dominion
Controverted Elections Act'
R. S. C. 1970, Chapter C-28

AND IN THE MATTER OF Controverted
Election for the Election District of York
North

B E T W E E N :

MICHAEL O'BRIEN

...Petitioner

and

JEAN-MARC HAMEL, MARGARET BRITNELL, MAURIZIO BEVILACQUA, EVELYN BUCK and CHRIS EDWARDS

...Respondents

R.J. Rolls, Q.C. and M.S. Hayes for the petitioner

E. A. Ayers, Q.C. and R. Travers for the respondents Hamel and Britnell

J. A. Graham for the respondent Bevilacqua

Heard: May 7 and 8, 1990.

***Elections** – Bogus voting – The count – Effect of bogus votes – Whether election valid.*

***Background facts:** On the election night (November 21, 1988), the petitioner, Michael O'Brien, was declared the winner of the election by a margin of 58 votes. The following day, after a recount, the respondent, Maurizio Bevilacqua, was declared the winner by 6 votes. After another recount, Mr Bevilacqua was confirmed the winner by 66 votes.*

The petitioner then sought a judicial recount and, on December 5, 1988, the Hon. Judge Fadak declared Mr. O'Brien the winner by 99 votes. Mr. O'Brien was duly sworn in and commenced sitting in the House of Commons as the member for York North.

Mr Belivacqua appealed the last recount and on December 30, 1988, Mr Justice Doherty allowed the appeal and referred the matter back to Judge Fadak for another recount. Judge Fadak certified Mr. Bevilacqua the winner by a margin of 77 votes. Mr. Bevilacqua was then returned as the member of York North, and Mr O'Brien launched this petition.

The petitioner asked that the election of the respondent Bevilacqua on November 21, 1988 was invalid by reason of non-compliance with certain provisions of the Canada Elections Act, R. S. 1984 C.14 as amended.

***Held:** That the election of Maurizio Bevilacqua was void and invalid, that the election of November 21, 1988 was not conducted in accordance with the principles laid down in the Elections Act and the non-compliance did affect the result of the election. It affected the result because the number of impugned ballots exceeded the plurality of 77 votes, to which reference had been previously made.*

***Cases Cited in the Judgement**:*

Blanchard v *Cole [1950] 4 D. L. R. 316*
Re Dominion Controverted Elections Act; Neilsen v *Simmons (1957) 25 WWR.*, 68
McMaclean v *Dow (1968), 67 D. L. R. (2nd) 56*
Morgan v *Simpson [1974] 3 All E. R, 722 (CA)*
Pollard v *Patterson [1975] 2 W. W. R. 211, [1976] 3 W.W.R 270 (C.A)*
Montreal Street Railway v *Normandy [1917] A. C. 171.*

GRAY and MACFARLAND JJ: The petitioner asks this court to find, pursuant to the provisions of *The Dominion Controverted Elections Act*, R. S. C. 1970, Chapter C-28 that the election of the respondent Bevilacqua (hereafter referred to as "the respondent") as the Federal Member of Parliament for the Electoral District of York North on November 21, 1988 was invalid by reason of non-compliance with certain provisions of the *Canada Elections Act*, R. S. 1984, c.14 as amended.

The petitioner, Michael O'Brien, was the Progressive Conservative candidate for the riding of York North. The respondent, Jean-Marck Hamel, was the Chief Electoral Officer for Canada during the last federal election. Margaret Britnell was the Returning Officer for York North during this election. Maurizio Bevilacqua, Evelyn Buck and Chris Edwards were the respective candidates for the Liberal, New Democratic and Libertarian parties. Evelyn Buck and Chris Edwards have taken no part in this petition.

The Facts

On the election night (November 21, 1988) the petitioner, Michael O'Brien, was declared the winner of the election by a margin of 58 votes. The following day, after a recount, the respondent, Maurizio Bevilacqua, was declared the winner by 6 votes. After another recount, Mr. Bevilacqua was confirmed the winner by 66 votes.

The petitioner then sought a judicial recount and, on December 5, 1988, the Honourable Judge Fedak declared Mr. O'Brien the winner by 99 votes. Mr. O'Brien was duly sworn in and commenced sitting in the House of Commons as the Member for York North.

However, Mr Bevilacqua appealed the last recount and, on December 30, 1988, Mr Justice Doherty allowed the appeal and referred the matter back to Judge Fedak for another recount. Judge Fedak certified Mr. Bevilacqua the winner by a margin of 77 votes. Mr. Bevilacqua was then returned as the Member for York North, and Mr O'Brien launched this petition.

The petition proceeded on the basis of an Agreed Statement of Fact.

The parties have examined the poll books and have discovered a number of irregularities, which, the petitioner submits, invalidates the election. These irregularities are set out as follows:

(a) Eighteen persons in a *rural* polling division, not on the official electoral list for that poll, were permitted to vote after being vouched for by a person who was also not on the list for that poll.

(b) Eight persons in a *rural* polling division, not on the official electoral list for that poll, were permitted to vote after being vouched for by a person who was not on the list for that poll, but who was on the list for another polling division.

(c) Nineteen persons in a *rural* polling division, not on the official electoral list for that poll, were permitted to vote after being vouched for by a person who was also not on the list for that poll, but who was an election officer.

(d) Twelve persons in a *rural* polling division, not on the official electoral list for that poll, were permitted to vote after being vouched for by a person who had previously been properly vouched for by another person.

(e) One person in a *rural* polling division was vouched for by a person who was not on the official list, but who had previously voted after showing identification.

(f) One person voted twice, once by means of an advance poll and again by regular ballot.

(g) Twenty-two persons in a *rural* polling division were permitted to vote after showing identification.

(h) Four persons in an *urban* polling division were permitted to vote even though they were not on the official list for that poll.

(i) One person in an *urban* polling division was permitted to vote after presenting a Personal Request for Registration, Correction or Deletion from (EC 4130).

(j) One person in an *urban* polling division was permitted to vote after presenting an Application for Registration of an Elector form (EC 4050).

(k) Sixteen persons in an *urban* polling division who had apparently been enumerated, although not placed on an official electoral list, were permitted to vote after showing an Enumeration Record (EC 3010). In one case, two persons were enumerated on one form. Both were permitted to vote, by means of adding the letter A to the voter number, in effect creating another ballot for that poll.

In addition, four persons in a *rural* polling division voted after being vouched for by persons whose identity does not appear in the poll book. Another thirteen persons were permitted to vote in a *rural* polling division, but the poll book does not indicate whether they were vouched for.

Of approximately 86,000 votes cast in the riding of York North, the total number of votes called into question is 121. As already stated, the plurality of votes, by which Mr. Bevilacqua succeeded, was 77.

It should also be made clear that there is no evidence that these irregularities arose out of the misconduct of any voters or election officials.

Summary of Counsels' Submissions

The petitioner's position may be summarised very briefly. The secrecy of the ballot is sacrosanct, so much so that the petition before this Court proceeded on the basis of complete anonymity of the voters whose ballots are now called into question. Since no one, not even this court, may enquire for which candidates these votes were cast, 121 votes may be discounted. Since this number exceeds the plurality of votes obtained Mr. Bevilacqua by 34 votes, the election must be voided.

Mr. Bevilacqua argues that the provisions of the *Canada Elections Act* which govern the voting procedure are directory, not mandatory, in nature. If the election was conducted in accordance with the *principles* of the *Canada Elections Act*, non-compliance with formal requirements should not invalidate the election. He goes further and submits that a voter should not be disenfranchised because of mistakes committed by election officials.

Mr. Bevilacqua concedes, however, that one of the votes referred to in both paragraphs (f) and (k) (the "extra" voter) above were irregular and should be disregarded.

The Law

(i) The Statutory Provisions

Federal elections are governed by the *Canada Elections Act.* This statute is said to contain provisions reflecting an earlier era.

The provisions dealing with rural polls provide that a voter who is not on the official list may nevertheless cast a ballot if he is vouched for by another person in the poll whose name does appear on the list. It calls to mind a time when rural communities were much smaller than they are today, when people knew most of their neighbours, and when distances were much greater and the population much less mobile.

The starting point is section 14(1) which recognises that every person over the age of 18 who is a Canadian citizen is qualified to vote. Section 16 (1) goes further and provides that:

> Subject to this Act, every person who is qualified as an elector is entitled to have his name included in the list of electors for the polling division in which he is

> ordinarily resident on the enumeration date for the election and to vote at the polling station established therein. (Emphasis added.)

It is clear, therefore, that the Act contemplates a distinction between a person who is *qualified* to vote and one who is *entitled* to do so. Age and citizenship thus do not confer an automatic entitlement to vote. More is obviously required, and that is to ensure that one's name is on the appropriate voters' list on election day.

If a person does not get enumerated, he or she may still be permitted to vote by following the procedure outlined in the Act. This will differ depending on whether the elector resides within an urban or a rural polling division.

The Urban Poll

Section 39(2) indicates that urban polls are "closed" polls, i.e. an elector may only vote if his or her name appears on the official list for that poll. There are two exceptions. The first is for those persons who are required to be at another poll on election day, such as a deputy returning officer or poll clerk. Such a person may obtain a transfer certificate allowing him or her to vote at the poll where he or she is officiating. The second exception is where an elector, although properly enumerated, is omitted from the list. The elector may apply to the returning officer and obtain a certificate which will permit him or her to vote. In both cases, the elector's name is then added to the official list.

The Rural Poll

The procedure for a rural poll is somewhat different. A rural poll is an "open" poll. Therefore, if an elector's name does not appear on the list, as already indicated, he or she may still cast a ballot if vouched for by a properly qualified elector.

Section 47 (1) reads thus:

> Subject to this section, any person who is qualified to vote in an electoral district in which an election is pending and is, on polling day, ordinarily resident in a rural polling division may, notwithstanding that his name does not appear on the official list of electors for the rural polling division, vote at the appropriate polling station established therefore.

(2) *Any person described in sub-section (1) is entitled to vote only*

(a) *upon his being vouch(ed) for by an elector whose name appears on the official list of electors for the rural polling division* and who is ordinarily resident therein and personally attends with him at the polling station and takes an oath in the prescribed form; and

(b) upon himself taking an oat in the prescribed form.

(3) The poll clerk shall make such entries in the poll book as the deputy returning officer directs him to make, including the name of the elector who vouched for the applicant elector and such other entries as are required by the Act. (Emphasis added.)

In a rural polling division, the name of the elector vouched for is *not* added to the official list.

The final relevant provision is section 83, which states:

No election shall be declared invalid by reason of:

(a) non-compliance with the provisions of this Act relating to

(i) limitations of time; or

(ii) *the taking of the poll on the counting of the vote;*

(b) any want of qualifications in the persons signing any nomination paper;

(c) any error in the name, or omission of, or error in, the address or occupation of any candidate as stated on a nomination paper received by a returning officer; or

(d) any insufficiency in any publication of any proclamation, notice or other document, or any mistake in the use of the Forms contained in this Act or in the use of the forms contained in this Act or prescribed by the Chief Electoral Officer pursuant to this Act, if it appears to the tribunal that is considering the question that the election was conducted in accordance with the principles laid down in this Act, *and that such non-compliance did not affect the result of the election.* (Emphasis added.)

(ii) The Relevant Case Law

In a matter such as this, the petitioner submits that it is the duty of the Court to examine the election process itself to determine that it was properly and fairly conducted. As already indicated, we are not concerned with the vast majority of the votes cast by those *entitled* to do so. That entitlement is met by satisfying one or other of the statutory requirements set out earlier.

The petitioner referred to the plurality of 77 votes, by which Mr. Bevilacqua was ultimately declared the winner, as a "magic number". The cases have consistently held that if the number of irregular votes exceeds the plurality of votes cast, the election cannot stand. A leading case is Blanchard v Cole, [1950] 4 D.L.R. 316 (N. S. C . A.) at 320, wherein the Court held:

> It would appear reasonable to hold that once the Court comes to the conclusion that votes were cast to a number equal to or greater than the majority claimed, by persons who had no right to cast them, it is the duty of the Court not only to declare the person having a minority of the properly marked ballots neither duly marked nor duly returned, but being unable in such circumstances to declare the candidate having the majority of the properly marked ballots duly elected, to declare the election void.

This case arose under the vouching provisions of the *Canada Election Act,* and the court held that, since some of the electors were not vouched for, their ballots were therefore invalid. The principle has, however, been extended to include cases where the elector was improperly vouched for by someone who was not on the official list, as in the present case, and it has been held that "[i]f the vouching was done by an unqualified person, the result is the same as if there was no vouching." (*Re: Dominion Controverted Elections Act; Neilson* v *Simmons* (1957), 25 W.W. R. 68 at 76).

It is clear, therefore, that, subject to any curative provisions in section 83 of the Act, the votes cast after improper vouching must be declared invalid.

With regard to the urban polls, as already stated, the list is "closed". The exceptions permitting one's name to be added to the list are extremely limited and detailed. It is only in the two sets of circumstances set out above that a voter's name can be added to the list. Election officers are not otherwise permitted to enlarge the list. To do so may well endanger the election process and could lead to abuse (*McMechan* v *Dow* (1968), 67 D. L. R. (2d) 56 at 63).

In some urban polls, electors whose names did not appear on the list were permitted to vote after producing a passport or, more often, a driver's licence which contained their address and a photograph. These procedures, although no doubt well-meaning on the part of the election officials at the poll, are contrary to the scheme of Act. For this reason also, this Court is unable

to validate the ballots of those electors who were permitted to vote after producing various registration forms or enumeration records.

The respondent urges this Court to find that, although the statutory provisions may not have been strictly complied with, the ballots cast are nevertheless valid, because the methods used were as good as the statutory scheme. For example, in the case where drivers' licences were presented, for election officials were able to satisfy themselves as to the identity of the elector by means of the photograph with the licence. We have no doubt that the election officials carried out their duties diligently and tried to ensure that the principles of the Act were properly followed. However, the fact of the matter is that these methods did not comply with the statute.

It is not good enough to say that the method pursued was just as good as, or even better than, the statutory method. It is the statutory method that gives meaning and validity to the vote. The vote without the statute is of no effect, is meaningless, binds nobody. (Stoddart *v* Town of Owen Sound (1912), 27 O.L.R. 221 at 230 (H.C.J.), leave to appeal refused (1912); 4 O.W. N. 170 (C.A.))

We should therefore turn to a consideration of the effect of section 83 on these irregularities. As indicated above, section 83 sets out a number of circumstances which will not render an election void. The section is somewhat awkwardly expressed in the negative. With regard to a similar provision in the English Act, Lord Denning in *Morgan* v *Simpson,* [1974] 3 AII E.R. 722 (C.A.) held that the section should be transformed to the positive to show when an election *is* to be declared invalid. In Canada, the case of *Pollard* v *Petterson,* [1975] W.W.R. 211 at 215; [1976] 3 W.W.R. 270 (C.A.); application for leave to appeal dismissed 53 D.L.R. (3d) 215n (S.C.C.), stands for the principle that section 83 may only operate to correct irregularities, not a failure of statutory compliance.

The curative effect of section 146 (the equivalent of section 83 of the *Canada Elections Act*) may not be invoked to condone what is more than a mere irregularity, but rather a failure in the observance of the statutory requirements for the conduct of the poll. The saving grace afforded by the section can hardly cover a substantial omission of a positive requirement.

It is in this sense that the respondent argues that the provisions of the Act are derogatory, and that section 83 may be resorted to in order to correct such deficiencies. He submits that where an act done in neglect of the public duty would work injustice to persons who have no control over those entrusted with the duty and which would not promote the main object of the Legislature, such neglect of duty should not affect the validity of the acts done *(Montreal Street Railway* v *Normandin,* [1971] A.C. 171 at 175), and that the no-compliance of an election official with the provisions of the Act should not disenfranchise a voter. To give a directory reading to the statute would thus have the effect of excusing inadvertent shortcomings on the part of the election officials and thus avoid invalidating the ballots.

Such an argument does not, however, take into account the concluding words of section 83 which provide that no-compliance with the Act may only be cured where "the election was conducted in accordance with the principles laid down in this Act, *and that such no-compliance did not affect the result of the election".* It is the latter test that causes some difficulty. The question formulated by the petitioner was whether there were "ballots in the box that should not have been there". Having regard to the statutory provisions, if all of the impugned ballots are to be declared invalid, and the number of these ballots exceed the margin of votes by which Mr. Bevilacqua was declared the successful candidate, it is evident that no-compliance with the statute might well have affected the result. In that sense, this is not a question of a mere irregularity which may be cured by section 83.

The Charter of Rights and Freedoms

The respondent argued, over objection by the petitioner, that the issue in the present case should be decided with regard to the principles laid down by the *Charter of Rights and Freedoms*, particularly section 3 and the limitations imposed by section 1. Neither the Court nor the petitioner was aware of the argument proposed by the respondent until the morning that the petition was heard when the respondent's factum was served on the petitioner and filed with the Court. In spite of the fact that there had been some mention of a proposed "Charter argument" six months before this hearing, at which time counsel for the petitioner suggested that the respondent serve a Notice of Constitutional Question pursuant to section 122 of the *Courts of Justice Act*, S. O. 1984, c 11, no such notice was in fact served upon the appropriate Attorneys-General. Counsel for the petitioner quite rightly objected to the introduction of such an issue at this late stage of the proceedings and opposed the respondent's request for an adjournment. The Court did not grant adjournment and counsel for the respondent made his submissions as set forth in paragraphs 7, 8, 9, 10, 11 and 12 of the respondent's factum.

Conclusion

After a consideration of the provision of the relevant sections of the elections acts and the decisions we have referred to, we have determined that the election of the respondent Bevilacqua was void and invalid. The election of Maurizio Bevilacqua as Federal Member of Parliament for the Electoral District of York North on November 21, 1988 was not conducted in accordance with the principles laid down in the Elections Act and the non-compliance did affect the result of the election. It affected the result because the number of impugned ballots exceeds the plurality of 77 votes, to which reference has been previously made.

We will certify in writing our determination to the Honourable Speaker of the House of Commons appending thereto a copy of the notes of evidence pursuant to the provisions of section 58(1) of the *Dominion Controverted Elections Act, supra.*

Released: May 28, 1990

ONTARIO COURT OF JUSTICE

B E T W E E N :

THE COMMISSIONER OF CANADA ELECTIONS AND YVONNE TARTE	*E. A. Ayers, Q. C.* *and T. O. Buckley* Counsel for the Appellants

...Appellants

and

THE FORD MOTOR COMPANY OF CANADA LIMITED	*Harry Freedman,* Counsel for the Respondent

...Respondent

Heard: April 12, 1991

Elections: *Time off to vote – Deduction of payment for time-off – whether offence under the Act.*

Background Facts: *Ford Motor Company of Canada Ltd was charged for not paying certain of its employees the amount those employees would normally have earned had they not taken time off to vote, contrary to Sections 148 (2), 149 and 150 (1) of the Canada Elections Act [R.S.C 1985 C E 2].*

At the trial, the Judge discussed the charges against the Company. The appellants contended that the trial judge misinterpreted the relevant provisions of the Act, and that the company should have been found guilty of an offence for making the deductions from the employees' wages.

Held: *The appeal was dismissed.*

Cases cited in the Judgment:

The Queen in Right of Canada v *The Saskatchewan Wheat Pool (1983), 1 S.C.R. 204*
City of Kamloops v *Neilseen et al 10 D. L. R. (4th) 641*
Tuck and Sons v Priester (1887) 19 O B D 629

McCART J: This is an appeal heard by me in St. Thomas, Ontario on April 12, 1991 from the judgement of His Honour Judge G. A. Phillips delivered on June 21, 1990.

On August 30, 1989 Ford Motor Company of Canada Limited ("Ford") was charged that on November 21, 1988 it did not pay certain of its employees the amount such employees would normally have earned if they had worked from 4.00 p.m. until 5.30 p.m., contrary to sections 148 (2), 150 (1) and 149 of the Canada Elections Act. The appellants elected to proceed summarily. The trial was held on June 21, 1990 resulting in a dismissal of the charge against Ford.

The relevant sections of the Canada Elections Act provide as follows:

> "148. (2) No employer shall make any deduction for the pay of any employee or impose on or exact from him any penalty by reason of his absence from his for work during the consecutive hours that the employer is required to allow him pursuant to subsection (1)."
>
> "149. For the purposes of section 148, where an employee is normally paid on an hourly, piece-work or other basis, the hours of his employment on polling day at an election are the hours that he would normally work on that day if it were not polling day and, if, subject to subsection 148 (3), the employee is absent at any time during the consecutive hours that the employer is required to allow the employee pursuant to subsection 148 (1), the employer shall be deemed to have made a deduction from the employee's pay if the employer does not pay the employee that amount that the employee would normally have earned during that time if he had worked during that time."
>
> "150. (1) any employer who, directly or indirectly, refuses or by intimidation, undue influence or in any other way interferes with the granting of any elector in his employ of the consecutive hours for voting, as provided in section 148, is guilty of an illegal practice and of an offence."

Ford complied with section 148 (1) in that it shut down operations at 4.00 p.m. on November 21, 1988 thus giving its employees four consecutive hours for the purpose of voting, the polls not closing until 8.00 p.m. The day-shift at Ford commenced work at 7.00 a.m. and finished at 4.00 p.m. They were paid for 8.5 hours of work, a half-hour having been deducted for lunch. It is alleged by the appellant that for some considerable length of time the day-shift had been working until 5.30 p.m. and thus, their pay from 4.00 until 5.00 p.m. was wrongfully deducted in contravention of the provisions of section 148 (2) and 149 of the Act.

In the trial before His Honour Judge Phillips and in argument before me, much time was spent regarding the "normal" work week and "normal" hours of work each day. The collective agreement between Ford and its workers stipulated that the normal work week consists of 40

hours and by implication and custom this translates into a five-day work week at eight hours per day. His Honour Judge Phillips found that the collective agreement provided a reliable guide in interpreting and defining section 149 of the Canada Elections Act as the parties had agreed upon the use of the word "normal" in the description of hours of work.

In respectful opinion, however, Judge Phillips misses the point. Section 149 requires that employers pay to its hourly employees on polling day for the hours that they would normally work *on that day* if it were not polling day. There is no question on the evidence that the production workers at Ford had worked ten hours per day for several years prior to November 21, 1988 and that they continued to do so after November 21, 1988. They were paid straight time for the first eight hours and time and one-half for the additional two hours. It was conceded that there would be reductions from time to time in the hours worked for a variety of reasons such as a parts shortage, breakdowns and reduced demands for the particular model they were assembling. It is clear to me that section 149 is not concerned with the normal work week. It is only concerned with the hours that the employees of Ford would have worked had it not been election day. On the evidence I am satisfied beyond a reasonable doubt, that, but for the election on November 21, 1988, the production workers would have worked ten hours that day. Consequently I find that the employees of Ford were entitled to have been paid for ten hours' work on November 21, 1988 and that they received pay for only 8.5 hours of work.

It was submitted by counsel for the respondent that even if Ford made a deduction from pay under section 149 to which it was not entitled to do, such deduction did not constitute an offence under section 150 of the Canada Elections Act. Section 150 (1) of the Act makes it an offence for an employer in any way to interfere with the granting to an elector in his employ of the consecutive hours for voting as provided in section 148. The section contains no specific reference to an employer making deductions from an employee's pay. Neither sections 148 nor 149 create offences. They are merely declaratory in nature.

It was urged upon me by counsel for the appellants that to interpret section 150 other than by incorporating into it section 148 in its entirety would render the provisions of section 148(2) meaningless. I have some difficulty in subscribing to that opinion. It seems to me that if Parliament intended it to be an offence to fail to pay a worker for the hours he normally would have worked on election day pursuant to section 148 it would have expressly so stated in section 150 (1), or it could have drafted section 150 in such a way as to provide that an employer who violates the provisions of the whole of section 148 is guilty of an offence. As was pointed out by Mr. Freedman there are numerous examples throughout the Canada Elections Act which makes it an offence to contravene or fail to observe any of the provisions of a particular section; for example, see sections 129 (3) and 159 (2).

It seems to me that the only logical remedy for an employer's failure to pay a worker for time off would be a civil action for recovery of such loss to pay, or perhaps, in case, a worker could pursue his remedy under the collective bargaining agreement. Counsel for the appellants argued

that breach of a statutory duty does not give rise to a civil cause of action and he referred to *The Queen in Right of Canada* v *The Saskatchewan Wheat Pool* (1983), 1 S. C. R. 204, in support of his position that breach of a statutory provision will not confer a civil cause of action unless Parliament specifically confers the cause of action in the statute. In my opinion, however, the *Saskatchewan Wheat Pool* case simply stands for the proposition that mere breach of a statutory condition, absent an intentional or negligent failure to comply with a statutory duty, does not give a right to recovery merely on proof of the breach. In this connection, I refer also to the judgment of Madam Justice Wilson in *City of Kamloops* v *Neilsen et al* 10 D. L. R. (4th) 641 where she says at p. 679:

> "The plaintiff 's claim here is against a public authority for breach of a private law duty of care arising under a statute. (This should not be confused with breach of statutory duty *per se: see The Queen in Right of Canada v Saskatchewan Wheat Pool* (1983), 143 D. L. R. (3rd) 9 [1983] 1 S. C. R. 205, [1983] 3 W. W. R. 97.)";

and again at p. 681 her decision states:

> "In order to obtain recovery for economic loss the statute has to create a private law duty to the plaintiff alongside the public law duty. The plaintiff has to belong to the limited class of owners of occupiers of the property at the time the damage manifests itself..... Finally, and perhaps this merits some emphasis, economic loss will only be recoverable if as a matter of statutory interpretation it is a type of loss the statute intended to guard against."

In his text "Construction of Statutes" Driedger says in the opening paragraph of chapter 10 that:

> "It was "presumed", in the absence of a clear indication in the statute to the contrary, that Parliament did not intend prejudicially to affect the liberty or property of the subject."

At p. 207 Dredger goes on to say that penal statutes are to be construed "strictly" and he quotes from the decision of Lord Esher in *Tuck and Sons* v *Priester* (1887) 19 Q. B. D. 629 at p. 638:

> "We must be very careful in construing that section, because it imposes a penalty. If there is a reasonable interpretation which will avoid the penalty in any particular case, we must adopt that construction."

In my view the only reasonable interpretation of section 150 (1) is that it simply imposes a penalty and creates an offence for interfering with the employee's right to have four consecutive hours for voting. Furthermore, while the improper deduction of wages may be a breach of a private law duty, impeding an elector's right to vote is a public mischief because it is in the

public's interest that all properly qualified electors be given the right to exercise his or her franchise.

In the result therefore the appeal is dismissed.

Justice J. F. McCart.

Released: May 8, 1991

ONTARIO COURT (GENERAL DIVISION)

B E T W E E N:

THE COMMISSIONER OF CANADA ELECTIONS AND YVONNE TARTE

...Appellant

and

THE RELIGIOUS HOSPITALLERS OF HOTEL-DIEU OF ST. JOSEPH OF THE DIOCESE OF LONDON

...Respondent

Elections *– Time off to vote – Intimidation of employer by superior – Whether offence under Election Act.*

Background facts: *The respondent was charged with unlawful interfering and for intimidating an employee with respect to the grants of additional time for voting, contrary to sections 148 and 150 of the Canada Elections Act. A poster was set up by the respondent informing its employees of their right to four hours on polling day to vote, but one employee was only granted two hours after having been intimidated by her superior.*

Held: *Charges were dismissed and the decision was confirmed on appeal.*

REASONS FOR JUDGEMENT

BEFORE THE HONOURABLE MR. JUSTICE JOSEPH P. McMAHON,
on the 22nd day of January, 1991, at WINDSOR, Ontario.

CHARGES: s. 148, 150 Canada Elections Act.

APPEARANCES:

Mr. T. Buckley	For the Appellant
Mr. L. Kavanaugh	For the Respondent

REASONS FOR JUDGEMENT

McMAHON, O. C. G. J (Orally) In this matter the Religious Hospitallers of Hotel-Dieu of St. Joseph of the Diocese of London were charged that on or about the 21st day of November, 1988, at the city of Windsor in the County of Essex, that it unlawfully interfered with the granting of additional time for voting to its employee, Marie Boyd, so as to provide the said Marie Boyd with four consecutive hours for the purpose of casting her vote.

The count then went on to put in particulars which are binding upon the prosecution, that on the 21st day of November, 1988, the said Marie Boyd alleges that she was intimidated by Penny Stuart, the supervisor of the said Marie Boyd, thereby interfering with the granting to the said Marie Boyd by Hotel-Dieu Hospital of additional time for the purpose of casting her vote contrary to Sections 148 and 150 of the Canada Elections Act.

The second count which was also dismissed at the trial was not appealed. As I have indicated the charge against the accused was dismissed by His Honour Judge Nosanchuk of the Provincial Court of this county.

I have had the distinct pleasure and opportunity of reading Judge Nosanchuk's reasons for judgement, and I will say at the outset that I concur with him wholeheartedly, not only on his interpretation of the facts in this case, but on his interpretation of the law. I do not intend to refer to all of the numerous cases that have been cited by counsel. I am only going to state what I think is the present situation in Canada and in Ontario.

First, I am finding, as His Honour did, that this is a statute of strict liability. I am finding that means that the onus is upon the accused once the fact has been established to put forward in an evidentiary way the defense of due diligence.

Prior, the law was that the accused person in such circumstances was required to establish due diligence on the balance of probabilities or the preponderance of evidence, that of course has now been changed and the onus is now on the accused to raise an evidentiary issue, if that issue is raised by proper evidence then the onus continues on the prosecution to establish guilt beyond a reasonable doubt.

Section 148 (1) of the Elections Act of Canada reads:

> "Every employee who is qualified to vote shall, while the polls are open on polling day at an election, have four consecutive hours for the purpose of casting his vote and, if the hours of his employment do not allow for those four consecutive hours, his employer shall allow him such additional time for voting as may be necessary to provide those four consecutive hours."

Section 150 (1) reads: "Any employer who, directly or indirectly refuses...", and I will stop there, because there is absolutely no evidence that the defendant in this case refused to provide the proper hours, and in fact the wording of the charge completely sets that aside, so that the charge was,

> "...by intimidation, undue influence or in any other way interferes with the granting to any elector in his employ of the consecutive hours for voting, as provided in Section 148, is guilty of an illegal practice and of an offence."

Now, what are the undisputed facts in this case? The undisputed facts really are found in the judgment of Judge Nosanchuk and admitted by everyone, was a memo was issued by, I believe he has been referred to as the Director of Personnel, Lorne E. Dunkley of the hospital. This memo was posted in the hospital and was read by the aggrieved person and the memo is directed to all department heads, supervisors and head nurses, and it reads as follows:

> "As you are no doubt aware, there is a Federal election scheduled for Monday, November 21, 1988. The Canada Elections Act requires that employers make certain provisions concerning time available to employees for voting purposes. These provisions are as follows:
>
> 1. They apply only to employees who are 18 years of age or older and are Canadian citizens.
>
> 2. The voting polls are open 0900 hours (9.00 a.m.) to 2000 hours (8.00 p.m.). Employees who qualify as electors are entitled to four (4) consecutive hours while the polls are open in order to vote. If an employee's hours of employment do not allow for this, he/she must be granted sufficient time off work at the convenience of the employer to allow the employee such time for voting as is necessary to provide for the four consecutive hours. Such time off is to be without deduction from pay. As you can see from the above regulations, employees whose work schedule commences after 0900 hours (9.00 a.m.) and before 1300 hours (1.00 p.m.) do not possess the requisite four (4) hours for voting and, as such, the Hospital would be required to provide for additional time off unless the employee declined or waived his or her need for additional time off. This also applies to employees scheduled from 1600 hours (4.00 p.m.) who have not had four (4) hours prior to commencing work that day.
>
> Please review the work schedules of all the staff under your direction and determine if your schedules conflict with the four (4) hour requirement. Should you have any questions or wish to discuss the provisions as they apply to your schedules, please contact us."

Marie Boyd is a nurse in Hotel-Dieu Hospital, and at the time in question was employed as what has been described as the Telemetry Unit of the Cardiac Department. Her immediate supervisor or head nurse is one Penny Stuart. Marie Boyd lives in the Town of Tecumseh. On the date in question, Miss Stuart approached Marie Boyd to ask in effect when she was leaving to vote, and a discussion took place as to whether she required four hours.

I am satisfied in the finding of Judge Nosanchuk that Miss Stuart did at that time indicate that Miss Boyd in a sense would be abdicating her professional responsibility if she took a total of four hours to go to the Town of Tecumseh in order to register her vote. As a result of that discussion Miss Boyd left at one o'clock, went to Tecumseh, cast her vote and returned by 3.00 p.m.

So let us first recognise a very important fact: Miss Boyd was not deprived of her right to vote. She was deprived of a further two hours in which she could cast that vote. It has been argued by counsel for the respondent that the wording in Section 148 would indicate that the four hours must be used for the purpose of voting. I think that is probably the well-meaning intention, but clearly the section provides for four hours, and the employer is required to grant that four hours.

Obviously, Miss Boyd, in this case, could use two hours for voting and two hours to conduct her personal business and be paid for it by the Religious Hospitalllers of Hotel-Dieu, and of course, she was deprived of that privilege of going about her personal business at the expense of the hospital by the intimidation set forth by Miss Stuart.

Now, the first question for a determination was whether or not this offence was an offence requiring *mens rea* or what is referred to in law as a strict liability offence. Judge Nosanchuk found that in his view it was a strict liability offence. Counsel for the respondent has argued that there are no deeming provisions in this particular act so it should be viewed as a *mens rea* offence.

I am prepared to accept the finding of His Honour Judge Nosanchuk and I will view this act as a strict liability offence. Now, what in that count does it mean? It means of course that the onus is cast upon the Religious Hospitallers of St. Joseph to establish an evidentiary, or I should say, to set aside an evidentiary burden. Now, clearly how can anybody with any amount of rationality not say that the memorandum that was filed as Exhibit Number One which was posted by the direction of the personnel management and was read by Miss Boyd, and was ready by Penny Stuart, did not in effect dispose of that evidentiary burden regardless of what else the respondent did or did not do, clearly that was evidence and a vital piece of evidence regarding the act of the accused.

Next then, it was the question before the court as to whether or not Miss Stuart could be regarded as a directing mind of the corporation. This is on the basis of the so-called identification theory. I am not again going to refer to the authorities that have been filed with me, *The Canadian*

Dredging case and others, but I am satisfied as was Judge Nosanchuk satisfied that a head nurse in the Telemetry Section of a Cardiac Unit is not a directing mind of the Religious Hospitallers of St. Joseph of Hotel-Dieu.

We had in this case a firm action taken by the personnel director who might and should I think qualify as a directing mind. Subsequent to that, there was a visit by a person referred to as Mr Tramel (phonetic) who I understand is the co-ordinator of nursing. He met with Miss Stuart early that day to inquire if satisfactory arrangements had been made so that everyone would have their four hours.

Now, it obviously was Miss Stuart's view that just because the Act said you had four hours you also had a professional responsibility, and she made that quite plain to Miss Boyd. I am satisfied that this was probably an intimidating conversation with Miss Boyd, and caused Miss Boyd to restrict her activities with regard to voting to two hours instead of four, but are the directing minds of the hospital responsible for the Act? I think clearly the answer is no.

Now, it has been argued quite forcefully before me by counsel for the appellant that due diligence includes more than things that you do, it includes things that you did not do, and that in this case there was no evidence by the respondent that extra staffing had been made available. In the view of the appellant, the obligation was upon the respondent to probably check the day before to insure that people would be free to use their four hours.

I am advised by counsel for the respondent that yes there was no evidence. Nobody was asked what extra staff was available. Nobody was asked whether it would interfere with the work of the hospital if Miss Boyd took her four hours. There was evidence that staff was not a problem, that there was another head nurse on duty from 11 to 11 on that day, and that there were not staffing difficulties when Miss Boyd left for her two-hour voting exercise, but that really in my view has no relevance to the count before the court, because the count does not say that Hotel-Dieu or the hospital did not grant the four hours. It said that it interfered with the grant of the four hours, and that is a real distinction. Clearly the hospital in Exhibit One granted the four hours, now where is there any evidence whatsoever that the hospital interfered with the grant of those four hours?

I am prepared to accept that Penny Stuart by her comments may have intimidated and therefore interfered with Marie Boyd's right to the four-hour period, but there is absolutely no evidence that the hospital and any of its individual directing minds in any way interfered with her right to a grant of four hours. When one discusses, "Well, did they make a provision for other staff?", what did they do that interfered with her right to a grant of those four hours? The answer obviously is that they did nothing that interfered with her right to the grant of those four hours. That in effect was the finding of Judge Nosachuk, and I not only concur with it – I should not say I not only feel that I should not overturn that finding, I concur completely with his finding.

I do not see how any judicial officer could have come to any other finding based on the evidence that was before him than the learned trial judge did in this case. The appeal will be marked dismissed. Now, having said that gentlemen, I am prepared to hear Mr. Kavanaugh, (a) on my right to grant costs on this appeal; and (b) on my right to grant costs personally against the Commissioner under the Election Act whose name commenced as I understand it this information.

Mr Kavanaugh: Well, Your Honour, I am constrained to say obviously at the outset that either way it is the public coffers that is sort of funding litigation.

The Court: Well, you see Mr Kavanaugh, this is why I am so incensed, I can possibly regard the laying of the charge is one thing. We have on one hand the Commissioner, whatever his title is, the Commissioner under the Elections Act, who is supported entirely by the tax-payers of our country, of all of whose expenses are paid by the tax-payers of our country, that is on one side. On the other side you have the Religious Hospitallers of St. Joseph of Hotel-Dieu of the Diocese of London. This is a hospital which has been operating in our city well back into the 19th Century which has been providing services for generations and generations of people of this county. Through the evolution of history this hospital, I presume, now operates on 95 per cent either grant or payments under the OHIP provisions, and that is all tax-payers' money. So we have one person supported by the tax-payers suing or charging another person supported by the tax-payers, and not only proceeding to trial at the Provincial Court level, but then embarking upon a further expenditure of public money on both sides on what to me was an absolutely obscene and nonsensical appeal. I think somebody should suffer for it. I am so upset.

Mr Kavanaugh, I do not want to embarrass you by asking you what your bill is going to be to the hospital, but surely that money could have expended to a much greater affect on doing what the hospital is required to do and that is to take care of sick people. Here we are today, gentlemen, from ten o'clock this morning until twenty to three this afternoon squandering in legal fees, money that should more properly be expended elsewhere for the benefit of the citizens of our country.

I am mad. I am incensed. I think you can see that I am mad and that I am incensed. This is just absolutely stupid and I think someone should suffer for it. I will tell you quite properly, if I have the power, and that is why I am asking Mr. Kavanaugh, if I have the power I want to assess costs fixed at $2,000 against the Commissioner to be paid personally and not to be paid by the Government of Canada. Now, I do not know whether I have the power to do that in an application under a provincial statute which is not under the Criminal Code.

Mr Kavanaugh: Well, frankly Your Honour, as I said – with that caveat, of course, if you are ordering it personally then it does not come out of the tax-payers' money or fund. I am embarrassed to tell you that I have not taken specific instructions on this because we just did not apply our minds to it. Now, I can take instructions quickly. I have a senior member of

administration or a member of senior administration present, but did Your Honour have in mind you would entertain full submissions on your authority because on that point I...

The Court: No, I have too much to do the rest of this week.

Mr Kavanaugh: Yes.

The Court: Then I will be off for a week, and I do not want to bring Mr. Buckley all the way back down here and expend further money. If you.....

Mr Buckley: May I make a submission Your Honour?

The Court: Yes, certainly.

Mr Buckley: I think I should be heard on this point. I am not aware that there is a power. I have not reviewed it... I am just not aware that there is a power. At this risk of further incensing Your Honour, I wish to say that Judge Nosanchuk found that this was an entirely justifiable prosecution.

The Court: I read that in this judgement. I said at the outset – I thought I said, the prosecution itself I did not mind....

Mr Buckley: If I may.....

The Court: .....but once he made his finding of fact in law then I just saw no merit in the appeal.

Mr Buckley: If I might state on the change in the law in December of 1990 with the release of the Ellis-Don decision in the production of the burden, it is my understanding that the Wholesale Travel Case, which is the foundation of that is under appeal to the Supreme Court of Canada.....Your Honour may be bound by that decision in this court, it may well be the case that the Supreme Court of Canada will find differently without criticising the Court of Appeal in any respect, and that would change insignificantly the burden on the defense.

The Court: Do you have the Notice of Appeal, Madam Clerk?

Mr Kavanaugh: May I just say this to you Your Honour, I want to direct you to – I would submit you do have the authority generally. Costs are always in .....in the court even as you are.....

The Court: Not normally against a crown in a criminal prosecution.

Mr Kavanaugh: True, but in the Elections Act in Section 276, I believe you have the full Act in from of you. I do not have the – I have a paraphrasing of it and I read it Your Honour it says:

> "Any court of criminal jurisdiction before which a prosecution is instituted for an offence against this Act may order payment by the defendant to the prosecutor of such costs and expenses as appear to the court to have been reasonably incurred in and about the conduct of the prosecution." Now, that is by the defendant to the prosecutor. Later on there is a provision.....

The Court: Did you say 176?

Mr Kavanaugh: 276 Your Honour. Your Honour, sub-three of that ....

The Court: Yes.

Mr Kavanaugh: Do you have that section Your Honour?

The Court: Yes.

Mr Kavanaugh: In sub-three:

> "In case of an information by a private prosecutor for an offence against this Act, if judgment is given....",

and I would submit that the consent was filed by Mr. Tarte and proceed on that basis, "...if judgement is given for the defendant, he is entitled to recover from the prosecutor the costs sustained by the defendant by reason of the proceedings, which costs shall be taxed by the proper officer of the court in which judgement is given."

So I would submit statutorily you have the authority.

Mr Buckley: Your Honour, the private prosecution would be by Marie Boyd, citizen. This is a prosecution out of the office of the Commissioner of Canada Elections, and it is not – it refers back to the consent of the Commissioner. 256, that refers to when someone else brings it on but when the Commissioner in fact brings a prosecution in my submission that is not a private prosecution.

The Court: Well, I tend to agree with Mr. Buckley that, since it is the Commissioner and his office with regard to his office who commenced this prosecution. I cannot view it strictly as a private prosecution, and certainly it is not a crown prosecution in the sense that we normally deal with it. So it is some hybrid, I guess between a crown prosecution and a private prosecution, but I trust Mr. Buckley that you make my views well known to your seniors or whoever – the

members of the Commission and the Commissioner because if I had the power there would be costs assessed against him personally.

Mr Buckley: Your Honour, I will report the judgement fully to my client.

Mr Kavanaugh: Thank you Your Honour.

The Court: The appeal will be dismissed without costs.

THIS IS TO CERTIFY that the
foregoing is a true and accurate
transcription from the record made
by sound recording apparatus, to
the best of my skill and ability.

.....
Loretta Beneteau,
Certified Court Reporter.

