Electoral Laws in Free and Democratic Countries: Political Questions and Judicial Review

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I. CONSTITUTIONALISING POLITICAL REPRESENTATION

Constitutional charters do not normally include detailed rules as to political representation and the operation of the electoral laws.[1] This is partly for aesthetic or stylistic reasons, going to the desirable length of any constitutional charter and the understandable preference of constitution-makers to confine such instruments to general principles, uncluttered by too much low-level detail of the sort normally necessary for the spelling out of electoral systems. Other causes concern the quest for stability and long-range continuity in the constitutional charter, for in no area of constitutional law do political tastes seem to change so easily or frequently as with electoral systems. A further explanation involves traditional, "classical" conceptions of what a constitutional charter should try to do. Right up until the present day many constitution-makers still seem to envisage constitutional charters as being limited to the institutions and processes of *government* only — the main community decision-making organs (executive, legislative, and judicial), how they are to make and publish their decisions, and their institutional equilibrium *inter se*. The emphasis on inclusion in constitutional charters of constitutional Bills of Rights, on the late 18th century American and French models, is a latter-day trend in general Western constitutionalism, dating from the era between the two World Wars and being consummated in Canada only as late as 1982 with Prime Minister Trudeau's "Patriation" package. The emphasis on a "constitutionalising" of political representation, by stipulating in the constitution itself minimum, limiting principles as to elections and their fair conduct and also as to the organisation and control of political parties, is even more recent. So also is the attempt by the Courts to create their own constitutional "ground rules" on political representation, either as alternatives to constitutional charter-defined norms where these do not exist as such, or else as a supplement to such charter norms where they do exist but need up-dating or fleshing-out to be rendered operational as constitutional law-in-action today.

The Constitution of the United States, as originally adopted in 1787, did include certain rules as to political representation — among these the principle of minimum representation of each state of the federal system in the lower house of the federal legislature [Article I(2)3], and also the age and citizenship qualifications of candidates for election [Article I(2)2]; the principle of equal representation of each state in the federal Senate, and of delegation of the Senators from each state by the relevant state legislature, and the length of term of office of such Senators [Article I(3)1]; the principle of election of the federal President by an electoral college composed of members selected from each state [Article II(1)]. These provisions, as originally adopted, have been modified, with the passage of time. This has sometimes been by constitutional custom and convention developing as a gloss on the constitutional text as written, as with the change in the nature and character of the members of the electoral college for the federal Presidency, from genuine electors having their own full discretion (as envisaged both in Article II(1), and also the Twelfth Amendment to the Constitution adopted in 1804) to persons exercising a purely mechanical, automatic *role* in strict accord with the popular majority vote cast within their states at the Presidential elections. At other times, the original constitutional rules have been changed by formal

1. E. McWhinney, *Constitution-Making: Principles, Process, Practice* (Toronto: Univerity of Toronto Press, 1981), at 96ff. *et seq.* The detailed case-law discussion that follows — from the United States, West Germany and Japan — draws freely, and without express citation, upon E. McWhinney, *Supreme Courts and Judicial Law-Making: Constitutional Tribunals and Constitutional Review* (Boston: Nijhoff, 1986).

constitutional amendment, as with the substitution for the original system of indirect election or delegation of Senators by state legislatures, of direct, popular election of the Senators within their respective states, this being effected by the Seventeenth Amendment, adopted in 1913, and reflecting the more general, long-range trend in comparative constitutionalism away from "aristocratic," hereditary or nominated or indirectly selected, upper houses, to popularly elected legislative chambers.

Some major attempts were made to change the positive law of the constitution as to electoral representation in the United States, by way of formal constitutional amendments. The Fifteenth Amendment, adopted in 1870, as the third of the post-Civil War, "Reconstruction" Amendments, declares that:

> *The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, colour, or previous condition of servitude.*

