Discrimination in Canada's Electoral Law*

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The analysis of electoral discrimination is new for Canadians. This is understandable, for until recently we have had no history of active legal, judicial or citizen involvement in what might broadly be categorized as electoral questions. For their part, Canadian courts in the past were loathe to play any role in settling political disputes, and for theirs, individuals and groups began to challenge specific provisions of federal and provincial election laws only when they were armed with the *Canadian Charter of Rights and Freedoms.* With respect to federal election officials, courts in the past have held their conduct could only be reviewed by Parliament of Canada unless jurisdiction was specifically granted to them by legislation. It could be that with the advent of the *Charter* this may well change, but no court has yet specifically addressed this question since the adoption of the *Charter*.

However infrequent they might have been, the few cases involving political parties were invariably dismissed by courts on the grounds that they lacked jurisdiction to decide matters governing private organizations or groups without a "legal existence" in their own right.[1] It is most unlikely that the same sort of decision would be reached today. Although the final word on the legal status of political parties awaits a court decision, amendments to the *Canada Elections Act* adopted in 1974 brought to an end the previous informal standing of parties by imposing on them a detailed set of statutory obligations and responsibilities. The move to recognize in law the existence of political parties resulted from the practical necessities of the then new election expenses provisions. As a party's sources and amounts of income were henceforth to be disclosed and its expenditures limited, party registration with the Chief Electoral Officer would have to become a legal requirement. So too would the appointment of a "chief agent". As the sole individual with the right to incur expenses on the party's behalf, an agent would assume financial responsibility for the party. But ultimately, the party itself would be held legally accountable. In the words of the *Canada Elections Act*:

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1. See, for example, dismissal by the Quebec Superior Court of a case brought against the Progressive Conservative Party of Canada by an advertising agency seeking damages for non-payment of accounts. *Young and Rubicam Ltd.* v. *Progressive Conservative Party of Canada* (22 March 1971), C.S. 803-933.

> *A prosecution for an offence against this Act ... may be brought against a registered party and in the name of that party and, for the purposes of any such prosecution only, the registered party shall be deemed to be a person and any act or thing done or omitted by an officer, chief agent or other registered party within the scope of his authority to act on behalf of the registered party shall be deemed to be an act or thing done or omitted by that party.*[2]

It can be safely said that Canadian political parties no longer exist as purely voluntary and informal associations unknown to the law and without legal capacity. For the purposes of the *Canada Elections Act* they have assumed the characteristics of a "legal personality" with all the rights, obligations and responsibilities contained in that term.[3]

The change in legal standing of political parties is important in any discussion of electoral discrimination in so far as it confirms the old adage "here today, gone tomorrow." Parties previously immune from prosecution for the conduct of their financial affairs no longer enjoy that privileged status. Henceforth the courts can be called upon to decide matters that formerly were deemed to be private and non-justiciable. With that precedent (admittedly statutorily-based) at hand for court involvement, with the newly-discovered interest of Canadians in individual and collective rights, and with the record of American litigations over the last quarter century, can electoral discrimination cases be far behind in Canada?

In truth, the starting gun has already been fired — more as a shotgun, it might be added, than as a pistol. Among the several cases to be decided so far have been those challenging:

> (1) the prohibition on advertising by individuals (other than candidates) or groups (other than political parties) in support of or in opposition to a registered political party or candidate (Quebec [1982] and Canada [1984]);
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> (2) the denial to prisoners of the right to vote (British Columbia [1983], Quebec [1985], Manitoba [1986], Ontario [1988] and Canada [1988]);
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> (3) the denial to federally-appointed judges of the right to vote (Canada [1988]); and
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> (4) the denial to certain categories of persons suffering from mental disease of the right to vote (Canada [1988]).[4]

Where successful (and virtually every one of these challenges to federal and provincial electoral acts has succeeded, save for the occasional prisoners' rights case), the basis for the judgment has been found typically in the *Charter*. For the *National Citizens'*

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2. *Canada Elections Act*, R.S.C. 1985, c. E-2, s.49.