COURT FILE NO.REF.1851/92

ONTARIO COURT OF JUSTICE
(GENERAL DIVISION)

(WEEKLY COURT)

B E T W E E N:

FREDRICK STUART CLIFFORD	Charles Campbell for the Applicant
...Appellant	
and	
THE ATTORNEY- GENERAL OF CANADA and JEAN-PIERRE KINGSLEY in his capacity as CHIEF ELECTORAL OFFICER OFCANADA	*E. A. Ayers, Q.C. Freya J. Kristjanson* for the Respondent Jean-Pierre Kingsley, Chief Electoral Officer of Canada
...Respondents	
	Donald MacIntosh Cheryl Mitchell for the Respondent The Attorney-General of Canada

Heard: October 23, 1992

Referendum *– Right to Vote – Whether enactment preventing applicant from voting was valid.*

Background facts: *The applicant sought a declaration against the Attorney-General and the Chief Electoral Officer of Canada that the preclusion of his participation in the referendum of October 26, 1992 violated his right which was guaranteed by sections 2(b), 3, 6(1) and 15 (1) of the Canadian Charter of Rights and Freedoms. The applicant further sought a declaration that section 139 of the Canada Election Act, R..S. C. 1985, C. E. 2 as incorporated in the Referendum Act, S. C. 1992, C 30 was inconsistent with the appellants rights, being in violation of the same sections of the Charter.*

Held: *That the applicant had failed to establish a violation of his Charter rights.*

Cases cited in the Judgement:

Andrews v *Law of British Columbia (1989) 1 SCR 143*
Haig et al v *The Queen (released 20 October 1992)*

BORINS J (Orally): This is an application by Frederick Stuart Clifford against the Attorney-General of Canada and the Chief Electoral Officer of Canada for a declaration "that the preclusion of the applicant's participation in the referendum of October 26, 1992 " violates rights guaranteed to him by sections 2 (b), 3, 6 (1) and 15 (1) of the *Canadian Charter of Rights and Freedoms.* The applicant further seeks a declaration that section 139 of the *Canada Elections Act*, R.S.C. 1985, c. E-2 as incorporated in the *Referendum Act,* S.C. 1992, c.30 "is inconsistent with the applicant's rights" being in violation as the same sections of the *Charter.* The remedy sought is the deletion of certain words contained in section 139 (a) of the *Canada Elections Act* the effect of which it is submitted will enable the applicant to cast his vote in the referendum.

At the outset I find it necessary to observe that because this application is argued only four days before the date of the referendum, the consequent necessity of deciding it expeditiously and, in any event, before the referendum has not afforded me the opportunity to prepare extensive reasons for judgment. In other circumstances I would have announced my decision with reasons for judgement to follow. However, in the event that appellate proceedings might be contemplated before the referendum is held, I feel that it is necessary to provide brief reasons for my decision.

The convenient starting point is the following passage from the reasons for judgement of Mr. Justice Hugessen on behalf of a majority of the Federal Court of Appeal in *Haig et al* v *The Queen* released on October 20, 1992 which describes the basic scheme for voting in the referendum:

Under the Referendum Act the Governor in Council may order the holding of a referendum to obtain the opinion of 'the electors of Canada or of one or more provinces' on a 'question relating the Constitution of Canada' (subsection 3(1). The Act establishes a scheme for voting on the question which is based on and adopted from the Canada Elections Act. That scheme, like that for holding federal elections, is very largely based on considerations of geography: provinces are divided into electoral districts which are in turn divided into polling divisions. To be entitled to vote at an election an elector, besides being qualified, must have his or her name included on the list of electors in the polling division in which he or she resides. That is so for a referendum as well: one votes in the province, the electoral district and polling division of one's residence.

Section 139(a) of *Canada Elections Act* enables certain eligible electors absent from the polling division on the date of the referendum to vote by proxy. Scheme II to the Act contains Special Voting Rules which enable Canadian Forces electors and Public Service electors and their spouses and dependents living abroad to vote. Other than through the Special Voting Rules, a Canadian citizen who is outside Canada for purposes of his or her employment and who does not qualify to vote by proxy can vote in the referendum only if he or she returns to the polling division in which the person is ordinarily resident and where his name or her name has been included in the list of electors.

The facts are very brief. The applicant is a sixty-five year old Canadian citizen ordinarily resident in Mississauga, Ontario who is living and working in Bangladesh on a temporary basis pursuant to his employment with a Canadian employer. His name is on the list of electors in the polling division in which he is ordinarily resident. He is not eligible to vote pursuant to the Special Voting Rules nor does he qualify to vote by proxy under section 139 (a) of the *Canada Elections Act* as he does not come within the seven job categories given the right to vote by proxy. His daughter Sandra Clifford is prepared to vote by proxy for her father but she is ineligible to be a proxy voter as she does not meet the requirements of section 140 of the Act. Therefore, the only way the applicant can vote in the referendum is by returning to Mississauga and voting in the polling division in which he is ordinarily a resident. However, financial reasons prevent him from doing so.

Jean-Marc Hamel testified on behalf of the respondents. Until his retirement in 1990, Mr. Hamel was the Chief Electoral Officer for twenty-five years. He recently served as consultant to the Royal Commission on Electoral Reform and Party Financing which submitted its report in November, 1991. I doubt that there is any person in Canada who is more informed than Mr. Hamel on the subject of electoral law and procedure in Canada and elsewhere in the western world. His evidence was very helpful.

Mr Hamel testified that one of the central objects of the *Canada Elections Act,* as incorporated in the Referendum Act, is to ensure the integrity of the vote. This is accomplished in Canada by door-to-door enumeration, Canada being the only country in the western world which still does so. This results in the preparation of a list of electors for each polling division in the country. The integrity of the vote by members of the Canadian Forces and the Public Service serving abroad is achieved by maintaining a permanent register of these people and by other means. The integrity of the proxy vote is maintained by the safeguards contained in sections 139 and 140 of the *Canada Elections Act.* He stated that there is no permanent register of other Canadian citizens living or working abroad temporarily although recommendations have been made over the years that such a register be maintained to enable such persons to vote in federal elections. It was Mr. Hamel's opinion that the maintenance of a permanent list of voters is generally accepted as a means of ensuring the integrity of the vote. He said that the most recent statistics available from the Department of External Affairs suggest that from 2.3 to 2.5 million Canadian citizens have a residence abroad, including the United States of America.

Mr. Hamel stated that Canadian legislation presupposes that a person who will not be in his or her polling district on election day will either vote at an advanced poll, vote by proxy if the conditions of the Act are satisfied or vote abroad if a member of the Canadian Forces or the Public Service. He testified that Canada is the only country in the western world which does not make provision for absentee voting for all citizens who are residing abroad who wish to participate in a national election. He added that, even if the *Referendum Act* contained legislation to enable absentees such as the applicant to vote in the referendum, the time between the proclamation of the Act last June and the date of the referendum would have been insufficient to

enable the Chief Electoral Officer to establish a system for absentee voting containing the safeguards necessary to ensure the integrity of absentee voting in the referendum. It is also relevant to note that the administrative responsibilities encountered by the Chief Electoral Officer as a result of any amendment to the referendum legislation has been recognised by section 42 of the *Referendum Act* and section 331 of the *Canada Elections Act.*

As I have indicated, Mr. Clifford does not satisfy the requirements of section 139 (a) to enable him to vote by proxy and his daughter does not satisfy the section 140 requirements to cast her father's vote as his proxy. Although Mr. Hamel agreed with the applicant's counsel that if the Court were to grant the remedy which is requested and, in effect, to read sections 139 and 140 to enable Mr. Clifford to vote by proxy and there is enough evidence to ensure the integrity of the proxy vote, he was of the opinion that this would create a potential problem. Mr. Hamel said that the granting of the remedy would mean that an indeterminate number of other absentee voters would then become eligible to vote by proxy and that, by the statutory deadline enabling them to do so, which is 10.00 p.m. tonight, there would be no time for the election officials to make the inquiries necessary to ensure the integrity of the vote. To this I would add that if Mr. Clifford were to receive the remedy which he is seeking at literally the eleventh hour, the practical reality is that he would likely be the only absentee voter who would have the opportunity to take advantage of the relaxation of the requirements in section 139 and 140 which, in my view, would place him in an advantaged position, relative to all other similarly situated absentee voters.

I come now to consider the merits of Mr. Clifford's application that his *Charter* rights as emanating from "the *preclusion* of [his] participation" in the referendum (emphasis added). The significance is that he does not suggest that the legislation has deprived him of his right to vote in the referendum as clearly it does not. Nor, in my view, in the strict meaning of the term does the legislation preclude him from voting. However, it is obvious he will not have the opportunity to vote for two reasons. The first reason is that he is neither a member of the Canadian Forces or the Public Service entitled to vote abroad, nor is he a person eligible to vote by proxy under section 139 (a) of the *Canada Elections Act.* The second reason is his financial inability to travel from Bangladesh to Mississuauga to vote in the polling sub-division in which he is an eligible voter.

As I understand the argument presented by counsel for the applicant, two grounds are advanced in support of the declaration that his *Charter* rights have been violated. The first ground is that the relevant legislation does not address the circumstances of Canadian citizens temporarily residing abroad for purposes of employment, such as Clifford, by its failure to provide such persons the opportunity to cast their vote from, or in, their place to temporary residence. The second ground is more specific. It is that the category of voters entitled to vote by proxy as found in section 139 (a) is too narrow and should include persons in the category of the applicant.

Although I am of the view that the failure of the legislation enables people such as Mr. Clifford to cast an absentee vote in the referendum constitutes a serious omission, I have not been

persuaded that either this omission or the narrow scope of section 139 (a) constitute a violation of the rights guaranteed to Mr. Clifford by section 2 (b, 3, 6(1) and 15(1) of the *Charter*. The main reason for this conclusion is that the legislation does not deprive Mr. Clifford of his **right** to vote, even though it adversely affects the ability or opportunity which it affords him to exercise his right to vote. I appreciate that it may be said that this takes an unduly technical view of the case. However, in doing so I follow the lead of Mr. Justice Hugessen in the *Haig* case and, in particular, the following passage from his reasons for judgement at p. 6:

> .... For reasons of convenience, practicality and necessity Courts have traditionally acted with restraint in matters relating to the conduct of elections and we will continue to do so. This, however, is a matter of the judicious exercise of discretion in the fashioning (and even in the granting) of certain remedies. It does not and cannot restrict the Court's jurisdiction, power and duty to take cognizance of alleged denials of constitutional rights at election time.

In concluding that the applicant has failed to establish a violation of his *Charter* rights, I have considered the purpose or effect of the referendum legislation. I do not see how the legislation in any manner affects the mobility rights of Mr. Clifford guaranteed by s.6(1). Assuming for the purpose of my reasons that the freedom of opinion and expression guaranteed by section 2 (b) includes the right to vote in the referendum and that the language of section 3 is broad enough to encompass the referendum or that the referendum should be read into section 3, it is my view that the purpose or effect of the legislation is not to impose an absolute deprivation of Mr Clifford's right to vote in the referendum. Similarly, for the purposes of section 15(1) and assuming its application to the circumstances of this case, considering Mr Clifford's right to vote together with the alleged frailties of the legislation in regard to absentee voters, I am not satisfied that there has been a violation of his equality rights. As Mr. Justice McIntyre stated in *Andrews* v *Law Society of British Columbia,* [1989] 1 S.C.R. 143 at 168:

> It is not every distinction or difference in treatment at law which will transgress the equality guarantees of s.15 of the *Charter.*

In the circumstances it is unnecessary to consider the application of s.1 of the *Charter.*

Before leaving this application there is one observation which I feel bound to make. I understand fully Mr. Clifford's feelings and his frustration brought about by the difficulties he has encountered in attempting to register his vote in the referendum. Mr. Hamel testified that Canada is the only country in the western world which does not have universal legislation enabling all Canadian citizens temporarily resident outside of Canada for employment or other reasons, the means of voting in a federal election or referendum from, or in, their place of temporary residence. As I understood his evidence, it was Mr Hamel's opinion that the *Canada Elections Act* should be amended to provide for such absentee voting and he directed the attention of the Court to a similar recommendation contained in the report of the Royal Commission on Electoral

Reform and Party Financing released a year ago. Indeed a similar recommendation is also contained in the White Paper on Election Law Reform of June 1986.

Had I found any section of the Referendum Act or the Canada Election Act to be unconstitutional, it would have been within my powers to establish a period of temporary validity to provide a suitable transitional period to enable Parliament to enact remedial legislation with respect to absentee voting. Even though I have not found it necessary to make such a declaration, in my view it is not inappropriate to recommend that before the next election or referendum, should there be another one, that Parliament should enact such legislation.

Accordingly, I dismiss the application.

Released: November 10, 1992

SUPREME COURT OF CANADA

GRAHAM HAIG, JOHN DOE AND JANE DOE

and

THE CHIEF ELECTORAL OFFICER

and

THE ATTORNEY GENERAL OF CANADA

and

THE ATTORNEY GENERAL OF QUEBEC

CORAM:
The Rt. Hon. Antonio Lamer, P.C.
The Hon. Mr. Justice La Forest
The Hon. Mme. Justice L'Heureux-Dubé
The Hon. Mr. Justice Sopinka
The Hon. Mr Justice Gonthier
The Hon. Mr. Justice Cory
The Hon. Madam Justice McLachlin
The Hon. Mr. Justice Iacobucci
The Hon. Mr. Justice Major

Appeal heard:
March 4, 1993

Judgement rendered:
September 2, 1993

Reasons for judgement by:
The Hon. Mme Justice L'Heureux-Dubé

Concurred in by:
The Hon. Mr. Justice La Forest
The Hon. Mr. Justice Sopinka
The Hon. Mr. Justice Gonthier
The Hon. Mr. Justice Major

Concurring reasons by:
The Hon. Madam Justice McLachlin
Concurring reasons by:
The Hon. Mr Justice Cory

Dissenting reasons by:
The Hon. Mr Justice Iacobucci

Dissenting reasons by:
The Rt. Hon. Antonio Lamer, P.C.

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Citation
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N. R. 233, 97 D. L. R. (4TH) 71
F. C. T. D.: [1992], 3. F. C. 602, 57
F. T. R. 6 (Joyal J.), AND (1992), 57
F. T. R. 1, 97 D. L. R. (4TH) 64

(Denault J.)

Haig *v* Canada

Graham Haig, John Doe and Jane Doe *Appellants*

v

The Chief Electoral Officer *Respondent*

and

The Attorney General of Canada *Respondent*

and

The Attorney General of Quebec *Intervener*

Indexed as: Haig *v* Canada, Haig *v* Canada (Chief Electoral Officer)

File No: 23223

1993: March 4; 1993: September 2.

Present: Lamer CJ and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachin, Iacobucci and Major JJ.

On appeal from the federal court of appeal.

Constitutional Law – Charter of Rights – Right to Vote – Federal referendum held everywhere in Canada except Quebec – Quebec separate referendum subject to provincial legislation – Appellant who moved from Ontario to Quebec unable to vote in federal or Quebec refeum because of different residency requirements in federal and provincial legislation – Whether appellant's exclusion from federal referendum infringing s.3 of Canadian Charger of Rights and Freedoms – Referendum Act, S. C. 1992, c 30 – Canada Elections Act, R. S. C. 1985, c. E-2.

Constitutional law – Charter of Rights – Freedom of expression – Federal referendum held everywhere in Canada except Quebec – Quebec referendum subject to provincial legislation – Appellant who moved from Ontario to Quebec unable to vote in federal or Quebec referendum because of different residency requirements in federal and provincial legislation – Whether appellant's exclusion from federal referendum infringing section 2(b) of Canadian Charter of Rights and Freedom – Whether section 2(b) includes a positive right to be provided with a specific means of express – Referendum Act, S.C. 1992, c.30 – Canada Elections Act, R. S. C., 1985, c. E-2.

Constitutional law – Charter of Rights – Equal benefit of the law – New residents of a province – Province of residence – Federal referendum held everywhere in Canada except Quebec – Quebec referendum subject to provincial legislation – Appellant who moved from Ontario to Quebec unable to vote in federal or Quebec referendum because of different residency requirements in federal and provincial legislation – Whether appellant's exclusion or Quebec's exclusion from federal referendum infringing section 15(1) of Canadian Charter of Rights and Freedoms – Referendum Act, S. C. 1992, c. 30 – Canada Elections Act, R.S.C.,1985, c. E-2.

Elections – Federal referendum – Interpretation of federal referendum legislation – Federal referendum held everywhere in Canada except Quebec – Quebec referendum subject to provincial legislation – Appellant who moved from Ontario to Quebec unable to vote in federal or Quebec referendum because of different residency requirements in federal and provincial legislation – Whether federal referendum legislation may be interpreted to extend entitlement of vote in federal referendum to appellant – Referendum Act, S.C. 1992, c. 3(1) – Canada Elections Act, R.S.C. 1985, c.E-2, ss. 50, 53, 55(5) – Regulation Adapting the Canada Elections Act, SOR/92-430.

Elections – Federal referendum – Powers of Chief Electoral Officer – Federal referendum held everywhere in Canada except Quebec – Quebec referendum subject to provincial legislation -- Appellant who moved from Ontario to Quebec unable to vote in federal or Quebec referendum because of different residency requirements in federal and provincial legislation – Whether Chief Electoral Officer had power to adapt Canada Elections Act so as to extend entitlement to vote in federal referendum to appellant – Referendum Act, S.C. 1992, c.30, s.7 (3) – Canada Elections Act, R.S.C., 1985, c. E-2, s.9 (1) – Regulation Adapting the Canada Elections Act, SOR/92-430, section 4.

In September 1992, the federal government directed that a referendum be held on October 26, 1992 on a question relating to the Constitution of Canada in all provinces and territories, except Quebec. Quebec was to hold a separate referendum on the same date and on the same question but in accordance with the provincial legislation. As a result of the different requirements as to residency in the federal and provincial legislation, the appellant Haig, who had moved from Ontario to Quebec in August 1992, was not qualified to vote in the Quebec referendum because he had not resided in that province for six months prior to the referendum, or to vote in the federal referendum because, on the enumeration date, he was not ordinarily resident within one of the polling divisions established for the federal referendum. The appellant brought an application in the Federal Court, seeking a declaration that section 3 of the federal *Referendum Act* included a resident who was ordinarily resident in a province at any time in the six-month period prior to the referendum; or, in the alternative, a declaration that denying him a vote in the federal referendum violated his rights under sections 3, 2(b) and 15(1) of the *Canadian Charter of Rights and Freedoms*. He also sought a mandamus requiring the Chief Electoral Officer to make reasonable provisions to allow him and others in his situation to be enumerated. The court dismissed the application and the majority of the Federal Court of Appeal affirmed the judgement.

Held (Lamer C. J. and Iacobucci J. dissenting):
The appeal should be dismissed. The federal *Referendum Act* and the *Canada Elections Act* are constitutional. The appellant's exclusion from the federal referendum did not violate his rights under sections 2(b), 3 and 15(1) of the *Charter*.

Per La Forest, L'Heureux-Dubé, Sopinka, Gonthier and Major JJ: The federal *Referendum Act* and the *Canada Elections Act* did not grant the appellant an entitlement to vote in the federal referendum. The purpose of the *Referendum Act* is not to obtain the opinion of electors in all Canadian provinces at all times. Section 3(1) of that Act expressly provides that consultation by referendum may be carried out on a national, provincial or multi-provincial basis. The appellant was ordinarily resident in Quebec on the enumeration date set for the federal referendum and since Quebec was not one of the provinces listed in the federal proclamation, no polling divisions were established in that province for the federal referendum. Therefore, while the appellant came within the definition of a qualified voter, he was not on the enumeration date ordinarily resident in an established polling division and had no entitlement to vote in the federal referendum. The appellant did not retain a right to vote in Ontario by virtue of section 55(5) of the *Canada Elections Act*. This section merely states that a person cannot be without an ordinary residence and cannot be construed as meaning that the appellant could not lose his ordinary residence in Ontario for the purpose of voting in the federal referendum until he had qualified as an elector in Quebec, under the relevant Quebec legislation. Such an interpretation would go not only against the wording but also against the spirit of the federal *Referendum Act*, which clearly extends an entitlement to vote only to those people ordinarily resident in a jurisdiction specified by proclamation. Residency is not a purely technical matter, but is a fundamental aspect of the referendum scheme itself.

The Chief Electoral Officer did not have the power to extend the entitlement to vote in the federal referendum to the appellant. Though section 7(3) of the federal *Referendum Act* gives the Chief Electoral Officer a discretionary power to adapt the *Canada Elections Act* in such a manner as he considers necessary for the purposes of applying that Act in respect of a referendum, this power does not extend to authorise a fundamental departure from the scheme of the *Referendum Act.* Residence is a pivotal feature of the referendum scheme as captured in both pieces of federal legislation and the Order-in-Council directed that a referendum be held in a number of clearly specified jurisdictions. The discretionary power of the Chief Electoral Officer could not be exercised to extend the entitlement of vote beyond the parameters established in the Order-in-Council. Section 9(1) of the *Canada Elections Act* only contemplates situations where the provisions of the legislation do not accord with particular needs arising out of any "mistake, miscalculation, emergency or unusual or unforseen circumstance". The appellant's situation does not fall within these terms. The exclusion of electors not resident in the provinces in question on the enumeration date is the clear and unambiguous consequence of the legislative scheme adopted. Further, section 9(1) is also restricted to adoptions designed to facilitate the execution of the intent of the *Canada Elections Act.* The object of this Act, as adapted for the referendum, is to ensure that those who are entitled to vote are given an opportunity to do so. The object is not to enfranchise those who are not entitled to vote.

Section 3 of the Charter does not guarantee Canadians a constitutional right to vote in a referendum. The wording of section 3 is clear and unambiguous and guarantees only the right to vote in elections of representatives of the federal and the provincial legislative assemblies. The purpose of section 3 is to grant every citizen of this country the right to play a meaningful role in the selection of elected representatives. Since a referendum is in no way such a section – a referendum is basically a consultative process – Canadian citizens cannot claim a constitutional right to vote in a referendum under section 3. The appellant's section 3 *Charter* rights were therefore not infringed.

In the context of the 1992 federal referendum, freedom of expression did not include a constitutional right for all Canadians to be provided with a specific means of expression. Though a referendum is undoubtedly a platform for expression, section 2 (b) of the *Charter* does not impose upon a government any positive obligation to consult its citizens through the particular mechanism of a referendum, nor does it confer upon all citizens the right to express their opinions in a referendum. In another context, however, section 2 (b) could impose a positive governmental action. A referendum as a platform of expression is a matter of legislative policy and not of constitutional law. However, while section 2 (b) does not include the right to any particular means of expression, where a government chooses to provide one, it must do so in a fashion that is consistent with the Constitution. Here, the federal government did not violate section 2 (b) either in holding its referendum or in holding it in less than all provinces and territories. The appellant was unable to vote simply because, on the enumeration date, he was not ordinarily resident in a province where the federal referendum was held, a limitation which does not infringe the appellant's freedom of expression as guaranteed in the *Charter.*

In providing a platform of expression to less than all Canadians, the federal government did not infringe the appellant's section 15 (1) guarantee of equal benefit of the law. The new residents of a province do not constitute a disadvantaged group within the contemplation of section 15 (1). People moving to Quebec less than six months before a referendum date do not suffer from stereotyping, or social prejudice. Though its members were unable to vote in the Quebec referendum, the group is not one which has suffered historical disadvantage or political prejudice. Nor does the group appear to be "discrete and insular". As well, the exclusion of one province from the federal referendum legislation does not violate section 15 (1). The decision of the Governor in Council to hold a referendum only in a specific number of provinces is a constitutionally permissible exercise of the discretion accorded to the government under section 3 (1) of the federal *Referendum Act.* Both the decision to hold a referendum and the cession as to the number of provinces in which a referendum will be held are policy decisions left entirely to governments and legislatures. In a federal system, province-based distinctions do not automatically give rise to a presumption of discrimination. Section 15 (1), while prohibiting discrimination, does not alter the division of powers between governments, nor does it require that all federal legislation must always have uniform application to all provinces.

Per McLachlin J: The reasons of L'Heureux-Dubè J. were generally agreed with. Parliament's decision to hold a referendum in only some areas of Canada, and thus to exclude the residents outside these areas from the federal referendum, is not contrary to the *Charter.* However, had the law enacted a truly national referendum, the appellant's freedom of expression would have been violated. But even with a broad and liberal reading of residency requirements aimed at enfranchising as many Canadians as possible in every situation where that result could be attained without infringing the law, there was no legal basis upon which the Chief Electoral Officer could have registered a Quebec resident in a referendum which by its terms excluded Quebec.

Per Cory J: That right to vote is of fundamental importance to Canadians and to our democracy. In all enfranchising statutes, the provisions granting the right to vote should be given a broad and liberal interpretation and restrictions on that right should be narrowly construed and strictly limited. Every effort should be made to interpret the statute to enfranchise the voter. These principles, applicable to the right to vote in elections, should be applied in the same manner to the right to vote in a referendum. The Chief Electoral Officer thus has a duty to insure that as many Canadians as possible are enfranchised in every situation where that result can be attained without infringing the law. Flexibility must be given to the concept of residence, particularly in enfranchising status. The concept of residence as a requirement of exercising the right to vote was designed to facilitate the attainment of the principle of one person one vote and should not be used as a means of depriving a person of this right. It follows that the term "ordinarily resident" in an enfranchising statute should be interpreted broadly in the context of today's mobile society and in the light of the vital importance of the right to vote. There is no reason for departing from this approach and practice under the *Referendum Act.* Here, under the requisite flexible test of residency, it would be wrong to automatically hold that those who have moved to Quebec before the referendum enumeration date could, on that basis alone, be denied the right to

vote in a federal polling division outside Quebec. Unfortunately, since the appellant did not apply to be enumerated in his former riding, it is impossible to determine on the facts presented if there was a sufficient connection to a riding within the federal referendum to warrant his addition to the voter's list. Since the referendum is now long past, this is not a proper case in which to grant declaratory relief.

Per Iacobucci J (dissenting): The appellant entitled to vote in the federal referendum. The referendum contemplated by the federal *Referendum Act* was aimed at all Canadians citizens entitled to vote in a federal election; to accomplish that end, the federal referendum was co-ordinated with the Quebec referendum. While, in a formal sense, two referenda were held, to focus on the technicalities of separate referenda can only obscure the national character of the referendum. The appellant's right to express his political views by participating in a national referendum is guaranteed by section 2 (b) of the *Charter.* The right to express opinions in social and political decision-making is clearly protected by section 2 (b). The referendum was an important expressive activity relating to constitutional change in this country and Parliament was apparently under a political obligation to follow the referendum's results. The effect of the federal *Referendum Act,* however, was to deprive the appellant and others recently arrived in Quebec of their rights to participate in the referendum. Accordingly, their section 2 (b) rights were violated. In the absence of any evidence on section 1 of the *Charter,* the violation of the appellant's section 2 (b) rights has not been justified. The proper remedy would have been to expand the definition of "elector" in section 3 (1) of the *Referendum Act.* The Chief Electoral Officer, relying on section 7 (3) of the *Referendum Act* could have used section 9 (1) of the *Canada Elections Act* to permit the appellant to vote.

Per Lamer C J (dissenting): Cory J's approach to the definition of residency for voting purposes and Iacobucci J's reasons concerning section 2 (b) of the *Charter* were agreed with.

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2 [adapted idem, s. 93]

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APPEAL from a judgement of the Federal Court of Appeal, [1992] 3 F.C. 611, 145 N.R. 233, 97 D.L.R. (4th) 71, dismissing the appellants' appeal from an order of Denault J (1992), 57 F.T.R. 1, 97 D.L.R. (4th) 64, and dismissing their appeal (except on a procedural point) from an order of Joyal J, [1992] 3 F.C. 602, 57 F.T.R.6. Appeal dismissed, Lamer C J and Iacobucci J dissenting.

Philippa Lawson, for the appellants.

N.J. Schultz and H. McManus, for the respondent the Chief Electoral Officer.

Jean-Marc Aubry, Q.C. and *Richard Morneau,* for the respondent the Attorney General of Canada.

Jean-François Jobin and *Dominique A. Jobin,* for the intervener.

Solicitor for the appellants: Phillipa Lawson, Ottawa.

Solicitors for the respondent the Chief Electoral Officer: Fraser & Beatty, Ottawa, Jacques Girard, Ottawa.

Solicitor for the respondent the Attorney General of Canada: John C. Tait, Ottawa.

Solicitor for the intervener: The Department of Justice, Ste-Foy.

SUPREME COURT OF CANADA

GRAHAM HAIG, JOHN DOE, and JANE DOE
and
THE CHIEF ELECTORAL OFFICER
and
THE ATTORNEY GENERAL OF CANADA
and
THE ATTORNEY GENERAL OF QUEBEC

CORAM: **The Chief Justice and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major J J**

L'HEUREUX-DUBE J: On October 26, 1992, two referenda were held in Canada, each concerning proposed amendments to the Canadian Constitution. Graham Haig was not able to cast a ballot in either. This was unfortunate. The only issue in the present appeal is this: was Graham Haig entitled to cast a ballot in the federal referendum?

At the specific moment in Canada history, there was a confluence of political pressures, concerns and events. Among these was the on-going and often politically-heated constitutional dialogue. In order to seek the views of Canadians on this crucial issue of constitutional change, the federal government and the provincial governments who so desired had available a variety of options: commission surveys, opinion polls, referenda, etc. Quebec had legally bound itself to hold a referendum on sovereignty, while British Columbia and Alberta had articulated the possibility that they would hold provincial referenda dealing with constitutional change, and that they would consider themselves bound by the results. It was in this context that the federal government undertook to hold a referendum in those provinces where a provincial referendum would not otherwise be held. This choice was in accord with the desire and the authority to the provinces to consult their own electors as they saw fit.

In the end, only two referenda were held: one in Quebec pursuant to Quebec's provincial referendum legislation, the other in the rest of Canada pursuant to the federal referendum legislation. The model chosen by the federal government was one which was open to them under the relevant legislation, which specifically allowed for referenda to be conducted in one or more provinces. The model chosen was, at the time, thought to be politically sound by both the federal and the provincial governments.

The mechanics of the two referenda were governed by the elections legislation of each government. The federal and the Quebec elections legislation, though similar in certain respects, are *not* mirror images of each other, but contain different provisions on a number of issues including: the preparation of electoral lists, methods of voting, financing, referendum publicity

and spending, the roles and functions of the Chief Electoral Officers and their staff, and residency requirements. The residency provisions of the Quebec elections legislation, in particular, diverge from those in the federal legislation by requiring six months residency in order to be eligible to vote. It was this residency requirement which resulted in some Quebec residents, Mr. Haig in particular, not being able to cast their vote, and which is at the heart of this case.

Were the Quebec residents who were not entitled to vote in the Quebec referendum nonetheless entitled to vote in the federal referendum? To answer this question, it is essential to more fully refer to the political events and legislative context leading up to October 26, 1992.

Facts

On April 17, 1982, the *Constitution Act,* 1982 was proclaimed into force. The Meech Lake Accord, which proposed certain amendments to the *Constitution Act, 1982,* was not ratified by all provincial legislatures within the allotted time period, and failed on June 23, 1990. As a result of these events, Bill 150, *An Act respecting the process for determining the political and constitutional future of Quèbec,* S. Q. 1991, c. 34, section 32, came into force on June 20, 1991. According to Chapter 1 of this Bill, the Government of Quebec was required to hold a referendum on the sovereignty of Quebec no later than October 1992.

On June 23, 1992, the *Referendum Act,* S.C. 1992, c. 30, came into force. This Act provided a mechanism for the federal government to obtain the opinion of the electors of Canada, or the electors of one or more provinces, on issues related to the Canadian Constitution.

On August 28, 1992, the Prime Minister of Canada, the ten provincial premiers, the leaders of the territorial governments and representatives of four aboriginal associations, came to an agreement which has become known as the "Charlottetown Accord". This agreement proposed substantial amendments to the Constitution of Canada.

On September 3, 1992, as a direct result of the Charlottetown Accord, Bill 44, *An Act to amend the Act respecting the process for determining the political and constitutional future of Quebec, S. Q.* 1992, c. 47, was introduced into the Quebec National Assembly. This Bill, which came into force on September 8, 1992, amended Bill 150 so that the Government of Quebec was still obligated to hold a referendum on October 26, 1992, but the subject of the referendum would be the Charlottetown Accord, rather than Quebec sovereignty. Similarly, on September 8, 1992, the Prime Minister of Canada announced that a referendum would be held on October 26, 1992, the subject of which would also be the Charlottetown Accord.

On September 9, the Premier of Quebec, pursuant to section 8 of the *Referendum Act,* R.S.Q., c. C-64.1, put before the National Assembly the proposed text of the question to be the subject of the October 26, 1992 Quebec referendum. The same day, pursuant to section 5(1) of the

Referendum Act (Canada), the proposed text of the question which was to be the subject of the federal referendum was put before the House of Commons. Both questions were identical. The House of Commons approved the text of the federal referendum question on September 10, and the Senate approved the text on September 15. The National Assembly, pursuant to sections 8 and 9 of the *Referendum Act* (Quebec) approved the text of the Quebec referendum question on 16 September.

On September 17, 1992, pursuant to section 3 (1) of the *Referendum Act* (Canada), a proclamation was issued by Order-in-Council P.C. 1992-2045 directing that a referendum be held to obtain the opinion of the electors of "the provinces of Ontario, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Saskatchewan, Alberta, Newfoundland, the Yukon Territory and the Northwest Territories" on a question relating to the Constitution of Canada. The referendum was to be held October 26, 1992, its conduct to be governed by the *Canada Elections Act* R.S.C., 1985, c. E-2, as adapted for the purposes of the referendum. One of these provisions states that any *Canadian* citizen of 18 years of age who, on the enumeration date, was ordinarily resident within one of the polling divisions established for the referendum, would be entitled to cast a ballot.

On September 27, 1992, pursuant to section 13 of the *Referendum Act* (Quebec), the Government of Quebec ordered Quebec's Chief Electoral Officer to hold a referendum on October 26, 1992, to be conducted in accordance with the provisions of the *Elections Act,* R.S.Q., E-33, as adapted for the purposes of the referendum. According to one of these provisions, any *Canadian* citizen of 18 years of age who, on the polling day, had been domiciled in Quebec for six months, would be entitled to cast a ballot.

In August of 1992, Graham Haig moved from Ontario to Quebec. On the enumeration day for the federal referendum, Mr Haig was no longer ordinarily resident in a polling division established for the federal referendum and so, pursuant to the provisions of the *Canada Elections Act,* he was not included on the list of voters entitled to vote in the federal referendum. At the same time, having been domiciled in Quebec for less than six months, he did not meet the eligibility requirements under the *Election Act* (Quebec), and so was not included on the list of voters eligible to vote in the Quebec referendum. The result was, of course, that Mr. Haig was not enumerated and consequently could not vote in either referendum.

Proceedings

On September 30, 1992 Mr. Haig instituted proceedings in the Federal Court, Trial Division, filing on originating notice of motion under section 18.1 of the *Federal Court Act,* R.S.C., 1985, c. F-7. On behalf of himself and un-named others (represented by John Doe and Jane Doe), an application was brought against Her Majesty the Queen and the Chief Electoral Officer, seeking a declaration that section 3 of the *Referendum Act* (Canada) included the applicants, and

mandamus, requiring the respondents to make reasonable provisions to allow for the enumeration of the applicants. Notice was given to the Attorney General of Canada that the constitutional validity of the federal Order-in-Council would be challenged.

On October 7, 1992, counsel for Her Majesty the Queen made a preliminary application before Denault J in the Federal Court, Trial Division, to have Her Majesty the Queen struck as a respondent on the basis that the court had no jurisdiction under section 18.1 of the *Federal Court Act* to grant the remedies requested against the Queen. Denault J granted the application, striking the Queen as respondent: (1992), 57 F.T.R.1, 97 D.L.R. (4TH) 64. The applicants then brought an additional application to add the Attorney General of Canada as respondent. Both applications were heard before and dismissed by Joyal J in the Federal Court, Trial Division: [1992] 3 F.C.602, 57 F.T.R.6.

The appellants appealed the orders of Denault J and Joyal J, and the respondent Chief Electoral Officer cross-appealed. The appeals and cross-appeal were joined and heard on October 19, 1992 before the Federal Court of Appeal, which added the Attorney General as a party, dismissed the appeal from the order of Denault J as moot, dismissed the Chief Electoral Officer's cross-appeal, and also dismissed the original application on its merits: [1992] 3 F.C. 611, 145 N.R. 233, 97 D.L.R.(4th) 71. The appellants now appeal to this Court. The Chief Electoral Officer initially cross-appealed on an issue of jurisdiction related to parliamentary privilege, but that cross-appeal was discontinued on February 25, 1993.

Relevant Legislation

Referendum Act, R.S.Q., c. C-64.1

> 7. The Government may order that the electors be consulted by referendum
>
> (a) on a question approved by the National Assembly in accordance with sections 8 and 9, or
>
> (b) on a bill adopted by the National Assembly in accordance with section 10.
>
> As soon as the National Assembly is informed of the question or bill contemplated in the first paragraph, the Secretary General of the National Assembly shall notify the chief electoral officer thereof in writing.
>
> The chief electoral officer shall send a copy of the notice to the returning officer of each electoral division.

16. The lists of electors shall be established within the eighteen days following the day on which the National Assembly was informed of the question or bill contemplated in section 7.

Election Act, R.S.Q., E-3.3 (as adapted pursuant to ss.44 to 47 of the *Referendum Act,* R.S.Q., c.C-64.1)

1. Every person who

(1) has attained eighteen years of age;

(2) is a Canadian citizen;

(3) has been domiciled in Quebec for six months, or in the case of an elector outside Quebec, for twelve months;

(4) is not under curatorship; and

(5) is not deprived of election rights, pursuant to section 568, is a qualified elector.

Every person registered in the registry of electors outside Quebec is deemed to be domiciled in Quebec.

2. To exercise his right to vote, a person must be a qualified elector on polling day and be registered on the list of electors of the polling subdivision where his domicile is situated on the day of the notification provided for in section 7 of the Referendum Act, or be registered in the registry of electors outside Quebec.

Referendum Act, S.C. 1992, c.30

3.(1) Where the Governor in Council considers that it is in the public interest to obtain by means of a referendum the opinion of electors on any question relating to the Constitution of Canada, the Governor in Council may, by proclamation, direct that the opinion of electors be obtained by putting the question to the electors of Canada or of one or more provinces specified in the proclamation at a referendum called for that purpose.

6. (1) On the issue of a proclamation, the Chief Electoral Officer shall, in accordance with the proclamation, issue writs of referendum in the form set out

in Schedule 1 for all electoral districts in Canada or in the province or provinces specified in the proclamation.

7.(1) Subject to this Act, the *Canada Election* Act , as adapted pursuant to subsection (3), applies in respect of a referendum, and, for the purposes of that application, the issue of writs of referendum shall be deemed to be the issue of writs for a general election.

(2) The provisions of the *Canada Elections Act* referred to in Schedule II do not apply in respect of a referendum.

(3) Subject to this Act, the Chief Electoral Officer may, by regulation, adapt the *Canada Elections Act* in such manner as the Chief Electoral Officer considers necessary for the purposes of applying that Act in respect of a referendum.

(4) The Chief Electoral Officer may make regulations

(a) respecting the conduct of a referendum; and

(b) generally for carrying out the purposes and provisions of this Act.

Canada Elections Act, R.S.C., 1985., c.E-2 (as adapted for the purposes of a referendum, SOR/92-430).

9.(1) Where, during the course of a referendum, it appears to the Chief Electoral Officer that, by reason of any mistake, miscalculation, emergency or unusual or unforseen circumstance, any of the provisions of this Act do not accord with the exigencies of the situation, the Chief Electoral Officer may, by particular or general instructions extend the time for doing any act, increase the number of referendum officers or polling stations or otherwise adapt any of the provisions of this Act to the execution of its intent, to such extent as he considers necessary to meet the exigencies of the situation.

.....

50.(1) Every person who

(a) has attained the age of eighteen years, and

(b) is a Canadian citizen,

is qualified as and elector.

.....

53.(1) Subject to this Act, every person who is qualified as an elector is entitled to have his name included in the list of electors for the polling division in which that person is ordinarily resident on the enumeration date for the referendum and to vote at the polling station established therein.

55.(1) The rules in this section and sections 56 to 59 and 62 apply to the interpretation of the expression "ordinarily resident" and "ordinarily resided" in any section of this Act in which those expressions are used with respect to the right of a voter to vote.

(2) Subject to this section and sections 56 and 59 and 62, the question as to where a person is or was ordinarily resident at any material time or during any material period shall be determined by reference to all the facts of the case.

(3) The place of ordinary residence of a person is, generally, the place that has always been, or that the person has adopted as, the place of his habitation or home, and to which he intends to return when he is away from it.

(4) Where a person usually sleeps in one place and has his meals or is employed in another place, the place of his ordinary resident is where the person sleeps.

(5) A person can have only one place of ordinary residence and it cannot be lost until another is gained.

Order-in-Council P.C. 1992-2045, dated September 17, 1992.

WHEREAS, pursuant to subsection 3(1) of the Referendum Act, the Governor in Council considers that it is in the public interest to obtain by means of a referendum the opinion of electors on the question hereinafter set out relating to the Constitution of Canada;

WHEREAS, pursuant to section 4 of that Act, no proclamation may be issued before the text of the referendum question has been approved under section 5 of that Act;

AND WHEREAS, the text of the referendum question hereinafter set out was approved by the House of Commons under section 5 of that Act of September 10, 1992 and was concurred in thereunder by the Senate on September 15, 1992;

THEREFORE, HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL, on the recommendation of the Prime Minister, pursuant to subsection 3(1) of the Referendum Act, is pleased hereby to order that a proclamation do issue directing

that the opinion of electors be obtained by putting to the electors of the provinces of Ontario, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Saskatchewan, Alberta Newfoundland, the Yukon Territory and the Northwest Territories, at a referendum called for that purpose, the following question relating to the Constitution of Canada:

"Do you agree that the Constitution of Canada should be renewed on the basis of the agreement reached on August 28, 1992?

_____ _____"

Yes No

Judgements

*Federal Court, Trial Division (*Denault J)

On the application by the respondent Her Majesty the Queen for an order striking her from the originating notice, Denault J refused to hear the merits of the case, emphasising that the mandatory notice period for constitutional questions had not yet expired, and dealt only with the procedural issues.

Finding section 18 of the *Federal Court Act* available only where the relieve sought arises from a decision of a "federal board, commission or other tribunal", he held that the Crown does not come within the definition of "federal board, commission or other tribunal " set out in section 2 of the *Federal Court Act* and, in addition, that the section 18 procedure is not appropriate where the issues to be resolved are of a serious and complex nature. He concluded that sections 17 and 48 applied and that an action against the Queen had to be commenced by statement of claim. As such, Denault J granted the respondent's motion, and struck Her Majesty the Queen from the originating notice.

*Federal Court, Trial Division (*Joyal J), [1992] 3 F.C.602

At the hearing on the amended Originating Notice, the Crown (appearing in an institutional capacity and not as a party respondent) argued that since the real issue was the constitutional validity of a federal statute, the court lacked any jurisdiction to consider the matter under s.18 of the *Federal Court Act.* In view of the peculiar circumstances and in spite of the earlier order of Denault J, Joyal J took the jurisdictional questions under advisement, and allowed the case to proceed on the merits.