The historical intent of the Fifteenth Amendment, and its general egalitarian impulse and motivation, were clear from the outset. It cannot be divorced from its companion Amendments — the Thirteenth, adopted in 1865, declaring that "neither slavery nor involuntary servitude" should exist within the United States; and the Fourteenth, adopted in 1868, which both extended the Due Process of Law guarantees of the Fifth Amendment (adopted in 1791 and applying to the federal Government) to the individual states, and also established the general constitutional principle of "the equal protection of the laws." But the constitutional history of the Thirteenth, Fourteenth, and Fifteenth Amendments is that their egalitarian principles became, at the level of constitutional law-in-action, nominal and not normative. Those Amendments were caught up in the political reaction, after the brief "Reconstruction" period, to the harshness and excesses of the initial federal Government dealings with the defeated Southern States. The spirit of post-Civil War, North-South political reconciliation and also political realism dictated that deference to another, *federal* constitutional principle — here the ability of the legislatures of the Southern States and their governments to determine their own political future, within the United States — should prevail over the constitutionally egalitarian norms inscribed in the three "Reconstruction" Amendments. There were direct consequences, in the area of political representation. Action at the state level, executive or legislative, differentiating on the basis of race in terms of access to and participation in the electoral processes, was effectively tolerated through the Courts' invoking legal principles of judicial non-intervention in such matters in spite of the clear directives of the constitutional norms established by the "Reconstruction" Amendments. In general, fundamental changes in judicial attitudes — back to the spirit and letter of the United States Constitution and its Thirteenth, Fourteenth, and Fifteenth Amendments — would have to wait half a century for a new judicial activism, itself the product of the "Court Revolution" of 1937 and of the general civil libertarian, liberal activist drives in the community from the Second World War onwards.

II. TRADITIONAL JUDICIAL SELF-RESTRAINT, AND THE DOCTRINE OF "POLITICAL QUESTIONS."

Race relations in the practice and operation of electoral laws shade off into the larger issue of constitutional scrutiny and control, according to constitutional charter-stipulated norms, or the general spirit of the constitution, of political representation, including here the electoral processes as a whole and political parties as the main public organs for such political representation. The United States Supreme Court, as late as 1946, refused to intervene and strike down the gerrymandered federal electoral districts within the State of Illinois, as apportioned under Illinois State law. The Court, in its official opinion in *Colegrove v. Green*,[2] written by Mr. Justice Frankfurter, ruled the matter to be "of a peculiarly political nature and therefore not meet for judicial determination."[3] Mr. Justice Frankfurter suggested, in fact, that "the remedy ultimately lies with the people". He noted that the Court had "traditionally held aloof" from scrutinising "party contests", and that it was "hostile to a democratic system to involve the judiciary in the politics of the people". But the decision in *Colegrove v. Green* contained a strong dissent, by Justices Black, Douglas, and Murphy,[4] who considered the issue to be judicially cognisable. There was also a concurring opinion by Justice Rutledge[5] who, though he was with the Court majority on other grounds, nevertheless considered the substantive issue of the constitutionality of the Illinois apportionment according to Article I(2) and the Fourteenth Amendment, to be reviewable by the Courts. It was obvious, in view of these strong judicial doubts, that the principle of judicial self-restraint as to intervening to correct abuses in the electoral processes, would soon be challenged. The U.S. Supreme Court had already, in *Smith v. Allwright* in 1944[6], rejected the distinction, stemming from its earlier jurisprudence, between "State" action which would be violative of the Fourteenth and Fifteenth Amendments, and "private" action, which, *ex hypothesi*, would not, when it ruled that a political party's Primary election to choose its candidates for the federal Senate and House of Representatives was an integral part of the general electoral system, and that as the Party Primaries were conducted under State authority, the Party became, in effect, an agent of the State. On this rationale, the Court held that the exclusion of voters from the Texas Democratic Party primary, on account of race and colour, amounted to a violation of Article I(2) and of the Fourteenth and Fifteenth Amendments of the Constitution.

III. THE NEW JUDICIAL ACTIVISM: "EQUAL PROTECTION OF THE LAWS" IN THE ELECTORAL PROCESSES

In *Gomillion v. Lightfoot*, in 1960,[7] the U.S. Supreme Court invoked the Fifteenth Amendment to the Constitution to invalidate a State reapportionment plan that would have denied their pre-existing Municipal vote to almost all the Negro voters within the City of

2. 328 U.S. 549 (1946).

3. *Ibid.* at 556.

4. *Ibid.*

5. *Ibid.*

6. 321 U.S. 649 (1944).

7. 364 U.S. 399 (1960).