3. Further discussion of this point is to be found in the author's "Recognition of Canadian Political Parties in Parliament and in Law" (1978) 11 Can. J. Pol. Science 33.

4. Most cases are unreported. Names and citations as appropriate will be provided by the author upon request.

Coalition Case of 1984, the freedom of expression guarantees of Section 2 of the *Charter* were sufficient to strike down the prohibitions on third party advertising contained in the *Canada Elections Act*. For the cases testing the restrictions on the franchise, the courts typically applied Section 3 of the *Charter*:

> *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.*

As Section 3 is not subject to the *Charter*'s override clause [s. 33(1)], and as the "reasonable limits" tests of Section 1 have been found wanting by the courts, the successful challenges to discriminatory provisions of election laws have managed in a remarkably short period of time to undo statutory provisions that in some cases are well more than a century old.

Other challenges to electoral legislation have been less successful. At the time of the 1988 election (without doubt the most litigious that Canadians have known) several cases alleging discrimination under the federal electoral law were brought before the courts. With few exceptions they were dismissed. With arguments based at least in part on the *Charter* (notably ss. 3 and 15, but also ss. 2, 7 and 24), these challenges were prompted by concern over allegedly discriminatory provisions (or in some cases by the actions or interpretations of the Chief Electoral Officer or the Broadcasting Arbitrator and their officials) of the *Canada Elections Act* and the *Broadcasting Act*. They included such varied claims as violation of the "constitutional rights" of small political parties when excluded from the nationally-televised leaders' debates; denial of the right to vote of those omitted from the voters' list; unequal treatment of rural and urban electors for the purposes of enumeration; and denial to voters in one constituency of "the opportunity to vote for a member of the Liberal Party of Canada" as a consequence of the withdrawal of that party's candidate following the close of nominations. In every one of these dozen or so cases alleging discriminatory provisions or applications of federal electoral statutes, except for a court ordered enumeration of one urban voter in the federal riding of Victoria, the applicants were unsuccessful in their challenges.

In all, the lessons that might be drawn from the brief post-1982 experience with *Charter*-driven cases are that

> (1) challenges to the electoral laws based on restrictions to the franchise are by far and away the most likely to succeed, but challenges based on other grounds are more problematic;
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> (2) restrictions on a group's freedom of expression are likely to be struck down except in instances where, by applying the equality rights provisions of Section 15 of the *Charter*, a group's contribution to the political debate or its place in the political system is judged to be marginal;[5]

5. In deciding against the Green Party's application to be allowed to participate in the televised leaders' debate during the election campaign, Campbell J. of the Supreme Court of Ontario ruled that "an essential element in the test for the application of the equality rights provisions of s. 15 of the *Charter* is that the applicant be "similarly situated with the major parties." He took the media's failure to "consider the pronouncements

(3) interlocutory injunctions granting temporary relief to plaintiffs statutorily disfranchised or omitted from the voters' list at election time are not likely to be awarded, either because the implicit assumption is that the matter is one to be addressed more properly by legislatures and Parliament than by courts or because the federal or provincial Attorney General has not been served or given notice as required under the appropriate legislation for *Charter* cases to proceed; and

(4) hurried applications, court hearings and decisions are clearly the norm as voters and groups rush to challenge the allegedly offensive provisions or applications of the law within the tight time constraints of a statutorily-defined election period.