In Joyal J's view, the right to vote embodied in section 3 of the *Canadian Charter of Rights and Freedoms* relates only to election to the federal Parliament and legislative assemblies, and does

not include a right to vote in any other instance. Since the federal Order-in-Council did not include Quebec, the question of whether or not Quebec should have been included was a policy decision and not a justiciable issue. He concluded that the applicants had no rights to vote in the federal referendum, and that their only recourse, if any, might be to resort to the Quebec courts. In his opinion, at p.608, the predicament facing the applicants was one:

> which is often found when the political structure of a community is based on a federal system where both levels of authority enjoy their respective and exclusive jurisdictions.

While concluding that he had jurisdiction under section 18 of the *Federal Court Act,* Joyal J dismissed the applicants' *Charter* arguments, finding no violation of freedom of expression under section 2(b), of mobility rights under section 6, nor of equality rights under section 15(1). Given this conclusion on the merits, he dismissed the application to add the Attorney General as a party.

Federal Court of Appeal (Hugessen and Stone JJ A, and Dècary J A (dissenting)), [1992]3 F.C. 616.

On the jurisdictional question, Hugessen J A, for the majority found that the Chief Electoral Officer fell within the definition of 'federal board, commission or other tribunal'. The appellants' complaint was that the Chief Electoral Officer had failed to exercise his power and jurisdiction to correctly apply and adapt the *Canada Elections Act* to the referendum. Such an allegation properly comes under section 18 of the *Federal Court Act,* and the Attorney General of Canada is expressly authorised to be made a party to such proceedings. Since, in the context of a *Charter* challenge to federal legislation, the Attorney General is also a necessary party, the majority found that Joyal J should have allowed the application to add the Attorney General of Canada.

The appeal from the decision of Joyal J on the procedural point having been allowed, the appeal from Denault J's order on the related point was declared moot and quashed. With respect to the Chief Electoral Officer's cross-appeal, Hugessen J A observed that, although courts have traditionally acted with restraint in matters relating to the conduct of elections, a Chief Electoral Officer has no historical privilege or statutory immunity against claims which are founded in the *Charter.* The cross-appeal was accordingly dismissed.

On the merits, the majority held that Joyal J had reached the right conclusion, finding that if there was any denial of the appellants' rights, it flowed exclusively from the operation of the provincial legislation (at p.616):

> While it is no doubt true that it is the federal order in council restricting the federal referendum to all provinces and territories other than Quebec which has created the background for the appellant's present situation, it remains that it is the Quebec legislation alone which is at the root of his complaint. He does not

> now reside in any province in which the federal referendum is being held and the federal legislation does not affect him one way or the other. As a resident of Quebec he is subject to that province's referendum legislation and it is solely that legislation which denies him the right to vote.

Commencing that the very scheme of the *Referendum Act* (Canada) and the *Canada Elections Acts* is based upon questions of geography, the majority found no constitutional impropriety in the Order-in-Council which limited the number of provinces in which the federal referendum would be held (at p.617):

> ...because a referendum is limited to constitutional questions, and because the amending formula (and indeed the Constitution itself) envisages processes and substantive rules which may differ according to the province or number of provinces involved, it is entirely normal that different questions may be put to the electors in one or more provinces or that a question may be put to the electors in some provinces but not others. [Footnote omitted.]

Dècary J A, dissenting, agreed that the Federal Court of Appeal had jurisdiction under section 18 of the *Federal Court Act,* and that the Attorney General of Canada and the Chief Electoral Officer were properly made parties to the proceedings. However, he disagreed with the majority's conclusion on the merits. Taking judicial notice of "political realities", Dècary J A was of the view that the federal referendum, though not being held in all ten provinces, was in reality a *national* referendum and that Parliament had not intended that any citizen of Canada would be disenfranchised with respect to this important issue.

He asserted that if the appellants were denied the right to participate in the referendum, their freedom of expression guaranteed by section 2(b) of the *Charter* would be infringed. He also found that their rights to the equal benefit of the law guaranteed in section 15(1) of the *Charter* would be infringed, finding that in the circumstances of this case, province of residence could be a personal characteristic capable of constituting a ground of discrimination. Dècary J A further commented at p.622 that:

> The source of the infringement, should the appellant be denied his rights, would not be the Quebec legislation but, rather, the federal legislation which would have failed to take into account for the purposes of a national referendum the existing differences in provincial legislation with respect to electors' qualifications.

Since Parliament is presumed to act in conformity with the *Charter,* Dècary J A determined that the issue could be resolved through statutory interpretation without placing the holding of the referendum itself in jeopardy. He concluded at p.623 that the term "elector of a province" could be interpreted to include:

> in a particular province electors who are ordinarily resident of that given province on enumeration date and who do not qualify under the residency requirements of the latter, but who were ordinarily resident in that particular province at any time in the six-month period prior to the referendum.....

He recognised that his interpretation was "somewhat stretched", but would have granted the declaratory relief sought on the ground that the Federal Court of Appeal was the "next-to-last" resort of people in the appellants' position.

Constitutional Questions

The following constitutional questions were phrased by the Chief Justice:

> 1. If the *Referendum Act,* S.C. 1992, c. 30, and the *Canada Elections Act,* R.S.C.,1985. c. E-2, exclude from voting at the federal referendum Canadian electors who have moved to Quebec but who failed to meet Quebec's six months residency requirements for voting in the provincial referendum, do these Acts, in whole or in part, violate ss. 2(b), 3 or 15 (1) of the *Canadian Charter of Rights and Freedoms?*
>
> 2. If the answer to the first constitutional question stated herein is in the affirmative, is such infringement justified under s.1 of the *Canadian Charter of Rights and Freedoms* as a reasonable limit, demonstrably justified in a free and democratic society?
>
> 3. Does Order-in-Council P.C. 1992-2045, enacted pursuant to s. 3(1) of the *Referendum Act,* S.C. 1992, c. 30, infringe the rights or freedoms guaranteed the applicants under ss. 2(b), 3 or 15(1) of the *Canadian Charter of Rights and Freedoms?*
>
> 4. If the answer to the second constitutional questions stated herein is in the affirmative, is such infringement justified under s.1 of the *Canadian Charter of Rights and Freedoms* as a reasonable limit, demonstrably justified in a free and democratic society?

Issues

The Constitutional questions formulated above raise but one central issue: Did Mr. Haig and those persons in a similar situation have the right to cast a ballot in the federal referendum held

on October 26, 1992, either as a matter of statutory interpretation, or due to the operation of the *Charter*? I would answer this question by examining the following issues:

1. The proper interpretation of the federal referendum legislation, in particular, section 3(1) of the Referendum Act (Canada), and sections 53 and 55 of the Canada Elections Act.

2. The powers of the Chief Electoral Officer under section 7(3) of the *Referendum Act* (Canada) and section 9(1) of the *Canada Elections Act* to modify the provisions of the Canada Elections Act.

3. The Constitutionality of the *Referendum Act* (Canada) and the Order-in-Council made thereunder, with respect to alleged violations of sections 3, 2(b) and 15(1) of the *Charter.*

Statutory Interpretation of the Referendum Legislation

The first question is whether the federal referendum legislation is capable of bearing an interpretation that would allow the appellants to vote in the federal referendum. The answer to this question lies in the scope that can be given to the phrase "Electors of ... one or more provinces specified in the proclamation" in section 3(1) of the *Referendum Act* (Canada).

The appellants suggest that the Court should take a broad and purposive approach to this interpretative task. I agree. Following a number of authorities on the subject, the words of Dickson C J in *Canadian National Railway Co.* v *Canada (Canadian Human Rights Commission), [1987] 1* S.C.R. 1114, at p. 1134, support this proposition:

> Although it may seem commonplace, it may be wise to remind ourselves of the statutory guidance given by the federal *Interpretation Act* which asserts that statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objects are attained.

The purpose, then, of the *Referendum Act* (Canada) is encapsulated in section 3(1) of that Act:

> 3.(1) Where the Governor in Council considers that it is in the public interest to obtain by means of a referendum the opinion of electors on any question relating to the Constitution of Canada, the Governor in Council may, be proclamation, direct that the opinion of electors be obtained by putting the question to the electors of Canada or of one or more provinces specified in that proclamation at a referendum called for that purpose.

Section 3(1) expressly provides that consultation by referendum may be carried out on a national, provincial or multi-provincial basis. Clearly, the purpose is **not** to obtain the opinion of electors

in all Canadian provinces at all times. There could not be clearer language. In order to achieve its purpose, the *Referendum Act* (Canada) fashions a mechanism for obtaining the opinion of electors on questions relating to the Constitution of Canada.

Section 7(1) of the *Referendum Act* (Canada) adopts the *Canada Elections Act* (as adapted) as the model to be used in seeking the opinion of electors, a model in conformity with the purpose of the Order-in-Council. In order to be qualified as an elector under this model, section 50 specifies that a person must be 18 years of age and a Canadian citizen. Aside from this preliminary question of qualification, the *Canada Elections Act* model is one which is essentially founded on notions of geography. Once a referendum has been proclaimed, section 6(1) of the *Referendum Act* (Canada) directs the Chief Electoral Officer to issue writs of referendum for the provinces specified in the proclamation. Writs are issued for these provinces, these provinces are divided into electoral districts, and the electoral districts are further divided into polling divisions. The entitlement to vote under this model is contingent upon a person being ordinarily resident in one of these established polling divisions. This entitlement is clearly is set out in section 53(1), which bears repetition:

> 53.(1) Subject to this Act, every person who is qualified as an elector is entitled to have his name included in the list of electors *for the polling division in which that person is ordinarily resident on the enumeration date* for the referendum and to vote at the polling station established therein. (Emphasis added.)

In short, in order to vote in a federal referendum, a person must be both qualified as an elector, *and* be ordinarily resident in an established polling division in one of the provinces or territories where the referendum is held. Mr. Haig, as a Canadian citizen over the age of 18 years, comes within the definition of a qualified voter under section 50 of the *Canada Elections Act.* Did he also qualify, on the enumeration date, as "ordinarily resident" in one of the polling divisions established under the federal referendum legislation?

The interpretation of the expression "ordinarily resident" is governed by the rules set out in sections 55 to 59 and 62 of the *Canada Elections Act.* The general rule is that a person is ordinarily resident in the location where that persons makes his or her home. Making that determination can be complex, but section 55(2), reproduced earlier, provides required flexibility, stating that a person's ordinary residence is to "be determined by reference to all the facts of the case."

In the case before the Court, however, that determination was simple. Mr Haig's undisputed affidavit evidence is that he ceased to be ordinarily resident in Ontario in August of 1992, and was ordinarily resident in Quebec on the enumeration date set for the federal referendum. Since Quebec was not one of the provinces listed in the federal proclamation, no writ was issued, and no polling divisions were established in Quebec for the federal referendum. On the enumeration date, Mr. Haig was not ordinarily resident in an established polling division, and he thus had no

entitlement to vote in the federal referendum. This would appear to be sufficient to dispose of the matter as far as statutory interpretation of the *Referendum Act* (Canada) and the *Canada Elections Act* are concerned. Both the purpose and the language of the legislation are clear and unambiguous, and the facts are not contested.

Mr. Haig submits, however, that despite being a resident of Quebec on the federal enumeration date, he retained the right to vote in Ontario, relying on section 55(5) of the *Canada Elections Act* which states:

> 55. ...
> (5) A person can have only one place of ordinary residence and it cannot be lost until another is gained.

He argues that, according to this section, he could not lose his ordinary residence for the purpose of voting in the federal referendum *until he had qualified as an elector in Quebec,* under the relevant Quebec legislation. In my view, section 55(5) cannot by any stretch of the imagination bear this meaning.

First, such an interpretation simply cannot be sustained on the wording of the section. Section 55(5) is clear, stating merely that a person cannot be *without* an ordinary residence. There was no allegation that Mr. Haig was without an ordinary residence at any time. On the contrary, and by his own admission, he had an ordinary residence, and that was in the province of Quebec. What he complains of is not that he lacked an ordinary residence. His complaint is that, though resident in Quebec, he had not yet met the six-month residency requirement set out in section 1 of the *Election Act* (Quebec), and so was not entitled to vote in the Quebec referendum. Neither was he entitled to cast a ballot in the federal referendum held in Ontario, as he was no longer ordinarily resident in that province. Whether one adopts a plain or purposive reading, section 55(5) of the *Canada Elections Act* provides no assistance to Mr.Haig.

Second, the interpretation proposed goes not only against the wording, but also against the spirit of the *Referendum Act* (Canada), which expressly allows for a consultation of **less** than all Canadians. Accordingly, the appellants rely on the incorrect assumption that **all** Canadians were entitled to vote in *this* federal referendum, and that the question of where one actually casts one's ballot was a purely technical matter. This is clearly not so. Two distinct referenda were held. The federal referendum was held in nine provinces, and two territories. The entitlement to vote in this referendum was tied to ordinary residence in one of these jurisdictions on the enumeration date. The spirit of the Act was clearly to extend an entitlement to vote *only* to those people ordinarily resident in a jurisdiction specified by proclamation. It would go directly against this spirit and intent to find otherwise.

It is critical to appreciate that residency is *not* a purely technical matter, but in a fundamental aspect of the referendum scheme itself. This is so for a number of reasons, not the least of which

is the sheer mechanics of holding a referendum. The enumeration scheme provided for under the *Canada Elections Act* involves scrutineers going to the ordinary residence of each voter to place his or her name on the electoral roll. In order to apply this statutory structure to the appellant, the Chief Electoral Officer would have had two choices. The first would be to send enumerators into Quebec to find and enumerate those residents of Quebec who were not yet entitled to vote in the provincial referendum. In addition, to the time and expense incurred in enumerating those residents who have been in Quebec for less than six months, this option would also require enumerators to operate extra-territorially in a province for which no federal referendum writ was issued. The second choice would be to attempt to enumerate the persons who had recently moved to Quebec in the polling division they left behind. Besides involving similar issues of time, difficulty and expense, this option leaves unanswered the question of how these people would even be located. It goes without saying that both of these options expressly conflict with the requirements of section 53(1), by allowing for the enumeration of people who are **not** ordinarily resident in an established polling division. In addition to the difficulties involved in the mechanics of enumeration, there would also have been difficulties related to the mechanics of **how** these non-residents would be able to vote. It is clear that the interpretation proposed by the appellants would require a highly-crafted administrative system, a system that is notably absent from the legislation. In my view, the interpretation of section 55(5) proposed by the appellants would simply be unworkable, and it cannot be presumed that such an interpretation or result could have been foreseen, let alone intended, by Parliament.

Finally, I must add that the interpretative approach proposed by the appellants is one which would do violence to all cannons of interpretation as well as to legislative integrity. The appellants are asking the Court to conclude that ordinary residence under the *Referendum Act* (Canada) cannot be lost until one is entitled to vote under the *Referendum Act* (Quebec). To arrive at such a conclusion, the Court would be required to alter the clear meaning of provisions drafted by the federal government in order to accommodation exigencies arising from provisions drafted by a completely different legislative body, one over which the federal legislator has no authority whatsoever. To do this would be to cut away at the authority of legislative bodies to draft statutory instruments that they feel best reflect their specific purposes and goals. Such a conclusion would strike a blow at the autonomy and independence of legislative bodies in a federal system. It is clear that, carried in different settings, such an interpretative approach would have incredible and untenable consequences.

I conclude that the *Referendum Act* (Canada) and the *Canada Elections Act* could not properly be interpreted to extend an entitlement to vote to those Canadian citizens who, on the enumeration day, were not ordinarily resident in one of the jurisdictions where, pursuant to the Order-in-Council, the federal government held its referendum.

Powers of the Chief Electoral Officer

It was argued that it is the minority's view that, notwithstanding the clear and unambiguous terms of the legislation, the Chief Electoral Officer had, pursuant to section 7(3) of the *Referendum Act* (Canada) and section 9(1) of the *Canada Elections Act,* the discretion to adapt or interpret the *Canada Elections Act* so as to assist the appellants. Do these sections, then, confer upon the Chief Electoral Officer the authority to treat residents of Quebec as if they were residents of another province in order to enable them to vote in the federal referendum? In my view, they do not.

According to section 7(3) of the *Referendum Act* (Canada), the Chief Electoral Officer may "adapt the *Canada Elections Act* in such a manner as [he] considers necessary for the purposes of applying that Act in respect of a referendum". Clearly, the discretion accorded the Chief Electoral Officer may be exercised only where adaptations of the *Canada Elections Act* are deemed necessary to facilitate the holding of a specific referendum. Though the Chief Electoral Officer is given a discretionary power to adapt the legislation, this power does not extend to authorise a fundamental departure from the scheme of the *Referendum Act* (Canada). In exercising his discretion, he must remain within the parameters of the legislative scheme.

As noted above, residence is a pivotal feature of the referendum scheme as captured in both pieces of federal legislation. The Order-in-Council directed that a referendum be held in a number of clearly specified jurisdictions. Where electors were not ordinarily resident in those jurisdictions, they had no entitlement to vote in that referendum. The discretionary power of the Chief Electoral Officer cannot be exercised to extend the entitlement to vote beyond the parameters established in the Order-in-Council. Were he to adapt the legislation in a manner that extended the reach of the underlying Order-in-Council, the Chief Electoral Officer would exceed the boundaries of his jurisdiction and, in my view, he would be exposed to having his decision quashed upon judicial review.

It was suggested that section 9(1) of the *Canada Elections Act* referred to earlier, provides more expansive remedial powers. This section bears repetition here:

> 9.(1) *Where,* during the course of a referendum, it appears to the Chief Electoral Officer that, *by reason of any mistake, miscalculation, emergency or unusual or unforeseen circumstance, any of the provisions of this Act do not accord with the exigencies of the situation, the Chief Electoral Officer may,* by particular or general instructions extend the time for doing any act, increase the number of referendum officers or polling stations or otherwise *adapt any of the provisions of this Act to the execution of its intent,* to such extent as he considers necessary to meet the exigencies of the situation. (Emphasis added.)

Although the text of this section seems very broad, it only contemplates situations where the provisions of the legislation do not accord with particular needs arising out of any "mistake, miscalculation, emergency or unusual or unforseen circumstance". The appellants argue that their situation, falling in the gap between the provisions of a provincial and a federal referendum, was just such an *unusual* and *unforseen* occurrence. Clearly, it could not fall within the terms "mistake, miscalculation [or] emergency". In my view, Mr. Haig's situation is neither an unusual nor an unforeseen circumstance. The *Referendum Act* (Canada) expressly states that a referendum may be directed at the electors of specific provinces. The exclusion of electors not resident in those provinces on the enumeration date is the clear and unambiguous consequence of the legislative scheme adopted. It is entirely foreseeable and in no way unusual that those people who do not meet the minimal requirements set out in the legislation will not be entitled to vote, whether in a referendum or in an election.

Section 9(1) of the *Canada Elections Act* is also restricted to adaptations designed to facilitate the "execution of its intent". The object of the *Canada Elections Act,* as adapted for the referendum, is to ensure that those who are entitled to vote are given an opportunity to do so. The object is *not* to enfranchise those who are not entitled to vote. To invoke section 9(1) in aid of the appellants would distort the fundamental voting scheme, in a manner contrary to the intent of both the *Canada Elections Act* and the *Referendum Act* (Canada). In my opinion, the conditions necessary for the exercise of the remedial discretion accorded the Chief Electoral Officer in section 9(1) of the *Canada Elections Act* were simply not present in this case.

However, even if I were to conclude that the Chief Electoral Officer had the statutory authority to make arrangements to allow for the enumeration of the appellants, he was not *required* to make such arrangements. The power given the Chief Electoral Officer in section 9(1) of the *Canada Elections Act* is a discretionary power. In the absence of a *Charter* violation, this discretion remained to be exercised by the Chief Electoral Officer as he saw fit, and he cannot be compelled by a court to exercise it in a specific fashion, unless, of course, such discretion was not exercised judicially, which is not the case here.

In short, I find that the Chief Electoral Officer could not, without acting outside his jurisdiction under the Order-in-Council, accommodate Mr. Haig's circumstances and in no way was he remiss in his duty on the basis that he neglected to use the discretionary and remedial powers accorded to him by section 7(3) of the *Referendum Act* (Canada) and section 9(1) of the *Canada Elections Act.* These provisions did not entitle nor require him to supersede or extend the purpose and intent, expressed in clear and unambiguous terms, of the legislation. The appellants' argument in this connection must fail.

After writing these reasons, I have had the opportunity to read the reasons of my colleague Cory J and must emphasise that I find myself in total agreement with the principles he advances, particularly as to the importance to Canadians of the right to vote, in elections as well as

referenda. I also agree that the *Referendum Act* (Canada) "encourages very broad view of residence."

Since, however, Mr. Haig, in this case, never alleged nor even argued before us that he had an Ontario residence or any connection whatsoever to the province of Ontario on the enumeration date in Ontario, the question of the discretionary power of the Chief Electoral Officer to allow him to vote in the federal referendum on that basis was never raised. The only question raised in this appeal, as far as the Chief Electoral Officer is concerned, was his power to extend the federal referendum residing requirements to persons who were *not* residents on the enumeration date in a province or territory where the federal referendum was held. This, in my view, the Chief Electoral Officer has no power to do.

As my colleague suggests, however, had Mr Haig, and others in the same position, applied to the Chief Electoral Officer for a determination of his right to vote in Ontario on the basis of a substantial connection with Ontario on the enumeration date, it would have been up to the Chief Electoral Officer to exercise his discretionary power. This, of course, would be different case.

Constitutionality

It should be emphasised at this point that,although the Quebec referendum legislation did not allow the appellants to vote in the Quebec referendum, the Quebec legislation was never challenged by the appellants. This is hardly surprising since, in Canada's constitutional system, the provinces have and retain authority to establish rules governing voting within the province. Territorial exigencies, such as those present in the northern territories, may justify a host of rules particular to a given province, and the possibility of such divergence is woven into the very fabric of Canadian federalism itself. No one has challenged the residency requirements established in the Quebec legislation, nor argued that they are in any way unconstitutional.

The only enactments challenged are the *Referendum Act* (Canada), the *Canada Election Act* and the Order-in-Council as infringing upon the *Charter* rights of the appellants. The appellants submit that, to the extent that they were unable to participate in the federal referendum, they were deprived of their constitutional right to vote (section 3), of their freedom of expression (section 2(b)), and of their right to equal benefit of the law (section 15(1)). They set out two alternative sources of this *Charter* violation: first, they challenge the provisions of the *Referendum Act* (Canada) and the *Canada Elections Act* as constitutionally under-inclusive to the extent that they failed to make provision for the enumeration of the appellants in a "national" referendum; alternatively, they submit that the Order-in-Council itself violated the *Charter* by failing to include the province of Quebec.

Leaving aside for the moment the *Charter* issues, I am of the view that neither of these alternative arguments has any merit. I would make only the following two comments at this juncture. First,

the argument that the legislation is constitutionally under-inclusive received some support in the dissenting reasons of Dècary J A. However, the argument rests upon the flawed fundamental assumption that there was a "national" referendum. There was, in fact, no such "national" federal referendum. There were *two* referenda held on October 26, 1992, both, it is true, concerning the Charlottetown Accord, but pursuant to separate and distinct legislative schemes. Though the federal government may well have taken note of the results of the Quebec referendum, it would be unfounded in law to suggest that the federal government "allowed" Quebec to administer part of what was really a "national" referendum. Quebec did not need the authorisation of the federal government to hold its referendum, and the Quebec referendum legislation was not within federal control or authority. Had the federal government wished to hold a "national" referendum, it could have included Quebec in the proclamation. Though it had every right to do so, it chose not to, as it also had the right to do.

Second, the appellants challenge the constitutionality of the federal Order-in-Council itself. In this regard, I fully agree with Hugessen J A that "there is no constitutional impropriety in a federal order in council requiring a referendum to be held in some but not all of the provinces". In fact, there is nothing in the Canadian Constitution which relates to referenda, let alone anything that mandates or prevents this type of consultation by either the federal or provincial governments. The propositions of the appellants to the contrary simply cannot be sustained. The decision to hold a federal referendum in nine provinces and two territories was a constitutionally permissible one. It was a political choice, a choice open under the legislation, and a choice consistent with principles of federalism. What is left to consider, then, is whether his choice was also consistent with the obligations of the federal government under the Charter. It is to that issue that I now turn.

Section 3: The Right to Vote

Does section 3 of the *Charter* guarantee to every citizen of Canada the right to participate in a federal referendum, independently of the terms of the federal referendum legislation? Section 3 of the *Charter* reads as follows:

> 3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

The wording of the section, as in immediately apparent, is quite narrow, guaranteeing only the right to vote in elections of representatives of the federal and the provincial legislative assemblies. As Professor Peter Hogg notes in *Constitutional Law of Canada* (3rd ed. 1992), vol. 2, at p. 42, the right does not extend to municipal elections of referenda.

In *Reference re Provincial Electoral Boundaries (Sask.),*[1991] 2 S.C.R. 158, this Court had occasion to more fully consider the content of section 3 of the *Charter.* Writing in the context of a provincial election, Cory J, dissenting but not on this point, articulated at p.165 that "[t]he right to vote is synonymous with democracy". Clearly, in a democratic society, the right to vote as expressed in section 3 must be given a content commensurate with those values embodied in a democratic state. For the majority of the Court, McLachlin J concluded at p.183 that it is the Canadian system of effective representation that is at the centre of the guarantee:

> ... the purpose of the right to vote enshrined in s.3 of the *Charter* is not equality of voting power *per se,* but the right to "effective representation". Ours is a representative democracy. Each citizen is entitled to be represented in government. Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative.

The purpose of section 3 of the *Charter* is, then, to grant every citizen of this country the right to play a meaningful role in the selection of elected representatives who, in turn, will be responsible for making decisions embodied in legislation for which they will be accountable to their electorate.

The democratic rights contained in sections 3, 4 and 5 of the *Charter* are quite explicitly articulated. In his discussion in "Democratic Rights", in G.-A. Beaudoin and E. Ratushny, eds., *The Canadian Charter of Rights and Freedoms* (2nd ed. 1989), 265, Professor Beaudoin summarises these rights at p.266 as:

> The right to choose the government, the right to seek public office, the right to vote periodically, freely and in secret and the right for those elected to sit regularly are the bases of democratic rights.

The democratic rights guaranteed in the *Charter* are also positive ones. Federal and provincial governments have a mandate to hold regular elections to allow citizens to select their representatives. The failure to hold such regular elections would violate the *Charter,* would open the government to account for such constitutional infringements, and would undoubtedly provoke a constitutional crisis. Since the results of an election are clearly binding upon citizens in a democratic society, failure to act upon such results would entail a serious constitutional breach.

A referendum, on the other hand, is basically a consultative process, advice for the fathering of opinions. Voting in a referendum differs significantly from voting in an election. First, unless it legislatively binds itself to do so, a government is under no obligation to consult its citizens through a mechanism of a referendum. It may, as did Quebec under Bill 150, bind itself to conduct a specific referendum but, in the absence of such legislation, there is no obligation to hold this type of consultation. Second, though a referendum may carry great political weight and a

government may choose to act on the basis of the results obtained, such results are non-binding in the absence of legislation requiring a government to act on the basis of the results obtained. In the absence of binding legislation, the citizens of this country would not be entitled to a legal remedy in the event of non-compliance with the results. Were a government to hold a referendum and then ignore the results, the remedy would be in the political and not the legal arena. These differences provide further evidence that the constitutionally guaranteed right to vote does not contemplate the right to vote in a referendum.

Section 3 of the *Charter* is clear and unambiguous as it its purpose: it is limited to the elections of provincial and federal representatives. Consequently, since a referendum is in no way such a selection, the citizens of this country cannot claim a constitutional right to vote in a referendum under section 3 of the *Charter*. Accordingly, Mr. Haig's section 3 *Charter* rights were not infringed because he could not cast his ballot in the federal referendum.

Section 2 (b): Freedom of Expression

Mr Haig also claims that the fact that he could not vote in the federal referendum infringed his freedom of expression. Expressing one's opinion on the Charlottetown Accord, according to Mr. Haig is an attempt to convey meaning, the content of which relates to political discourse, which is at the core of section 2(b) of the *Charter* and enjoys the highest degree of protection. The content of this expression, he says, cannot be meaningfully examined apart from its form namely, participation in the referendum itself. Consequently, he urges the Court to find that the actual *casting of a ballot* in a federal referendum is a protected form of expression, asserting that section 2(b) of the *Charter* mandates not only immunity from state interference, but also an affirmative role on the part of the state in providing this specific means of expression.

The Court has, on many occasions, considered the freedom of expression guaranteed in s.2(b) of the *Charter*. (See RWDSU v *Dolphin Delivery Ltd.*,[1986] 2 S.C.R.573; BCGEU v *British Colombia (Attorney General),* [1988] 2 S.C.R.712; *Devine* v *Quebec (Attorney General),* 2S.C.R 790; *Irwin Toy Ltd.* v *Quebec (Attorney General),* [1989] 1 S.C.R. 927; *Slaight Communications Inc.* v *Davidson,* [1989] 1 S.C.R. 1038; *Edmonton Journal* v *Alberta (Attorney General),* [1989] 2. S.C.R.1326; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.),[1990]* 2 S.C.R. 1123; *Rocket* v *Royal College of Dental Surgeons of Ontario,* [1990] 2 S.C.R. 232; *R.* v *Keegstra,* [1990] 3 S.C.R.697; *Canada (Human Rights Commission)* v *Taylor,* [1990] 3 S.C.R.982; *R.* v *Butler,* [1992] 1 S.C.R.452; *R.* v *Zundel,* [1992] 2 S.C.R.731). Both Canadian society and the courts have at all times recognised that freedom of expression is a fundamental value in Canada. This Court has abundantly discussed the values underlying freedom of expression, and since those values are not in dispute here, it is not necessary to delve into them at great length. Nor is it in dispute that the activity of casting a ballot is an expressive one. As Dickson DJ and Lamer and Wilson JJ noted in *Irwin Toy, supra,* at p. 968, "'Expression' has both a content and a form and the two can be inextricably connected". Referenda are, in fact, illustrations of this phenomenon

and in this context, it would be artificial to separate the form of expression from its content. The casting of a ballot in a referendum is undoubtedly a means of expression, but again, this is not in dispute here.

At issue is whether section 2 (b) of the *Charter* guarantees to all Canadians the right to vote in a referendum. In failing to ensure that each Canadian was provided with the opportunity to vote in the federal referendum, did the federal government infringe upon their freedom of expression guaranteed in section 2 (b) of the *Charter?* Does freedom of expression include a positive right to be provided with specific means of expression?

As a starting point, I would note that case law and doctrinal writings have generally conceptualised freedom of expression in terms of negative rather than positive entitlements. In *The System of Freedom of Expression (1970),* T.I. Emerson, speaking of the United States Bill of Rights whose First Amendment provision is even more stringent than its Canadian *Charter* counterpart, observes at p. 627:

> The traditional premises of the system [of freedom of expression] are essentially laissez-faire in character. They envisage an open marketplace of ideas, with all persons and points of view having equal access to the means of communications. In supporting this system, the First Amendment has played a largely negative role: it has operated to protect the system against interference from the government. Thus the issues have turned for the most part upon reconciling freedom of expression with other special interests that the government seeks to safeguard. *The development of legal doctrine has been primarily in the evolution of a series of negative commands.* (Emphasis added.)

Like its United States First Amendment counterpart, the Canadian section 2 (b) *Charter* jurisprudence has been shaped by these same foundational premises, focusing mainly on attempts by governments to place limitations on what can be expressed. The traditional question before courts has been: to what extent can freedom of expression be justifiably limited? The answer has been that individuals can expect to be free from government action the purpose of effect of which is to deny or abridge freedom of expression, unless the restraint is one that can be justified in a free and democratic society in accordance with section 1 of the *Charter.*

It has not yet been decided that, in circumstances such as the present ones, a government has a constitutional obligation under section 2 (b) of the *Charter* to provide *a particular platform* to facilitate the exercise of freedom of expression. The traditional view, in colloquial terms, is that the freedom of expression contained in section 2 (b) prohibits gags but does not compel the distribution of megaphones. A case on point is *Re Allman and Commissioner of the Northwest Territories* (1983), 144 D.L.R.(3rd) 467 (N.W.T.S.C.). aff'd (1983), 8 D.L.R.(4th) 230 (C.A.), leave to appeal to S.C.C. denied, [1984] 1 S.C.R. *v* Mr. Allman challenged the constitutionality of a three-year residency requirement contained in a territorial *Plebiscite Ordinance* that prevented

him from voting in an upcoming referendum. The trial judge made the following observation at p.479:

> The "freedom of thought, belief, opinion and expression" referred to in para. 2 (b) of the Charter, on which the applicants rely, is therefore to be understood as recognition of a claim which anyone may make against the state ... to non-interference in matters of thought, belief, opinion and expression...
>
> The applicant's complaint in these proceedings... falls instead into the class of a "demand for state intervention" to provide access to the means of expression available to those designated as voters by the Ordinance. ...

The trial judge concluded that no such entitlement existed, and that Mr. Allman did not have a right to be provided with access to a specific means of expression. The Court of Appeal agreed with that conclusion at p.236:

> ....*the expression of opinion sought* by a plebiscite under the *Plebiscite Ordinance has nothing at all to do with the fundamental freedom of expression guaranteed by the Canadian Charter.* It does not abridge or abrogate the fundamental freedom of expression previously enjoyed by the applicants as a guaranteed birthright. It is a supplementary forum created by the territorial government for its own information purposes. The fact that the applicants were denied the opportunity to participate in a public opinion poll did not detract from their fundamental right to speak out and express their views on the subject matter, whether individually or through the media. (Emphasis added.)

The approach followed in *Allman, supra,* rests firmly on the traditional foundational premises outlined above. However, it is these very premises that are being challenged by the appellants. While the basic theoretical framework underlying freedom of expression has remained unchanged over the past two hundred years, the appellants point out that the political, economic and social conditions under which the theory must be applied have changed significantly. The urge that true freedom of expression must be broader than simply the right to be free from interference, referring to Emerson's claim in *The System of Freedom of Expression, supra,* at p.4, that the state "has a more affirmative role to play in the maintenance of a system of free expression in modern society".

I would agree, and it is well understood, that a philosophy of non-interference may not in all circumstances guarantee the optimal functioning of the marketplace of ideas. Clare Beckton notes in "Freedom of Expression" in W.S. Tarnopolsky and G.A. Beaudoin, eds., *The Canadian Charter of Rights and Freedoms: Commentary* (1982), 75, at p.76:

> Generally the fundamental freedoms are guaranteed by placing limitations on the state's ability to abrogate or abridge them. While this can ensure that the state will not erode these guarantees, it does not ensure that freedom of expression will be fostered.

Owen M. Fiss, for his part, in "Free Speech and Social Structure" in J. Lobel, ed., *A Less Than Perfect Union: Alternative Perspectives on the U.S. Constitution* (1988), 346 at p.352, writes that in modern society, freedom of expression "depends on the resources at one's disposal, and it reminds us that more is required these days than a soapbox, a good voice, and the talent to hold an audience". As he points out, speech often takes place under conditions of scarcity. Both the resources and the very opportunities for speech may tend to be limited, whether by time, lack of money, unavailability of space, or even by our capacity to digest and process information.

Does this inevitably lead to the conclusion that the constitutional guarantees of freedom of expression may import more than the absence of government interference? Some people have suggested that it might. Jean Jacques Blais, in "Freedom of Expression and Public Administration" in D. Schneiderman, ed., *Freedom of Expression and the Charter* (1991), 446, express as the view that, for example, the concentration of media ownership in Canada may not be in the public interest, and that there may be a more positive role for government to play in diffusing ownership to ensure a more vigorous exercise of freedom of expression amongst the mass media. Along the same lines, Allan C. Hutchinson, in "Money Talk: Against Constitutionalizing (Commercial) Speech" (1990), 17 *Can Bus. L.J. 1,* at pp 31 and 33, observes that literature produced by striking Molson workers could not gain wide dissemination due to restrictions set by the mass media. Yves de Montigny, in "The Difficult Relationship Between Freedom of Expression and Its Reasonable Limits" (1992), *55 Law & Contemp. Probs.* 35 expresses a similar view at p. 40:

> While it is accurate to claim that government interference is very often inconsistent with individual freedom, it is equally accurate to say that genuine autonomy presupposes the legislature's active intervention if necessary.

In *Reference re Public Service Employee Relations Act (Atla.)* [1987] I S.C.R.313, a case dealing with the boundaries of freedom of association, Dickson CJ (Dissenting) addressed this same concern at p. 361:

> Section 2 of the *Charter* protects fundamental "freedoms" at opposed to "rights". although these two terms are sometimes used interchangeably, a conceptual distinction between the two is often drawn. "Rights" are said to impose a corresponding duty or obligation on another party to ensure the protection of the right in question whereas "freedoms" are said to involve simply an absence of interference or constraint. *This conceptual approach to the nature of "freedoms" may be too narrow since it fails to acknowledge situations where the absence of*

> *government intervention may in effect substantially impede the enjoyment of fundamental freedoms* (e.g. regulations limiting the monopolization of the press may be required to ensure freedom of expression and freedom of the press). (Emphasis added.)

Although that case did not involve a request for government action, but dealt rather with legislative action alleged to interfere with a freedom, Dickson CJ seems to imply that fundamental freedoms might, in some situations, impose affirmative duties on a state.

At this point, it is important to emphasise that, in talking about freedom of expression, a variety of vocabularies have been employed. People have sometimes used the language of negative and positive entitlements, sometimes focusing on distinctions between rights and freedoms, other times on distinctions between "liberty to" and "liberty of". (For example, see I. Berlin, "Two Concepts of Liberty", in *Four Essays on Liberty* (1969), at pp.118–72; A. W. Mackay, Freedom of Expression: Is It All Just Talk?" (1989), 68 Can Bar Rev. 713; and W. R. Lederman, "Democratic Parliaments, Independent Courts, and the Canadian Charter of Rights and Freedoms" (1985), 11 *Queen's L.J. 1).* There may be value to these conceptual distinctions as they provide frameworks which can assist in an analysis of the issues, interests and values that shape a conclusion that a right has or has not been violated.

However, as Dickson CJ rightly observed, this language cannot be used in a dogmatic fashion. The distinctions between "freedoms" and "rights", and between positive and negative entitlements, are not always clearly made, nor are they always helpful. One must not depart from the context of the purposive approach articulated by this Court in *R.* v *Big M Drug Mart Ltd.,* [1985] 1 S.C.R. 295. Under this approach, a situation might arise in which, in order to make a fundamental freedom meaningful, a posture of restraint would not be enough, and positive governmental action might be required. This might, for example, take the form of legislative intervention aimed at preventing certain conditions which muzzle expression, or ensuring public access to certain kinds of information.

In the proper context, these may perhaps be relevant considerations leading a court to conclude that positive governmental action is required. However, these considerations do not arise in our case. The context here is a referendum whose legality and legitimacy have been recognised. First, the provisions of the *Referendum Act* (Canada) allow for a referendum to be held in some provinces and not others, and that is what was done here. Second, as discussed earlier, section 3 of the *Charter* does not guarantee Canadians a constitutional right to vote in a referendum. Third, the referendum itself, far from stifling expression, provided a particular forum for such expression.

The observations of Le Dain J (Beetz and La Forest JJ concurring) in *Referendum re Public Service Employee Relations Act (Alta.), supra*, provide some insight. In the context of section 2(d) of the *Charter*, he commented at p. 391:

> *What is in issue here is not the importance of freedom of association* in this sense, which is the one I ascribe to s.2(d) of the *Charter, but whether particular activity* of an association in pursuit of its objects *is to be constitutionally protected or left to be regulated by legislative policy.* The rights for which constitutional protection is sought – the modern rights to bargain collectively and to strike, involving correlative duties or obligations resting on an employer – are not fundamental rights or freedoms. They are the creation of legislation ... (Emphasis added.)

These comments find application to the issue before us. As I stated at the outset, there is no dispute concerning the importance of freedom of expression. Nor is it disputed that voting is a form of expression. Further, in the context of legislative elections, it is clear that voting as a means of expression is constitutionally entrenched in section 3 of the *Charter.* However, there is just as clearly no constitutionally entrenched right to vote in a referendum.

A referendum is a creation of legislation. Independent of the legislation giving genesis to a referendum, there is no right of participation. The right to vote in a referendum is a right accorded by statute, and the statute governs the terms and conditions of participation. The Court is being asked to find that this statutorily created platform for expression has taken on constitutional status. In my view, though a referendum is undoubtedly a platform for expression, section 2 (b) of the *Charter* does not impose upon a government, whether provincial or federal, any positive obligation to consult its citizens through particular mechanism of a referendum. Nor does it confer upon all citizens the right to express their opinions in a referendum. A government is under no constitutional obligation to extend this platform of expression to **anyone**, let along to **everyone**. A referendum as a platform of expression is, in my view, a matter of legislative policy and not of constitutional law.

The following caveat is, however, in order here. While section 2 (b) of the *Charter* does not include the right to any particular means of expression, where a government chooses to provide one, it must do so in a fashion that is consistent with the Constitution. The traditional rules of *Charter* scrutiny continue to apply. Thus, while the government may extend such a benefit to a limited number of persons, it may not do so in a discriminatory fashion, and particularly not on ground prohibited under section 15 of the *Charter.*

I would add that issues of expression may on occasion be strongly linked to issues of equality. In *Schachter* v *Canada,* [1992] 2 S.C.R. 679, the Court said that section 15 of the *Charter* is indeed a hybrid of positive and negative protection, and that a government may be required to take positive steps to ensure the equality of people or groups who come within the scope of section 15. It might well be that, in the context of a particular equality claim, those positive steps may involve the provision of means of expression to certain groups or individuals. However, despite obvious links between various provisions of the *Charter,* I believe that, should such

situations arise, it would be preferable to address them within the boundaries of section 15, without unduly blurring the distinctions between different *Charter* guarantees.

In short, I am of the view that, in the context of the federal referendum held in this case, freedom did not include a constitutional right for all Canadians to be provided with a specific means of expression. Accordingly, the federal government did not violate section 2(b) of the *Charter* either in holding its referendum or in holding it in less than **all** provinces and territories. The appellants were unable to cast their ballot simply because, on the enumeration date, they were not ordinarily resident in a province where the federal referendum was held, a limitation which does not infringe the appellants' freedom of expression as guaranteed in the *Charter*.

This leads us to the third alleged *Charter* violation. In providing a platform of expression to less than **all** Canadians, did the government infringe the appellant's section 15(1) guarantee to the equal benefit of the law?

Section 15(1): Equality

Section 15(1) of the *Charter* guarantees the right to equality in the following terms:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

To the extent that they were unable to vote in the federal referendum, the appellants allege that they were denied the equal benefit of the law. In their opinion, once the federal government decided to hold a "national" referendum on the Charlottetown Accord, it was compelled by section 15(1) of the *Charter* to afford **every** qualified Canadian citizen the opportunity to participate in that vote. Since the appellants were not given this opportunity, they forwarded the proposition that the differential treatment they received was based on a prohibited ground of discrimination. They advanced two arguments in this regard: first, that **they** were improperly denied equal benefit of the law **as new residents of a province**; alternatively, that **all residents of Quebec** were improperly denied equal benefit of the law as a result of the failure to include Quebec in the Order-in-Council.