It should be recognized that parliamentarians had been prepared by election officials for the assault on the federal electoral legislation that took place in 1988. As Canada's Chief Electoral Officer noted following the most recent election, "the numerous court actions invoking the *Charter* and challenges to the electoral legislation (in 1988) were not unexpected." As far back as 1983 he had used his *Statutory Report* to draw Parliament's attention to "several areas in the *Canada Elections Act* which apparently conflicted with the basic rights and freedoms guaranteed by the *Charter*. The coming into effect in 1985 of Section 15 (equality rights) of the *Charter* added yet another dimension to the issue."[6] The matters drawn to parliament's attention between 1983 and 1986 by the Chief Electoral Officer included most of the key sections of the *Canada Elections Act* discriminating among classes of voters that were subsequently brought before the courts and widely discussed in the media and by the public at the time of the 1988 election. He had called on Parliament to end the disqualification from the vote of federally-appointed judges and the mentally disabled, to provide for a more comprehensive system of enabling Canadians residing abroad to vote, and to take steps to end the distinction drawn between urban and rural voters for the purpose of enumeration. Had Bill C-79 (a massive set of amendments to the *Canada Elections Act* based largely on the Chief Electoral Officer's recommendations and on the Government's own *White Paper on Electoral Reform* of 1986) been approved by Parliament subsequent to its introduction by the Deputy Prime Minister in June, 1987, the great majority
of cases heard by the courts in 1988 would never have had to have been launched. With the death of Bill C-79 when Parliament was dissolved in 1988, it was left to the courts to accomplish much of what Parliament had failed to do over the previous five years to address various forms of electoral discrimination.

If it is reasonable to assume that either court-ordered or legislated changes have ended, or soon will end, discriminatory enfranchisement provisions of federal and provincial statutes, what likely will be the principal electoral discrimination charges to be addressed by the courts in the years ahead? Certainly one of the big ones could be freedom of expression cases if election acts are amended to attempt to outlaw campaign advertising by

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of the applicants to have the same news significance to the public as the pronouncements of the leaders of the major political parties" and the unanimous agreement on the part of the leaders of the three major parties not to debate the Green Party as proof of the claim that the Green Party was not "similarly situated" with the three older parties (Supreme Court of Ontario, Action 32392/88 at 10-11).

6. *Report of the Chief Electoral Officer of Canada* (Ottawa, 1989) at 44.

interested third parties or individuals. The provisions of the *Canada Elections Act* struck down in the *National Citizens' Coalition Case* in 1984 are not likely to surface again. But if they were refashioned in some way to accomplish much the same sort of goal, that apparently would meet the objections that candidates, parties and even election officials continue to voice over the non-regulation of special interest groups. Critics of these groups assert that they enjoy a clearly privileged position by remaining free of the spending and time constraints that are imposed on registered parties and candidates during election campaigns. The battle between the two sides on this issue could well end up in the courts again given any legislative attempt to restrict third party advertising.

Legal challenges on a host of other lesser grounds to electoral statutes and to regulatory and administrative decisions affecting the operation of elections will almost certainly continue to be a feature of future elections. The subject-matters, as became apparent from some of the recent challenges to federal and provincial electoral legislation, will depend on little more than a modicum of human ingenuity and an interest in testing the limits to which the *Charter* might be pushed.[7] For their part, courts will no doubt continue to manifest their unease at having to deal with such questions by expressing, as they did in the Green Party challenge of 1988 to the rules governing the nationally-televised leaders' debate, "grave jurisdictional" reservations and maintaining that "it is not for the court to assume the role of the regulator."[8] In simple terms, court dismissal or denial of applications alleging discrimination will not end simply because the *Charter* has facilitated attacks on electoral statutes.

It is in a different direction (different to the extent that Canadians have so far scarcely addressed the issue) that courts may soon be called upon to move in their adjudication of claims of alleged electoral discrimination. The question of "voter equality" may well emerge as one of the more likely topics to be added to the political, legislative and judicial agendas in the years ahead. The challenges, if launched, would likely be to two types of legislative or constitutional arrangements: the determination of both federal and provincial constituency boundaries and population size *within* the respective provinces and territories, and the federal distribution of seats *among* the provinces and territories. The challenges, different in kind and in intent, would nonetheless be based loosely on the principle of "one person-one vote" — a simple and attractive concept in the abstract, but a complex and contentious one in the application.

So far as the first of these two questions is concerned, the recent history of United States Supreme Court decisions highlights the difficulties that Americans have had to face in coming to grips with this thorny matter. It also points to the direction that Canadian courts would eventually take should they chose to become as activist and as involved as their American colleagues in defining voter equality. The noted student of reapportionment

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7. Witness, for example, an instance of one individual who having lost his party's nomination nonetheless sought, on the grounds that he was being denied his right to qualify for membership in the House of Commons (*Charter*, s. 3), to have his name added to the list of candidates after the properly-nominated candidate withdrew from the contest following the close of nominations. The application was dismissed by Associate Chief Justice J.A. Jerome. *Kenneth Robinson and Beryl Innes* v. *A.G. for Canada and Dorothy Kirby* (31 October 1988), T-2099-88 (F.C.).