At the outset, I would reiterate the earlier observation that there was in fact **no** "national" referendum. The appellants were not afforded an opportunity to vote in the federal referendum simply because they were not ordinarily resident in a polling division established under the *Referendum Act* (Canada). However, was this distinction, one made between the appellants and those Canadians who **were** ordinarily resident in one of those polling divisions, a distinction which was based on a prohibited ground of discrimination?

In *Andrews* v *Law Society of British Columbia,* [1989] 1 S.C.R. 143, McIntyre J. at p.174 defined prohibited discrimination under section 15 (1) as:

> ... a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

He also noted that not all distinctions and differentiations are discriminatory. A complainant under section 15(1) must establish that he or she is a member of a discrete and insular minority group, that the group is defined by characteristics analogous to the enumerated grounds of discrimination set out in section 15(1), and that the law has a negative impact. In determining whether a group is analogous to those that are enumerated with section 15(1) of the *Charter*, Wilson J in *R.* v *Turpin,* [1989] 1 S.C.R. 1296, at p.1333, focused on the larger context by searching for indicia of discrimination such as "stereotyping, historical disadvantage or vulnerability to political and social prejudice".

Against this background, the appellants submit that a person's **place of residence** may be a personal characteristic which is analogous to those prohibited grounds listed in section 15(1). Though this may well be true in a proper case, this case is **not** such a case. It would require a serious stretch of the imagination to find that **persons moving to Quebec less than six months before a referendum date** are analogous to persons suffering discrimination on the basis of race, religion or gender. People moving to Quebec less than six months before a referendum date do not suffer from stereotyping, or social prejudice. Though its members were unable to case a ballot in the Quebec referendum, the group is not one which has suffered historical disadvantage, or political prejudice. Nor does the group appear to be "discrete and insular". Membership in the group is highly fluid, with people constantly flowing in or out once they meet Quebec's residency requirements. As they do not exhibit any of the traditional indicia of discrimination, I cannot find that new residents of a province constitute the group which merits the creation of a new section 15(1) category.

The appellant's alternative argument was that not simply **new residents**, but rather **all** residents of Quebec suffered discrimination. This is, they state that the federal government discriminated against all residents of the province of Quebec by failing to include Quebec in the proclamation. It is clear that at the base of the appellant's complaint is the existence of a scheme which allows for one province to be exempted from the scope of federal legislation. Even had the appellants been entitled to vote in the Quebec referendum, the central question would remain: Does the exclusion of one province from a piece of federal legislation violate section 15(1) of the *Charter*?

The appellants contend that the differential application of federal law to the provinces can only be tolerated if it is "legitimate" and advances the values of a federal system. In their view, the

decision to hold a referendum in only nine provinces did not advance these values. The appellants thus ask the Court to assess the legitimacy of the political decision not to include Quebec in the federal referendum, and to find that this decision was based on the prohibited ground of province of residence, and that it thus violated the section 15(1) rights of all citizens of Quebec to the equal benefit of the law.

In *Turpin, supra,* the Court considered a provision in the *Criminal Code* which allowed for murder trials by judge alone only in the province of Alberta. An accused outside of Alberta who wanted a trial by judge along argued that his equality rights were violated. Wilson J, finding that province of residence did not form the basis of a claim in the case before her, clearly left open that possibility that in some situations it might. Residence based equality rights were more fully articulated by Dickson C J in *R.* v *S.* (S)., [1990] 2 S.C.R. 254. In that case, the *Young Offenders Act* permitted provinces to set up "alternative measures" programmes to deal with young offenders. The Attorney General for Ontario made the decision **not** to implement such a programme. The Court held that this was not a violation of section 15(1), emphasising at p.285 the discretion of the Attorney General to implement such federal programmes:

> *Once it is determined that there is no duty on the Attorney General for Ontario to implement a program* of alternative measures, *the non-exercise of discretion cannot be constitutionally attached simply because it crates differences as between provinces.* To find otherwise would potentially open to *Charter* scrutiny every jurisdictionally permissible exercise of power by a province, solely on the basis that it creates a distinction in how individuals are treated in different provinces. The Attorney General for Ontario was under no legal obligation to implement a program and, in my opinion, the decision is unimpeachable because, for the purposes of a constitutional challenge on the basis of s. 15(1) of the *Charter*, "the law" is s. 4, which grants the discretion.

Dickson C J added at p.286 his opinion that the result "would be no different had s. 4 of the *Young Offenders Act* been challenged directly".

These comments are apposite here. Section 3 (1) of the *Referendum Act* (Canada) confers upon the Governor in Council a discretionary power to direct that a referendum be held in any number of provinces. Nowhere in the Canadian Constitution is there mention of an obligation on the Governor in Council to hold a referendum, or to see that a referendum is held in **all** provinces in which a referendum will be held are policy decisions left entirely to governments and legislatures. They involve matters of political consideration. Besides, the Governor in Council is not required to justify the reasons for any particular exercise of his discretion. As Dickson J said in *Thorne's Hardware Ltd.* v *The Queen,* [1983] 1 S.C.R. 106, at pp.112–113:

> Governments do not publish reasons for their decisions, governments may be moved by any number of political, economic, social or partisan considerations.

Clearly, in a federal system, province-based distinctions do not automatically give rise to a presumption of discrimination. Section 15(1) of the *Charter,* while prohibiting discrimination, does not alter the division of powers between governments, nor does it require that all federal legislation must always have uniform application of all provinces. It is worth emphasising that, as Dickson C J commented in *R. V. S. (S.), supra,* at pp 289–92, differential application of federal law in different provinces can be legitimate means of promotion and advancing the values of a federal system. Differences between provinces are a rational part of the political reality in the federal process. Difference and discrimination are two different concepts and the presence of a difference will not automatically entail discrimination.

The motives which might have guided the decision of the Governor in Council to hold a referendum are not here in dispute, and it is not the task of courts to second-guess the legislature on its political judgement. The decision to hold a referendum in a specific number of provinces is a constitutionally permissible exercise of the discretion accorded to the government under section 3 (1) of the *Referendum Act* (Canada). The fact that the legislature decided not to hold a referendum in the province of Quebec did not violate the constitutional guarantees contained in section 15(1) of the *Charter.* The appellants had no constitutional right to an Order-in-Council directing that a federal referendum be held in all Canadian provinces and territories.

In conclusion, the provisions of the *Referendum Act* (Canada) and the *Canada Elections Act* are constitutionally valid and, properly interpreted, they did not grant the appellants an entitlement to vote in the federal referendum. In not enumerating the appellants, the Chief Electoral Officer did not err in the exercise of the discretionary and remedial powers accorded him by section 7 (3) of the *Referendum Act* (Canada) and section 9 (1) of the *Canada Elections Act.* Finally, the exclusion of the appellants from the federal referendum did not violate the appellants' constitutional rights under sections 3, 2(b) or 15(1) of the *Charter.* In light of these findings, I would dismiss the appeal and answer the constitutional questions articulated by the Chief Justice as follows:

1. No.
2. Not necessary to answer.
3. No.
4. Not necessary to answer.

As in the courts below, I will make no order as to costs.

SUPREME COURT OF CANADA

GRAHAM HAIG, JOHN DOE and JANE DOE

and

THE CHIEF ELECTORAL OFFICER

and

THE ATTORNEY GENERAL OF CANADA

and

THE ATTORNEY GENERAL OF QUEBEC

CORAM: The Chief Justice and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

McLACHLIN J: I have had the benefit of reading the reasons of L'Heureux-Dubè J., Cory J. and Iacobucci J. While I am in general agreement with L'Heureux-Dubè J.'s disposition of this appeal, I wish to add the following comments.

I agree with Iacobucci J that the debates of the House of Commons evince an intent that the referendum include all eligible Canadian voters. The problem, as I see it, is that the proclamation which resulted did not provide for a referendum including all Canadian voters. It provided a referendum for nine provinces and two territories, excluding Quebec. The province of Quebec was already committed to a provincial referendum on the same day, posing the same question. Doubtless it would have seemed over-zealous, for lack of a better word, for Parliament to overlap the federal referendum with the previously set Quebec referendum.

The appellants' case is that it is the legislative acts of Parliament which violated their rights under the *Canadian Charter of Rights and Freedoms.* Accordingly, it is to the acts of Parliament and not to the expressed intention of its members that we must look. The act impugned is the act of providing for a referendum in areas of Canada other than Quebec, without providing a means for persons recently resident in Quebec to vote in their referendum. It is not contrary to the *Charter* that Parliament should decide to hold a referendum in only some areas of Canada. Having chosen to do so, it is not contrary to the *Charter* that voters outside those areas be excluded. So the legal breach is not made out.

In order to carry though its expressed intention of holding a national referendum, Parliament should have made provision for persons such as Mr. Haig who, although Quebec residents, were ineligible to vote in Quebec because they had recently moved there. While, as discussed by L'Heureux-Dubé J, an enumeration of all such persons might have been difficult and costly, alternatives such as advertisements requesting such persons to step forward might have been attempted. But Parliament made no such provision. Instead, it confined the right to vote in the federal referendum to the residents of provinces and territories other than Quebec, and failed to provide for the registration in its referendum of recently-arrived Quebec residents. Had the law, as opposed to the speeches in Parliament, enacted a truly national referendum then I would agree with Iacobucci J. that the result here violated the appellants' freedom of expression. The problem is that the law did not do this. Even with a broad and liberal reading of residency requirements aimed at enfranchising as many Canadians as possible "in every situation where that result could be attained from infringing the law" (per Cory J, at p.5), there was simply no legal basis upon which the Chief Electoral Officer could have registered Mr. Haig, a Quebec resident, in a referendum which by its terms excluded Quebec.

In the result, while I see much force in the contentions of my colleagues Iacobucci J and Cory J, I would dismiss the appeal for essentially the reasons given by L'Heureux-Dubé J.

SUPREME COURT OF CANADA

GRAHAM HAIG, JOHN DOE, and JANE DOE

and

THE CHIEF ELECTORAL OFFICER

and

THE ATTORNEY GENERAL OF CANADA

and

THE ATTORNEY GENERAL OF QUEBEC

CORAM: The Chief Justice and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

CORY J: I have read with great interest the excellent reasons of Justice L'Heureux-Dubé. However, with respect to residency requirements, I differ from her with regard to the authority, the duties and the nature of the role of the Chief Electoral Officer.

In this appeal consideration must be given to the nature of the right to vote and how statutes which enact that right should be interpreted.

The Approach to the Interpretation of Statutory Franchise Provisions

All forms of democratic government are founded upon the right to vote. Without that right, democracy cannot exist. The marking of a ballot is the mark of distinction of citizens of a democracy. It is a proud badge of freedom. While the *Charter* guarantees certain electoral rights, the right to vote is generally granted and defined by statute. That statutory right is so fundamental that a broad and liberal interpretation must be given to it. Every reasonable effort should be made to enfranchise citizens. Conversely, every care should be taken to guard against disenfranchisement.

The principle was captured by J.P. Boyer in *Election Law in Canada: The Law and Procedure of Federal, Provincial and Territorial Elections* (1987), vol. 1, at p. 383:

> Drawing two short lines to form an "x" is the simplest act imaginable. Yet the right to so mark a ballot is as profound as the act is simple. Such marks, systematically compiled, are transformed by our beliefs and our laws into the most eloquent voice that people have.
>
> The right to cast a vote for those seeking public office is encircled by procedures and laws designed not to make the exercise of this right difficult (although someone frustrated at not being able to vote for a technical reason may feel this is the case), but rather to ensure that it cannot be easily swept away.

The courts have always recognised the fundamental importance of the vote and the necessity to give a broad interpretation to the statutes which provide for it. This traditional approach is not only sound, it is essential for the preservation of democratic rights. The principle was well expressed in *Cawley* v *Branchflower* (1884), 1 B.C.R. (Pt.II) 35 (S.C.). There, Crease J wrote at p.37:

> The law is very jealous of the franchise, and will not take it away from a voter if the Act has been reasonably complied with ... *It looks to realities, not technicalities or mere formalities*, unless where forms are by law, especially criminal law, essential, or affect the subject matter under dispute. (Emphasis added).

To the same effect in *Re Lincoln Election* (1876), 2 O.A.R.316, Blake V.C. stated (at p.323):

> The Court is anxious to allow the person who claims it the right to exercise the franchise, in every case in which there has been a reasonable compliance with the statute which gives him the right he seeks to avail himself of. No merely formal or immaterial matter should be allowed to interfere with the voter exercising the franchise.

It can be seen that enfranchising statutes have been interpreted with the aim and object of providing citizens with the opportunity of exercising this basic democratic right. Conversely, restrictions on that right should be narrowly interpreted and strictly limited.

The Importance of the Right to Vote on the Referendum

During the course of the hearing an argument was advanced that a referendum was distinct from and less important than an election. It was argued that, as a result, the generous principles applicable to the right to vote in elections should not apply with the same force to a referendum. I cannot accept that contention. A vast amount of public study, effort and time was expended in drafting the terms of the Charlottetown Accord. Every effort was made to advise Canadians of the importance of the referendum pertaining to it and the significance of the vote of every citizen. The number of voters exercising their franchise in the referendum was comparable to the turn-out in federal elections. In the minds of most Canadians, the referendum was every bit as important as an election. If it was not, then Canadians would be clearly justified in wondering what all the fuss was about. The same principles applicable to the right to vote in elections should be applied in the same manner to the right to vote in referendum.

Residency Requirements and the Interpretation of "ordinarily resident"

It follows that it was the duty of the Chief Electoral Officer to insure that as many Canadian as possible were enfranchised in every situation where that result could be attained without infringing the law.

Let us review the legislation governing the referendum and the right to vote in that referendum.

> Section 7 of the *Referendum Act*, S. C. 1992, c. 30, provides in part:
>
> 7. (1) Subject to this Act, the *Canada Elections Act,* as adapted pursuant to subsection (3), applies in respect of a referendum, and, for the purposes of that application, the issue of writs of referendum shall be deemed to be the issue of writs for a general election.

.....

(3) Subject to this Act, the Chief Electoral Officer may, by regulation, adapt the *Canada Elections Act* in such manner as the Chief Electoral Officer considers necessary for the purposes of applying that Act in respect of a referendum.

.....

Section 50(1), 53(1) and 55(1) to (5) of the *Canada Elections Act,* R. S. C., 1985, c. E-2 (as adapted for the purposes of a referendum by SOR/92-430) read:

> 50. (1) Every person who
> (a) has attained the age of eighteen years, and
> (b) is a Canadian citizen,
>
> is qualified as an elector.

53.(1) Subject to this Act, every person who is qualified as an elector is entitled to have his name included in the list of electors for the polling division in which that person is ordinarily resident on the enumeration date for the referendum and to vote at the polling station established therein.

55.(1) The rules in this section and sections 56 to 59 and 62 apply to the interpretation of the expression "ordinarily resided" in any section of this Act in which those "ordinary resided" in any section of this Act in which those expressions are used with respect to the right of a voter to vote.

(2) Subject to this section and sections 56 to 59 and 62, the question as to where a person is or was ordinarily resident at any material time or during any material period shall be determined by reference to all the facts of the case.

(3) The place or ordinary residence of a person is, generally, the place that has always been, or that the person has adopted as, the place of his habitation or home, and to which he intends to return when he is away from it.

(4) Where a person usually sleeps in one place and has his meals or is employed in another place, the place of his ordinary residence is where the person sleeps.

(5) A person can have only one place of ordinary residence and it cannot be lost until another is gained.

Haig deposed that he resided in Ottawa from June 18, 1989 until August 1992 when he moved to Hull, Quebec. Thus he did not qualify to vote in the Quebec referendum because he had not been a resident of that province for the requisite statutory period of six months. It must be

remembered that Haig did not seek to challenge the validity of the Quebec legislation. Rather he sought to be enfranchised pursuant to the provisions of the federal Act.

My colleague takes the position that Haig, when he moved to Hull, lost his Ontario residency for voting purposes. With respect, I think the Chief Electoral Officer could well have come to a different conclusion.

At the outset, it must be remembered that originally the right to vote was tied to ownership of property. A person owning property in several ridings could cast a vote in each of them. The provisions pertaining to residency were aimed at preventing "plural voting" by prohibiting property-owners from voting in more than one riding. The residency requirement was designed to facilitate the attainment of the principle of one person one vote. It should not be used too readily as a means of depriving a person of any right to vote.

The residential requirement was considered in *Re Provincial Elections Act* (1903), 10 B.C R. 114 (S.C. en banc). This case was concerned with persons who were temporarily outside the province but who nonetheless wished to be sworn as voters. Walkem J stated (at pp. 120–21):

> It is a rule that franchise Acts should be liberally construed. The object of the Elections Act is to enfranchise and not disfranchise, persons who possess the necessary qualifications for being placed on the Voters' List; and hence the Act should, if possible, be so construed as to forward that object.....

This approach had been earlier affirmed by the Ontario Court of Appeal in *Re Voters' List of the Township of Seymour* (1899), 2 Ont. Elec. 69 where, with respect to harvesters, MacLennan JA held: "...temporary absence, even of very considerable duration, is not inconsistent with continuous residence, where the franchise is concerned" (pp. 74–75).

This repetition of the principle of enfranchisement, coupled with a recollection of the historical object of the residency requirement, provides a useful point commencement for considering the key phrase "ordinarily resident". The *Canada Elections Acts* deals specifically with various specific aspects of residency as well as the general rule to be applied in determining a voter's residence. For example, the residence of summer residents is determined by section 57; that of students and migrant workers in section 58; those in charitable missions by section 59 and Members of Parliament by section 60. The general residency rule is expressed under section 55(2). It provides that the ordinary residence of a voter "shall be determined by reference of all the facts of the case". Sub-sections 3 and 4 of the same section provide:

> (3) The place of ordinary residence of a person is, generally, the place that has always been, or that the person has adopted as, the place of his habitation or home, and to which he intends to return when he is away from it.

> (4) Where a person usually sleeps in one place and has his meals or is employed in another place, the place of his ordinary residence is where the person sleeps.

Sub-section 3 uses the word "generally" and subsection 4 uses the word "usually". By the use of these words, it can be seen that the framers of the legislation expected that there would be exceptions to the usual residency rule. Human existence itself is transitory. The residence of human beings is even more so. It is seldom that a Canadian can now be referred to as "a lifetime resident of such and such a district". Ours is now a highly mobile society whose members will frequently move about the country. This mobility does not mean that the right to vote should be considered any less important than it was in earlier times. Indeed, if a modern democracy is to function effectively the right is even more precious than before. Our whole concept of residency must be more flexible than ever before. It follows that the term "ordinarily resident" in an enfranchising statute should be interpreted broadly in the context of today's mobile society and in the light of the right to vote.

The case which in my view demonstrates the proper approach that should be taken to residency as it pertains to the right to vote is *Hipperson* v *Newbury District Electoral Registration Officer, [1985]* Q.B. 1060 (C.A.). In that case, the English Court of Appeal determined that the nuclear protesters who were camped outside the Greenham Common air-base were residents of that district. The court came to this conclusion despite the obviously temporary nature of this town of tents. Sir John Donaldson M.R. found that the issue of the permanence of a settlement was a question of fact and degree. At page 1073 he wrote:

> Permanence, like most aspects of residence, is a question of fact and degree.... All human affairs have a degree of impermanence, the precise degree being best forecast in the light of experience.

Another example of the flexibility which must be given to the concept of residence is presented by the much older case of *Re Fitzmartin and Village of Newburgh* (1911), 24 O.L.R. 102 (Div. Ct.). Fitzmartin lived on a farm. The farm was located partly in one municipality while the farmhouse was in another. Middleton J sensibly held (at p.104):

> *"Residence" is a word of very elastic meaning...* the "residence" required by the statute is not governed by such narrow considerations, but is *such a residence as can be fairly regarded as giving the voter the right to be recognised as a citizen of the municipality in question* (Emphasis added.)

Turning to more recent Canadian cases, *Tenold* v *Chapman (1981),* 9 Sask. R. 278 (Q.B.), held that a person who had been living in Ottawa since 1974, first as an M.P. for a Saskatchewan riding and subsequently as a senatorial assistant was, for voting purposes, to be deemed ordinarily resident in Saskatchewan. The court balanced the facts presented. For example, although the applicant rented and maintained a small apartment in Ottawa, had a bank account in that city and

obtained and used a province of Ontario health card, his relationship to Saskatchewan was such that he could properly be found to be ordinarily resident in that province.

In the case of *Fells* v *Spence, [1984]* N. W. T.R. 123 (S.C.), the term "ordinarily resident" for electoral purposes was again considered. An application was brought to strike Spence as a candidate on the grounds that he did not meet the residency requirements. Spence had moved to the Territory with his family when he was ten years old. However, he left to attend university, travel and work. In 1976, he declared himself a resident of Kingston, Ontario, in order to run for mayor. Later he worked as an assistant to a cabinet minister in Ottawa for three years. However, he frequently travelled to Yellowknife and stayed with his parents on those occasions. He expressed the intention of returning to live permanently in Yellowknife. He held a territorial driver's licence and health insurance card. In those circumstances, it was held that he compiled with the residential requirement. Marshall J appropriately held (at p. 130):

> In my view, "ordinarily resident" under the Elections Ordinance of the Northwest Territories ought to be generously interpreted ... If a man or woman can reasonably, on all the facts, fit within the statute, then let that person run. Democracy wants candidates.

These cases demonstrate the appropriate approach that courts should take to the concept of residence as a requirement of exercising the right to vote.

I note as well that it has been very sagely written that in any scheme of enumeration voters should be drawn up with a view to insuring that the right to vote is given to the greatest possible number of eligible voters. T. H. Qualter in *Election Process (1970)*, at p. 21, observed that an ideal enumeration scheme is one administered so as to maximise eligibility. In Canada, the Chief Electoral Officer has been remarkably successful in this regard. In parliamentary elections approximately 98 per cent of the eligible voters are registered and there would appear to be very little if any administrative disenfranchisement (Boyer, *supra,* at p. 426). I can see no reason for departing from this approach and practice under the *Referendum Act.*

The very nature of the *Referendum Act* encourages a very broad view of residence. In a parliamentary election, the location of votes can make a substantial difference in the election of a candidate in each riding. That is not true of a federal referendum where the exact location of any ballot is much less important. Further, the argument made in favour of residential requirements as proving an indication that the voter is reasonably acquainted with local issues and candidates is obviously not present in a referendum where all Canadians are called upon to vote on a question that transcends riding boundaries.

In my view, it would be wrong to automatically hold that those who had moved to Quebec before the referendum enumeration date could, on that basis alone, be denied the right to vote in a federal polling division outside Quebec. They could still properly exercise this franchise if it

could possibly be said that they retained a substantial connection to a polling division within the federal referendum area. They could well be found to be "ordinarily resident" for the purpose of voting depending on the factual evidence placed before electoral officials. It can never be forgotten that the term "ordinary resident " **must** be given a broad and liberal interpretation with a view to enfranchising the voter. It would be completely contrary to the objects of the *Canadian Elections Act* and our concept of democratic government if rigid rules were applied too quickly and disenfranchised Canadians desirous of voting in a referendum without real justification. The connections of Haig to an Ottawa riding or any other riding within the federal referendum area should have been explored in this case. His move to Hull should not have had the automatic result of depriving him of his right to vote. However, it is impossible to determine the exact policy of the Chief Electoral Officer on this issue. The appellant chose to move directly before the courts without first seeking to be enumerated in a polling division within the federal referendum area where it could well have been found that he retained sufficient ties to enable him to vote.

The *Referendum Act,* though its incorporation of the provisions of the *Canada Elections Act,* provides that once an initial voter's list is drawn up citizens can then seek to have their names added to it. It is significant that this first list is referred to as "preliminary" (see section 65(1)). The revision of the list takes place before a "revising officer" acting as a justice of the peace. (section 68 and Sch.IV, r.42 *et seq.).* At this stage a person may apply to be included. The appellant did not avail himself of this procedure.

He undoubtedly took his course because of his intention to seek a ruling that would treat all persons who had moved to Quebec within six months of the referendum voting date as a class of voters entitled to enfranchisement. Unfortunately, this makes it impossible for the Court to determine whether, under the requisite flexible test of residency, the appellant was qualified to cast his vote in the federal referendum area. There is simply no evidence upon which a finding could be made that he retained the necessary connection to a federal polling division to enable him to vote. Had the referendum not been held it might have been appropriate to remit the matter to a revising officer for an examination of the facts. This no longer can be done.

Nor should declaratory relief be granted. It is true that often the judicial interpretation of a statute can lead to the granting of a declaratory order by the Court. Nonetheless, declaratory relief is a matter of discretion which should only be exercised in a clear case. The referendum is now long past and in the circumstances presented in this case declaratory relief should not be granted.

Summary

The following principles emerge from a consideration of the right to vote and the interpretation of the statutes providing that right, here the *Canada Elections Act* and the *Referendum Act:*

> The right to vote is of fundamental importance to Canadians and to our Canadian democracy.

In the interpretation of all enfranchising statutes the provisions granting the right to vote should be given a broad and liberal interpretation. Every effort should be made to interpret the statute to enfranchise the voter.

Conversely every effort should be made to limit the scope of provisions which tend to disenfranchise the voter.

The concept of residency must be interpreted broadly in our mobile society. The term must be given a particularly broad and flexible meaning in statutes granting the right to vote. These statutes must be interpreted with the aim of enfranchising as many voters as possible. Further support for this approach can be derived from the historical purpose of enacting residency requirements which was to prohibit land owners from voting in each riding where they owned property. They were not enacted to completely deprive a person of the right to vote.

It follows that the specific term "ordinarily resident" should be interpreted broadly with a view to enfranchising as many voters as possible and to disenfranchising as few as possible.

There is still a further basis for giving the words "ordinarily resident" a very wide meaning in a referendum. Voting on a national question diminishes the strength of any argument that establishing the residence of a voter will give some indication of a voter's knowledge of local issues and candidates. As well, the exact location of each vote is less important than in a riding-by-riding parliamentary election.

A consideration of these principles could very well have led and perhaps should have led to his enfranchisement had Haig applied to be added to the list of voters in his former riding. Unfortunately, he did not seek to make such an application and it is impossible to determine on the facts presented if there was a sufficient connection to a riding to warrant his addition to the voter's list.

This is not a proper situation in which to grant declaratory relief.

Disposition

On the evidence presented, I find that I must come to the same result as Justice L'Heureux-Dubé but for different reasons. I would therefore dismiss the appeal and answer the constitutional questions in the manner suggested by my colleague.

SUPREME COURT OF CANADA

GRAHAM HAIG, JOHN DOE AND JANE DOE

V

THE CHIEF ELECTORAL OFFICER

and

THE ATTORNEY GENERAL OF CANADA

and

THE ATTORNEY GENERAL OF QUEBEC

CORAM: The Chief Justice and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

IACOBUCCI J: I have read the reasons of my colleague, L'Heureux-Dubé J and Cory J, and find myself in respectful disagreement with them although my colleagues make many points with which I fully agree. My principal disagreement is that, in my view, the appellant's rights under section 2 (b) of the *Canadian Charter of Rights and Freedoms* were violated by the effect of the *Referendum Act,* S. C. 1992, c.30 (*"Referendum Act"),* and such violation cannot, in the absence of evidence on the point, be saved under section 1 of the *Charter.* In the result, I would allow the appeal.

In a technical or formal sense, it is correct to observe, as L'Heureux-Dubé J does, that two referenda were held in the circumstances of this case: one by the province of Quebec and one by the federal government in the rest of Canada. Moreover, both British Columbia and Alberta require, under their legislation, that referenda be held in their respective provinces prior to the authorisation of amendments to the Constitution of Canada. See the *Referendum Act,* S.B.C 1990, c. 68, and the *Constitutional Amendment Approval Act, S.B.C.* 1991, c. 2; and the *Constitutional Referendum Act,* S. A. 1992, c. C-22.25 (as amended by S. A. 1992, c. 36). It appears that the federal referendum was to serve the purpose of a provincial referendum in those provinces. See the *Constitutional Referendum Amendment Act, 1992,* S. A. 1992, c 36, section 2. Technically, therefore, there were some four referenda being conducted: the federal referendum in nine provinces and two territories, the Quebec referendum, the federal referendum as applied to British Columbia, and the federal referendum as applied to Alberta.

In my opinion, focusing on the technicalities of separate referenda obscures the national character of the referendum. I agree with Dècary J A that the reality was that Parliament intended the country to have a national referendum which would be conducted by the holding of a federal referendum in conjunction with one or more provincial referenda, and in which the federal referendum could be treated as a provincial referendum in certain provinces, as apparently was the case in British Columbia and Alberta.

That a national referendum involving all Canadians was intended is shown by the statement of Mr. Jim Edwards, then Parliamentary Secretary to the Minister of State and Leader of the Government in the House of Commons, speaking on the second reading of Bill C-81 (the *Referendum Act* (Canada):

> "We would consult all Canadians in a national referendum. This referendum would be fair and give everyone an opportunity to express their opinion. It would be the culmination of the most extensive consultation exercise ever undertaken by a Canadian government."
>
> (*House of Commons Debate,* vol. 132, No. 144, 3rd sess., 34th Parl, May 19, 1992, at p. 10889.)

In addition, the then Prime Minister, the Right Honourable Brian Mulroney, P.C., in moving receipt of the *Consensus Report on the Constitution, Charlottetown, August 28, 1992,* stated:

> "This constitutional package provides a framework within which we are able to move ahead as a united nation, diverse and different it is true, yet one nation. And now the referendum ensures that every person of voting age in Canada will have an opportunity to express his or her preference."
>
> (*House of Commons Debates,* vol.132, No. 165, 3rd sess., 34th Parl., September 8, 1992, at p. 12732.)

It is also interesting to note that the Honourable Marcel Danis, then Minister of Labour, in describing the referendum, emphasised the importance of adopting a process that was fair, democratic and consonant with the Charter.

> "The government's purpose in tabling this bill is also to ensure that the rules of the game for any consultation that takes place will be fair, open and transparent, in accordance with our democratic traditions and the Canadian Charter of Rights and Freedoms.
>
> What are those rules, Mr. Speaker? Basically, they would be the same as for a general election. The referendum would be supervised by the Chief Electoral Officer and be subject to the provisions of the Canada Elections Act, already a guarantee of a fair process. Furthermore, the "yes" and "no" sides would have equal access to free air time, as determined by the arbitrator. The CRTC would also supervise the purchase of air time on radio and television networks for advertising purposes.
>
> However, there are some differences because of the very nature of this kind of consultation and the implications of the Charter. First of all, the bill does not make so-called umbrella committees mandatory. Any obligation to take part in the referendum campaign under the aegis of such committees would be contrary to the Charter of Rights, according to the legal opinions we have received so far. In fact, such an obligation would not only be likely to violate freedom of expression, it would also force groups that may be for or against the question for entirely different reasons to operate under the same umbrella."
>
> (*House of Commons Debates,* vol.132, No. 144, 3rd sess., 34th Parl., May 19, 1992, at p. 10854.)

I would therefore conclude that the federal referendum contemplated by the *Referendum Act* was aimed at all Canadians entitled to vote in a federal election.

The majority of the Federal Court of Appeal, [1992] 3 F.C. 611, was of the view that, when the appellant Haig moved from Ottawa to Hull, he exempted himself from the scope of the *Referendum Act* by virtue of being a non-resident of every province and territory to which the *Referendum Act* applied. Therefore, Haig could not challenge the *Referendum Act* because it did not apply to him. Consequently, the only legislation that Haig could attack was the Quebec legislation which lies outside the jurisdiction of the Federal Court of Canada.

The trouble with this approach is that it ignores the very purpose of the *Referendum Act* as stated above: to permit those Canadians entitled to vote in a federal election to accept or reject the Charlottetown Accord. The *Referendum Act* sought to co-ordinate a national referendum with the Quebec referendum, for which the underlying legislation had already been enacted. The aim of the *Referendum Act* was to include all Canadian citizens. If as a result of the requirements of the Quebec legislation, someone in the position of the appellant Haig was left out of the process he could, for the sake of argument, have launched a claim against two possible defendants: the province of Quebec and the federal government. I say no more about whatever rights he may have had against the province of Quebec because they are irrelevant to this appeal.

I agree with the appellant's submission that the federal legislation was aimed at a national referendum; to accomplish that end, it was co-ordinated with the Quebec referendum. As my colleague L'Heureux-Dubé J observes, the appellant unfortunately fell between the legislative cracks and was neither able to participate in the national referendum directly, nor was he able to participate indirectly through the Quebec referendum.

The question which then arises is whether his inability to participate in the referendum process amounts to a violation of his rights under the *Charter,* and it is to that question I now turn.

I agree with the view that the federal government is not legally obligated to hold referenda, nor is it legally bound by the results of any referenda it conducts. However, if the government chooses to conduct a referendum, it must do so in compliance with the *Charter. The Referendum Act* provided a legislative framework to allow Canadian citizens to express their political opinions. The referendum was an important expressive activity relating to constitutional change in this country.

The importance of the expressive activity in question was clearly evidenced by the statement of the Right Honourable Joe Clark, P.C., in moving the constitutional question to be put to Canadians in the referendum:

> Three major steps remain. The first is to invite the judgement of the Canadian people in a national referendum on October 26. *If Canadians vote yes, Parliament and legislatures would then act immediately to debate and, I expect, adopt the specific resolutions.* Then we would seek the unanimous agreement of the provinces to shorten the period of final ratification, in a way that could have these

> major constitutional changes approved and ratified and effective in law within a matter of months. (Emphasis added.)
>
> (*House of Commons Debates,* vol. 132, No. 166A, 3rd sess., 34th Parl., September 9, 1992, at p. 12786.)

Although Parliament was under no *legal* obligation to follow the results of the referendum, apparently a *political* obligation to do so had been assumed. Despite the absence of such a legal obligation, nevertheless, the referendum was an exceedingly important expressive activity that is worthy of *Charter* protection, as was acknowledged by Minister Danis in his comments quoted above.

The right to express opinions in social and political decision-making clearly attracts the protection of section 2 (b) (*R.* v *Zundel, [1992]* 2 S.C.R.731; *Irwin Toy Ltd.* v Quebec (Attorney General), [1989] 1. S. C. R. 927, at p.927). In *Native Women's Assn.* v Canada, [1992] 3 F.C. 192, Mahoney J A succinctly stated: "[c]ommunicating one's constitutional views to the public and to governments is unquestionably an expressive activity protected by paragraph 2(b)" (p. 211). I would agree. Casting a referendum ballot is an important form of expression which is worthy of constitutional protection. In my view, the appellant Haig's right to express his political views by participating in the referendum was guaranteed by section 2 (b) of the *Charter.* He was denied the right to participate and thus his section 2 (b) rights were violated.

Although the appellant Haig was free to express his views as he wished on the Charlottetown Accord prior to the vote, he was denied the ability to participate in the most important expressive activity, that of voting in the referendum. While the purpose of the *Referendum Act* was to include all voters, the effect was to deprive those residents of Quebec who were ordinarily resident in another province in the six-month period prior to the referendum of the ability to participate in expressive activity which is clearly protected under the *Charter.*

As the respondent Attorney General of Canada did not introduce any evidence on section 1, the violation of the appellant's 2 (b) rights has not been justified under section 1.

Under the circumstances, as the referendum has already taken place, any remedy is more theoretical than real. However, like Dècary J A, I would have sought to expand the definition of "elector" in section 3(1) of the *Referendum Act.* Relying on section 7(3) of the *Referendum Act,* which states that the *Canada Elections Act,* R.S.C., 1985, c. E-2, may be adapted "in such manner as the Chief Electoral Officer considers necessary for the purpose of applying that Act in respect of a referendum", the Chief Electoral Officer could have used section 9(1) of the *Canada Elections Act* to permit the appellant Haig to vote as Dècary J A outlined. Hopefully, the *Canada Elections Act* or the *Referendum Act* provisions will be clarified if Parliament decides to hold a referendum in the future.

In sum, I would allow the appeal with costs here and in the courts below, set aside the order of the Federal Court of Appeal, and substitute therefore an order declaring that the appellant was entitled to vote in the October 26, 1992 federal referendum as outlined by Dècary J A in the Court below.

SUPREME COURT OF CANADA

GRAHAM HAIG, JOHN DOE and JANE DOE

V

THE CHIEF ELECTORAL OFFICER

and

THE ATTORNEY GENERAL OF CANADA

and

THE ATTORNEY GENERAL OF QUEBEC

CORAM: The Chief Justice and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

THE CHIEF JUSTICE: I agree with Cory J with respect to the proper approach to the definition of residency for voting purposes. I also agree with Iacobucci J concerning section 2(b) of the *Canadian Charter of Rights and Freedoms* and with respect to his proposed disposition of this appeal. I would, therefore, dispose of the appeal as proposed by Iacobucci J.

FEDERAL COURT OF CANADA

TRIAL DIVISION

between

RICHARD SAUVE, Plaintiff,

and

THE CHIEF ELECTORAL OFFICER OF CANADA
THE SOLICITOR GENERAL OF CANADA
THE ATTORNEY GENERAL OF CANADA,
Defendants

and

between

T-1084-94

SHELDON, McCORRISTER, Chairman, LLOYD KNEZACEK, Vice-Chairman on their own behalf and on behalf of the Stony Mountain Institution Inmate Welfare Committee, and CLAIR WOODHOUSE, Chairman, AARON SPENCE, Vice-Chairman on their own behalf and on behalf of the Native Brotherhood Organisation of Stony Mountain Institution, and SERGE BELANGER, EMILE A. BEAR and RANDY OPOONECHAW.

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

Elections *– Right to Vote – Whether inmates of Correctional Institutions have right to vote – Whether section 51(e) of the Canada Election Act is valid – Violation of the Canadian Charter of Rights and Freedoms.*

Background facts: *The plaintiffs who were inmates or former inmates of correctional institutions brought an action challenging the constitutionality of section 51(e) of the Canada Elections Act which purported to disqualify from voting at an election persons imprisoned in a correctional institution, serving a sentence of two years or more. The plaintiffs alleged that section 51(e) of Act contravenes both sections 3 and section 15 of the Canadian Charter of Rights and Freedoms.*

Held: *The section 51 (e) did not infringe section 15 of the Charter. However, section 51(e) did infringe section 3 of the Charter and was not saved by section 1.*

Case cited in the Judgement:

Sauvè v *Canada (Attorney General) (1988), 66 OR (2d) 234 (H.C); reversed (1992), 7 O.R. (3d)* 481 (C.A.) ("Sauvè No.1"); *affirmed [1993] 2 S.C.R. 438*
RJR – MacDonald The v *Canada (Attorney-General), September 21, 1995, unreported*
R. v *Oakes, [1986] 1 S. C. R. 103*
Irwin Toy v *Quebec (A.G.) [1989] 1 S. C. R. 927*
Rodriguez v *A.G. of Canada [1993] 3 S. C. R. 528*
R. v *Big M. Drug Mart Ltd., [1985] 1 S. C. R. 295*
Belczowski v *Canada [1992] 2 F.C.440, affirming [1991] 3 F.C.151 (T.D.)*
Reference Re Prov. Electoral Boundaries (Sask), [1991] 2 S. C. R. 158
R. v *Lyons [1984] S. C. R. 309*
R. v *Goltz [1991] 3 S. C. R. 485*
R. v *Butler [1992] 1 S .C. R. 462*
R. v *Laba [1994] 3 S. C. R. 965*
R. v *Edwards Books and Art Ltd [1986] 2 S. C. R. 713*
McKinney v *University of Guelph [1990] 3 S. C. R. 229*
Dagenais v *Canadian Broadcasting Corpn. [1994] 3 S. C. R. 835*
Thibaudeau v *Canada [1995] 2 S. C. R. 627*
Jackson v *Joyceville Penitentiary Disciplinary Tribunal [1990], 32 F.T.R. 96*
Symes v *Canada [1993] 4 S. C. R. 695*
Egan and Nesbit v *Canada [1995] 2 S. C. R. 513*

REASONS FOR JUDGEMENT

WETSTON J: The plaintiffs, who are inmates or former inmates of correctional institutions, are challenging the constitutionality of section 51(e) of the *Canada Elections Act* (the "CEA""), R.S.C. 1985, c. E-2, as amended by S.C. 1993, c. 19, section 23. The provisions, which came into force on May 6, 1993, states:

> 51. The following persons are not qualified to vote at an election and shall not vote at an election:
>
> .....
>
> (e) every person who is imprisoned in a correctional institution serving a sentence of two years or more.

This provision replaces a previous disqualification, which was struck down by the Supreme Court of Canada in 1993.

The plaintiffs allege that section 51(e) of the CEA contravenes both section 3 and section 15 of the *Canadian Charter of Rights and Freedoms* (the "Charter"). The defendants admit that the impugned provision constitutes a *prima facie* breach of section 3 of the Charter; however, they maintain that the disqualification of prisoners, as set out in section 51(e) of the CEA, is justified under section 1 of the Charter, and does not discriminate within the meaning of section 15.

The present action comprises two separate actions that were joined and heard together. The plaintiffs are, or recently have been, inmates in Canadian correctional institutions. The plaintiff in the first case in Richard Sauvé. He is now on parole. There are a number of plaintiffs in the second case. Sheldon McCorrister, an Aboriginal, is the Chairman of the Stony Mountain Institution Inmate Welfare Committee. Lloyd Knezacek is the Vice-Chairman of that Committee. Aaron Spence, who is also an Aboriginal, is the President of the Native Brotherhood Organization. The Native Brotherhood Organization represents Aboriginal inmates at the Stony Mountain Institution, primarily on matters relating to Aboriginal culture and spirituality.

THE NATURE OF THE EVIDENCE

There were few adjudicative facts presented in this trial. Where evidence of such facts exists, it will be considered at the appropriate place in these reasons. Other than the relevant adjudicative and legislative facts to which I shall refer, the evidence consists almost entirely of expert opinions.

The Expert Witness

The experts, on behalf of both the plaintiffs and defendants, were almost exclusively academics who advanced opinions in the areas of political theory, moral philosophy, political philosophy,

philosophy of law, criminology, correctional policy, and penal theory. Given the issues in this case, the type of expert evidence adduced represents a most reasonable approach to assisting the Court in its determination as to whether the disenfranchisement of prisoners is justified.

Almost all of the defendants' witnesses are American citizens, American scholars, or American residents, or they have been primarily educated and trained in the United States. In contrast, most of the plaintiffs' experts are Canadian citizens, Canadian scholars, and Canadian residents. Given the international nature of academia, it is clear that all of the experts have multifaceted backgrounds and experiences. Dr. Pangle, for example, has even recently taken out Canadian citizenship.

None of the defendants' witnesses, despite their impressive academic backgrounds and contributions to scholarship, has ever considered the issue of prisoner disenfranchisement, before being retained by the Attorney General of Canada in this proceeding. Indeed, other than John Stuart Mill in a brief footnote reference, no well-known political theorist or moral philosopher, including de Tocqueville, Kant, Locke, Rousseau, or Hobbes, has ever considered this question. More recent political and moral philosophers, such as Rawls, Hart, Murphy, and Morris, has also not specifically considered this issue.