8. *Supra* note 4 at 4, 5.

and redistricting, Robert G. Dixon, once described America's approach to these matters as "kaleidoscopic", amounting to constantly changing patterns of "new cases, new doctrines, new possibilities, and new insights follow[ing] each round of experience."[9] United States Supreme Court decisions, from *Baker* v. *Carr* and *Reynolds* v. *Sims* in the 1960s to *Davis* v. *Bandemer* in 1986, bear out his assessment. In less than three decades American courts moved from granting the justiciability of redistricting cases, through the adoption and application of the "one person-one vote" doctrine, to the acceptance of "inverse" and "affirmative" gerrymandering and the rejection of "racial" and "political" gerrymandering.[10] This remarkable list of justiciable subjects suggests that there appear to be few electoral discrimination issues concerning population distribution that the courts have been unprepared to tackle. The net result is that American judges, having dealt with literally hundreds of cases brought against state legislatures for their design of state and/or congressional districts, have become active players in the more-or-less continual game of redistricting politics in the United States. For this, the jurisprudential origin for American court involvement can be traced to the U.S. Supreme Court majority ruling in *Reynolds* v. *Sims* (1964): "the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a state."[11]

Canadians have just recently begun to play a similar game of turning to the courts to judge the fairness of their electoral boundaries — and at that on only a modest scale. How often and on what conditions they will involve the courts remains a matter of speculation. It might be argued that the first (and to date the only) judgment to accept both the justiciability of the issue and the arguments about the unfairness of electoral districts with wide disparities in population is an indication of the active role that the courts will play in the future, and that Canadian judges, politicians, interested citizens and groups will soon be following the lead of the Americans. It is far from clear at this stage, however, that that will come to pass. Electoral boundary readjustments in Canada, based as they are in several jurisdictions on statutorily-defined population limits, are qualitatively and historically different from American redistricting. Acknowledging that distinctiveness ("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 British Columbia Supreme Court in *Dixon* v. *A.G. B.C.* (1989) nonetheless broke new Canadian ground by accepting the proposition that "equality of voting power is the single most

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9. R.G. Dixon, *Democratic Representation: Reapportionment in Law and Politics* (New York: Oxford University Press, 1968) at 7.

10. See the review of the *Bandemer* case and of earlier court redistricting decisions in "Justices Uphold Partisan Lines in Redistricting" *New York Times* (1 July 1986) A1, A17. Inverse and affirmative gerrymandering enable states to design electoral boundaries in such a way as to ensure legislative representation for racial or religious minorities and political parties. Claims of political gerrymandering, though the districts were equal in population, were found in 1986 to be justiciable in that the design of the districts was such as to advance the majority party's political interests at the expense of the minority party.

11. The literature on reapportionment and redistricting in the United States seems almost as vast as the number of court cases. In addition to Dixon, see B. Grofman *et al.*, eds, *Representation and Redistricting Issues* (Toronto: D.C. Heath, 1982); "The Supreme Court — Leading Cases" (1986) 100 Harv. L. Rev. at 153-163; and J. M. Anderson, "Politics and Purpose: Hide and Seek in the Gerrymandering Thicket after *Davis* v. *Bandemer*" (1987) 136 U. Pa. L. Rev. at 183-237.

important factor to be considered in determining electoral boundaries."[12] Madame Chief Justice McLachlin found that the province's electoral districts (at that time varying in population from 5,511 to 68,347) violated the right to vote as guaranteed by Section 3 of the *Charter of Rights and Freedoms* and ruled that a new set of districts with more equitable population figures must be approved by the provincial legislature.[13]