For the most part, with the exception of a report submitted by Dr. Colin Meredith, the evidence of the defendants may be characterised as academic and theoretical. While the plaintiffs also adduced considerable academic and theoretical evidence, on balance, their evidence is less lofty and is more tangible, particularly in relation to Canadian penology, social justice, and prisons. However, the evidence consists of virtually no observable phenomena. Indeed, the plaintiffs described the defendants' case as highly theoretical and abstract. While it is possible that some areas of social science theory may be confirmed by empirical observation, there was little in this case that could be assigned to that category. The evidence of the defendants was provided principally as part of an *ex post facto* analysis.

In weighing the evidence, I have considered each expert witness' skill, knowledge, training, experience, and the degree of attention which he or she gave to the matter in issue. Given the imprecise nature of the testimony, reason and common sense are even more important considerations in assessing the evidence. Furthermore, knowledge of Canadian society, laws, and institutions, and Canada's liberal democratic traditions, is also significant. I was also struck by the fact that three of the defendants' five expert witnesses are generally considered to represent non-mainstream positions in their respective theoretical disciplines. Although each expert, in this trial, has a well-established reputation, it is still necessary for the Court to analyse the evidence and to prefer to accept the testimony of one witness over that of another.

Plaintiffs Richard Sauvé and Aaron Spence

Two of the individual plaintiffs, Richard Sauvé and Aaron Spence, also provided testimony in the present matter. Mr Sauvé was convicted of aiding and abetting in the murder of a rival bike-gang member. He was sentenced to twenty-five years of incarceration, and was released in May of 1994. Since his release, Mr. Sauvé has been living in a half-way house, and currently works as a furniture-maker. He has worked with young offenders in a programme known as Youths at Risk, and is now a candidate for a Master of Arts degree in Criminology from the University of Ottawa. An agreed transcript of his evidence from a previous trial involving prisoner voting rights was introduced in this case: See *Sauvé* v *Canada (Attorney General)* (1988), 66 O.R. (2d) 234 (H.C.); reversed (1992), 7 O.R. (3d) 481 (C.A.) (*"Sauvé No.1");* affirmed [1993] 2 S C R 438.

Mr. Sauvé believes that offenders are not born as criminals, but become criminals as a result of circumstances. He asserted that inmates would feel more linked to society if they were granted the right to vote. Furthermore, Mr Sauvé testified that he had not lost his right of citizenship, nor his concern for society and his country, when he was sent to prison. He implied that prisoners eventually must return to society, and indicated that prisons are hostile environments containing many hurt individuals. He talked about various voluntary efforts within the Collins Bay penal institution which were organised by prisoners, including the sponsorship of camps for disadvantaged kids, foster parents, and a special olympiad for the "developmentally handicapped".

Mr. Spence has a very different criminal record from that of Mr. Sauvé. Mr Spence is an Aboriginal who is presently serving four years of incarceration for a combination of offences, including break and enter, theft, breach of a recognisance, and assault against another Aboriginal person. His record is extensive, and dates back to 1984. Mr Spence now considers himself on the road to rehabilitation. He agreed that he has been acting dysfunctionally, selfishly, and irresponsibly. He also agreed that the right to vote is valuable, and that he does feel a deprivation as a result of this loss. He also feels that being inside a penal institution does not mean that his family on the outside are not being affected by government actions. Mr Spence knows that he will return to society. In his words, "at one time or another, we are going to be part of that society, whether we like it or not."

ANALYSIS

Section 3 of the Charter: The Democratic Right to Vote

The defendants concede that section 51 (e) of the CEA constitutes a *prima facie* breach of section 3 of the Charter. In my view, that is the appropriate position to take. Accordingly, the burden is on the defendants to prove that the impugned provision is a reasonable limit that is demonstrably justified in a free and democratic society, pursuant to section 1 of the Charter.

In *RJR-MacDonald Inc.* v *Canada (Attorney General),* September 21, 1995, unreported, the Supreme Court of Canada recently considered section 1 of the Charter, and explicitly adopted the approach to that section, as first set out in *R.* v *Oakes*, [1986] 1 S. C. R. 103. In further elaborating upon the Oakes analysis, McLachlin J noted the following, at pages 4–5:

> The question is not whether the measure is popular or accords with the current public opinion polls. The question is rather whether it can be justified by application of the processes of reason.
>
> The process is not one of mere institution, nor is it one of deference of Parliament's choice. It is a process of *demonstration.* This reinforces the notion, inherent in the word "reasonable", of rational inference from evidence or established truths. (Emphasis in original.)

In short, the section 1 analysis is an exercise based not on abstractions, but on the facts of the case and the proof offered to justify the law. As stated by McLachlin J, at page 8:

> Context is essential in determining legislative objective and proportionality, but it cannot be carried to the extreme of treating the challenged law as unique socio-economic phenomenon, of which Parliament is deemed the best judge. This would undercut the obligation on Parliament to justify the limitations which it places on *Charter* rights.

Depending upon the situation which the law is attempting to address, the degree of deference which the Court should accord to Parliament's choice will vary. In this regard, McLachlin J stated the following, at page 9:

> As with context, care must be taken not to extend the notion of deference too far .... Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the constitution. But the Courts also have an important role: to determine, objectively and impartially, whether Parliament's choice falls within this limiting framework of the constitution.

The discharge of the civil standard does not require scientific demonstration; the balance of probabilities may be established by the application of common sense to what is known, even though what is known may be deficient from a scientific point of view: *per* Iacobucci J, in *RJR-MacDonald Inc., supra,* at page 3.

A previous version of section 51(e) of the CEA was struck down by the Supreme Court of Canada in May 1993: *Sauvé* v *Canada (Attorney General),* [1993] 2 S C R 438. In the present case, the defendants argue that the Court should defer to Parliament's choice when it decided to re-enact a provision which would disenfranchise offenders who are imprisoned for a period of two or more

years. In this regard, I am guided by the principles as outlined in *RJR-MacDonald Inc., supra.* In that case, a majority of the Supreme Court of Canada agreed that some deference may be shown to legislators, and recognition should be given to the difficulties inherent in the process of drafting rules of general application. However, the Court did caution that deference should not be taken too far: *per* McLachlin J in *RJR-MacDonald Inc., supra,* at page 9.

According to McLachlin J, in *RJR-MacDonald Inc., supra,* it is always difficult to determine when Parliament should be shown a greater degree of deference. It has been suggested that greater deference may be more appropriate in situations where the law is concerned with the competing rights of different sectors of society, rather than in cases which involve a contest between the individual and the State as the singular antagonist: *Irwin Toy* v *Quebec (A.G.), [1989]* 1 S.C.R. 927, at pp. 993–994; *Rodriguez* v *A.G. of Canada, [1993]* 3 S.C.R. 528, at p 563. Despite some submissions to the contrary which the defendants did not vigorously pursue, I find that this case is, on balance, one in which the State performs the role of singular antagonist. In any event, my examination of the evidence in this matter is made in relation to the civil standard of proof on a balance of probabilities, as required by *RJR-MacDonald Inc., supra,* at p. 10.

1. What are the Defendants' objectives, and are these pressing and substantial?

At this stage, the Court must determine whether the objectives of the infringing measure are sufficiently important to be capable, in principle, or justifying the limitation. To meet this test, the objectives must be of pressing and substantial importance.

(a) Objectives

The defendants submit that section 51(e) of the CEA advances two principal objectives:

(i) the enhancement of civic responsibility and respect for the rule of law; and,
(ii) the enhancement of the general purposes of the criminal sanction.

In the defendants' view, prisoners serving sentences of two years or more do so for reasons relating to long criminal records and/or particularly serious criminal convictions. It is this bad conduct which attracts the important objectives.

With respect to the first objective, the defendants argue that the provision is designed to cultivate, among Canadian citizens, an appreciation for, and an understanding of, the relationship between individuals' rights and societal responsibilities, i.e. good citizenship. In addition, the defendants argue that the provision seeks to denounce citizens who have, through their serious criminal conduct, acted in a grossly disrespectful manner toward the lives, property, or dignity of their fellow citizens. This denunciatory message aims to affirm the connection between participation in the voting process and commitment to the rule of law.

The defendants submit that the second objective of the legislation is the enhancement of the general purposes of the criminal sanction. In their view, the suspension of an inmate's right to vote until he has been released from prison sends a message which has a retributive, denunciatory, and morally-educative function.

The plaintiffs do not fundamentally disagree with the objectives of good citizenship, respect for the rule of law, and punishment of the guilty, upon which the defendants' case is based. However, they contend that the defendants' case is abstract, generalised, symbolic, and unrealistic, and that the objectives of the impugned legislation remain ambiguous. The plaintiffs also submit that the two-year cut-off is arbitrary, and was chosen for administrative convenience. Furthermore, the plaintiffs submit that the inmate disqualification operates simply as a form of additional gratuitous punishment, so as to provide comfort to those outside of prison by further stigmatising inmates as social outcasts disconnected from society.

In *R.* v *Big M Drug Mart Ltd., [1985] 1 S. C. R. 295,* at p. 335, Dickson C J noted that the purpose of legislation "is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable". Accordingly, in order to determine the objectives of section 51(e) of the CEA", it is necessary to examine, in the context of the broad social and political factors, the impact which the provision has on constitutional rights. In this regard, a number of factors may provide important insight into the defendants' objectives. Such factors include the jurisprudence surrounding the impugned provision's predecessor legislation, and the legislative history and legislative text of the present impugned provision.

Prior State of the Law

The previous version of section 51(e) of the CEA provided as follows:

> 51. The following persons are not qualified to vote at an election and shall not vote at and election:
> .....
> (e) every person undergoing punishment as an inmate in any penal institution for the commission of any offence.

This provision was found to contravene section 3 of the Charter in a judgment pronounced by the Supreme Court of Canada on May 27, 1993: *Sauvé* v *Canada (Attorney General), supra.* In that case, an appeal from a judgement of the Federal Court of Appeal in *Belczowski* v *Canada, [1992] 2 F.C. 440,* affirming *[1991] 3 F.C. 151 (T.D.),* was heard concomitantly with an appeal from a judgement on the Ontario Court of Appeal in *Sauvé No. 1, supra.*

In *Belczowski, supra,* the defendants argued that there were three objectives associated with the former version of section 51(e) of the CEC; to affirm and maintain the sanctity of the franchise

in our democracy; to preserve the integrity of the voting process; and to sanction offenders. In that case, Hugessen J A stated the following, at p 456:

> [T]he most striking point about the alleged objectives of paragraph 51(e) is that they are all symbolic and abstract. The appellant admits as much, but maintains that this fact does not prevent them from being legitimate objectives of legislation...For my part, I must say that I have very serious doubts whether a wholly symbolic objective can ever be sufficiently important to justify the taking away of rights which are themselves so important and fundamental as to have been enshrined in our Constitution.

In refusing to accept the alleged objectives, Hugessen J A held that there was no evidence to prove that the alleged purposes of section 51(e) of the CEA was the objectives which Parliament had in mind when it adopted the legislation. Moreover, upon a textual analysis, he could not, with confidence, assign any legislative purpose to the provision: *Belczowski, supra,* at p. 454.

In *Sauvé No. 1, supra,* the Ontario Court of Appeal more or less fully agreed with the reasons contained in *Belczowski, supra.* Arbour J A believed that the most plausible objective for the disenfranchisement of inmates was the sanctioning of offenders. In her view, if the former version of section 51(e) was meant to levy a sanction, the punishment was imposed as a result of imprisonment, and not as a result of the commission of any particular offence. The Ontario Court of Appeal also struck down the provision.

In *Sauvé* v *Canada (Attorney General), supra,* Iacobucci J, speaking for the majority of the Supreme Court of Canada, stated as follows, at pp. 439–440:

> We are all of the view that these appeals should be dismissed.
>
> The Attorney General of Canada has properly conceded that section 51(e) of the *Canada Elections Act, R.S.C. 1985,* c. E-2, contravenes section 3 of the *Canadian Charter of Rights and Freedoms* but submits that section 51(e) is saved under section 1 of the *Charter.* We do not agree. In our view, section 51(e) is drawn too broadly and fails to meet the proportionality test, particularly the minimal impairment component of the test, as expressed in the section 1 jurisprudence of the Court.

This is the entire decision of the Court. In expressing its view that the previous legislation was drawn too broadly and failed to meet the proportionality test, the Supreme Court of Canada made no comments regarding Parliament's alleged objectives in denying prisoners the right to vote.

The first objective of section 51(e) of the CEA is the enhancement of civic responsibility and respect for the rule of law. Unlike in *Belczowski, supra,* the defendants no longer assert that the

integrity of the voting process is affected by the provision; rather, as part of their contention, they now assert that one of the effects of the legislation is the removal of untrustworthy votes from the electoral process. This, then, is slightly different from the allegations advanced in *Belczowski, supra.* In addition, the evidence adduced by the defendants is different from, and considerably more extensive than, that in *Belczowski, supra.*

The defendants assert that the Federal Court of Appeal in *Belczowski, supra,* was in error when it held that the predecessor provision failed the first stage of the *Oakes test.* The defendants claim that the Federal Court of Appeal ignored the broader philosophic and historical development of the right to vote when it considered the legislative objectives: *Reference Re Prov. Electoral Boundaries (Sask.),* [1991] 2 S.C.R. 158 (*"Saskatchewan Boundaries"*). In that case, the Supreme Court of Canada, at p. 181, determined that the "broader philosophy underlying the historical development of the right to vote – a philosophy which is capable of explaining the past and animating the future" must be considered. The Court noted that both the ideal of a free and democratic society, as well as the scope of the right to vote, must be considered when determining whether current qualifications or limitations on that right can be demonstrably justified.

The defendants argue that the Federal Court of Appeal erred when it did not consider *Saskatchewan Boundaries, supra.* The defendants further assert that the objectives in the previous case were implicity adopted by the Supreme Court of Canada in *Sauvé* v *Canada (Attorney General), supra*, as the Supreme Court made no adverse comments regarding the objectives; therefore, while stated differently in this case, the objectives should be accepted by this Court. I do not accept this argument since it would be a bold step on my part to infer that the brief reasons of the Supreme Court would support this assertion.

The plaintiffs submit that the defendants' arguments in the present case do not differ in substance from those in the previous case, wherein the objectives of civic virtue and punishment were rejected. They therefore contend that the Court is bound by the previous decision in *Belczowski, supra.* In that case, Hugessen J A stated the following at p. 459: "[i]t would appear to me that the true objective of [the former] paragraph 51(e) may be to satisfy a widely held stereotype of the prisoner as a no-good, almost sub-human form of life to which all rights should be discriminately denied." I am also of the opinion that I am not bound by *Belczowski, supra,* as the impugned provision is tailored differently. That is not to say, however, that the approach and rationale of the Federal Court of Appeal are not instructive.

The Legislative History

The plaintiffs argue that, from an historical perspective, Canada's record on voting rights is not exemplary. Indeed, it could be argued that extensions of the franchise have been motivated by essentially moral principles. In Canada, it is not just prisoners who have experienced a denial of the right to vote. For example, Aboriginal people living on reserves were denied the vote until

1960. While there are other examples of disqualifications of marginalised or disadvantaged people in the past, my review of the legislative history will only deal with the debates and proceedings that gave rise to the enactment of the present version of section 51(e) of the CEA, which deals with prisoners.

In 1993, the CEA was substantially amended by Bill C-114. However, prior to the enactment of the amended CEA", a Royal Commission on Electoral Reform and Party Financing (the "Lortie Commission") was established, in November of 1989, for the purpose of inquiring into the appropriate principles and processes that should govern, *inter alia,* the election of members of the House of Commons. The Lortie Commission's Final Report was submitted to Cabinet in November 1991. The report was comprehensive and covered numerous topics, including the disqualification of certain groups of voters, among whom were prison inmates.

As is typical of Royal Commissions, numerous research studies accompanied the Lortie Commission's recommendations. The prisoner disqualification, in particular, was addressed in a research study entitled "Voting Rights for Prisoner Inmates" in which the authors recommended that all prisoners be granted the right to vote. The Lortie Commission did not accept that recommendation; rather, it concluded that persons who had been convicted of an offence punishable by a maximum of life imprisonment, and who had been sentenced to a prison term of ten years or more, should be disqualified from voting during the period of incarceration (Recommendation 1.2.7.). Obviously, parliamentarians had full access to the research studies as well as the Final Report of the Royal Commission.

As part of the consideration of Bill C-114, there was also an intensive review by a Special Committee on Electoral Reform. Considerable discussion of the prisoner voting rights issue also took place during the Debates of the House of Commons and the Senate.

The Minutes of the Proceedings of the Special Committee on Electoral Reform reveal Parliament's concern that the courts should defer to Parliament on the issue of the prisoner disqualification. The Special Committee spent a great deal of time trying to determine whether a two-year limit for the disqualification was appropriate, or whether a cut-off of five years, or seven years, or ten years (as recommended by the Lortie Commission) was more justifiable. Eventually, the Special Committee recommended a two-year cut-off since, in their view, serious offenders may be considered to be those individuals who have been sentenced to a term of two years or more in a correctional institution. Generally, that means a federal penitentiary, but not exclusively.

It is evident from the Minutes that members of the Special Committee expressed anxiety over the fact that the most serious offenders could be given the right to vote. In this respect, the objective of enhancing punishment through the disenfranchisement of prisoners was clearly considered by the Committee. For instance, during the discussions of the Committee, it was expressed that there must be some limits on the right to vote, and that punishment encompassed the disenfranchisement

of all incarcerated offenders: *Minutes of Proceedings and Evidence of the Special Committee on Electoral Reform,* Issue No.12, at pp. 12: 18–12: 19.

The House of Commons Debates reveal the differences of opinion expected when Parliamentarians are dealing with a knotty social policy question. A number of legislators were opposed to any type of disqualifications; others were clearly in favour of a disqualification on the basis of the two year cut-off; others favoured something in between. While the objective of the enhancement of civic responsibility was not expressly addressed in the House of Commons Debates, it was asserted that all Canadians should be made aware of the existence of the inmate voting disqualification, and its imposition as a consequence of a sentence of imprisonment: *House of Commons Debates ("HOC Debates"),* Vol. 132, No. 233, at pp. 18015–18107. These comments imply that the government intended the prisoner disenfranchisement provision to have an educative effect. Similarly, it was expressed that persons who choose to act against society must suffer the consequences, including the denial of freedom and the loss of privileges which free and responsible citizens enjoy – one of which is the right to vote: HOC *Debates,* vol. 132, No. 233, at pp. 10817–18019. This suggests that one purpose of the impugned provision relates to civic responsibility and respect for the rule of law.

The Senate Debates also reveal the considerable ambivalence which many Senators exhibited toward the continuation of any prisoner disenfranchisement. In addition, the Senate Debates reflect the difficulty which Senators experienced in attempting to determine the appropriate line to be drawn. As might be expected, the Debates do not illuminate the objectives clearly although, as indicated above, there is some glimmer of light.

The Legislative Text

The defendants argue that the stipulated two-year cut-off contained in section 51(e) of the CEA indicates Parliament's desire to address a category of persons whose conduct was sufficiently offensive that it resulted in a serious period of imprisonment. A report file by Dr. Colin Meredith provided a statistical breakdown of serious crimes for which federal inmates are imprisoned, as well as the significant cumulative record of most of those federal inmates. As of April 1995, there were 14,179 inmates in federal penitentiaries. The Meredith statistics demonstrated that each of these offenders had committed, on average, 29.5 offences. Indeed, in the present case, an examination of the criminal records of two of the plaintiffs, Richard Sauvé and Aaron Spence, confirms Dr. Meredith's findings. Mr. Sauvé, for example, was convicted of murder as an aider and abettor. While he committed only one significant offence, he was sentenced to a period of twenty-five years in prison. In contrast, Mr. Spence's criminal record reveals a history of repeated crimes which eventually led to a four-year term of imprisonment for armed robbery and related offence. Clearly, both individuals engaged in serious criminal conduct, which the courts punished by way of prison sentences of more than two years. Thus, the records of Mr. Sauvé and

Mr. Spence also lend support to the defendants' assertion that prison sentences of two years or more target serious criminals and repeat offenders.

The legislative text of section 51(e) of the CEA makes it clear that the disenfranchisement of offenders relates in obvious ways to the commission of serious criminal acts. At this stage, I am not commenting upon the causes of crime, nor am I reflecting upon the circumstances underpinning particular crimes; rather, consideration is merely being given to the conspicuous relationship between the denial of the right to vote and serious criminal conduct.

The application of section 51(e) is not offender-specific. It does not take into account the particular circumstances of the inmate before and after incarceration. It is sentence-specific. I am satisfied that sentences of two years or more involve serious crimes that reflect conduct which a court has determined to be sufficiently distasteful to have warranted such a sentence.

In the context of the considerable amount of study and discussion surrounding prisoner disenfranchisement before Bill C-114 was passed, I find a clear concern by Parliament regarding the characteristics of civic responsibility and respect for the rule of law in Canadian society. Furthermore, there is evidence of an intent to punish individuals who commit serious anti-social acts.

Specifically, the legislative text, in conjunction with the proceedings of the Special Committee of Electoral Reform, reveal that the provision is clearly directed at imposing the sanction of disenfranchisement as a further punishment for serious crime. Moral education also appears to be a rationale for this additional sanction. The objective of enhancing civic responsibility through the operation of section 51(e) of the CEA is more elusive. Nevertheless, the Debates of the House of Commons do reveal that some consideration was given to the fact that the impugned provision is capable of sending a message to offenders, and to the general public, about the importance, in a democracy, of the right to vote.

The plaintiffs contend that the message sent by section 51(e) is merely symbolic. In their view, a symbolic message is unable to support objectives which underpin a provision that is violative of a Charter right. Does this mean that a law cannot have a legitimate symbolic function?

In *The Sociology of Law* (London: Butterworths, 1984), the author, R. Cotterrell, states, at page 108:

> In a thoughtful and stimulating book, *The Symbols of Government,* published in 1935, Thurman Arnold argued that the idea of law as a mechanism of social integration based on the interpretation of societal values can be maintained despite the diversity of individuals' beliefs and aspirations. In Arnold's view the proclamation and maintenance of symbols – values, ideals, and ways of thinking about government and society – to which individuals can adhere, is a fundamental

> task of law by which it contributes to social integration. The special function of development and application of legal doctrine is to create the illusion of unity, coherence and system in thought and belief out of the reality of the irreconcilable diversity, contradiction and opposition of individual and group interests and desires. Thus, for Arnold, law is primarily a way of thinking about government, a reservoir of emotionally important social symbols – of freedom of contract, equality before the law, personal and political liberty, sanctify of property, 'law and order', equity and fairness, moral responsibility – many of them mutually inconsistent if applied in practice with the meaning that they possess as symbolic ideals.

At p. 110, the author further states:

> The ideal that law has symbolic functions suggests that the effectiveness of a law does not necessarily depend on whether it can be invoked or enforced.

Of course, at this stage, the Court must examine the objectives of section 51(e) of the CEA; hence, Parliament's rhetoric is more significant than any prospective evidence relating to the operation of the law or the effectiveness of the law. That discussion will be left to the proportionality analysis.

Accordingly, I find that section 51(e) has, as its twin objectives, those submitted by the defendants.

(b) Pressing and Substantial Objectives

In support of its assertion that the two objectives which section 51(e) of the CEA was designed to achieve are sufficiently pressing and substantial, the defendants rely upon the underlying historical values and principles of traditional liberal democracy, of which respect for the rule of law plays a momentous part. In fact, the defendants submit that the enactment of section 51(e) represents Parliament's intention to reaffirm Canada's links with the philosophical and political values which underlie the western liberal democratic tradition, and the penological aims which help to reserve it. A considerable portion of the defendants' evidence related to the philosophical, political, and penological values and goals which liberal democracies, in theory, generally foster.

The defendants argue that the disenfranchisement of prisoners is a well-accepted practice in many liberal democratic societies. However, it is not a universal democratic practice. In Denmark, Sweden, Ireland, Israel and Switzerland, for example, prisoners vote. In Australia, inmates serving sentences of five years or more are disqualified from voting in federal elections. In Greece, prisoners serving life sentences or indefinite sentences are disqualified; otherwise, the matter is left to the discretion of the courts. In France and Spain, disqualification depends on the sentence of the court. In England and Japan, the disqualification is total. In the United States,

most states disqualify inmates from the voting process. Some states disenfranchise offenders permanently, while only two states do not disqualify at all.

A similar argument relating to prisoner voting rights in other jurisdictions was raised in *Belczowski, supra,* before Mr. Justice Strayer. In that case, however, Strayer J was not persuaded that the existence of corresponding legislation in other jurisdictions could meaningfully assist the Court in its determination. I agree with that position. After surveying examples of foreign law which deal with the issue of voting rights for prisoners, it is difficult to draw any meaningful conclusions as to the reasons why prisoners are disenfranchised in some free and democratic societies but not in others.

The plaintiffs argue that there is no single, generally-accepted theoretical basis for contemporary democracy, and no unified western tradition of political theory. Consequently, the enhancement of civic responsibility should not be a significant objective of public policy. The plaintiffs also assert that a retributive philosophy of punishment invoked by the defendants does not correspond to the empirical realities of present-day Canadian society.

At this stage, attention must be focused on the democratic ideals which Canada, as a free and democratic society, fosters. There may well be no unified western tradition of political theory, but it is clear from the evidence in this trial that civic and moral responsibility are key components of our liberal democratic traditions. In fact, the Preamble to the Charter declares that Canada is founded upon principles that recognise "the rule of law". The rule of law may be the subject of a number of interpretations, such as a call to law and order, or a legal ordering of social life; S. Rawls, *A Theory of Justice* (Cambridge, Mass., 1971), at pp. 235–243. The ideals of the rule of law express the requirements of legal rules formulated in such a manner as to secure voluntary compliance with the standard of conduct which they set. Of course, while no legal system can expect that all of its laws will be known by the public, it is nevertheless important, as part of the shaping of the voluntary social order, for persons to know in advance what the consequences of their actions might be; E. Colvin, "Criminal Law and The Rule of Law" in *Crime, Justice & Codification* (Toronto: Carswell, 1986), at p. 125.

Section 51(e) of the CEA" has a punitive aspect. There is little doubt that retribution is a concept that is not alien to criminal sanctions. Indeed, sentences, are invariably partly punitive in nature. As stated by La Forest J in *R.* v *Lyons, [1984]* S.C.R 309, at p. 329: "In a relative system of sentencing, the respective importance of prevention, deterrence, retribution and rehabilitation will vary according to the nature of the crime and the circumstances of the offender." See also *R.* v *Goltz, [1991]* 3 S.C.R. 485, at p. 503.

Accordingly, I find the objectives of section 51(e) of the CEA to be pressing and substantial.

II Are the means embodied in section 51(e) of the CEA proportional to the Objectives and to the effects of the provision?

(a) Rational Connection

The first stage of the proportionality test requires that the means chosen to fulfill the legislative objectives bear a rational connection to those objectives. In *RJR-MacDonald Inc., supra,* at p. 3, Iacobucci J stated that rational connection "is to be established upon a civil standard through reason, logic or simply common sense. The existence of scientific proof is simply of probative value in demonstrating this reason, logic or commons sense. However, it is not dispositive or determinative of the issue." Similarly, Sopinka J, in *R.* v *Butler, [1992]* 1 S.C.R. 462, at p. 502, indicated that "[i] in the face of inconclusive social science evidence ... in choosing its mode of intervention, it is sufficient that Parliament had a *reasonable basis"* (Emphasis in original). Sopinka J also recognised that the government must be afforded a margin of appreciation to form legitimate objectives based upon somewhat inconclusive social science evidence.

In the present case, the casual relationship between the infringement of the right to vote and the legislation's objectives are not in any way observable, demonstrable, or empirically measurable. The Court must determine, then, whether the evidence establishes that it is reasonable or logical to conclude that there is a rational link between the disqualification and the objectives.

For the most part, the evidence before the Court consisted of expert opinions of non-empirical nature. However, there was some evidence, provided by Mr. Spence, Mr. Sauvé, and the Meredith report, which suggests that a nexus exists between the impugned provision and criminal conduct. The totality of this evidence when viewed from the standpoint of reason or common sense, must be sufficient to establish, on the balance of probabilities, a link between disenfranchisement and the objectives advanced by the defendants.

Can it be said, on the basis of logic and common sense, that prisoner disenfranchisement for serious conduct is rationally connected to the goal of enhancing civic responsibility and respect for the rule of law? Regarding civic responsibility, there is no evidence of a nexus other than political and philosophical theory. Regarding respect for the rule of law, it is clear that the members of the federal inmate population have manifestly acted contrary to, and in defiance of, the social order.

The defendants contend that section 51(e) of the CEA deprives certain persons of the right to participate in political decision-making by virtue of having demonstrated disdain for civic responsibility and the rule of law through the commission of serious crimes. By so denouncing this bad conduct, it is contended, Parliament has attempted to connect the right to vote in a federal elections with the objective of establishing a minimal standard of civic responsibility.

The defendants urge the Court to adopt an approach as outlined in *Saskatchewan Boundaries, supra,* which suggests that an analysis under section 3 of the Charter must be animated by a consideration of the scope, including qualifications, of the right to vote in a free and democratic society. Consequently, many of the defendants' expert witnesses have advanced political, philosophical, and penological arguments explaining why many western liberal democracies have qualified, and continue to constrain, in one manner or another, the prisoner's right to vote.

Dr. Thomas Pangle, for the defendants, is a political theorist. He is a well-published author and a highly-respected academic. He is American by birth, and recently became a naturalised Canadian citizen. Dr. Pangle examined the elements of a free society and a democratic society in order to determine if section 51(e) of the CEA is consistent with the theoretical precepts. He relied upon the theories of "the great thinkers" of the past who have provided the framework of discourse concerning human rights, constitutions, republicanism, and liberal democratic theory. He is supportive of disenfranchisement as one of the tools capable of promoting a minimal standard of civic responsibility.

Dr. Pangle indicated that the criminal conduct in which offenders have engaged merits their disenfranchisement for three reasons:

In the first place, the criminal behaviour, the serious criminal behaviours for which they have been sentenced indicates a clear and flagrant disrespect for the welfare of fellow members of the community and one of the most fundamental aspects of responsible voting is voting with a view to the welfare of the rest of the community. ... In the second place, these persons have been convicted of misconduct that indicates not only a disrespect for the law. Now, in a democracy, law means something quite different from what it means in other forms of government. In a democracy, disrespect for law is disrespect for the electoral process which is the original source of the legitimacy of law. The purpose of an election is to select those representatives who make our laws. Therefore, to disrespect the law is to disrespect the goal, and therefore the process, the electoral process that culminates in and finds its fruit in that goal, the law... and then finally in the third place... it also indicates a disrespect for or a failure to grasp the implicit commitment one makes as a member of the social contract to respect the process and the outcome of the process that creates the laws in a contractual society.

Dr. Pangle emphasised that a conduct-driven disqualification, as a minimum standard, is perfectly consistent with the generosity of spirit that pervades a pluralistic democracy, wherein all citizens are free and equal in the eyes of the State. It is not based on status or virtue.

Dr. Christopher Manfredi, for the defendants, is an expert in constitutional and political theory, and political philosophy. He is also a well-published author. He is Canadian, but did his graduate studies in the United States. Dr. Manfredi testified that every liberal democracy restricts access to the franchise in order to maintain a connection between the members of the electorate and their communities. In this regard, various restrictions are attached to the right to vote, including

citizenship restrictions and age restrictions. In Dr. Manfredi's opinion, as long as there are no positive prerequisites for voting (as with a literacy test, for example), and the application of disenfranchisement is universal (unlike with age restrictions), then it is not undemocratic to restrict access to the franchise.

Dr. Manfredi testified that there is a rational connection between the inmate voting disqualification and good citizenship which is necessary for the proper functioning of liberal democratic self-government. He contended that serious criminal behaviour is an appropriate indicator that individuals lack the character necessary to ensure that they will exercise their civic responsibility seriously and in a spirit of good citizenship. In this regard, Dr. Manfredi felt that civic virtue referred to the virtues of a liberal democratic citizenship, which relate to factors of empathy and self-control; he did not believe that civic virtue entailed a positive test wherein individuals have to prove, in some way or another, that they are decent and responsible. Moreover, in his opinion, the health of a liberal democracy requires and empathetic and self-controlled citizenry. In his view, it is reasonable to suspend an individual offender's right to participate in the electoral process until the offender has acquired the characteristic virtues of civic responsibility and good citizenship which are necessary for liberal democratic participation.

In addition, Dr. Manfredi expressed his view that a willingness on the part of individuals to participate in a collective action, such as voting, is determined, to a large extent, by the psychic and social benefits that arise from that activity. According to Dr. Manfredi there is a logical inference, based on empirical studies, that participation in the voting process can have beneficial effects on the electorate.

The plaintiffs argue that there is no rational connection between the denial of the right to vote in federal elections and the government's first objective, since no proof has been offered that the class affected under the impugned provision is co-extensive with indecent citizens. The plaintiffs point out that the provisions catches many citizens who still deserve the vote because they do not, in fact, lack civic virtue. They argue that many individuals who are disqualified under section 51(e) of the CEA are not manifestly indecent or evil; rather, they are, themselves, the victims of social impoverishment, abusive upbringing, alcoholism, other addictions and diseases, or other social causes of crime, including poverty and illiteracy. For example, as recognised repeatedly by judicial inquiries and other studies, much of the crime committed by Aboriginal people falls into his category.

With respect to this argument, the plaintiffs contend that the Constitution cannot be interpreted in isolation from the society in which it is rooted. In their view, socio-economic background and a lack of opportunities can lead individuals to commit criminal offences. If this fact is denied, according to the plaintiffs, then the reality of the composition of the prison population is ignored.

Additionally, the plaintiffs contend that the impugned provision fails the rational connection test because the disenfranchisement of a minority of sane, adult citizens merely promotes intolerance

and stereotyping within society generally, and aggravates the alienation of those who are capable of dealing with it.

Dr. Grant Amyot, for the plaintiffs, is an academic specialising in comparative politics and political theory. Dr. Amyot rejected the view that section 51(e) of the CEA fosters civic virtue in the population as a whole by educating citizens about the standards of civic responsibility. He contended that there was no evidence of any nexus between the disenfranchisement of prisoners and any moral education effects of the law. In fact, he indicated that there was no empirical evidence of any such morally-educative effects. Moreover, Dr. Amyot asserted that there was no evidence to demonstrate any connection between responsible citizenry and the disenfranchisement of prisoners. In contrast, he suggested that theorists of participatory democracy, as well as many communitarians in general, would argue that the enfranchisement of prisoners, and not the converse, would contribute to civic virtue and good citizenship by educating the prisoners themselves about these qualities.

Dr Arthur Schafer, for the plaintiffs, is an academic with expertise in biomedical ethics, jurisprudence, and moral and political philosophy. Professor Schafer strongly disagreed with the prisoner disqualification, suggesting that no rational connection can exist between the legislation and its first objective. In his view, most Canadians are not even aware of the inmate disqualification; accordingly, it can serve no useful purpose.

The plaintiffs are quite correct in asserting a complete lack of empirical evidence to support the defendants' case regarding the enhancement of civic responsibility. However, this is not determinative of the matter. Rather, the real question is whether or not there exists a rational or common sense basis, as indicated in *RJR-MacDonald Inc., supra,* upon which it can be said that the disqualification is clearly intended for a person who engaged in a particular type of disagreeable anti-social conduct. In my view, after considering the evidence, I find that there exists a rational connection between disenfranchisement and enhancement of civic responsibility and respect for the rule of law.

While most laws are symbolic and carry messages to society, not all laws seek to alter human behaviour. The criminal law is one example of a law that does attempt to shape a voluntary social order. In the same sense, I think it can be said that section 51(e) of the CEA was intended to have a similar effect. It is reasonable to suggest that the provision sends a very strong message that certain forms of criminal behaviour are not acceptable in a society that is both free and democratic. I find the morally-educative function of the law to be compelling. While this education may have little or no effect on the offender, it nevertheless sends a powerful message to society that good citizenship and serious crimes are inconsistent with liberal democratic principles.

No doubt it is true that many individuals who have committed crimes are not prosecuted, and are therefore not sentenced to prison. There are cruel anti-social offenders who slip through the

system; however, the fact that the "few pay for the many" is not a basis for failing to recognise the nexus between the legislation and its first objective. Accordingly, section 51(e) of the CEA is rationally connected to the defendants objective of enhancing civic responsibility and respect for the rule of law.

The defendants argue that the disenfranchisement of prisoners is also connected to, and supportive of, the general purposes of the criminal sanction, in so far as such a deprivation has a potentially retributive, denunciatory, and morally-educative role. The defendants argued that retribution is not the same as vengeance or revenge; rather, it operates as a proportionate response to wrong-doers who have committed crimes against individuals, and against society generally. Indeed, an examination of the evidence of Mr. Sauvé and Mr. Spence clearly indicates that they both perceive the deprivation as a loss of something valuable.

According to Dr. Manfredi, the principle of just deserts or proportionate punishments is imposed primarily to express society's moral condemnation of criminals acts. Dr. Manfredi contrasted the retrospective nature of the just deserts approach with the prospective nature of other sanctions, including incapacitation, deterrents (both general and specific), and rehabilitative sanctions which seek to change the character and behaviour of criminal offenders. In his opinion, the disqualification is a means of expressing society's abhorrence of a breach of the social contract.

Dr Jean Hampton, for the defendants, is an American citizen who was educated in the United States. As an academic, she has published numerous articles on subjects relating to moral, political, and legal philosophy. Dr. Hampton addressed the relationships among the expressive aspects of retribution, denunciation, and the moral education theory of punishment. She is a firm proponent of the theory of punishment. In her opinion, the health and well-being of any free and democratic state must be preserved, in part, by punishment, which, due to moral indignation, requires a suspension, or perhaps a revocation, of rights. In Dr. Hampton's view, the most important aspect of a retributive punishment is its victim-based response to wrong-doing. She submitted that punishment must attempt to provide individuals with moral reasons for choosing not to commit crimes. This forms part of the moral education theory of punishment.

Dr. Ernest Van den Haag, for the defendants, has a multifaceted background and may simply be described as an "intellectual". He specialises in law, sociology, and psychology. Dr. Van den Haag focused on the various purposes of punishment. He opined that "to give the vote to incarcerated criminals is inconsistent with the moral, denunciatory, and educational purposes of punishment – perhaps its most important purpose". In this regard, he felt that the disqualification aims to have an educative effect upon the general public by symbolling the moral wrongness of the criminal act, and by symbolically excluding the offenders from the community's affairs.

Dr. Seymour Lipset, for the defendants, is a respected American academic who is well known in Canada, and who has published extensively. Dr. Lipset compared the political and legal cultures of Canada and the United States. He concluded that section 51(e) of the CEA denounces a

violation of the social contract and reflects a communitarian ethos whereby communal rights can temper individual liberties. Dr Lipset described Canada as being statist and communitarian, but claimed that the United States is anti-statist and laissez faire. In his view, however, the Charter is beginning to change the balance between rights and responsibilities in Canada.

Professor Schafer, for the plaintiffs, was of the view that there are practical difficulties in applying the doctrine of retributivism to a society in which there exist substantial inequalities of opportunity, both socially and economically. With respect to the defendants' assertion of a moral education theory of punishment, Professor Schafer argued that it is not charitable or reasonable to resort to retributive punishment in the face of society's failure to provide a healthy, nurturing environment for so many of its minority and/or disadvantaged citizens.

The plaintiffs advanced a number of arguments under rational connection which, I believe, are more relevant to the proportionate effects analysis which appears later in these reasons.

While there is no empirical evidence to suggest that the disenfranchisement of prisoners reduces crime (either generally or specifically), or serves a morally-educative function, or could operate as an effective punitive sanction, I find that a rational connection exists between the impugned provision and the stated objective of enhancing the criminal sanction. As an aid to punishment, the provision clearly imposes a sanction, and denounces bad conduct. In the present case, the sanction takes the form of a disenfranchisement, in addition to the loss of liberty. A fundamental democratic right has been removed for crimes committed, and its removal is clearly felt as a deprivation by Mr. Sauvé and Mr. Spence. It is also reasonable to conclude that a morally-educative message is sent to offenders, and possibly to the general population, by the imposition of a sanction. Of course, the message may not be heard or understood, but that does not diminish the connection between the means and the second objective.

(b) Minimal Impairment

The government must demonstrate that the impairment of rights is minimal, i.e. that the law was carefully tailored so that Charter rights are impaired no more than necessary. As McLachlin J stated, in *RJR-MacDonald Inc., supra,* at p. 20:

> [T]he tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range or reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement... On the other hand, if the government fails to explain why a *significantly* less intrusive and *equally effective* measure was not chosen, the law may fail." (Emphasis added.)

Thus, Parliament need not adopt the absolutely least-intrusive means of attaining its objectives; R. v. Laba, [1994] 3 S.C.R. 965, at p. 1009.

In *Sauvé* v *Canada (Attorney General), supra*, the Supreme Court of Canada held that the previous version of section 51(e) of the CEA "was overbroad and failed the minimal impairment part of the proportionality test. In light of the amendments to section 51(e), has Parliament succeeded in enacting a provision which is justified under section 1 of the Charter?

The defendants assert that the impugned provision impairs the right to vote as little as possible. The defendants argue that there are inherent safeguards in the present legislation, as the two-year cut-off will ensure that only serious members will be disqualified from voting. Moreover, the defendants submit that the right to vote remains intact and that it is only suspended temporarily, i.e. during the period of incarceration. The defendants further note that the suspension applies only to those citizens who have been sentenced to a term of imprisonment of two years or more; it is therefore not an all-encompassing, over-reaching prohibition or denial. It is also restored automatically, without process, upon release from the correctional institution.

The defendants observe that only 37 per cent of offenders who had been committed to federal institutions between 1989 and 1990 would have been disenfranchised in the 1993 federal election. Moreover, almost half of those inmates will be released from their current sentence before the next federal election. Hence, the defendants submit that the legislation is sufficiently tailored to ensure that the legislation is sufficiently tailored to ensure that the right to vote is minimally impaired.

The defendants argue that the disqualification satisfies the two conditions of a positive test and universal application required to justify a limitation in a liberal and democratic society. Of course, that may be a condition precedent to legislative action, but it does not necessarily satisfy the need to examine further whether the right to vote is only minimally impaired. In this regard, it is contended that section 51(e) of the CEA is not arbitrary, as the denial relates directly to the sentence imposed, which flows directly from the commission of criminal offences, i.e. the bad conduct. The defendants therefore submit that this is a pristine policy choice to which the Court should defer. In their view, the provision is not overbroad because longer prison terms are imposed upon persons with negative character traits. Since the legislation relates to the nature of their crimes, it is precise in its application. The defendants contend that imprisonment, in and of itself, is not the reason for the disqualification, rather, the sentence of imprisonment is an indication of the gravity and extent of the harmful criminal conduct.

As a final matter, the defendants also note that, while there is temporary loss of the vote, it does not mean a loss of the right to representation. The defendants rely upon certain comments of McLachlin J. in *Saskatchewan Boundaries, supra,* wherein she said, at p. 183, that "[r]epresentation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative." The defendants contend that this stands for the proposition that offenders who lose the right to vote do not necessarily lose the right to representation. I do not accept this reference as authority for such as argument. In my view, Justice McLachlin is

discussing the concept of a representative democracy in which persons are elected in a representative capacity through direct participation of the electorate in the electoral process.

The plaintiffs argue that section 51(e) of the CEA fails the minimal impairment test because it is arbitrary in its application. It flows, it is contended, from the sentence rather than from the facts and circumstances which give rise to a particular criminal offence. It is further submitted that only two types of disqualification could survive the minimal impairment test: case-by-case disqualification at the time of sentencing, or a disqualification based on conviction for treason or high treason, as set out in sections 46–48 of the *Criminal Code.*

Similarly, the plaintiffs contend that the impugned provision fails the minimal impairment test because there are less intrusive means by which the government could attain its stated objectives. These include the denial of the right to vote at the discretion of the sentencing Judge; the Lortie Commission's recommendation which targeted the most serious offences (those punishable by ten years' life imprisonment) and the most serious sentences (those punishable by ten years or more); an offence-oriented approach which would define the specific types of crimes which could be seen as bearing a rational connection to the franchise; and a low which allows for restoration of the right to vote as a result of good behaviour while in prison.

The plaintiffs further assert that a prisoner who has been sentenced to a period of imprisonment of two years or more is completely denied the right to vote if a federal election is held during a term of imprisonment. In this regard, they contend that the denial may be seen as a complete ban during the period of a prisoner's incarceration. The defendants view the disqualification as a temporary suspension of the Charter-protected right, while the plaintiffs see the denial as a permanent loss of the right to vote. However, what must be considered is the impact of the disqualification on individual offenders. It is clear that, for any particular federal election, those inmates who fit within section 51(e) of the CEA are completely denied the right to vote.

As I indicated above, the Lortie Commission recommended that disenfranchisement occur where an offender has been convicted of a crime for which he could potentially receive a punishment of life imprisonment, and for which he did receive a sentence of ten years or more in prison. It is clear that Parliament considered this recommendation and rejected it. Parliament also considered a five-year cut-off and a seven-year cut-off, and rejected both. Furthermore, Parliament considered the voting rights of prisoners in other democratic countries. Eventually, Parliament settled on a two-year cut-off for disqualification. According to the defendants, this limitation allows Parliament to ensure that only those who have committed serious crimes are denied the right to vote.

In this context, the statistics filed by Dr. Colin Meredith demonstrate that, of 654 inmates sampled, who represented 4.5% of the total federal inmate population, there was an average number of 29.5 convictions per inmate. Moreover, 75.3 per cent of the inmates sampled had more than ten convictions during their criminal careers. The Meredith analysis did not find any

statistically-significant difference between Aboriginal and non-Aboriginal inmates. The statistics do verify that the federal inmate population consists of individuals with long histories of involvement in serious criminal activities. Thus, these statistics appear to support Parliament's choice for selecting two years as the cut-off for the disqualification of individual offenders who have exhibited bad criminal conduct.

Parliament must have some latitude to choose alternatives. It is for this reason that I reject the plaintiffs' argument regarding the other alternatives. There is one exception. In this respect, it must be recognised that a final option was available to Parliament: the disenfranchisement of each offender could be imposed on a case-by-case basis, by the sentencing Judge. In this way, the disenfranchisement would not be automatic; rather, the right to vote would only be removed by a Judge who, as part of the sentencing process, has determined that, in the personal circumstances of the accused, disenfranchisement should occur: *R.* v *Goltz, supra.*

The legislative history of section 51(e) of the CEA displays virtually no consideration of a court-based process where disqualification is considered as part of sentencing. What the legislative history does reveal, in somewhat vague terms, is an apparent desire to keep the matter out of the courts. In the House of Commons Debates, some reference was made to the issue of whether or not a criminal like Clifford Olsen should be permitted to vote. With disqualification on a case-by-case basis, a clearly indecent and immoral offender like Clifford Olsen could, as a consequence, be disenfranchised by sentence of the court.

At trial, Dr. Pangle was asked whether the removal of the right to vote by the courts, as in a number of countries, would satisfy his requirements in terms of liberal democratic theory. While he did not vigorously disagree that it would, he preferred the legislative ban over a court-imposed disqualification. In his opinion, if the courts become involved in the disenfranchisement of prisoners, no clear minimum standard would exist or be applied. He was also concerned with the fact of judicial knowledge regarding political theory, and questioned whether Judges could perform the task satisfactorily. Dr. Pangle also expressed the view that the educational message would be less clear. Of course, an analysis of minimal impairment involves a consideration of the legislation's application, not the clarity of its objectives. On the other hand, Dr. Pangle, in another comment, indicated his view that an independent judiciary is the guardian of the rule of law against majority oppression or factionalism.

Dr. Pangle is quite correct in his concerns regarding sentencing discretion and the fact that sentences – including the nature, type, or quantity of sanctions – could vary considerably from Judge to Judge. Needless to say, appellate review has an important role to play in determining the "fitness of a sentence". Any possible and unwarranted disparity in sentencing with respect to disenfranchisement, however, could be lessened by providing legislative criteria.

The courts now play a pivotal role in sentencing. The Canadian Sentencing Commission, in *Sentencing Reform: A Canadian Approach,*(Ottawa, On., 1987), did contemplate a comprehensive

reform, of sentencing laws and practices in Canada. The Commission defined sentencing as the "judicial determination of a legal sanction to be imposed on a person found guilty of an offence." This definition is not particularly controversial. The disqualification at issue in this trial currently involves no sentencing process whatsoever.

As I shall discuss later, prisoner disenfranchisement is not well known or visible in Canada. Certainly, any contemplated reform of the law, if pursued, could take this obvious consideration into account. The communication of sanctions to be public is the only obvious way for them to be effective. No doubt, minimising disparity is an important goal, and perhaps only legal specialists can find their way through the maze of judge-made law; nevertheless, the public has a greater chance of being informed of the prisoner disenfranchisement through a court-imposed disqualification, rather than under the current scheme.

The defendants' experts have provided a number of thoughtful and compelling arguments supporting disenfranchisement. If Parliament decides to pass another law, there is no reason why these arguments could not inform the criteria that could be selected. A sentencing Judge could take into account the nature of the crime and the personal circumstances of the accused in conjunction with the principles of sentencing: *R.* v *Goltz, supra.* This process would, in my opinion, be a significantly less intrusive, and equally effective, means of infringing a citizen's democratic right to vote. If a judge is entrusted with the responsibility of taking away a person's liberty, should he or she not also be charged with the responsibility of determining if disenfranchisement is warranted?

Indecency exists in society generally, and is not only found in correctional institutions. The law as it now stands cannot distinguish the type of offender whose indecency is so profound as to threaten the principles of our free and democratic society. As such, I find that section 51(e) of the CEA fails the minimal impairment component of the *Oakes* test.

(c) Proportionate Effects

Despite finding that section 51(e) of the CEA fails the minimal impairment test, I believe it is also important to consider the provision's proportionate effects. The effects of the limiting measure must not so severely trench on Charter rights that the legislative objective, albeit important, is outweighed by the infringement of rights. Essentially, then, the proportionate effects test requires that the deleterious effects of the measure be proportionate to the attainment of its legislative objectives: *R.* v *Oakes, supra,* at pp. 138–140; *R. v. Edwards Books and Art Ltd.,* [1986] 2 S.C.R. 713; and *McKinney* v *University of Guelph, [1990]* 3 S.C.R. 229, at pp. 281–286. In the rational connection analysis, the Court must compare the means to the objectives, in order to assess if Parliament acted reasonably. In contrast, when considering proportionate effects, the Court balances the objectives with the actual effects of the impugned provision.

The proportionate effects test has recently been restated and modified by the Supreme Court of Canada in *Dagenais* v *Canadian Broadcasting Corporation,* [1994] 3 S. C. R. 835. In that case, Lamer C J held that the conventional *Oakes* analysis is appropriate where a measure fully, or nearly fully, realises its legislative objective. However, according to Lamer C J, at p. 889, where a measure only partially achieves its legislative objective, the proportionality requirements are as follows:

> [T]here must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, *and there must be a proportionality between the deleterious and the salutary effects of the measures.* (Emphasis in original.)

At p. 887, the Chief Justice explained the rationale behind this reformulation of the proportionate effect test:

> In may instances, the imposition of a measure will result in the full, or nearly full, realization of the legislative objective. In these situations, the third step of the proportionality test calls for an examination of the balance that has been struck between the objective in question and the deleterious effects on constitutionally protected rights arising from the means that have been employed to achieve this objective. At other times, however, the measure at issue, while rationally connected to an important objective, will result in only the partial achievement of this object. In such cases, I believe that the third step of the second branch of the *Oakes* test requires both that the underlying objective of a measure and the *salutary effects that actually result* from its implementation be proportional to the deleterious effects the measure has on fundamental rights and freedoms. A legislative objective may be pressing and substantial, the means chosen may be rationally connected to that objective, and less rights-impairing alternatives may not be available. Nonetheless, even if the importance of the objective itself (when viewed in the abstract) outweighs the deleterious effects on protected rights, it is still possible that the actual salutary effects of the legislation will not be sufficient to justify these negative effects. (Emphasis added.)

The Supreme Court of Canada appears to have applied this reformulated test in *RJR-MacDonald In., supra, and Thibaudeau* v *Canada*, [1995] 2 S.C.R. 627.

The reformulation of the proportionate effects test appears to necessitate a consideration of the *actual* salutary effects when assessing proportionality. In certain cases then, if there is a lack of proportionality between the deleterious effects and the actual salutary effects of the impugned law, the law cannot be justified under section 1 of the Charter. As such, in a case where partial achievement of the objective is found, the proportionate effects assessment becomes vital and is

no way redundant with respect to the first step, i.e. whether pressing and substantial objectives exist.

It appears, then, that the Chief Justice in *Dagenaise, supra,* was suggesting that a legislative provision which infringes a Charter right or freedom, and yet does not fully accomplish the objectives it was designed to achieve, may be less likely to produce salutary effects which are proportionate to the deleterious effects generated by the measure. It is not sufficient in such a case to merely balance the legislation's desired objectives against the deleterious effects produced by the provision, as the legislation's salutary effects do not fully correspond to the results which were expected to be produced.

In the present case, the defendants agree that I must examine proportionate effects in light of the reformulation in *Dagenais, supra.* I must look beyond the theoretical objectives of the impugned measure, and consider what salutary effects, if any, have been produced by the provision. The defendants admit that the actual salutary effects of the measure are unascertainable. In fact, there is no evidence, other than theory, to suggest that section 51(e) of the CEA has even partially attained the objectives which it was designed to achieve.

The defendants contend that a prison sentence of two years or more is indicative of bad conduct. They also assert that the principal negative effects of the impugned provision are merely two-fold: a democratic right is infringed, and a disenfranchised inmate is left feeling isolated from his community.

Most of the defendants' experts appeared to agree that section 51(e) of the CEA would have little or no effect on the prisoner. Dr. Pangle seemed to think it might have a weak rehabilitative effect; Dr. Manfredi felt there might be a general deterrent effect. While Dr. Van den Haag, as a conservative criminologist, supported general deference, he suggested that greater punishment is necessary even if the effects are not measurable.

According to Dr. Pangle, one function of the prisoner voting suspension is the regulation of potentially untrustworthy votes. However, he noted that the principle long-term benefit to society is that the disqualification can provide an important morally-educative function. In this regard, he focused on the electorate as a whole, rather than the individual offender. Dr. Pangle asserted that the disqualification de-emphasised the tendency to promote and advance individual rights. While he viewed these as noble and worthwhile endeavours, he asserted that they neglect or obscure the responsibilities and duties which attend those rights in a free and democratic society.

Dr. Pangle is an eminent scholar who presented his evidence in an extremely thoughtful and credible manner. Nevertheless, it is clear that he only recently began consideration of the relationship between prisoners and the franchise. In addition, his thorough research on the matter only led to one footnote reference by John Stuart Mill. Furthermore, despite being an eminent political theorist, and , until recently, an American citizen, Dr. Pangle was unaware of the status

of prisoner voting rights in the United States. He thought that most prisoners vote in the United States, and claimed that this is one factor that has led to social disintegration and loss of a sense of community. In fact, the opposite is true. Most American prisoners do not vote; thus, if there is moral and social deterioration, disenfranchisement cannot be a cause. Dr. Pangle was also concerned with untrustworthy votes, and submitted that individuals should not vote if they lack the requisite capacity. However, he was unaware of the fact that the 1993 amendments to the *Canadian Elections Act* removed the disqualification for those who are mentally challenged.

Dr. Manfredi addressed the costs of disenfranchisement, and found them to be small. He indicated that, in most cases, prisoners will only be excluded from voting in one federal election. He also minimised the prisoner's loss of the vote by asserting that prisoners are otherwise represented in political matters by advocacy groups, and retain access counsel and the judicial system.

Dr. Manfredi emphasised at least two benefits associated with the prisoner disqualification. Firstly, the disqualification serves the collective goal of promoting lawful behaviour, i.e. the sanction performs a moral norm-setting function for the public in general. Secondly, prisoner disenfranchisement encourages political participation. In Dr. Manfredi's opinion, the collective-action problem could be solved by compulsory voting, and could reinforce a view that participation in the electoral process is, indeed, a mark of good citizenship. The disenfranchisement of prisoners can therefore make voting less irrational and less threatening to the viability of a liberal democracy.

The plaintiffs argue that there can be no proportionality between the deleterious effects of section 51(e) of the CEA and its objectives and salutary effects, given the absence of any proof whatsoever that there are any salutary effects. It is submitted that the objectives identified by the defendants are abstract, whereas the effects of the impugned provision are concreted and fundamental to the individuals involved. The loss of voting rights is particularly grave, in the plaintiffs' view, because the disenfranchised class is a group which lacks power in society, and therefore has difficulty making itself heard in the political and social arenas. The plaintiffs also emphasise that all inmates were allowed to vote in the 1992 federal Referendum, and can presently vote in provincial elections in four provinces; yet, no negative effects have been shown to arise from the participation of inmates in these elections.

The plaintiffs contend that other deleterious effects of section 51(e) of the CEA include stigmatisation, loss of rehabilitative opportunity, promotion of a message of inequality, and the characterisation of our society as being intolerant and fearful of the less advantaged. It is also argued that there is no evidence that knowledge of the disqualification is widespread; thus, the plaintiffs question the alleged denunciatory, morally-educative, and potentially-rehabilitative effects of the legislation. In contrast, it is submitted that there is absolutely no cost to society as a whole, nor to any specific group in society, if the right to vote is granted to prisoners.

Dr Amyot noted that the defendants could not refer to any direct effect on the outcome of the voting process which would be produced if prisoners were enfranchised. He further indicated that the impact on the overall quality of Canadian democracy would be trivial, as inmates comprise a relatively insignificant proportion of the overall voting population. Dr. Amyot disagreed that there was any evidence to support the theory of morally-educative effects, or that disqualification would produce a psychological incentive for others to vote. In contrast, he referred to a number of empirical studies on voter turn-out, and noted that none considered the disenfranchisement of prisoners to be a factor explaining levels of voter participation.

In Professor Schafer's view, the denial of the right to vote can be seen as a removal of one of the prisoner's links to the community. Professor Schafer referred to the principle, favoured by liberal criminologists, that prisoners are sent to jail as punishment, and not for punishment. In this regard, while noting Dr. Van den Haag's assertion that there was no evidence that the enfranchisement of prisoners would contribute to their rehabilitation, Professor Schafer contended that there was evidence to suggest that prison inmates who are given greater control over their lives during incarceration exhibit increased independence and self-control upon release. Thus, in Professor Schafer's opinion, the exercise of civic responsibilities, including participation in the electoral process, has a potentially educative effect in the area of civic virtue, and should represent one of the main reasons why prisoners should **not** be disenfranchised. While Professor Schafer advocated punishment, he fundamentally believes in a person's capacity to change his own behaviour.

Applying a common sense approach, Professor Schafer asserted that it was unlikely that a potential serious offender, who has not deterred from committing an offence by the knowledge that he could spend two or more years in prison, would be deterred by the knowledge that he would also temporarily lose the right to vote. Moreover, Professor Schafer disagreed with Dr. Van den Haag's claim that incarceration is insufficient, in itself, to stigmatise the offender and denounce his criminal conduct, but that the disenfranchisement, as an additional stigma, will better ensure the safety of the social order. According to Professor Schafer, this claim is even less plausible in the face of the general lack of awareness of the disenfranchising provision.

Professor Neil Boyd, a witness for the plaintiffs, is Director of the School of Criminology at Simon Fraser University in British Columbia. He is also a lawyer, and has published extensively. Professor Boyd rejected the argument that the deprivation of the prisoner's right to vote will have a salutary effect by deterring the commission of crimes, as there was no evidence that retention of the right to vote will adversely affect the extent and nature of crime in the community. Indeed, Professor Boyd suggested that there is evidence that federal prisoners who become involved in political processes, such as inquiries, often benefit substantially from their participation. Thus, Professor Boyd concluded that the disqualification provides neither specific nor general deterrence. Moreover, there appears to be a greater possibility of a morally-educative benefit flowing from the enfranchisement of prisoners. Professor Boyd described the disenfranchisement of prisoners as a "kind of knee jerk reaction that might fall within the retributive sphere", and claimed that it

is consistent with the public's attitude that prisoners should have fewer rights. He also agreed that social denunciation my be valid, but not by the denial of a democratic right.

Mr. Eric Anderson was also called by the plaintiffs. He is a citizen of Denmark, and has been employed in the prison system there for thirty-seven years. For many of those years, he was a prison warden. Mr. Andersen indicated that prisoners have voted in Denmark since 1970 without any negative effects in that society. In his view, it is enormously beneficial to them and allows prisoners to keep their civil rights, including the right to vote. Similarly, he indicated that a denial of such liberties would make the rehabilitation of offenders much more difficult.

Professor Michael Jackson, a witness for the plaintiffs, is a well-known Canadian law professor. He has written extensively about the criminal justice system, with a particular emphasis on Aboriginal people and prison issues. In this testimony, Professor Jackson was concerned with the over-representation of Aboriginal people in Canada's correctional facilities. He attributed the problem of Aboriginal over-representation to systemic discrimination, in both the criminal justice system and society in general. He highlighted the disproportionately high rates of Aboriginal poverty, unemployment, and other social and economic disadvantages as being contributors to the over-representation of Aboriginals people in Canadian prisons.

Professor Jackson considered the deleterious of section 51(e) of the CEA in the historical and political context of both the franchise and Aboriginal people. He noted that the franchise in federal elections was only returned to the Aboriginal people in 1960, after seventy-five years of disenfranchisement. Similarly, the Inuit people were disenfranchised in 1935; their voting rights were not restored until 1950. Professor Jackson concluded that, for Aboriginal people in federal penitentiaries, the right to vote is still being denied today as a result of systemic discrimination on the basis of race.

The over-representation of Aboriginal people in prisons was seen by Professor Jackson to be the clearest example of the relationship between socio-economic status and imprisonment. In this regard, Professor Jackson also noted a similar connection between crime and class for other disadvantaged groups in society, including the unemployed, the illiterate, the poor, the homeless, and those from broken homes or unstable families. He contended that the exercise of the prisoner's right to vote in a federal election would promote citizenship skills and encourage responsible behaviour. He indicated that prisons do contain some evil people, but stated that not all inmates are evil. Nevertheless, Professor Jackson strongly suggested that the inmate disqualification cannot distinguish between the two types of prisoners.

In Canada, prisoners in both provincial and federal institutions may vote in provincial general elections in Manitoba, Ontario, Quebec, and Newfoundland. In Quebec, all prisoners have been eligible to vote in provincial elections since 1981. In British Columbia, a new *Election Act,* which came into force on September 1, 1995, parallels the federal law. Based on the figure of 14,955 federal prisoners in Canada on April 30, 1995, provided at trial, approximately 56% of

these were entitled to vote in provincial elections. Interestingly, in Quebec, the participation rate for inmates in the three recent provincial elections has been approximately 74 per cent.

The defendants were unable to adduce any evidence of harm flowing from the exercise of prisoner voting rights in provincial elections or in the 1992 Referendum. Indeed, the defendants could not advance any meaningful arguments to justify the mixed messages which Canadian society is receiving from the conflicting federal and provincial policies relating to prisoner voting rights. The defendants did suggest, however, that the federal government has a national norm-setting function.

The defendants were also unable to demonstrate any negative impact upon other democratic societies where prisoner voting is freely or partially allowed. While it may not be possible for the defendants to adduce such evidence, it is striking that Mr. Anderson did not allude to any costs, to offenders or to society in general, resulting from the enfranchisement of prisoners. Indeed, Mr. Andersen was generally of the opinion that it is better to hold individuals to a higher standard, rather than a lower standard, of responsibility.

Democracies have struggled for many years to achieve a truly universal franchise. In Canada, we have almost attained that goal. With the reform of the *Canada Elections Act,* in 1993, several groups, including Judges, persons restrained by reason of mental disease, and inmates serving sentences of less than two years, have been enfranchised. What remains is the disqualification of approximately 14,955 inmates, almost 2,000 of whom are Aboriginal.

While this case is not about the causes of crime, the plaintiffs argue that the defendants' approach to disenfranchisement ignores the entire socio-economic dimension of crime. The defendants, as well as the defendants' witnesses, recognise, in minimal terms, the relationship between society and crime; however, the defendants submit that the role which society plays in influencing criminal behaviour is secondary to the voluntary choice to engage in crime, made by an individual who displays a bad character, a lack of empathy, and/or a lack of self-control. The defendants have chosen to focus on a sentence of the court as being the marker which attracts the disqualification. In the defendant's view, the more complex problems of criminal behaviour that may be associated with abuse, despair, poverty, illiteracy, learning disabilities, or drug/alcohol addiction, are not, in any way, relevant.

As I have already found at almost every step in these reasons, the evidence clearly indicates that prisoner disqualification is not well-known in Canadian society. Indeed, in the Government of Canada's publication, *The Charter of Rights and Freedoms: A Guide for Canadians* (Ottawa, Ont., 1982), the following is stated, at page 6, in regard to section 3 of the Charter:

> The tradition of democratic rights in Canada is specifically guaranteed by the Charter. Citizens will have a constitutionally enshrined right to vote in elections

> for members of the House of Commons or a legislative assembly and to seek election to either of those houses.
>
> *The only restrictions that may be placed on your right to vote* or run in an election will be those that are considered to be reasonable and justified, such as the age restriction for minors, mental incompetence, and certain restrictions on some election of officials, such as returning officers, who may have to cast a deciding ballot. In the case of seeking elective office there may be some restrictions on judges because of the non-partisan nature of their office. (Emphasis added.)

At the time of this publication, no prisoner could vote federally; nevertheless, conspicuously, there is no reference whatsoever to the disenfranchisement of prisoners. Section 51(e) of the CEA has a very low visibility. Despite the litigation in this area throughout the past decade, Dr. Pangle was unaware of the decisions involving prisoner voting rights.

In the present case, the parties could not refer to any Canadian source, other than the case law, in which the issue of prisoner disenfranchisement has been discussed. I have reviewed two recent texts on criminal law and sentencing: *C Ruby, Sentencing,* 4th ed (Toronto: Butterworths, 1994), and D. Stuart, *Canadian Criminal Law,* 3rd ed. (Toronto: Carswell, 1995). Not surprisingly, neither author considers the issue of the disenfranchisement of inmates. I mention this not to criticise their excellent contributions; rather, I believe that this is typical of the attention that Canadians, including legal scholars, have given to the question of prisoner disenfranchisement.

In *Sentencing, supra,* at page 1, Professor Ruby considers the causes of crime in the following manner:

> It is evident to all thinking practitioners of law that the causes of crime and their solutions lie in the legal system but in a society itself.

Professor Stuart states the issue somewhat differently, at pp. 54–55 of *Canadian Criminal Law, supra:*

> Even if an acceptable typology of conduct is arrived at, most researchers now agree that any attempt to seek a mono-casual theory is doomed to failure and that the best we can do is to suggest that there are a host of predisposing factors – biological, psychological and sociological.
>
> .....
>
> Yet even the most sophisticated research has produced very pessimistic results, particularly if we are concerned with the acid test: the rate of recidivism(re-conviction). Different forms of punishment or treatment seem equally ineffective, even if we compare such markedly different punishments as long-term and short-term prison sentences, probation and institutional punishments, and authoritarian

> institutions and therapeutic communities. The greatest hope is with the first offenders, but it does not seem to matter what the disposition is.

Professor Stuart goes on to state, at p. 58:

> However we live in law and order times. There are widespread calls for toughening the criminal law, especially as it relates to violence, and voices favouring restraint have been drowned out. Instead there are pleas for "Zero Tolerance" and concern that criminals have too many rights at the expense of victims... There are no votes in being soft on crime.

Professor Stuart then suggests that the truths of criminology are limited and that there are no clear explanations, definitions, or answers.

The intellectual debate among moral philosophers over the nature and purposes of punishment normally does not enter into the practical business of sentencing; *Ruby, supra*, at page 1; rather, sentencing aims and principles seem to have a somewhat more pragmatic focus. Indeed, there may be strong philosophic and political reasons to support the disenfranchisement of prisoners; however, there appear to be few practical reasons for doing so. Undoubtedly, the various purposes of sentencing are generally considered to be general deterrence, specific deterrence, protection of the public (incapacitation), rehabilitation, and retribution. Professor Stuart, *supra,* at p. 60, describes the first four of these aims as being "utilitarian in the sense that they seek to provide a benefit to society which outweighs its disadvantage". In contrast, at p. 60, retribution is said to have a moral basis, which justifies punishment, irrespective of its benefits, solely by relating the punishment to the crime:

> Most would distinguish the retributive aim from vengence (sic) and would distinguish as straddling the moral and utilitarian classifications, the denunciatory theory which sees punishment as an emphatic denunciation by the community of particular offence.

Thus, retribution is a more offender-specific aim of sentencing.

While an all-embracing characterisation of the defendants' case might be presumptuous, the defendants have advanced, as part of the goal of enhancement of the criminal sanction, the view that retribution should play a greater role in the sentencing process. In particular, from Dr. Van den Haag's perspective, retribution should be given greater prominence, given the fact that deterrence and rehabilitation appear futile. Dr. Van den Haag did admit, though, that he has little knowledge of criminal justice policy in Canada.

Retribution is, in fact, one of the defendants' main justifications for the disenfranchisement of prisoners. In this context, however, the Canadian Sentencing Commission, in *Sentencing Reform: A Canadian Approach, supra,* noted as follows, at p. 114:

> More directly, the rediscovery of retributivism is essentially the outcome of a thorough study of incarceration in the United States and it has resulted in a narrow theory of criminal justice which links the sentencing process to the imposition of custodial sentences and to punishment. In fact, all three reports cited in section 3.3 of this chapter were studies of incarceration. These studies of imprisonment were as profound as their focus was limited. When we are urged to collapse sentencing and punishing, one into the other, the type of sentence on which the whole argument implicitly rests is a jail term, which, save for capital punishment, is the most punitive sentence in use.

Thus, the Canadian Sentencing Commission down-plays the role of retribution in the Canadian justice system. Furthermore, the debate on crime in the United States is different from that in Canada.

Sentencing policy and corrections policy, while they represent different stages of the criminal justice system, must have a number of common goals. Sentencing is by its nature coercive and involuntary. However, sections 3 and 4 of the *Corrections and Conditional Release Act* (the "CCRA"), S.C. 1992, c. 20, as amended by S.C. 1993, c. 34, states follows:

> Purpose
>
> 3. The principles of the federal correctional system to contribute to the maintenance of a just, peaceful and safe society by
>
> ...
>
> (b) assisting the *rehabilitation* of offenders and their *reintegration into the community* as law-abiding citizens through the provision of programs in penitentiaries and in the community.
>
> Principles
>
> 4. The principles that shall guide the Service in achieving the purpose referred to in section 3 are
>
> ...
>
> (h) that correctional policies, programmes and practices respect gender, ethnic, cultural and linguistic differences and be responsible to the special needs of women and *aboriginal peoples*, as well as the needs of other groups of offenders with special requirements; (Emphasis added.)

Also, sections 5 and 76 state:

> 5. There shall continue to be a correctional service in and for Canada, to be known as the Correctional Service of Canada, which shall be responsible for
>
> ...
>
> (b) the provision of programs that contribute to the *rehabilitation* of offenders and to their successful *reintegration* into the community;
>
> 76. The Service shall provide a range of programs designed to address the needs of offenders and contribute to their successful *reintegration* into the community. (Emphasis added.)

Cleary, corrections policy emphasises the rehabilitation of the offender, and his integration into the community. While the defendants argue that disenfranchisement can contribute to rehabilitation, I prefer the plaintiffs' evidence which suggests that section 51(e) of the CEA hinders the rehabilitation of offenders and their successful reintegration into the community. The provision only serves to further alienate prisoners from the community to which they must return, and in which their families live. Accordingly, the retributive effects of section 51(e) are deleterious in that they are contrary to the purpose and principles contained in the CCRA.

At page 141 of *Sentencing Reform, supra,* the Canadian Sentencing Commission notes as follows:

> Since it stresses the obligation to punish persons guilty of a crime, retributivism is oriented more towards past blameworthy behaviour than towards the consequences of punishment in the future. Thus, as was stressed in section 1.1, retributivism provides a moral ground for imposing sanctions rather than a purpose which they can strive to achieve (although it can be violated, a moral ground is not, properly speaking, something that can be "achieved" with various degrees of success). *It is therefore problematic to treat retribution as a goal and to estimate to what extent it is achieved.* However, such an appraisal would require us to note that, strictly understood, retributivism implies that a sanction ought to be imposed upon *all* offenders. *As we know that only a small percentage of offenders is brought to justice, it follows immediately that the criminal justice system fails to a very large extent to achieve what is implied by retributivism.* (Emphasis added.)

Nevertheless, while the retributive aim of punishment is likely to be increasingly stressed in the courts, the principles of sentencing in Canada include more than just retribution: *R.* v *Goltz, supra.*

Of course, in this context, the complexity is great, and a sentencing Judge is given the enormous responsibility of knowing when to impose a sentence which not only has a retributive effect, but which also emphasises rehabilitation. According to Professor Ruby, *supra,* at p. 4, sentencing in Canada entails a strange liaison between both the moral and utilitarian views of democracy.

However, this is not surprising since the courts must determine whether the sanctions will be effective for the purposes claimed, and for each specific offender. In other words, there is an important difference between theory and reality.

Interestingly, both Professor Ruby and Professor Stuart emphasise that the criminal law is concerned with the protection of property and its abhorrence of physical violence; yet, our criminal law does not appear to emphasise other serious kinds of harm that are prevalent in Canadian society. Indeed, both authors, as well as the plaintiffs, reflect upon certain types of white-collar crime, including price fixing and misleading advertising under the *Competition Act,* income tax evasion, and other corporate crimes. In essence, Professor Ruby, *supra,* at p. 1, notes that these crimes are "lightly penalized". In that regard, I believe the author to mean that serious prison terms are rare for these types of white-collar crimes. Similarly, the plaintiffs assert that a class bias is created against the poor and illiterate who are marginalised, and who are more likely to be given a sentence of imprisonment.

As indicated previously, the potential salutary effects which could be generated through the operation of section 51(e) of the CEA are not ascertainable. However, I must, nevertheless, determine, on a common sense basis, whether any salutary effects could be produced by the disqualification, even if the actual effects which are produced are not conducive to measurement.

It is clear that section 51(e) of the CEA produces a number of deleterious effects through its operation. I accept the plaintiffs' evidence that the provision generates in some, if not all, prisoners a feeling of isolation from the community. In losing one more link to society, through the denial of the right to vote, their subsequent reintegration into the community is likely to be impeded. After all, most offenders will return to society. The disqualification also prevents them from experiencing any form of rehabilitative influence which could otherwise be felt through participation in the democratic process.

As well, there is evidence to suggest that there have been no negative costs to society if prisoners are granted the right to vote. The four provinces in which prisoners participate in provincial elections appear not to be adversely affected. It does not seem that any harmful impact on free and democratic principles has resulted. Similarly, the participation of inmates in the 1992 Referendum appears to have gone unnoticed.

It has been contended that the salutary effects of section 51(e) of the CEA include the promotion of law-abiding conduct, respect for the rule of law, and a sense of duty, as well as the facilitation of the inmates's re-integration into the community. However, the pervasive lack of awareness of the provision suggests that the disqualification is actually incapable of producing any such salutary effects.

It is not reasonable to suggest that a potential prisoner would be less likely to commit a crime in the face of knowledge that he would lose the right to vote if he were found guilty of an offence

and sentenced to a term of imprisonment of two years or more. Similarly, it does not make sense to suggest that crime in general will be curbed through a widespread awareness of the potential disenfranchisement of offenders. As Dr. Van den Haag indicated, the moral dimension of punishment is its main dimension; yet, in his view, individuals obey the law not because of a fear of punishment, but rather because it is wrong or immoral to do that which the law prohibits. It may be comforting to the value systems of law-abiding citizens to know that prisoners will receive greater punishment. However, the salutary effects upon which the defendants rely are tenuous in the face of the denial of the democratic right to vote, and are insufficient to meet the civil standard of proof.

In my opinion, the proportionality between the effects of the impugned legislation and its objectives, and the proportionality between its salutary effects and its deleterious effects, are not satisfied. Accordingly, section 51(e) of the CEA infringes section 3 of the Charter, and is not justified under section 1 of the Charter.

Section 15 of the Charter: Equality Rights

Having found that section 51(e) of the CEA infringes section 3 of the Charter, and is not saved by section 1, it is unnecessary for me to consider the section 15 case. However, I will, by way of *obiter,* make a few comments regarding section 15.

The plaintiffs argue that there is a clear *prima facie* breach of sub-section 15(1) of the Charter. They submit that section 51(e) of the CEA deprives a class of persons of a valuable legal right which amounts to a denial of equality and the equal benefit of the law. The plaintiffs assert that prisoners under the impugned provision are a disadvantaged class analogous to the groups enumerated in the Charter, because they are burdened and limited by a law based on the personal characteristic incarceration. It is argued that prisoners have been shown to be a disadvantaged group which is lacking in political power, and which is vulnerable to having its interests overlooked. It is further submitted that in light of the history of punishment in Canada, the racial and socio-economic composition of federal prison populations, and the obvious exclusion and powerlessness faced by prisoners, inmates in federal correctional institutions constitute a "discrete and insular minority" deserving of protection under sub-section 15(1) of the Charter.

The plaintiffs note, however, that they are confining their section 15 argument to electoral rights, and claim that federal prisoners are not necessarily an analogous group for all purposes. It is not contended that prisoners should be treated as a minority with regard to treatment that is directly relevant to prison management; rather, it is contended that, with respect to political rights irrelevant to prison management, prisoners should be considered as a minority group within the meaning of section 15 of the Charter.

Alternatively, the plaintiffs base their argument on systemic discrimination as a form of adverse impact discrimination. They assert that the impugned provision impacts upon disadvantaged and Aboriginal people disproportionately when compared with the general population, due to the over-representation of these two groups within the prison population. In particular, the plaintiffs submit that there is evidence of systemic discrimination against Aboriginal people in the Canadian justice system, and that this has led to an over-representation of Aboriginals in the prison population. They argue, therefore, that the proportion of Aboriginal people negatively affected by section 51(e) of the CEA is greater than is warranted in light of their numbers in the general Canadian population. On this basis, it is argued that the impact of the inmate voting disqualification falls disproportionately upon Aboriginal people. Thus, the plaintiffs argue that the disqualification causes discrimination on the basis of social condition – an analogous ground under sub-section 15(1) of the Charter – and on the basis of race – an enumerated category under sub-section 15(1).

In response, the defendants submit that prisoners, as a class, are not an analogous group for the purposes of section 15 of the Charter. The defendants rely upon the trial decisions in *Belczowski, supra* and *Jackson* v *Joyceville Penitentiary Disciplinary Tribunal* (1990), 32 F. T. R. 96, in support of this assertion. Furthermore, the defendants submit that the fact that Aboriginal people may be over-represented in the prison population is irrelevant for the purposes of the present section 15 analysis. The defendants reason that, if prisoners as a class are not an analogous group under section 15 of the Charter, then a sub-group of prisoner, such as Aboriginal inmates, cannot constitute an analogous group. According to the defendants, what distinguishes prisoners as a class from other groups in society is their serious criminal behaviour.

Regarding adverse impact discrimination, the defendants submit that the mere existence of a disparate impact of section 51(e) of the CEA, upon Aboriginal people, is not determinative for the purposes of section 15 of the Charter. Following the approach in *Symes* v *Canada*, (1993) 4 S.C.R. 695, the defendants argue that any adverse impact of the impugned provision upon Aboriginal people does not flow from the position itself. The defendants argue that the plaintiffs must do more than merely establish an adverse impact; they must demonstrate that the adverse effect is caused, or contributed to, by the impugned provision. However, the defendants submit that no such evidence exists in the present case.

The first step in a section 15 Charter analysis requires the Court to determine whether, due to a distinction created by the impugned law, there has been a denial of an equality right. At this stage, the Court should consider whether the challenged law has drawn a distinction between the claimant and others, based upon personal characteristics: *Egan and Nesbit* v *Canada,* (1995) 2 S.C.R. 513, at p. 584.

As stated by Iacobucci J in *Egan, supra,* at p. 584, "Not every distinction produced by legislation gives rise to discrimination". Therefore, the second step in the section 15 analysis requires the Court to determine whether the distinction results in discrimination. At this stage, the Court must

examine whether the impugned legislation imposes, on a group of persons to which the plaintiffs belong, burden, obligation, or disadvantage which is not imposed on others, or fails to provide them with a benefit which it grants to others. This also requires an assessment of whether or not the distinction is based on an irrelevant personal characteristic which is enumerated in subsection 15(1) of the Charter, or is analogous thereto.

As indicated by Iacobucci J in *Egan, supra,* at p. 586, "direct discrimination involves a law, rule or practice which on its face discriminates on a prohibited ground. Adverse effect discrimination occurs when a law, rule or practice is facially neutral, but has a disproportionate impact on a group because of a particular characteristic of that group". In an adverse effects analysis, the source of the disparate impact is critical. The Court must determine whether the impact flows from the impugned provision itself, or whether it relates to some pre-existing or independent condition. This point was addressed by Iacobucci J in *Symes, supra,* wherein he indicated that the Court must take care to distinguish between effect which are wholly caused, or contributed to, by an impugned provision, and those social circumstances which exist independently of such a provision.

In the present case, section 51(e) of the CEA clearly imposes a burden on certain prison inmates by disqualifying them from the federal electoral process. In this way, the law takes away from them a benefit which is granted to others. The group directly affected by this burden or disadvantage is that class of prison inmates who have been sentenced to a term of imprisonment of two years of more.

Prisoners, as a class, have generally not been viewed as an analogous group under section 15 of the Charter. In *Jackson* v *Joyceville Penitentiary Tribunal, supra,* at pp. 127–128, MacKay J held that prisoners were not an analogous group under section 15. In that case, the Court considered section 41 of the Penitentiary Service Regulations, which provided for differential treatment of prison inmates as compared with other individuals in Canada. Justice MacKay found that the impugned provision did not discriminate against prison inmates on the basis of any analogous grounds. In fact, he indicated that section 15 was not even engaged in that case, as the difference in treatment of prison inmates as a group arose not from their personal characteristics but from past course of conduct which amounted to crimes against society. Similarly, Strayer J, in *Belczowski, supra,* held that section 15 of the Charter was not engaged by the former version of section 51(e) of the CEA.

Consequently, a sub-population of all prison inmates – namely those who have been sentenced to a term of imprisonment of two years or more – does not constitute a group which is analogous to those enumerated in section 15 of the Charter. In fact, this group does not comprise a class of persons who may be distinguished from others on the basis of an irrelevant personal characteristic that is enumerated in sub-section 15(1) of the Charter, or is analogous thereto. Accordingly, there is no direct discrimination on the basis of an enumerated or analogous ground under section 15.

With respect to the possibility that section 51(e) of the CEA produces adverse effects which are discriminatory in nature, the focus must shift from a consideration of prisoners as being the targeted group, to one where poor or Aboriginal inmates comprise the disadvantaged group, to one where poor or Aboriginal inmates comprise the disadvantaged group. The plaintiffs argue that systemic discrimination has resulted in an over-representation of the poor and Aboriginal people in the Canadian inmate population. The evidence appears to support the fact of this over-representation. As a result, the plaintiffs contend that section 51(e) of the CEA impacts upon the poor and Aboriginal people disproportionately. It is therefore argued that the provision results in adverse effect discrimination on the basis of both social condition and race.

In the present case, section 51(e) of the CEA takes away the right to vote from all prisoners who have been sentenced to a term of imprisonment of two years or more. Every inmate to whom the provision applies is affected in the same manner; his right to vote is temporarily suspended. All disenfranchised inmates suffer from this burden to the same degree. Those inmates who are poor, or who are Aboriginal, are not in any way more greatly impacted than are other disenfranchised inmates.

The plaintiffs are correct that a disproportionate number of poor or Aboriginal inmates will lose the right to vote as a result of the operation of section 51(e) of the CEA. However, a finding of adverse effect discrimination does not depend upon the size of the group in question; rather, it depends upon the severity of a provision's impact on a particular group. For example, while more Aboriginal inmates may be losing the right to vote as a result of section 51(e) of the CEA, they are not suffering more greatly than are inmates from other groups in society.

Accordingly, although the impugned provision may operate in such a way that it targets more members from the poor and Aboriginal inmate groups, it does not operate more harshly in relation to these two groups. Consequently, it cannot be said that the provision treats those inmates who come from these backgrounds in a more burdensome manner than it does other prisoners. It is the effect of the impugned provision which must be considered in an adverse effects analysis, and not the extent of its application. Over-representation does not in any way result from the impugned provision.

I conclude that section 51(e) does not infringe section 15 of the Charter. However, section 51(e) does infringe section 3 of the Charter and is not saved by section 1.

I wish to thank all counsel for their efforts in this trial and to compliment them with respect to the quality and thoroughness of their submissions.

"Wetston J."

J. F. C. C.

Ottawa, Ontario, December 27, 1995

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS ON THE RECORD

COURT FILE Nos. and
STYLES OF CAUSE: T-2257-93

Richard Sauvé
Plaintiffs

and

The Chief Electoral Officer of Canada et al
Defendants

T-1084-94
Seldon M[c]Corrister et al
Plaintiffs

and

Attorney General of Canada
Defendants

PLACE OF HEARING: Winnipeg, Manitoba

DATES OF HEARING: May 24, 25, 26, 29, 30, and 31,1995;
June 1, 2, 5 and 6, 1995;
August 30 and 31, 1995; and
September 1, 1995.

REASONS FOR JUDGEMENT OF THE HONOURABLE MR. JUSTICE WETSTON

DATED: December 27, 1995

APPEARANCES:

Fergus J. O'Connor — FOR THE PLAINTIFF RICHARD SAUVE

Arne Peltz	FOR THE PLAINTIFFS SHELDON M[C]CORRISTER et al
Gerald Chartier and Glenn Joyal	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

Fergus J. O'Connor Barrister and Solicitor Kingston, Ontario	FOR THE PLAINTIFF RICHARD SAUVE
Arne Peltz Legal Aid Manitoba Winnipeg, Manitoba	FOR THE PLAINTIFFS SHELDON M[C]CORRISTER et al
Deputy Attorney General of Canada	FOR THE DEFENDANTS

HIGH COURT OF AUSTRALIA

BRENNAN C J,
DAWSON, TOOHEY GAUDRON, McHUGH AND GUMMOW J J

ALBERT LANGER — PLAINTIFF

AND

THE COMMONWEALTH OF AUSTRALIA
& OTHERS — DEFENDANTS

ORDER

1 *Answer the question reserved as follows:*

Is section 329A of the Commonwealth Electoral Act 1918 a *valid enactment of the Parliament of the Commonwealth?*

Answer: Yes

2 *The plaintiff pay the defendants' costs of the question reserved.*

Date of Order: *7 February 1996*
Reasons for Judgement delivered: *20 February 1996*

Plaintiff in person

Solicitor for the Defendants: *Australian Government Solicitor*

Solicitor for the Interveners: *R. C. Beazley, Victorian Government Solicitor*

Notice: This copy of the Court's Reasons for Judgement is subject to formal revision prior to publication in the Commonwealth Law Reports.