However forceful the egalitarian assertions of the court in the *Dixon* case may seem, that decision serves nicely to highlight one of the striking differences between boundary readjustments in Canada and redistricting in the United States. American courts judge each case of population deviation more or less on its own merits. Even so, since *Baker* v. *Carr* a trend in the direction of tighter limits on population disparities has been established. Initially accepting as a rule of thumb something in the order of 15 per cent deviation from a state's average population figure, the courts followed this later with 10 and then 5 per cent limits. Instances have been recorded of courts (including the United States Supreme Court) voiding districts designed with even smaller deviations.[14]

At the federal level, Canada has addressed the matter of population deviations by way of legislation rather than through court rulings. Since the adoption in 1964 of the *Electoral Boundaries Readjustment Act,* parliamentary seats are to be constructed to correspond to a province's electoral quota "as close as reasonably possible."[15] But if there are persuasive economic, geographic or social considerations, electoral districts may be designed that depart from that rule by as much as 25 per cent above or below a province's population quota. Indeed with the acceptance of recent amendments to the Act, parliamentary seats that exceed the quota by more than the +/- 25 per cent limit may now be constructed when there are deemed to be "extraordinary" circumstances. That amendment itself might be seen by some as grounds for challenging the federal legislation. Although in its application in the most recent redistribution the "extraordinary" circumstances option was used by only three of the eleven federal commissions, it nonetheless led to the creation of constituencies of considerably different populations. Newfoundland, whose commission designed the constituencies with the most extreme differences, ended up with one of its seven seats 29 per cent above the province's electoral quota and another 61 per cent below it.

Since the passage of the *Electoral Boundaries Readjustment Act,* several provinces have followed the federal lead and established the +/- 25 per cent figures as outside limits for deviations from the population quota for seats in the provincial assemblies. As the *Dixon* decision arose in a province without any statutorily-defined limits,

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12. *Dixon* v. *Attorney General of British Columbia* (18 April 1989) (B.C.S.C.).

13. Note that the decision was based not on s. 15 ("equal protection ... of the law"), as would have been the basis for an American decision, but on s. 3 of the *Charter,* to which there is no equivalent in the American Constitution.

14. Robert G. Dixon, Jr., "Fair Criteria and Procedures for Establishing Legislative Districts," in Grofman *et al., supra* note 11 at 8, 13, 17.

15. *Electoral Boundaries Readjustment Act* R.S.C. 1970 C.E-20, s. 13, as amended by S.C. 1986 C-8, s. 6. The electoral quota is determined by dividing a province's total population as determined by the latest decennial census by the number of parliamentary seats to which it is entitled.

it is particularly instructive about the current status of arguments regarding malapportioned electoral districts. The court recognized in *Dixon* that British Columbia had had no acceptable upper and lower limits for its electoral districts and that substantial population inequities had resulted. In ordering the legislature to design a new set of constituency maps, it suggested that they be drawn within a +/- 25 per cent range of the province's electoral quota. Such limits, in the view of the court, were both "reasonable" and "tolerable".[16] For those jurisdictions without legislatively-approved limits, a precedent now has been set for courts to become involved at least to the extent of accepting proposals for electoral districts within the standards first agreed to by the federal Parliament in 1964. *Dixon's* major impact (apart from its immediate political fallout in British Columbia) is almost certainly going to derive from its acceptance of the 25 per cent limits as a standard that is judged to be fair and reasonable.

Clearly the "equality of voting power" proposition that was so critical to the court's reasoning in *Dixon* v. *A.G. B.C.* would not have met the test imposed by the U.S. Supreme Court in *Reynolds* v. *Sims* and later redistricting cases. Although the respective courts played similar roles in the *Dixon* and *Reynolds* cases, the meaning they gave to "voter equality" in those decisions points to a difference between the attitude toward and the handling of electoral reapportionment in the two countries. In Canada, parliamentary agreement on statutorily-defined federal limits preceded by 25 years any court involvement in defining the adequacy of population deviation limits. As if to reinforce the eventual pervasiveness of those limits, the British Columbia court's decision in 1989 was based on acceptance of what were initially federal standards — even though the matter being contested involved electoral readjustments of provincial, not federal, districts. In the United States, it was the failure to accept any legislated maxima for population deviations at the national level as well as the arbitrary and capricious nature of congressional redistricting by state assemblies that led, in Justice Frankfurter's prophetic phrase, to the involvement of courts in the "political thicket" of electoral reapportionment.[17] The court-imposed limits on population deviations of American redistricting became a measure of that country's commitment to an egalitarian electoral ethic. So far that has been unmatched in Canada. It will almost certainly remain so if *Dixon*, with its acceptance of the 25 per cent tolerance limits, is the harbinger of future cases addressing the matter of voter equality *within* federal or provincial constituencies.