Constitutional Law – Commonwealth Constitution – sections 24, 31, 51(xxxvi) – "directly chosen by the people" – compulsory preferential voting – whether this entitles voters to refuse to indicate a preference for all candidates – prohibiting the encouragement of informal voting – implied freedom of political discussion – Commonwealth Electoral Act 1918 sections 240, 268, 270 and 329A.

Background facts: *Deane J reserved the undermentioned question for the consideration of the Full Court:*

> *"Is section 329A of the Commonwealth Electoral Act 1918 a valid enactment of the Parliament of the Commonwealth?"*

This section provides as follows:

> *"(1) A person must not, during the relevant period in relation to a House of Representatives election under this Act, print, publish, or distribute, or cause, permit or authorise to be printed, published or distributed, any matter or thing with the intention of encouraging persons voting at the election to fill in a ballot paper otherwise than in accordance with section 240.*
>
> *Penalty: Imprisonment for 6 months.*
>
> *(2) In this section:*
> *"publish includes publish by radio or television."*

Section 240 of the Act provides:

> *"In a House of Representatives election a person shall mark his or her vote on a ballot paper by:*
> *(a) writing the number 1 in the square opposite the name of the candidate for whom the person votes as his or her first preference;*
> *and*
> *(b) writing the numbers 2, 3, 4, (and so on, as the case requires) in the squares opposite the names of all the remaining candidates so as to indicate the order of the person's preference of them".*

Held: *Section 329A of the Commonwealth Electoral Act 1918 is valid.*

Cases cited in the Judgement:

Judd v *McKeon (1926) 38 CLR 380*
Faderson v *Bridger (1971) 126 CLR 271*
Smith v *Oldham (1912) 15 CLR 355*
Australian Capital Television Pty Ltd v *The Commonwealth (1992) 177 CLR 106*
Theophanous v *Herald & Weekly Times Ltd (1994) 182 CLR 104*
Cunliffe v *The Commonwealth (1994) 182 CLR 272*
Davis v *The Commonwealth (1988) 166 CLR 79*
Attorney-General (Cth); Ex rel McKinlay v *The Commonwealth (1975) 135 CLR 1*
Nationwide News Pty Ltd v *Wills (19920 177 CLR 1*
Cutler v *Wandsworth Stadium Ltd 91949) AC 398*
McGinty v *Western Australia, unreported, High Court of Australia, 1996.*

BRENNAN CJ: The following question was reserved by Deane J for consideration of the Full Court:

> "Is section 329A of the *Commonwealth Electoral Act* 1918 a valid enactment of the Parliament of the Commonwealth?"

Section 329[1] of the *Commonwealth Electoral Act 1918* (1918) ("the Act") provides as follows:

> " (1) A person must not, during the relevant period[2] in relation to a House of Representatives election under this Act, print, publish or distribute, or cause, permit or authorise to be printed, published or distributed, any matter or thing with the intention of encouraging persons voting at the election to fill in a ballot paper otherwise than in accordance with section 240.
>
> Penalty: Imprisonment for six months.
>
> (2) In this section:
> 'publish' includes publish by radio or television."

Section 240 of the Act provides:

> " In a House of Representatives election a person shall mark his or her vote on the ballot paper by:
>
> (a) writing the number 1 in the square opposite the name of the candidate for whom the person votes as his or her first preference; and
>
> (b) writing the numbers 2, 3, 4 (and so on, as the case require) in the squares opposite the names of all the remaining candidates so as to indicate the order of the person's preference for them."

The method of voting prescribed by this section can be described as full preferential voting. To cast an effective vote, a voter must indicate an order of preference as among all the candidates whose names appear on the ballot paper. If the voter fails to indicate preferences in accordance with section 240, section 268(1)(c) applies:

> " (1) A ballot paper shall (except as otherwise provided by section 239, and by the regulations relating to voting by post) be informal if:

(c) subject to sub-section 270(2), in a House of Representatives election, it has no vote indicated on it, or it does not indicate the voter's first preference for 1 candidate and an order of preference for all the remaining candidates:

Provided that the voter has indicated a first preference for 1 candidate and an order of preference for all the remaining candidates except 1 and the square opposite the name of that candidate has been left blank, it shall be deemed that the voter's preference for that candidate is the voter's last and that accordingly the vote has indicated an order of preference for all the candidates:

Provided further that, where there are two candidates only and the voter has indicated his or her vote by placing the figure 1 in the square opposite the name of 1 candidate and has left the other square blank or placed figure other than 2 in it, the voter shall be deemed to have indicated an order of preference for all the candidates;

.....

(3) A ballot-paper shall not be informal for any reason other than the reasons specified in this section, but shall be given effect to according to the voter's intention so far as that intention is clear."

Thus, subject to section 270(2), a ballot paper that is not filled in in accordance with section 240 is excluded from the scrutiny as informal unless a preference is deemed to have been indicated by a single blank square in accordance with the provisos to section 268(1)(c).

Despite the provisions of sections 240 and 268(1)(c), section 270(2) provides for a remedial reading of a ballot paper that would otherwise be excluded from the scrutiny:

" (2) Where a ballot-paper in a House of Representatives election in which there are 3 or more candidates:

(a) has the number 1 in the square opposite to the name of a candidate;
(b) has other numbers in all the other squares opposite to the names of candidates or in all those other squares except one square that is left blank; and
(c) but for this sub-section, would be informal by virtue of paragraph 268(1)(c);
then;
(d) the ballot paper shall not be informal by virtue of that paragraph;
(e) the number 1 shall be taken to express the voter's first preference;

(f) where numbers in squares opposite to the names of candidates are in a sequence of consecutive numbers commencing with the number 1 – the voter shall be taken to have expressed a preference by other numbers, or to have expressed preferences by the other numbers, in that sequence; and

(g) the voter shall not be taken to have expressed any other preference."

Section 270(3) provides:

> "In considering, for the purposes of subsection (1) or (2), whether numbers are in a sequence of consecutive numbers, any number that is repeated shall be disregarded."

The provisos to section 268(1)(c) and section 270(2) ("the saving provisions") save from informality ballot papers that are filled in otherwise than in accordance with section 240.

The plaintiff contends that he is constitutionally entitled to publish material encouraging persons to filling their ballot papers otherwise than in accordance with section 240 so that, if the encouragement is taken, their ballot papers would be informal or would be saved from informality by the saving provisions. This entitlement is said to be conferred by the requirements expressed in section 24 of the Constitution that the members of the House of Representatives be "chosen by the people". A voter, so the argument goes, must be free to indicate the candidates which the voter does not choose as well as the candidate or candidates which the voter does choose and, in some circumstances, that can be done only by the filling in of a ballot paper otherwise than in accordance with section 240. If I apprehend correctly the next step in the argument, it is said that section 329A cannot validly prohibit the encouragement of voters to exercise that right of choice which the Constitution allows. A secondary argument – raised but not pressed – is that section 329A is invalid because it infringes the freedom of communication about political matters which this Court has held to be implied in the Constitution[3].

Voters' choice in filling in ballot paper

The method of choosing members of the House of Representatives is governed by the Act. The Parliament is empowered to prescribe that method by sections 31 and 51(xxxvi) of the Constitution, just as it is empowered by section 9 to prescribe the method of choosing senators.

In *Judd* v *McKeon*[4], an elector was prosecuted for failing to vote in a Senate election without a valid and sufficient reason for that failure. (Under the Act as it now stands that offence is created by section 245(15)(a)). The elector's reason for not voting was political antipathy towards all the candidates. His argument that a law prescribing compulsory preferential voting was beyond the power conferred by section 9 of the Constitution was rejected. Isaacs J said[5]:

> "The community organized, being seized of the subject matter of parliamentary elections and finding no express restrictions in the Constitution, may properly do all it thinks necessary to make elections as expressive of the will of the community as they possibly can be ... A method of choosing which involves compulsory voting, so long as it preserves freedom of choice of possible candidates, does not offend against the freedom of elections, as established and recognised by the *Stature of Westminster I* (3 Edw I c 5)".

What the Constitution requires is that the law prescribe a method of voting which leaves the voter free to make a choice, not that the law leave the voter free to choose the method of voting by which a voter's choice is to be made. A method which requires full preferential voting satisfies the constitutional requirement. In *Judd* v *McKeon,* Knox C J, Gavan Duffy and Starke J J said[6]:

> "In common parlance 'to choose' means no more than to make a selection between different things or alternatives submitted, to take by preference out of all that are available. As an illustration of the meaning of the corresponding noun 'choice' the *Oxford Dictionary* quotes the phrase 'I have given thee thy choice of the manner in which thou wilt die,' and this use of the word seems to exclude the idea that a right of choice can only be said to be given when one or other of the alternatives submitted is desired by the person who is to exercise the right, or, in other words, to choose between them".

A refusal to vote on the ground that the elector would not wish to give a preference to any candidate would be an "open challenge to the very essence of the enactment" as Isaacs J said[7].

In *Faderson* v *Bridger*[8], an elector who did not have any preference among the candidates advanced that fact as a "valid and sufficient reason" for not voting at a Senate election in which voters were required to "'place the number 1 in the square opposite the name of the candidate for whom he votes as his first preference'" all the remaining squares to be marked with successive numbers as the voter determines as contingent votes"[9]. The elector's defence failed. Barwick C J, with whom McTiernan and Owen J J agreed, said[10]:

> "However much the elector may say he has no personal preference for any candidate, that none of them will suit him, he is not asked that question nor required to express by his vote that opinion. He is asked to express a preference amongst those who are available for election, that is, to state which of them he prefers if he must have one or more of them as Parliamentary representatives, as he must, and to mark down his vote in an order of preference of them. ... To face the voter with a list of names of persons, none of whom he may like or really want to represent him and ask him to indicate a preference amongst them does not present him with a task that he cannot perform."

The legislative power over elections for the House of Representatives conferred by sections 31 and 51(xxxvi) is a plenary power and, as Isaacs J said in *Smith* v *Oldham*[11] with reference to the power over federal elections:

> "The limits of plenary power end only with the subject matter in respect of which it may be exercised."

Provided the prescribed method of voting permits a free choice among the candidates for election, it is within the legislative power of the Parliament. Section 24 of the Constitution does not limit the Parliament's selection of the method of voting by which a voter's choice is made known so long as the method allows a free choice. Section 240 permits a voter to make a discriminating choice among the candidates for election to the House of Representatives. An election in which members of the House of Representatives are elected pursuant to such a method of voting achieves what section 24 requires, namely, a House of Representatives composed of members directly chosen by the people.

It follows that the Parliament is empowered to prescribe a method of voting in an election for the House of Representatives that requires a voter to fill in a ballot paper in accordance with section 240, although that method requires a voter to choose by allocating preferences among candidates for whom the voter does not wish to vote. It is not to the point that, if a ballot paper were filled in otherwise than in accordance with section 240, the vote would better express the voter's political opinion.

Since section 240 can reasonably be regarded as prescribing a method of freely choosing members of the House of Representatives, a law which is appropriate and adapted to prevent the subversion of that method is within power. Section 329A in such a law. The saving provisions do not affect its validity. They are designed to minimise the exclusion of ballot papers from the scrutiny provided the voter's intention clearly appears from the voter's partial compliance with the method prescribed by section 240. But the saving provisions do not detract from the power to enact section 329A in order to protect what the Parliament intends to be the primary method of choosing members of the House of Representatives.

Once the generality of the power to enact laws relating to elections is appreciated and the validity of section 240 is accepted, section 329A can be seen to be a provision appropriate and adapted to the protection of the method of electing members of the of the House of Representatives.

Freedom of communication

The powers of the Parliament are impliedly limited so as to preserve that freedom of political discussion which is essential to the maintenance of the Commonwealth system of representative government. But, as the judgements in the free speech cases have shown[12], the extent of the

limitation depends on the particular circumstances, including especially the subject matter of the law which impairs the freedom. In *Australian Capital Television Pty Ltd* v *The Commonwealth*[13], *Theophanous* v *Herald & Weekly Times Ltd.*[14] and *Cunliffe* v *The Commonwealth*[15], I sought to explain the approach to be taken in determining the validity of a law impugned on the ground that it impairs the freedom of political discussion. In my view, if the impairment of the freedom is reasonably capable of being regarded as appropriate the adapted??? to the achieving of a legitimate legislative purpose and the impairment is merely incidental to the achievement of that purpose, the law is within power. In *Cunliffe*[16], I observed:

> "The constitutional freedom of political discussion ensures freedom to engage in debate about the institutions of government and the exercise of any kind of governmental power but it does not impair, much less sterilize, the exercise of a power which might become the subject of political debate."

Section 329A does not prohibit discussion about the operation or desirability of the method of voting prescribed by section 240 nor does it prohibit advocacy of its amendment or repeal. Section 329A operates in the context of the method of voting prescribed by section 240 and prohibits intentional encouragement of the filling in of ballot papers in a way which, if not within the saving provisions, will result in the exclusion of the ballot paper from the scrutiny and which, if within the saving provisions of section 270(2), will result in a diminished expression of the elector's preferences. The prohibition contained in section 329A is thus a means of protecting the method which Parliament has selected for the choosing of members of the House of Representatives. The restriction on freedom of speech imposed by section 329A is not imposed with a view to repressing freedom of political discussion; it is imposed as an incident to the protection of the section 240 method of voting.

If the Act had prescribed methods of voting alternative to those prescribed by section 240, there would be much to be said for the view that no law could preclude a person from encouraging voters to vote by an alternative method. The saving provisions do not prescribe an alternative method, they merely save from invalidity some ballot papers which are not filled in in accordance with the method which the Act prescribes. Nor does section 329A prohibit a person from informing electors of the state of the law. It simply prohibits encouragement of voters to fill in their ballot papers otherwise than in accordance with the method of voting prescribed by the Act.

Section 329A is therefore valid.

I would answer the question reserved: Yes.

DAWSON J: By a question reserved by Deane J for its consideration, the Court is asked to determine the validity of section 329A of the *Commonwealth Electoral Act* 1918 (Cth) ("the Act"). That Section provides:

> "(1) A person must not, during the relevant period in relation to a House of Representatives election under this Act, print, publish or distribute, or cause, permit or authorise to be printed, published or distributed, any matter or thing with the intention of encouraging persons voting at the election to fill in a ballot paper otherwise than in accordance with section 240.
>
> Penalty: Imprisonment of 6 months.
>
> (2) In this section:
>
> 'publish' includes publish by radio or television."

By section 322 "relevant period" means in relation to an election the period commencing on the issue of the writ for the election and expiring at the latest time on polling day at which an elector in Australia could enter a polling booth for the purpose of casting a vote in the election.

It would appear that the "mischief" to which section 329A is directed is not the casting of an informal vote but rather the casting of a vote in a particular – and permissible – form. To appreciate that, it is necessary to refer to other sections of the Act which prescribe the preferential system of voting which is employed in the election of members of the House of Representatives.

Section 240 itself provides:

> "In a House of Representatives election a person shall mark his or her vote on the ballot paper by:
>
> (a) writing the number 1 in the square opposite the name of the candidate for whom the person votes as his or her first preference;
>
> (b) writing the numbers 2, 3, 4 (and so on, as the case requires) in the squares opposite the names of all the remaining candidates so as to indicate the order of the person's preference for them."

The purpose of requiring an elector to mark the ballot paper in the manner prescribed by section 240 is revealed by section 274(7)(d), which directs the divisional returning officer to count the votes as follows:

"(i) the candidate who has received the fewest first preference votes shall be excluded, and each ballot paper counted to the candidate shall be counted to the candidate next in the order of the voter's preference;

(ii) the process of excluding the candidate who has the fewest votes, and counting each of his or her ballot papers to the excluded candidate next in the order of the voter's preference, shall be repeated until only 2 candidates remain in the count; and

(iii) if, following the ascertainment of the first preference votes given for each candidate or the exclusion of candidates under this paragraph, a candidate has an absolute majority of votes, that candidate shall be elected".

Under section 274(8) a ballot paper is to be set aside as exhausted where on a count it is found that the ballot paper expresses no preference for any unexcluded candidate.

Section 268(1)[17] provides that a ballot paper may be informal for a number of reasons. Under par(c) it is informal if it has no vote indicated on it or it does not indicate the voter's first preference for one candidate and an order of preference for all the remaining candidates. But section 268(1) is subject to two provisos. The first is that where the voter has indicated a first preference for one candidate and an order of preference for all the remaining candidates except one and the square opposite the name of that candidate had been blank, it is deemed that the voter's preference for that candidate is the voter's last and that accordingly the voter has indicated an order of preference for all the candidates. The second proviso is that where there are two candidates only the voter has indicated his or her vote by placing the number 1 in the square opposite the name of one candidate and has left the other square blank or placed a number other than 2 in it, the voter is deemed to have indicated an order of preference for all the candidates.

Section 270(2)[18] and (3) provide:

"Where a ballot paper in a House of Representatives election in which there are 3 or more candidates:

(a) has the number 1 in the square opposite to the name of a candidate;

(b) has other numbers in all the other squares opposite to the names of candidates or in all those other squares except one square that is left blank; and

(c) but for this subsection, would be informal by virtue of paragraph 268(1)(c);

then:

(d) the ballot paper shall not be informal by virtue of that paragraph;

(e) the number 1 shall be taken to express the voter's first preference;

(f) where numbers in squares opposite to the names of candidates are in a sequence of consecutive numbers commencing with the number 1

– the voter shall be taken to have expressed a preference by the other number, or to have expressed preferences by the other numbers, in that sequence; and

(g) the voter shall not be taken to have expressed any other preference.

(3) In considering, for the purposes of subsection (1) or (2), whether numbers are in a sequence of consecutive numbers, any number that is repeated shall be disregarded."

The effect of section 270, which appears under the heading "Certain votes with non-consecutive numbers to be formal", is to modify section 240, which requires numbers to be written in the squares opposite the names of all candidates so that, when the numbers are read consecutively, the voter's order of preference for all the candidates is indicated. Under section 270 a voter is not required to number each square so that these numbers may be read consecutively provided that he or she places the number 1 in one square and fills in all the other squares save the one which may be left blank under the provisos to section 268(1). This is made clear by section 270(3) which provides that a number which is repeated is to be disregarded. The result is, it would seem, that section 270 saves from informality votes such as the following:

A	B	C	D
1	1	1	1
2	2	2	2
2	2	3	3
2	2	3	3
2		3	

The ballot papers A and B would be exhausted after the first preference was counted. The ballot papers in C and D would be exhausted after the second preference was counted. Thus, a voter may by repeating a number avoid expressing a preference for a particular candidate or particular candidates and nevertheless have his or her vote counted. This result has been described as optional preferential voting or, perhaps more accurately, selective preferential voting as opposed to the full preferential system of voting which is envisaged by section 240 standing alone.

Whilst it was appreciated, indeed intended, that section 270 should have the effect of saving votes which, by reason of mistake on the part of the voter, could not be read consecutively, it may not have been appreciated that the effect of the section was to allow voters to avoid intentionally the

expression of any preference, and hence any vote, for a particular candidate or particular candidates.

When sections 240, 268 and 270 are read together – as they must be – it is clear that the Act allows more than one method of casting a formal vote. A ballot paper not completed in accordance with section 240 may nevertheless constitute a formal vote if the requirements of section 268 or section 270 are satisfied. In my view, it is an incorrect construction of the Act to say that section 240 alone prescribes the manner in which a formal vote may be cast. Although sections 268 and 270 in terms deal with the counting of votes so as to save votes unintentionally cast in a form different from that prescribed by section 240, it is plain that the effect of those provisions is to allow a voter to case a formal vote with a ballot paper which is not in accordance with section 240.

In the *1990 Federal Election Report*[19] from the Joint Standing Committee on Electoral Matters it was said:

> "The issue of encouraging electors to record their votes other than in accordance with the instructions on the ballot paper arose again during the 1990 election and received considerable media attention. In some instances electors were urged not to express their preferences fully – for example, by voting 1, 2, 2, 2, etc. This effectively allows optional preferential voting."

The preference in that passage to the recording of votes otherwise than in accordance with the instructions on the ballot paper appears not to be entirely accurate. The instruction on the ballot paper merely instructs voters: "Remember ... number *every* box to make your vote count."[20] That instruction is, in any event, at variance with the provisos to section 268.

The Report goes on to say that optional preferential voting was an unintended effect of section 270 which was designed "only to provide a safety net for people who make a genuine mistake in filling out their ballot papers". It continues:

> "This practice is of considerable concern because of the significant increase in the number of House of Representatives exhausted votes between the 1987 and 1990 elections – that is, an increase from 2,082 exhausted votes at the 1987 election to 18,765 in 1990. Given the small margins separating winning candidates at the 1990 election this figure is disturbing. The AEC [Australian Electoral Commission] suggested that the increase in exhausted votes would appear to indicate that the public attention given to the matter may have had an undesirable effect.
>
> The AEC commented that it is very difficult to see how section 270 of the Electoral Act could be amended to retain the safety net yet avoid *de facto* optional

> preferential voting. One avenue for dealing with the problem is in the area of penalties for those who induce people to fill out the ballot paper other than in accordance with the instructions under s 329(3) of the Act."

Section 329(3) of the Act creates an offence arising from the misrepresentation of a ballot paper in a manner likely to induce an elector to mark his or her ballot paper otherwise than in accordance with the directions on the ballot paper.

Section 329A, which was inserted in the Act in 1992[21], was plainly directed against the exercise of the right conferred by the Act to engage in optional or selective preferential voting in a House of Representatives election. It does not, however, deny the right but seeks to prevent voters becoming aware of its existence, at all events where the imparting of information concerning its existence is intended to encourage its use. If there is a line between imparting information with an intention to encourage its application and imparting information with an intention merely to inform it must (save where there is active discouragement) be a thin one. But I shall return to this.

Section 24 of the Constitution provides that the House of Representatives shall be composed of members directly chosen by the people of the Commonwealth. Although that section does not expressly require the choice to be made by election, other sections, in particular sections 30 and 31, make it clear that members are to be chosen by election. And it is clear from section 30 that not all of the people were intended to vote in elections so that the choice by the people is to be made through the casting of votes by those eligible to vote. The Constitution does not require the provision of any particular electoral system[22]. Thus, the provision in section 240 for a preferential voting system is clearly within power notwithstanding that it requires a choice to be made in a specified manner and, standing alone, requires a preference to be expressed in respect of each candidate[23]. Whatever the system, the Constitution requires that a choice must be made and, as I pointed out in *Australian Capital Television Pty Ltd* v *The Commonwealth*[24], the choice involved must obviously be a genuine or informed choice which requires access on the part of the voter to the available alternatives in the making of the choice. Other members of the Court adopted a different approach and found in the concept of representative government or representative democracy an implied freedom of communication which was to be read into the Constitution. The freedom was said to embrace the discussion of government and political matters[25].

I was unable to accept the line of reasoning adopted by the majority of the Court in finding a constitutionally-guaranteed freedom of communication because that guarantee was derived, in my view, from a notion of representative government which does not appear from any requirement contained in the Constitution itself[26]. The freedom of communication which I thought to be required by the Constitution was confined to what is necessary for the conduct of elections by direct popular vote as envisaged by sections 7 and 24 and related sections. Nevertheless, in my view, that requirement is sufficient to invalidate section 329A of the Act.

Section 31 of the Constitution provides that:

> "Until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State for the time being relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections in the State of members of the House of Representatives."

Section 51(xxxvi) provides that the Parliament may make laws for those matters in respect of which the Constitution makes provision until the Parliament otherwise provides and, hence, Parliament has power to make laws with respect to the election of members of the House of Representatives. It is that power which was exercised in the enactment of the Act. But it is clearly not a power which is at large. The Constitution, having established in section 24 that the House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, the elections with respect to which Parliament is given power to make laws by sections 31 and 51(xxxvi) must necessarily be elections fulfilling the requirements of section 24. That is to say, the legislative power conferred by those provisions is a purposive power: a power to make laws for the purpose of implementing section 24.

Since, as I have said, the choice which is required by section 24 must be genuine choice[27], those eligible to vote must have available to them the information necessary to exercise such a choice. In *Cunnliffe* v *The Commonwealth*[28] I expressed the view, to which I adhere, that the usefulness of the doctrine of proportionality in determining the validity of laws under the Constitution is confined to those laws which are enacted pursuant to a purposive power. Otherwise, the test must be whether there is sufficient connection between the law and the subject matter of the power. But, for the reasons which I have given, the power conferred by sections 31 and 51(xxxvi) may properly be regarded as a purposive power and it is therefore open to test the validity of a law enacted in the purported exercise of that power by asking whether the law is reasonably and appropriately adapted to the achievement of an end which lies within power. To my mind, section 329A (or, more accurately, the law inserting it in the Act) is not such a law. It is a law which is designed to keep from voters information which is required by them to enable them to exercise an informed choice. It can hardly be said that a choice is an informed choice if it is made in ignorance of a means of making the choice which is available and which a voter, if he or she knows, for it, ??? may wish to use in order to achieve a particular result.

If section 240 stood alone, section 329A would be supportable as a protection of the preferential system of voting provided by the Act. Upon any view, some limitations upon freedom of communication are necessary to ensure the proper working of any electoral system[29]. However, the method of preferential voting which is established by the Act is that which may be discerned from sections 240, 268, 270 and 274 read together. Sections 268 and 270 qualify the method of voting prescribed by section 240 and section 270 makes available optional or selective preferential voting as opposed to full preferential voting. It is true that a voter cannot cast a formal vote by simply placing the number 1 in the square beside one candidate and leaving all the others blank.

But the fact remains that the Act permits voters intentionally to record a preference for only one or some of the candidate standing for election by completing their ballot paper in the manner which I have described above. To prohibit communication of this fact (or at any rate communication in the form of encouragement) is to restrict the access of voters to information essential to the formation of the choice required by section 24 of the Constitution. Thus, section 329A has the intended effect of keeping from voters an alternative method of casting a formal vote which they are entitled to choose under the Act.

It does not, to my mind, matter that the prohibition imposed by section 329A is confined to the conveying of information with the intention of encouraging persons voting at an election to fill in a ballot paper otherwise than in accordance with section 240. To impart information which can be used (and information about the availability of an optional or selective preferential vote is of that kind) is necessarily to encourage its use if the recipient of the information is so inclined. A person in making that information available to an eligible voter would, in the absence of active discouragement of its use, find it well nigh impossible to prove that it was made available without any intention that those to whom it was made available should make use of it. To put the matter briefly, to make available useful information is ordinarily to encourage its use. This is particularly so in the context of an election. The effect of section 329A in any practical sense must, in my view, be to discourage, if not prevent, persons from imparting to eligible voters knowledge that the electoral system permits optional or selective preferential voting. It cannot, therefore, be a law which is reasonably and appropriately adapted to the achievement of an end which lies within the ambit of the relevant legislative power. Indeed, the effect of the provision is such that it is possible to adopt the words of Mason C J, Dean and Gaudron J J in *Davis* v *The Commonwealth*[30]

> "This extraordinary intrusion into freedom of expression is not reasonably and appropriately adapted to achieve the ends that lie within the limits of constitutional power."

I have been able to reach my conclusion without reliance upon the reasoning of the majority with regard to freedom of communication in the previous cases[31]. With the greatest of respect, that reasoning does not, as I have indicated, commend itself to me. But upon that reasoning, the Constitution guarantees freedom of political discussion. I must confess that I am unable to see how political discussion can be confined to the mere imparting of information and why it should not extend to the furnishing of information with the intention that it should be used. Indeed, exhortation or encouragement of electors to adopt a particular course in an election is of the very essence of political discussion and it would seem to me that upon the view adopted by the majority in the earlier cases, section 329A must infringe the guarantee which they discern. It is true that the encouragement of voters to adopt a course which is inconsistent with the casting of a formal vote may not infringe that guarantee because the casting of a formal, and therefore, effective, vote is in the interests of representative government, as are the various other controls which may impede freedom of discussion but which are required to ensure that an electoral system

works properly. But section 329A goes beyond matters of that kind. It seeks to prevent the encouragement of voters to cast their votes in a form which is open to them. It must inevitably inhibit freedom of political discussion in a manner which does nothing to aid the proper conduct of elections in accordance with the Act.

For these reasons, I would answer no to the question whether section 329A of the *Commonwealth Electoral Act* 1918 is a valid enactment of the Parliament of the Commonwealth.

TOOHEY AND GAUDRON J J: The following question has been reserved for the consideration of the Full Court:

> "Is section 329A of the Commonwealth Electoral Act 1918 a valid enactment of the Parliament of the Commonwealth?"

Section 329A of the Commonwealth Electoral Act 1918 (Cth) ("the Act") relevantly provides:

> "(1) A person must not, during the relevant period in relation to a house of Representatives election under this Act, print, publish[32] or distribute, or cause, permit or authorise to be printed, published or distributed, any matter or thing with the intention of encouraging persons voting at the election to fill in a ballot paper otherwise than in accordance with section 240."

Section 322 defines "relevant period" to mean, "in relation to an election under [the] Act, ... the period commencing on the issue of the writ for the election and expiring at the latest time on polling day at which an elector in Australia could enter a polling booth for the purpose of casting a vote in the election".

Section 240 provides that "[i]n a House of Representatives election a person shall mark his or her vote on the ballot paper by:

> (a) writing the number 1 in the square opposite the name of the candidate for whom the person votes as his or her first preference; and
>
> (b) writing the numbers 2, 3, 4 (and so on, as the case requires) in the squares opposite the names of all the remaining candidates so as to indicate the order of the person's preference for them".

Although couched in mandatory terms section 240 does not operate to require a voter to fill in a ballot paper in the manner described in that section or, indeed, at all. Rather, it is the foundation of a somewhat complicated legislative scheme directed to the question whether and, if so, how a ballot paper will be counted in an election for the House of Representatives. The preferences expressed in a ballot-paper which complies with section 240 will be distributed in accordance with section 274 of the Act until one candidate has an absolute majority of votes or until only two candidates remain[33].

The scheme is partially revealed by section 268(1)(c) which relevantly provides that, subject to section 270(2) of the Act, a ballot paper which does not comply with section 240 is informal unless it satisfies one or other of the provisos to section 268(1)(c)[34]. The effect of the provisos is that, if the number 1 is placed against the name of one candidate and consecutive numbers are placed against the names of all but one of the other candidates, the elector is deemed to have

given his or her last preference to that candidate and his or her ballot paper is counted in the ballot on the basis that it expresses a preference, from first to last, for each of the candidates whose names appear on the ballot paper.

The scheme is completed by section 270(2) which provides:

> "Where a ballot paper in a House of Representatives election in which there are 3 or more candidates:
>
> (a) has the number 1 in the square opposite to the name of a candidate;
> (b) has other numbers in all the other squares opposite to the names of candidates or in all those other squares except one square that is left blank; and
> (c) but for this subsection, would be informal by virtue of paragraph 268(1)(c);
>
> then:
>
> (d) the ballot paper shall not be informal by virtue of that paragraph;
> (e) the number 1 shall be taken to express the voter's first preference;
> (f) where numbers in squares opposite to the names of candidates are in a sequence of numbers commencing with the number 1 – the voter shall be taken to have expressed a preference by the other number, or to have expressed preferences by the other numbers, in that sequence; and
> (g) the voter shall not be taken to have expressed any other preference."

It is provided by section 270(3) that "[i]n considering, for the purposes of subsection ...(2), whether numbers are in a sequence of consecutive numbers, any number that is repeated shall be disregarded". The effect section 270(2) and (3) is that, if there are three or more candidates, a ballot paper will be counted until it is exhausted[35] so long as the number 1 is placed against one candidate and there are numbers against all other candidates, or all other candidates but one. Thus, for example, if there are six candidates and the voter places numbers 1, 2, 3, 4 and 4 against the names of five candidates, the ballot paper will be exhausted after the third preference but, until then, it will be counted in the ballot.

The proscription effected by section 329A is not accurately described as a proscription of conduct intended to encourage electors to vote informally. A ballot paper may be informal for reasons other than non-compliance with section 240: it may not be authenticated by the initials of the presiding officer or by the presence of the official mark[36]; or it may be marked in such a way that, in the opinion of the Divisional Returning Officer, the voter can be identified[37]. And as already noted, ballot papers which do not comply with section 240 will, nonetheless, be formal and counted in the ballot if they satisfy one or other of the provisos to section 268(1)(c) or the

conditions specified in section 270(2): fully counted, if they satisfy one or other of the provisos; counted until exhausted, in the case of the ballot papers satisfying section 270(2) of the Act.

The proscription effected by section 329A is different in purpose and effect from a proscription on conduct intended to encourage electors to vote informally. Its effect is to proscribe conduct of the kind which the section describes and which is intended to encourage voters not to place consecutive numbers, starting with the number 1, against the names of all candidates on the ballot paper. And odd though it be, its purpose would seem to be to limit the possibility of voters deliberately taking advantage of the provisos to section 268(1)(c) or of the provisions of section 270(2) so as to express a preference for some only of the candidates. In any event, it operates that way and, in so doing, it assists in the maintenance of a system of full preferential voting, to the extent that that is possible in a context where effect is given to ballot papers that do not express a preference for all candidates by deeming them so to do, or by counting them to the extent that an order of preference is revealed.

It should be noted that section 329A is confined to conduct that is intended to encourage non-compliance with section 240 and is not concerned with conduct that is intended only to inform. Thus, it is not directed to conduct intended to provide information as to the circumstances in which a ballot-paper will be formal, notwithstanding non-compliance with section 240, or as to the manner in which it will be counted. Nor is it directed to conduct intended to inform voters as to the possible consequences of expressing a preference for each of the candidates whose names appear on the ballot paper.

It is asserted by the plaintiff, and not contested by the defendants, that one of the possible consequences or "paradoxes" of compliance with section 240 of the Act is that, although a last or final preference is popularly regarded as a vote against the candidate to whom it is given, a candidate may, in some circumstances, be "elected on final preferences"[38].

Strictly, this case is concerned only with section 329A of the Act. However, the plaintiff contends that section 240 is invalid to the extend that it requires a voter to express a preference for a person whom he or she would wish to vote against. And he contends that, consequently, section 329A is also invalid. The argument is that section 240 offends against the requirement in section 24 of the Constitution that members of the House of Representatives be "directly chosen by the people of the Commonwealth"[39] because, it is said, a voter is denied effective choice if he or she is required to express a preference for a candidate whom he or she wishes to vote against.

It is not strictly correct to say that section 240 obliges a voter to express a preference for a candidate whom he or she wishes to vote against. The section must be read in the context of the Act as a whole, including section 270(2). When so read, a voter is free, if there are three or more candidates, to vote against a candidate by ensuring that his or her ballot paper is exhausted before it is counted towards the candidate whom he or she wishes to vote against. Thus, for example, if there are three candidate whom he or she wishes to vote against two of them, he of she can do

so by voting 1, 2, 2. However, it is not possible to vote against one candidate only; if a voter votes 1, 2 and leaves the other box blank, for example, the ballot paper will be deemed to express a preference for all candidates pursuant to the first proviso to section 268(1)(c) and will be counted accordingly.

The circumstances in which the application of the provisos to section 268(1)(c) of the Act would have any practical effect on the outcome of an election were not explored in argument. However, it would seem that that is possible where there are two unexcluded candidates and the ballot papers counted to them are equal[40]. And on that basis, it may fairly be said that a voter cannot cast a formal vote and, at the same time, vote against one candidate only. The question then is whether this limited ability to vote against a candidate offends the requirement in section 24 of the Constitution that members of the House of Representatives be "directly chosen by the people".

The expression "directly chosen by the people of the Commonwealth" in section 24 has its counterpart, in relation to Senate elections section 7 which requires that the Senate "be composed of senators for each State, directly chosen by the people of the State". Two matters may be noted with respect to the expression in sections 7 and 24: as pointed out in *Attorney General (Cth); Ex rel McKinlay* v *The Commonwealth,* the phrase is concerned with "the people", not with "electors" who are referred to as such as sections 8, 30 and 128 of the Constitution[41]; and the word used is "chosen" rather than "elected", a distinction of some significance which is evident in section 15 following its substitution in 1977 to deal with casual Senate vacancies[42].

The words "choose", "choosing" and "chosen" are used in various other constitutional provisions relating to senators and members of the House of Representatives, including sections 8, 9, 13, 15, 26, 30, 43 and 44. It would be wrong to approach those words in sections 7, 24 or any of the other provisions to which reference has been made on the basis that they are to be equated with the words "elect", "electing", or "elected"[43]. At the very least, the word "chosen" is apt to describe accurately the situation where there is only one candidate and it is, thus, unnecessary to conduct a ballot. A further distinction can be discerned in the context of section 43 which provides that "[a] member of either House of the Parliament shall be incapable of being chosen or of sitting as a member of the House." Such a person may well be capable of being elected, in the sense of securing the necessary number of votes, although not capable of being chosen because of his or her disqualification.

When regard is had to the absence of any reference in sections 7 and 24 to electors, elections or persons being elected, the limited nature of the franchise which existed at the time of federation[44], the separate constitutional provisions concerned with the franchise[44], the separate constitutional provisions concerned with the franchise[45] and the numbers of senators[46] and members of the House of Representatives [47], the requirement that senators and members of the House of Representatives be "chosen by the people" must be taken as primarily mandating a democratic electoral system and as bearing on the features of that system only in the sense that it prohibits any feature that prevents it being said that the Senate or the House of Representatives is, or would, in the event

of any election, be composed of persons "chosen by the people". In this context, and no matter how broadly the words "chosen by the people" are construed, there is nothing to support the view that members who are elected pursuant to a full preferential voting system, or the modified preferential voting system effected by sections 240, 268 and 270 of the Act, are not properly described as "chosen by the people". The mere fact that a voter's ability to cast a formal vote and, at the same time, vote against a candidate is limited in the way earlier described does not have the effect that the House of Representatives is not properly described as composed of members "chosen by the people". Accordingly section 240 is valid and it follows that the plaintiff's argument with respect to section 329A of the Act must fail.

There is, perhaps, more force in an argument that an individual who is "elected on final preferences"[48] is not properly described as "chosen by the people". However, in our view, such a person is as much "chosen by the people" as a candidate who is unopposed and declared "duly elected" pursuant to section 179(3) of the Act and who, as already indicated, is properly encompassed in the expression "chosen by the people". This notwithstanding, it may be that the same could not be said if the outcome of an election were to depend on deemed preferences because of the operation of one or other of the provisos to s 268(1)(c) of the Act. If, in the event of a tied vote, for example, the candidate for whom fewer voters expressed a final preference were to be declared elected, it may be that he or she could not accurately be described as "chosen by the people"[49]. That, however, is a question that is separate and distinct from any question as to the validity of section 240 of the Act. Moreover, it is a question that may never arise.

Although the plaintiff did not argue that section 329A of the Act is invalid by reason that it infringes the implied freedom of political discussion recognised in *Nationwide News Pty Ltd* v *Wills*[50] and in *Australian Capital Television Pty Ltd* v *The Commonwealth*[51], it is, nonetheless, appropriate to indicate that, in our view, it does not. Freedom of political discussion is an indispensable concomitant of representative democracy which is embodied in the text, particularly sections 7 and 24, and in the structure of the Constitution. However, as was made clear in *Nationwide News and Australian Capital Television,* the freedom is not absolute[52]. The limits of the freedom were expressed in different ways by those justices who constituted the majority in those cases[53] but there is nothing in those cases to warrant a conclusion that the freedom operates to strike down laws which curtail freedom of communication, where that curtailment is reasonably capable of being viewed as appropriate and adapted to furthering or enhancing the democratic process. And the nature and the source of the freedom are such that, in our view, the freedom does not operate to strike down laws of that kind, although it will not often be the case that a law which curtails freedom of political discussion will be capable of being viewed as appropriate and adapted to furthering or enhancing the democratic system. Perhaps, it could only be said of laws that regulate the conduct of persons in connection with elections as, for example, laws to "prevent intimidation and undue influence"[54].

One matter that furthers the democratic process is full, equal and effective participation in the electoral process. If a voter's ballot paper is informal, as may be the case if it is not completed

in accordance with section 240, he or she does not effectively participate in the electoral process. And a voter does not participate either fully or equally with those who indicate an order of preference for all candidates if his or her ballot paper is filled in such a way that it is earlier exhausted. To the extent that section 329A operates to prevent conduct that is intended to encourage voters not to fill in a ballot paper in accordance with section 240 and, thus, either vote informally or to vote in such a way that their ballot papers are exhausted earlier than those of other voters, it is reasonably capable of being viewed as appropriate and adapted to furthering the democratic process.

So far as concerns ballot papers which are deemed by the provisos to section 268(1)(c) to express a preference for all candidates, different considerations apply. Although the provisos operate to give effect to a ballot paper which might otherwise be informal, the democratic process is enhanced if a voter's actual intention is capable of ascertainment from the ballot paper effect is given to that intention rather than an intention which he or she is deemed to have expressed. In relation to ballot papers which fall within the provisos to section 268(1)(c), section 329A operates to proscribe conduct which might encourage votes in filling their ballot papers in a way that does not make their intentions manifest. Because it operates in this way, it is reasonably capable of being viewed as appropriate and adapted to the enhancement of the democratic process.

The question reserved should be answered "yes".

McHUGH J: The question reserved for the decision of the Full Court of this Court in this suit is whether section 329A of the *Commonwealth Electoral Act* 1918 (Cth) ("the Act") is a "valid enactment of the Parliament of the Commonwealth". Section 329A provides:

> "(1) A person must not, during the relevant period in relation to a House of Representatives election under this Act, print, publish or distribute, or cause, permit or authorise to be printed, published or distributed, any matter or thing with the intention of encouraging persons voting at the election to filling a ballot paper otherwise than in accordance with section 240.
>
> Penalty: Imprisonment for 6 months.
>
> (2) In this section:
> 'publish' includes publish by radio or television."

Section 322 defines "relevant period" to mean "the period commencing on the issue of the writ for the election and expiring at the latest time on polling day at which an elector in Australia could enter a polling booth for the purpose of casting a vote in the election".

Section 240 provides:

> "In a House of Representatives election a person shall mark his or her vote on the ballot-paper by:
>
> (a) writing the number 1 in the square opposite the name of the candidate for whom the person votes as his or her preference; and
> (b) writing the numbers, 2, 3, 4 (and so on, as the case requires) in the squares opposite the names of all the remaining candidates so as to indicate the order of the person's preference for them."

Section 240 is an essential element in the system of preferential voting, the system that the Act uses to determine which candidate is to be elected to the House of Representatives[55]. Failure to comply with section 240 does not mean that a vote is always informal. In some limited circumstances[56], a ballot paper may be admitted to the scrutiny and its preferences distributed, even though the paper does not fully comply with the directions contained in section 240. But the system of preferential voting, which the Act sets up, would break down if there was a widespread failure to comply with its terms. Section 329A is, therefore, a desirable, if not essential, protection of the preferential system of voting that the Act sets up for House of Representatives' elections. Its object is to prohibit persons from encouraging voters not to indicate their order of preference for each candidate.

The enactment of section 329A became necessary once the Parliament relaxed the circumstances in which a ballot paper, not marked in accordance with section 240, could be admitted to the scrutiny. But necessary or not, the plaintiff contends that section 329A does not prevent a person encouraging voters to leave blanks against the name of a candidate on a ballot paper if the voter does not wish to vote for that candidate. Nor, says the plaintiff, does the section prevent a person from encouraging a voter to indicate his order of preference for the candidates for whom he or she wishes to vote and then giving the next consecutive number to all the candidates that the voter does not wish to vote for. If section 329A does prevent a person from encouraging a voter to mark his or her ballot paper in those ways, says the plaintiff, it is beyond the constitutional power of the Commonwealth to enact such a provision.

The Construction of Section 240

During argument it emerged that, although the question reserved concerns the validity of section 329A, the plaintiff's real concern was the construction and validity of section 240 of the Act. The plaintiff alleges that section 329A is invalid if section 240 requires a voter to state a preference for a candidate for whom he or she does not wish to vote because, on that construction, section 240 is invalid. He contends that, because section 24 of the *Commonwealth of Australia Constitution Act* 1990 (UK) declares that the "House of Representatives shall be composed of members directly chosen by the people of the Commonwealth", a voter must be able to choose his or her candidate and cannot be forced to record a preference for a candidate whom he wishes to vote against. He submits therefore that, consistently with section 24 of the Constitution, section 240 should be given a construction that does not require a voter to record a preference vote for a candidate that the voter opposes. He contends that "implicit in 240 ... is that if you do not choose any of the candidates, leave it blank. Surely it could not be that you are required to pretend to vote for a candidate who you do not choose. How could that be an election?" The plaintiff argues that, if a voter wishes to vote for only one candidate he or she is entitled to fill in all the other squares with a "2". If there are six candidates and the voter only wishes to vote for three, the voter can "write the numbers 1, 2, 3, 4, 4, 4. Those are consecutive numbers." Somewhat inconsistently, the plaintiff does not object to a voter having to place a "4" against a candidate if he or she wishes to vote for only three of four candidates.

The plaintiff relies on the word "all" in section 240(b) to support his construction of the section. He argues that "all" in section 240 requires you to number all candidates. Now, I believe that does not require you to use unrepeated numbers, that you are perfectly entitled to give the candidates you reject your last choice." It follows according to the plaintiff's argument that section 329A does not prevent a person from encouraging voters to give preferences only to the candidates for whom they wish to vote and to give the remaining candidates the next consecutive number.

However, I can see nothing in the use of the word "all" or in section 240 as a whole that supports the construction that the plaintiff seeks to put on the section. The plain meaning of the section is that the voter must place a number in each square, commencing with the number 1 and rising consecutively, so as to indicate the voter's order of preference for each candidate. A complete expression of preferences for all candidates is required irrespective of the difficulty that a voter may have in deciding the order of preference. A ballot paper that gives the same number to more than one candidate is in breach of the directions that the section addresses to the voter, although that breach is not made punishable by fine or imprisonment.

Notwithstanding the use of the mandatory "shall", the better view is that section 240 does not impose a legally enforceable duty on the voter. It seems extremely unlikely that Parliament intended to impose such a duty on voters. The absence of any penalty for breach tells against such a conclusion although it is not conclusive. As Lord Normand pointed out in *Cutler* v *Wandsworth Stadium Ltd*[57]:

> "If there is no penalty and no other special means of enforcement provided by the statute, it may be presumed that those who have an interest to enforce one of the statutory duties have an individual right of action."

If section 240 imposes a legally enforceable duty, perhaps the Electoral Commissioner is a person who can enforce it. But the practical difficulties of enforcing such a duty are so great that, combined with the absence of any penalty for breach, it seems extremely unlikely that the section was intended to impose a legal duty on a voter. The section should be read, therefore, as giving directions to a voter as to how the voter is to discharge the statutory duty a vote in a federal election.

Nevertheless, it seems clear that it is the legislative intention that, when voters discharge their duty to vote, they will comply with the directions. The efficacy of the system is dependent upon the directions being obeyed. It is true that, if a ballot paper does not comply with section 240, it is not necessarily informal. Other sections of the Act enable a ballot paper that does not comply with section 240 to be admitted to the scrutiny in some cases[58]. But the words of section 240 direct each voter to express consecutive preferences for all candidates on the ballot paper; it is a breach of that direction to mark a ballot paper otherwise than in accordance with the section. The provisions of the Act which save the validity of a ballot paper that does not comply with section 240 do not affect the Act's intention that voters are to follow the directions contained in that section. The purpose of the saving provisions is to further the franchise by protecting certain ballot papers that do not comply with the directions, but the saving provisions provide no ground for concluding that the Act is indifferent as to whether or not voters comply with those directions. While failure to follow the directions contained in section 240 is not a breach of legal duty, the directions are obviously an essential part of the system of preferential voting established by Pt XVIII of the Act: if they are disobeyed, the preferential system of voting set up by Pt XVIII is undermined.

I cannot accept the plaintiffs argument that the voter would not be marking "his or her vote on the ballot paper" within the meaning of section 240 if the voter indicated a preference for a candidate for whom the voter did not wish to vote. The object of section 240 is to require the voter to indicate an order of preference for each candidate and the section plainly regards such an indication of preference as a vote. Whether or not the voter wishes to give a candidate a preference or a vote is irrelevant.

The plaintiff's argument concerning the construction of section 240 must be rejected.

The Constitutional Validity of Section 329A

The next question is whether, consistently with section 24 of the Constitution, the Parliament can enact section 329A for the purpose of preventing a person from encouraging voters from filling in their ballot papers otherwise than in accordance with the above construction of section 240. The plaintiff made it clear that he did not oppose compulsory voting in the sense of compelling a voter to attend a polling booth and place a ballot paper in the ballot box. His complaint is that section 24 of the Constitution prevents the Parliament from requiring an elector to record a preference for a candidate against whom the voter wished to vote and that section 240 is therefore invalid if it requires a voter to record a preference for a candidate against whom he or she wished to vote.

Even if, contrary to my view, section 240 does not always[59] requires a voter to express a preference for a candidate against whom he or she wishes to vote, it is clear that in some cases it does so. Thus, it plainly requires a voter to give a first preference vote to a candidate even if he or she does not wish to vote for any candidate. Further, if there are only two candidates and a voter wishes to place a "1" against one candidate and leave the other square blank, section 240 will deem the voter to have indicated an order of preference for each candidate even though that is not the voter's intention or preference[60]. If the plaintiffs's argument on the meaning of section 24 of the Constitution is correct, section 240 is invalid unless it can be read down.

If section 240 is valid, however, section 329A is valid. The Parliament has power under sections 51(xxxvi) and 31 of the Constitution to enact laws "relating to elections" for the House of Representatives and that power extends to preventing persons from interfering with or undermining the electoral system that Parliament has chosen for such and election[61] . If a ballot-paper is not completed in accordance with the system ordained by the Parliament, the effectiveness of an election under that system is undermined. The system is as effectively undermined by filling in a ballot paper in a way that does not indicate the voter's complete order of preferences as it is by a vote that is wholly informal. Because the object of section 329A is to prevent the preference system of voting from being undermined, it is a law with respect to elections for the purpose of section 51(xxxvi) and section 31 of the Constitution and within the Parliament's power to enact.

It is not to the point in considering the validity of section 329A that breach of section 240 is not an illegal act, that in some instances a ballot paper that does not comply with that section may be admitted to the scrutiny, or that in certain instances the operation of the Act will result in an order of preference for every candidate being indicated even if a square is left blank. What is to the point is that encouraging persons to fill in a ballot paper otherwise than in accordance with section 240 undermines the system of voting which Pt XVIII of the Act sets up. That system requires the voter to express his or her complete order of preferences in respect of the candidates. That is to say, the system requires the voter to place the number "1" in the square opposite his or her first choice, the number "2" in the square opposite his or her second choice and so on until every square is consecutively numbered. If a person is encouraged to place a "1" against one candidate and a "2" against other candidates, the voter does not indicate the complete order of preference required by section 240, and the policy of the Act is undermined. If the Parliament can validly enact a system of voting under which voters are to indicate their complete order of preferences for candidates by marking the ballot in a particular way to the exclusion of other ways, it can prohibit people from encouraging voters to disregard the system.

I should note that the plaintiff, correctly in my opinion, does not contend that section 329A breaches any right of freedom of discussion or communication necessarily implied by section 24 of the Constitution or, as other members of the Court have held[62], inherent in the principle of representative democracy implied by the Constitution. Section 329A penalises conduct done "with the intention of encouraging persons voting at the election to fill in a ballot paper otherwise in accordance with section 240." If the Parliament can validly enact section 240, it is no breach of the implied freedom to punish those who seek to undermine the system of compulsory voting[63] laid down by the Act. Section 329A prevents political discussion or advocacy only when it is done with the intention of encouraging voters to disregard lawful directions that are fundamental to a system of compulsory preference voting. Those directions require the complete order of preferences of the voter to be stated in a particular way *and no other way.* There is a world of difference between prohibiting advocacy that is put forward with the intention of encouraging breaches of statutory directions and prohibiting advocacy that criticises or calls for the repeal of such directions. Nothing in section 329A prevents the plaintiff or anybody else from arguing that the system set up by Pt XVIII is unfair, undemocratic, an attack on conscience, or riddled with inconsistencies and absurdities. It is not inconsistent with the implied freedom for Parliament to prohibit a person from encouraging voters to disregard a system of voting validly set up under the Constitution. If the Parliament could not compel persons to vote, the matter might be different. But the plaintiff refused to challenge the compulsory voting system. Moreover, this Court has held that compulsory voting in federal elections is within the power of the Parliament[64].

It follows that, unless section 240 is invalid, section 329A is valid. Because the validity of section 240 was not a question that was reserved for the Court, strict adherence to the question reserved procedure would result in the conclusion that section 329A is valid. But I do not think that the plaintiff's case should be so technically confined.

In my opinion, section 240 does not breach section 24 of the Constitution by requiring a voter to record a preference for a candidate that he wishes to vote against. The plaintiff seeks to give a narrow meaning to the words "chosen by the people" in section 24 of the Constitution, a meaning which in their context they do not bear. Members of Parliament may be "chosen by the people" even though "the people" dislike voting for them. Section 24 of the Constitution is concerned with choices from the list of candidates who offer themselves for election not the wishes of individual electors. That was made clear in *Judd* v *McKeon*[65] where the Court held that legislation providing for compulsory voting in federal elections was valid. The Court rejected[66] an argument that "the choosing of a candidate implied a desire on the part of the elector that that candidate should be elected, and that consequently the power of Parliament was limited to prescribing the method by which electors desiring that a candidate should be elected should signify that desire". Knox C J, Gavan Duffy and Starke J J, in the course of discussing the meaning of the phrase "choosing the senators" in section 9 of the Constitution, said[67]:

> "In common parlance 'to choose' means no more than to make a selection between different things or alternatives submitted, to take by preference out of all that are available."

Thus, a member is "chosen by the people" even if he or she is elected unopposed or if the majority of voters under a preferential system of voting have refused to give their first preference vote to the person elected. Similarly, members are "chosen by the people" when they are elected by a system that requires each elector in an electorate to indicate his or her order of preference for each candidate in the election.

The purpose of the words "chosen by the people" in section 24 of the Constitution is to ensure that the members of the House of Representatives are elected by the direct vote of qualified electors in contrast to being appointed to office or being elected by electoral colleges or similar bodies. Those words were not intended to confer a personal right in each elector to vote for the candidate of his or her choice[68]. Indeed, section 24 of the Constitution is not concerned with the method of electing members, with the franchise or with any of the other matters that are relevant to the holding of federal elections except the computation of each State's representation in the House of Representatives. Section 24 leaves those matters to other sections of the Constitutions, sections 29, 30 and 31 in particular.

Section 24 does not say, for example, how or for how long the members of the House of Representatives are to be chosen. To answer those questions, recourse must be had to sections 25–34, 41–42 and 47 of the Constitution which make it clear that members are to be chosen by the holding of periodic elections[69].

Those sections also show that the words "the people" in section 24 of the Constitution are not intended to be read literally. Because the franchise was limited at the time of federation, it is plain that section 24 was enacted on the assumption that a member of the House of

Representatives could be "chosen by the people" even though women and many adult males were not eligible to vote in the election which returned that member. Even today, the term "the people" in section 24 does not mean every man, woman and child in the nation[70]. Ordinarily, "the people" will be identical with those electors who are entitled to vote in an election in accordance with the laws of the Parliament or, in the absence of such laws, with the laws of the States. Yet to read the words "the people" as always being equivalent to the eligible electors would be to miss the high purpose of section 24. That purpose is to ensure representative government by insisting that the Parliament be truly chosen in a democratic election by that vague but emotionally powerful abstraction known as "the people", a term whose content will change from time to time. In the light of the extension of the franchise during this century, for example, it would not be possible to find that the members of the House of Representatives were "chosen by the people" if women were excluded from voting or if electors had to have property qualifications before they could vote. As McTiernan and Jacobs J J said in *Attorney-General* (Cth); *Ex rel McKinlay* v *The Commonwealth*[71]:

> "The words 'chosen by the people of the Commonwealth' fall to be applied to different circumstances at different times and at any particular time the facts and circumstances may show that some or all members are not, or would not in the event of an election, be chosen by the people within the meaning of these words in s 24. At some point choice by electors could cease to be able to be described as a choice by the people of the Commonwealth. It is a question of degree. It cannot be determined in the abstract. It depends in part upon the common understanding of the time on those who must be eligible to vote before a member can be described as chosen by the people of the Commonwealth."

The words "chosen by the people" are therefore words of inexact application, dependent upon matters of fact and degree and always involving a value judgement. They describe the result of a process that begins with the calling of an election for the House of Representatives and ends with the declaration of the poll[72]. They do not confer individual rights on electors. The "rights" conferred by the section are given to "the people of the Commonwealth"[73] not individuals, although by necessary implication a member of the public may bring an action to declare void legislation that is contrary to the terms of section 24 or what is necessarily implied by it. Whether or not a member has been "chosen by the people" depends on a judgement, based on the common understanding of the time, as to whether the people as a class have elected the member. It does not depend on the concrete wishes or desires of individual electors.

Because of the terms of sections 29 and 31 of the Constitution, the Parliament has a wide choice of electoral systems from which to choose the members of the House of Representatives. Not every system that enables "the people" to elect their members results in those members being "chosen by the people" within the meaning of section 24. Nevertheless, having regard to the wide powers conferred by section 29 and 31, it is impossible to suppose that legislation in the form set

out in section 240 of the Act was beyond the power of the States for the first federal election or is now beyond the power of the federal Parliament to enact.

Compulsory preferential voting does not appear to have been introduced into Australia until 1911 when it was introduced in Western Australia. But optional preferential voting was used in Queensland after 1892 and proportional representation was introduced in Tasmania for the Hobart and Launceston metropolitan electorates in 1896. Since federation, compulsory preferential voting has become a widely-used method for electing members of parliaments[74]. The directions in section 240 of the Act are not so far removed from what was, and what is presently regarded as, involved in members being "chosen by the people" that that section is in breach of section 24 of the Constitution. Nor are those directions in conflict with the principles of representative government in so far as section 24 of the Constitution gives effect to that institution. Section 240 is a valid enactment. It follows that section 329A is also a valid enactment.

The question reserved should be answered, Yes.

GUMMOW J: By order of a Justice of this Court, there is reserved for the consideration of the Full Court the following questions:

> "Is Section 329A of the *Commonwealth Electoral Act* 1918 a valid enactment of the Parliament of the Commonwealth?"

Section 27 of the *Electoral and Referendum Amendment Act* 1992 (Cth) inserted section 329A in the *Commonwealth Electoral Act* 1918 (Cth) ("the Act"). Section 27 commenced on the day of the Royal Assent, 24 December 1992. Since the date one general election of members of the House of Representatives has been concluded.

Section 329A is in following terms:

> "(1) A person must not, during the relevant period in relation to a House of Representatives election under this Act, print, publish or distribute, or cause, permit or authorise to be printed, published or distributed, any matter or thing with the intention of encouraging persons voting at the election to fill in a ballot paper otherwise than in accordance with section 240.
>
> Penalty: Imprisonment for 6 months.
>
> (2) In this section:
> 'publish' includes publish by radio or television."

The term "House of Representatives election" means an election of a member of the House of Representatives (section 4). The term "relevant period" is defined in section 322 as follows:

> "In this Part, 'relevant period', in relation to an election under this Act, means the period commencing on the issue of the writ for the election and expiring at the latest time on polling day at which an elector in Australia could enter a polling booth for the purpose of casting a vote in the election."

Section 240 deals with the marking of votes in a House of Representatives election. It states:

> "In a House of Representatives election a person shall mark his or her vote on the ballot paper by:
>
> (a) writing the number 1 in the square opposite the name of the candidate for whom the person votes as his or her first preference;
>
> and

(b) writing the numbers 2, 3, 4 (and so on, as the case requires) in the squares opposite the names of all the remaining candidates so as to indicate the order of the person's preference for them."

The consequences for the ballot of a failure to mark the vote on the ballot paper in the manner specified in section 240 appear from sections 268 and 270.

A ballot paper shall not be informal for any reason other than those specified in section 268, but shall be given effect to according to the voter's intention so far as that intention is clear (section 268(3)).

So far as presently material, section 268(1)(c) renders a ballot paper in a House of Representatives election informal if it has no vote indicated on it, or it does not indicate the voter's first preference for one candidate and an order of preference for all the remaining candidates. This is subject to two provisos set out in section 268(1):

> "Provided that, where the voter has indicated a first preference for 1 candidate and an order of preference for the remaining candidates except 1 and the square opposite the name of that candidate has been left blank, it shall be deemed that the voter's preference for that candidate is the voter's last and that accordingly the voter has indicated an order of preference for all the candidates:
>
> Provided further that, where there are 2 candidates only and the voter has indicated his or her vote by placing the figure 1 in the square opposite the name of 1 candidate and has left the other square blank or placed a figure other than 2, the voter shall be deemed to have indicated an order of preference for all the candidates."

Paragraph (c) of section 268(1) is expressed as being subject to sub-section (2) of section 270. This sub-section applies where a ballot paper in a House of Representatives election in which there are three or more candidates has the number 1 in the square opposite the name of one candidate, has other numbers in all the other squares opposite to the names of candidates or in all those other squares except one square that is left blank and, but for the sub-section, the ballot paper would be informal by virtue of par (c) of section 268(1).

Where those circumstances apply, section 270(2) provides that the ballot paper shall not be informal by virtue of par (c) of section 268(1). Rather, the number 1 shall be taken to express the voter's first preference and, where numbers in squares opposite to the names of candidates are in the sequence of consecutive numbers commencing with the number 1, the voter shall be taken to have expressed any other preference (par (g) of section 270(2)). In considering for the purposes of section 270(2) whether numbers are in a sequence of consecutive numbers, any number that is repeated shall be disregarded (section 270(3)).

Section 245(1) imposes upon every elector what it states to be a duty to vote at each election. Section 245(17) provides that, in section 245, the term "elector" does not include three specified categories of elector[75]. Any elector who fails to vote at an election "without a valid and sufficient reason for such failure" is guilty of an offence which attracts a penalty of $50 (section 245(15)). Section 245(14) deals with one class where "a valid and sufficient reason" exists. It states:

> "Without limiting the circumstances that may constitute a valid and sufficient reason for not voting, the fact that an elector believes it to be part of his or her religious duty to abstain from voting constitutes a valid and sufficient reason for the failure of the elector to vote."

That an elector did not approve of any candidate and all candidates met with the disapproval of the elector is not a "valid and sufficient reason" for failure to vote[76]. Proceedings for an offence against section 245 may be instituted only by the Electoral Commissioner or an officer authorised in writing for that purpose by the Electoral Commissioner (section 245(16)).

Section 274 provides for the scrutiny and counting of votes in a House of Representatives election. It deals (section 274(7)) with the ascertainment of the total number of first preference votes, the distribution of preferences, exclusion of candidates by that process and the ascertainment of a candidate with an absolute majority of votes. In this process, a ballot paper shall be set aside as "exhausted" where on a count it is found that the ballot paper expresses no preference for any unexcluded candidate (section 274(8)).

Sections 338 and 339 create various offences relating to ballot papers. Section 338 states:

> "Except where expressly authorized by this Act, a person (other than the elector to whom the ballot paper has been lawfully issued) shall not mark a vote or make any mark or writing on the ballot paper of any elector.
>
> Penalty: $1,000 or imprisonment for 6 months, or both."

So, as is presently relevant, section 339 provides:

> "(1) A person shall not:
>
> .....
>
> (c) fraudulently destroy or deface any nomination paper or ballot paper;
>
> (d) fraudulently put any ballot paper or other paper into the ballot-box;
>
> (e) fraudulently take any ballot paper out of any polling booth or counting centre;

(f) forge any nomination paper or ballot paper or utter any nomination paper or ballot paper knowing it to be forged;

.....

Penalty: Imprisonment for 6 months."

The question referred to the Full Court concerns the validity only of section 329A. There is no question referred to the Full Court which concerns the validity of section 240 or any of the other provisions of the Act which I have set out or described. Nevertheless, these provisions assist in construing section 329A, and, as regards section 240, some attention to its validity is required for assessment of the plaintiffs's submission that an elector has a constitutional entitlement to complete a ballot paper in a House of Representatives election otherwise than in accordance with section 240. This entitlement is said to be conferred by the operation of the phrase "directly chosen by the people of the Commonwealth" in section 24 of the Constitution.

The first task is the construction of section 329A. It will be appropriate then to consider the grounds upon which the plaintiff attacks the validity of section 329A.

Section 329A requires proof by the prosecution of various elements of the offence. The first is that during the relevant period, as defined, and in relation to a House of Representatives election under the Act, the accused printed, published or distributed (or caused, permitted or authorised to be printed, published or distributed) any matter or thing. The second is that the accused did so with the necessary intention. The intention is that of encouraging persons voting at the election "to fill in a ballot paper" in a particular manner.

That manner is to fill in the ballot paper (to pick up the terms of section 240) otherwise than by writing the number 1 in the square opposite to the name of the candidate selected as the first preference, and otherwise than by writing the numbers 2, 3 and 4 (and so on as required) in the squares opposite the names of the remaining candidates so as to indicate the order of preference for them.

Section 329A uses the expression "to fill in a ballot paper" whilst section 240 speaks of a person "mark[ing]" his or her vote on the ballot paper. However, the final phrase in section 329(1), "otherwise than in accordance with section 240", indicates section 329A treats as filling in a ballot paper the marking of the ballot paper by writing the numbers 1, 2, 3 and so on in the squares opposite the names of the candidates so as to indicate the order of preference.

The prosecution must prove an intention to encourage voters to mark their ballot papers otherwise, that is to say differently or in some other manner whereby the ballot paper does not indicate the voter's first preference for one candidate and an order or preference for the remaining candidates.

A ballot paper which is not marked with this indication and which therefore does not comply with section 240 is to be treated as informal. That follows from part (c) of section 268(1). The treatment of the vote as informal is subject to the provisos contained in section 268(1) which I have set out earlier in these reasons. It is also subject to the provisions of section 270(2). These qualifications operate in aid of the principles that the ballot, being a means of protecting the franchise, should not be made an instrument to defeat it, and that, in particular, doubtful questions of form should be resolved in favour of the franchise where there is not doubt as to the real intention of the voter[77].

However, section 329A brings in the criminal law to assist achievement of the primary objective of the legislation as evinced in section 240 and in part (c) of section 268(1). This is that ballot papers shall be marked in the particular fashion identified in section 240 so as to indicate the first preference of a voter for one candidate and an order of preference for all the remaining candidates.

Section 329A presupposes that the persons who wrongly are encouraged to fill in their ballot paper otherwise than in accordance with section 240 will be "persons voting at the election". That is to say, section 329A operates on the footing that the persons in question will be discharging the duty imposed by section 245 to vote at the election unless they have a valid and sufficient reason for failing to do so. Put another way, section 329A is not concerned to proscribe the printing, publication or distribution of material with the intention of encouraging persons not to vote at all at a House of Representatives election under the Act.

Nor, as was conceded by the Solicitor-General for the Commonwealth in argument, does section 329A proscribe conduct with the intention of encouraging persons who do fill in a ballot paper in accordance with section 240 also to write on the ballot paper additional words or other graphic representations.

Other provisions of the Act create offences with respect to conduct which relates to the ballot. Section 329(1) makes it an offence to publish (including publication by radio or television), print or distribute any matter or thing "that is likely to mislead or deceive an elector in relation to the casting of a vote". The offence extends to causing, permitting or authorising those activities. I have referred to sections 338 and 339 which create various offences relating to ballot papers.

As I understand the submissions for the plaintiff, it is accepted (and rightly) that (subject to such limitations as properly apply by reason of any express provision of the Constitution or are properly implied from the system of representative government which is established and maintained by the Constitution) the Parliament has power under sections 31 and 51(xxxvi) of the Constitution to make laws which relate to elections for the House of Representatives.

Section 31 of the Constitution states:

> "Until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State for the time being relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections in the State of members of the House of Representatives."

Paragraph (xxxvi) of section 51 is a conferral of legislative power with respect to:

> "Matters in respect of which this Constitution makes provision until the Parliament otherwise provides."

The head of federal legislative power thus is the making of laws relating to elections for members of the House of Representatives. Section 240 plainly is such a law and it states that electors "shall mark" their vote on the ballot paper in a particular fashion so as to cast a fully-exercised preferential vote. The other provisions of sections 268 and 270 are ancillary (in the manner I have described) to the primary objective of the legislation, and do not evince any legislative intent to make optional or selective preferential voting available as an alternative to full preferential voting.

The legislative power of the Commonwealth I have identified above includes the making of laws which regulate the conduct of persons in relation to such elections[78]. Section 329A is a law which prohibits conduct, of the nature and quality identified in it by reference to section 240, which has the tendency to undermine the efficacy of the system in accordance with which the vote of an elector is to be recorded and counted. That system does not include optional or selective preferential voting. The key to that system is provided by the expression "shall mark" in section 240 and it is in aid of this that section 329A operates.

The plaintiff submits, in effect, that section 24 of the Constitution requires that members of the House of Representatives be elected in accordance with the desires or intentions of the electorate. In *McGinty* v *Western Australia*[79] I expressed the view that this phrase in section 24 was included in the Constitution to perform a function which is quite different. In my view, section 24 does not confer upon each elector a personal right to vote for the candidate of that elector's choice, and, therefore, a right (or immunity) not to state a preference for a candidate whom the elector does not wish to be elected. Section 24 is not concerned with the particular form to be taken by the franchise in a system of direct election of members of the House of Representatives. It follows that there is no constitutional limitation upon giving to section 240 the operation it has upon its terms. Therefore, there is no limitation which flows from section 240 into section 329A so as to impugn the validity of section 329A.

Once the generality of the power to enact laws relating to elections is appreciated and the validity of section 240 is accepted, section 329A stands as a provision which protects the method of electing members of the House of Representatives.

In my view, there is no substance in any submission that, even if section 329A otherwise be within legislative power, nevertheless it is invalid for infringement of that restraint upon power which is identified as the implied freedom of political communication.

As the constitutional implication recently was formulated in *Theophanous* v *Herald & Weekly Times Ltd*[80], it is derived from, and operates in aid of, the system of representative government established and maintained by the Constitution. At the centre of the system of representative government is the electoral process. This has long been recognised. In 1703, Hold C J said[81]:

> "It is not to be doubted, but that the commons of England have a great and considerable right in the government, and a share in the legislat[ure], without whom no law passes; but because of their vast numbers this right is not exercisable by them in their proper persons, and therefore by the constitution of England, it has been directed, that it should be exercised by representatives, chosen by and out of themselves, who have the whole right of all the commons of England vested in them...
>
> A right that a man has to give his vote at the election of a person to represent him in Parliament, there to concur to the making of laws, which are to bind his liberty and property, is a most transcendant thing, and of an high nature".

In *Nationwide News Pty Ltd* v *Wills,* Deane and Toohey J J said[82]:

> "The ability to cast a fully informed vote in an election of members of the Parliament depends upon the ability to acquire information about the background, qualifications and policies of the candidates for election and about the countless number of other circumstances and considerations, both factual and theoretical, which are relevant to a consideration of what is in the interests of the nation as a whole or of particular localities, communities or individuals within it."

Section 329A does not impose any restriction upon political discussion generally nor, more particularly, upon discussion as to the suitability or disadvantages in the voting system. Rather, it is directed at the particular processes or mechanism by which the franchise is exercised and the vote is cast.

It is one thing to advocate the abrogation or modification of the particular system by which the legislature provides for the exercise of the franchise. It is another intentionally to seek to undermine the effective franchise by encouraging a course of action which may lead to the casting by electors of informal votes in an election for the House of Representatives, thereby denying the effective exercise by those electors of their right to participate in the activity whereby representatives government is constituted and renewed.

The Constitutional implication of freedom of political communication has been formulated in the authorities as operating in aid of representative government. It does not facilitate or protect that which is intended to weaken or deplete an essential component of the system of representative government. It cannot be inimical to representative government to forbid intentional conduct comprising advocacy of the casting of a vote in such a way as may be an ineffective exercise of the franchise. I use the term "may be" to allow for the savings provisions which give effect to the franchise in some cases despite failure by the elector to mark the vote of that person on the ballot paper as stated in section 240. The primary objective of the system established by the legislation involves observance by electors of section 240.

Section 329A is a valid law of the Commonwealth. The question reserved should be answered "Yes".

The plaintiff should pay the defendants' costs of the question reserved.

FOOTNOTES

1. Insert by section 27 *of the Electoral and Referendum Amendment Act 1992 (Cth)*
2. Defined in section 322
3. *Nationwide News Pty Ltd* v *Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd* v *The Commonwealth* (1992) 177 CLR 106; *Theophanous* v *Herald & Weekly Times Ltd* ((1994) 182 CLR 104; *Stephens* v *West Australian Newspapers Ltd* (1994) 182 CLR 211
4. (1926) 38 CLR 380
5. (1926) 38 CLR 380 at 385
6. (1926) 38 CLR 380 at 383
7. (1926) 38 CLR 380 at 386
8. (1971) 126 CLR 271
9. (1971) 126 CLR 271 at 272
10. (1971) 126 CLR 271 at 273
11. (1912) 15 CLR 355 at 363
12. *Nationwide News Pty Ltd* v *Wills (1992) 177 CLR 1 at 51, 76–77, 94–95; Australian Capital Television Pty* v *The Commonwealth (1992)* 177 CLR 106 at 142–143, 150–151, 157–160, 169–218
13. (1992) 177 CLR 106 at 150–151, 157–160
14. (1994) 182 CLR 104 at 151–152
15. (1994) 182 CLR 272 at 324–325, 329
16. (1994) 182 CLR 272 at 329
17. Section 268 has always existed in some form in the Act, although previously it was more restricted. The section was originally numbered section 133. It was renumbered section 268 by the *Commonwealth Electoral Legislation Amendment Act* 1984 (Cth)
18. Section 270, which was originally numbers s 133B, was inserted by section 103 of the *Commonwealth Electoral Legislation Amendment Act* 1983 (Cth)
19. Joint Standing Committee on Electoral Matters, *1990 Federal Election Report,* December 1990 at 30
20. See Sched 1, Form F
21. *Electoral and Referendum Amendment Act* 1992 (Cth), section 27
22. *McGinty* v *The State of Western Australia,* unreported, 20 February 1996
23. *Judd* v *McKeon* (1926) 38 CLR 380 at 383, 385–386
24. (1992) 177 CLR 106 at 187
25. *Theophanous* v *Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 140. See also *Theophanous* v *Herald & Weekly Times Ltd* (182 CLR 104 at 120–121; *Australian Capital Television Pty Ltd* v *The Commonwealth* (1992) 177 CLR 106 at 138, 142, 169, 214, 227 and 233; *Nationwide News Pty Ltd* v *Wills* (1992) 177 CLR 1 at 50, 72–73, 76–77
26. See *McGinty* v *The State of Western Australia,* unreported, 20 February 1996
27. See *Australian Capital Television Pty Ltd* v *The Commonwealth* (1992) 177 CLR 106 at 187; *Theophanous* v *Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 189–190
28. (1994) 182 CLR 272 at 350–357
29. See, for example, *Commonwealth Electoral Act 1918* (Cth), sections 325, 325A, 326, 329, 330 and 340
30. (1988) 166 CLR 79 at 100
31. *Nationwide News Pty Ltd* v *Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd* v *The Commonwealth* (1992) 177 CLR 106; *Theophanous* v *Herald & Weekly Times Ltd* (1994) 182 CLR 104
32. Section 329A(2) of the Act defines "publish" to include "publish by radio or television"

Preferential Voting", (1983) 56 *Mathematics Magazine* 207, where this occurrence is termed as "no-show paradox".

39. Section 24 provides:
"The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.

The number of members chosen in the several States shall be in proportion to the respective numbers of their people, and shall, until the Parliament otherwise provides, be determined, whenever necessary, in the following manner:

(i) A quota shall be ascertained by dividing the number of the people of the Commonwealth, as shown by the latest statistics of the Commonwealth, by twice the number of the senators:

(ii) The number of members to be chosen in each State shall be determined by dividing the number of the people of the State, as shown by the quota; and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State.

But notwithstanding anything in this section, five members at least shall be chosen in each Original State."

40. Pursuant to section 274(7)(d)(ii) and (iii), the counting of ballot papers continues until a candidate has an absolute majority or until only two candidates remain unexcluded. Hence, final preferences are never actually counted. If the unexcluded candidates have the same number of votes counted to them, the Divisional Returning Officer decides which of the candidates to exclude: section 274(9). The provisos to section 268(1)(c) render it futile to examine final preferences in the event of a two-way tie, because the final preference of each ballot paper counted to one of the remaining candidates would be (or would be deemed to be) for the other candidate, and vice versa. However, were it not for the deeming provisos, an examination of final preferences might reveal that more voters actually expressed a final preference for one candidate than for the other. The provisos to section 268(1)(c) and the mechanism for counting ballot papers set out in section 274 combine to preclude this approach to resolving a tie.

41. (1975) 135 CLR 1 at 44 per Gibbs J; see also at 35–36 per McTiernan and Jacobs J J

42. Section 15 was substituted by the *Constitution Alteration (Senate Casual Vacancies)* 1977

43. cf *Theophanous* v *Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 189 per Dawson J where his Honour states that "other sections make it clear that senators and members of the House of Representatives shall be chosen by election."

44. See *Attorney-General (Cth), Ex rel McKinlay* v *The Commonwealth* (1975) 135 CLR 01 at 58 per Stephens J

45. Sections, 8, 30, 41, of the Constitution

46. Sections 7, 24 and 128 of the Constitution

47. Sections 24, 26, 27, 128 of the Constitution

48. See fn **38**

49. See fn **40**

33. Pursuant to section 274(7)(d), the Divisional Returning Officer is to proceed with the scrutiny of ballot papers as follows:

> "(i) the candidate who has received the fewest first preference votes shall be excluded, and each ballot paper counted to the candidate shall be counted to the candidate next in the order of the voter's preference;
>
> (ii) the process of excluding the candidate who has the fewest votes, and counting each of his or her ballot papers to the unexcluded candidate next in the order of the voter's preference, shall be repeated until only 2 candidates remain in the count; and
>
> (iii) if, following the ascertainment of the first preference votes given for each candidate or the exclusion of candidates under this paragraph, a candidate has an absolute majority of votes, that candidate shall be elected."

Section 274(9) provides that "[i]f, on any count, 2 or more candidates have an equal number of votes and one of them has to be excluded, the Divisional Returning Officer shall decide which of them shall be excluded."

34. The provisos to section 268(1)(c) are:
"Provided that, where the voter has indicated a first preference for 1 candidate and an order of preference for all the remaining candidates except 1 and the square opposite the name of that candidate has been left blank, it shall be deemed that the voter's preference for that candidate is the voter's last and that accordingly the voter has indicated an order of preference for all the candidates:

Provided further, where there are 2 candidates only and the voter has indicated his or her vote by placing the figure 1 in the square opposite the name of 1 candidate and has left the other square blank or placed a figure other than 2 in it, the voter shall be deemed to have indicated an order of preference for all the candidates."

35. By section 274(8), a ballot paper is to be "set aside as exhausted where on a count it is found that the ballot paper expresses no preference for any unexcluded candidate."

36. See section 268(1)(a). Note that, by section 268(2), a ballot paper shall not be informal by virtue of section 268(1)(a) if the relevant Divisional Returning Officer is satisfied that it is an authentic ballot paper on which a voter has marked a vote

37. See section 268(1)(d). Note, however, that the proviso to that paragraph makes formal a ballot paper so marked by an officer of the Electoral Commission, notwithstanding that marking the ballot paper in that way contravenes section 271

38. This "paradox" occurs because the provisions of the Act governing the counting of votes for both Senate elections (section 273) and House of Representatives elections (section 274) allow that candidates can be "excluded" in certain circumstances, and each ballot paper counted to them counted to the candidate next in order of voter's preference. A candidate is excluded when he or she has the fewest votes at a given stage of the distribution of preferences: see section 273(13) and (13A), and section 274(7)(d). In some circumstances, the notional addition of ballot papers to those ballot papers already counted would result in the candidate ranked last on all of those additional ballot papers becoming a successful candidate, even though he or she would have been unsuccessful but for the inclusion of the additional ballot papers. This occurs when the additional ballot papers have the effect of changing the sequence in which candidates are excluded and, hence, which ballot papers are counted towards which unexcluded candidates. See Fishburn and Brams, "Paradox of

50. (1992) 177 CLR 1
51. (1992) 177 CLR 106
52. (1992) 177 CLR 1 at 50 per Brennan J, 76–77 per Deane and Toohey J J, 94–95 per Gaudron J; (1992) 177 CLR 106 at 142–143 per Mason CJ, 150–151 per Brennan J, 169 per Deane and Toohey J J, 217 per Gaudron J
53. (1992) 177 CLR 1 at 50–51 per Brennan J, 76–77 per Deane and Toohey J J, 94–95 per Gaudron J; (1992) 177 CLR 106 at 142–144 per Mason C J, 169 per Deane and Toohey J J, 217–218 per Gaudron J. See also *Theophanous* v *Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 150–152 per Brennan J, 178–179 per Deane J; *Cunliffe* v *The Commonwealth* (1994) 182 CLR 272 at 300–301 per Mason CJ, 323–326 per Brennan J, 336–338 per Deane J, 387–388 per Gaudron J
54. See *Australian Capital Television* (1992) 177 CLR 106 at 142–143 per Mason C J
55. See Pt XVIII of the Act
56. See, for example, sections 268(1)(c) and 270(2)
57. [1949] AC 398 at 413
58. Sections 268(1)(c), 270(2) and 274
59. In their judgement, Toohey and Gaudron J J hold that it is not correct to say that section 240 obliges a voter to express a preference for a candidate whom he or she wishes to vote against. Their Honours point out, for example, that, if there are three or more candidates, a vote will be counted until it is exhausted provided that the number 1 has been placed against one candidate and there are numbers against all other candidates or all other candidates but one. Nevertheless, I think that the better view is that sections 268(1)(c) and 270(2) of the Act, while saving the validity of the ballot papers that do not comply with section 240, do not mean that section 240 does not require on the voter to vote in accordance with that section. The words "a person shall mark his or her vote on the ballot paper by" seem to me to require the voter to follow the directions in the section
60. Sections 268(1)(c) and 270(2)
61. *Smith* v *Oldham* (1912) 15 CLR 355 at 359–360, 362–363; *Australian Capital Television Pty Ltd* v *The Commonwealth* (1992) 177 CLR 106 at 157, 220, 225–226, 234
62. *Australian Capital Television Pty Ltd* v *The Commonwealth* (1992) 177 CLR 106; *Theophanous* v *Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211
63. Section 245
64. *Judd* v *McKeon* (1926) 38 CLR 380
65. (1926) 38 CLR 380 at 383, 385. See also *Faderson* v *Bridger* (1971) 126 CLR 271 at 272–273
66. *Judd* v *McKeon* (1926) 38 CLR 380 at 383
67. *Judd* v *McKeon* (1926) 38 CLR 380 at 383
68. cf section 41 of the Constitution which does confer a personal right to vote on certain electors
69. *Theophanous* v *Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 189 per Dawson J
70. cf *Attorney-General (Cth); Ex rel McKinlay* v *The Commonwealth* (1975) 135 CLR 1 at 36
71. (1975) 135 CLR 1 at 36
72. *Australian Capital Television Pty Ltd* v *The Commonwealth* (1992) 177 CLR 106 at 231–232, cf *Sykes* v *Cleary* (1992) 176 CLR at 100, 108, 130, 132
73. *Australian Capital Television Pty Ltd* v *The Commonwealth* (1992) 177 CLR 106 at 227, 235. Nothing in my judgement in *Australian Capital Television* at 227 or in *Theophanous* v *Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 206 should be read as supporting the view that either sections 7 or 24 of the Constitution confers individual rights on electors enforceable against the world. Rather the term "rights" in those judgements should be read in the sense of "the privileges

and immunities which are inherent in, or flow from, constitutional restrictions upon legislative, executive or judicial power": per Deane J in *Theophanous* at 168

74. Crisp, *Australian National Government,* 5th ed (1983) at 137

75. These are Antarctic electors (for whom special provision is made in Pt XVII), those who are entitled under sections 94 and 95 to be treated as eligible overseas electors and those entitled under section 96 to be treated as itinerant electors

76. *Faderson* v *Bridger* (1971) 126 CLR 271; *Lubcke* v *Little* [1970] VR 807; *Douglass* v *Ninnes* (1976) 14 SASR 377; cf *O'Brien* v *Warden* (1981) 37 ACTR 13

77. *Kean* v *Kerby* (1920) 27 CLR 449 at 459, 465 per Isaacs J

78. *Smith* v *Oldham* (1912) 15 CLR 355 at 358–359, 360–361, 362–365; *McKenzie* v *The Commonwealth of Australia* (1984) 59 ALJR 190 at 191; 57 ALR 747 at 749

79. Unreported, High Court of Australia, 20 February 1996 at 137–139

80. (1994) 182 CLR 104 at 120–121, 146–147, 163, 190. See also *Nationwide News Pty Ltd* v *Wills* (19920 177 CLR 1 at 47–48, 72–73; *Australian Capital Television Pty Ltd* v *The Commonwealth* (1992) 177 CLR 106 at 140, 149, 186–187; *Stephens* v *West Australian Newspapers Ltd* (1994) 182 CLR 211 at 235; *Cunliffe* v *The Commonwealth* 91994) 182 CLR 272 at 337, 360

81. *Ashby* v *White* (1703) 2 Ld Raym 938 at 950, 953 [92 ER 126 at 134, 135–136]

82. (1992) 177 CLR 1 at 72

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