With respect to the distribution of parliamentary seats *among* the provinces, there is a long and complicated history dating back to the early years of Confederation that suggests little acceptance of the idea that population should be the sole criterion for determining the number of seats to which a province is entitled. Parliamentarians have not hesitated to change the redistributional rules if, by so doing, they managed either to postpone some province's unavoidable loss of seats or to protect in perpetuity all provinces from ever falling below an agreed-upon minimum. Although now spent, the 15 per cent rule (adopted in 1952 to cut back on Saskatchewan's loss of seats from five to three) is an example of the former. Of the latter, there are at present two principal types. The "senatorial floor" clause has guaranteed, since its acceptance in 1915 as a constitutional amendment,

16. *Dixon* v. *Attorney General of British Columbia*, *supra* note 12 at 61.

17. *Colgrove* v. *Green,* 328 U.S. 549 (1946) at 553-54, 556.

that no province will ever have fewer MPs than it has Senators, and the "grandfather" clause, adopted most recently as part of the *Constitution Act, 1985 (Representation)*, ensures that no province will ever have fewer federal districts than it received in the redistribution of 1976. The effect of these two rules in the latest redistribution has been to give six provinces a total of 12 seats more than their population entitled them — seats awarded, it should be noted, not at the expense of, but rather in addition to, those awarded the larger provinces with faster growing populations. A reasonable projection of the next census suggests that with the post-1991 redistribution the figures will increase to seven provinces and 17 seats. At that point only three of the 10 provinces (Ontario, British Columbia and Alberta) will have their alloted seats determined solely on the basis of population.

A potentially politically sensitive, though clearly rarely discussed, question is to what extent parliamentary seats should be distributed among the provinces strictly according to population. This was at the heart of a recent court case. A challenge to the federal *Constitution Act, 1985 (Representation)* by the City of Vancouver and Mr. Ian Waddell, M.P., was launched following the latest redistribution against the formula contained in the Act for determining the number of seats to which each province is entitled. The plaintiffs argued (unsuccessfully at the trial division and on appeal, with dismissal by the Supreme Court of Canada of leave to appeal) that the 1985 changes violated the principle of "proportionate representation of the provinces" contained in section 52 of the *Constitution Act, 1867*. The courts held that Parliament has the power to change the representation formula without first obtaining the consent of the provinces and that absolute proportionate representation need not be adhered to in calculating the number of Commons seats allocated to the various provinces. It is notable that the plaintiffs did not argue their case on the equality and democratic rights sections of the *Charter* (15 and 3), nor did they challenge the +/- 25 per cent limits of the *Electoral Boundaries Readjustment Act*.[18] What weight such arguments would carry in any future cases charging "discrimination" against certain provinces in the allocation of federal seats remains an open question at this stage.

The two recent cases heard in British Columbia (the one challenging widely divergent provincial constituency populations, the other contesting federal electoral boundary legislation) suggest that Canadian courts are willing to accept liberal standards in defining "one person-one vote." If that remains the case, and there is no apparent reason at the moment to doubt the continued acceptance of those standards, the "political thicket" about which Mr. Justice Frankfurter warned in the United States will almost certainly be avoided in Canada.

18. They were careful to acknowledge in their factum on appeal that "unlike the U.S. cases, [this] is not one involving equality among ridings within one state or one province. Geographic, historical, economic or topographical considerations are relevant to drawing boundaries within a state or a province" (Plaintiffs' Factum, Court of Appeal (5 February 1988) at 20-21).