Tuskegee, Alabama, by removing them from within the City's electoral limits. Finally, in 1962, in *Baker v. Carr*,[8] the U.S. Supreme Court came to grips, frontally, with its earlier 1946 holding in *Colegrove v. Green*,[9] in which it had applied judicial self-restraint and refused to intervene in electoral cases generally. Voters within the State of Tennessee had challenged, on the ground of denial of federal constitutional rights and specifically of the Fourteenth Amendment's Equal Protection clause, the State's sixty-year-old apportionment statute governing elections to the State legislature. In the years since the first enactment of that State statute, the population distribution within the State had altered markedly, creating severe imbalances — in the ratio, in extreme cases, of more than nineteen to one — between different State electoral districts; but no new apportionments had been made. The U.S. Supreme Court, re-examining *Colegrove v. Green*, now held such electoral questions to be judicially cognisable. It therefore reversed lower court judgments denying jurisdiction, and remanded the case for application of Fourteenth Amendment Equal Protection principles.

This U.S. Supreme Court landmark decision, holding electoral issues to be justiciable and conceding legal standing-to-sue to individual voters, opened the flood-gates to constitutional litigation designed to effect more equitable and more "representative" legislative apportionment systems for both federal and state elections. This was achieved, as to equality of federal Congressional electoral districts, in *Wesbury v. Sanders* in 1964[10]. It was achieved as to State legislatures (and, in the actual instance involved, a State upper house) in *Reynolds v. Sims*, also decided in 1964[11]; and from this case, the "One Citizen, One Vote" principle evolved. In *Wesberry v. Sanders*, dealing with federal electoral districts, the Court decision was based squarely upon Article I of the Constitution. In *Reynolds v. Sims*, dealing with the contested Alabama State upper house's thirty-five senatorial districts, each of which elected one State senator, but with variations in populations within each district from 15,000 to more than 600,000 persons, the Court decision was related directly to the Fourteenth Amendment Equal Protection principle.

The consequences of the new jurisprudence were clear and substantial. Not merely did the Supreme Court act to ensure fair and honest political representation systems at both federal and State levels, in the spirit of Justice Harlan Stone's dictum from the *Carolene Products* case in 1938[12], of keeping the general political processes free and unobstructed. There were also important implications for the Court's work-load and its claims to specialist, as distinct from a general constitutional expertise. The Supreme Court could, manifestly, annul unjust electoral laws and practices on constitutional grounds. But unless the Court was prepared to sit as a sort of continuing electoral boundaries commission, it might, as Justice Frankfurter had noted as a rationale for the judicial "self-restraint" of *Colegrove v. Green* in 1946, perforce have to accept the temporary substitute of elections-at-large, on a State-wide basis, for federal or State elections as the case may be, and then depend on the eventual goodwill and desire to cooperate in good faith of the relevant State legislature for affirmative,

8. 369 U.S. 186 (1962).

9. *Supra* note 2.

10. 376 U.S. 1 (1964).

11. 377 U.S. 533 (1964).

12. 304 U.S. 144 (1938) at 152, n. 4.

follow-up action to any Court decisions striking down existing State electoral laws as unconstitutional.

In 1964, at the time the landmark, judicial activist, interventionist decisions on voting laws were being rendered by the Supreme Court, a further formal constitutional amendment, the Twenty-Fourth, indicated just such an affirmative will to cooperate on the part of both the federal legislative majorities that legally initiated the constitutional amendment, and the State legislative majorities that then ratified it. The Twenty-Fourth Amendment struck down the "poll tax", a device adopted in many of the defeated Southern States immediately after the Civil War to restrict access by Negroes to the electoral laws. At the same time, the Twenty-Fourth Amendment gave the federal legislature power to enforce that constitutional ban by appropriate legislation. Since the members of both federal Houses are elected in each State, according to State electoral laws, the establishment of such federal constitutional norms — in the Fifteenth and Twenty-Fourth Amendments — controlling and overriding State laws, and authorising further federal enforcement laws if needed — becomes crucial, as does continuance of the supervisory, monitoring role as to fairness of electoral laws effectively assumed by the Supreme Court since the early 1960s. In 1965, pursuant to the Fifteenth and Twenty-Fourth Amendments, the U.S. Congress, with strong Presidential pressure applied to it, enacted the *Voting Rights Act* establishing substantial federal authority to break down State discriminatory barriers of a racial character in the State electoral laws. This 1965 federal statute abolished literacy tests, waived accumulated poll taxes, and gave the federal Attorney-General vast discretionary powers to deal with areas suspected of discrimination against Negro voters. These powers included sending in federal examiners to any county in which 50 percent or more of the voting age population was not registered, and power in such federal examiners then to list all qualified voters and to declare them eligible to participate in elections. Portions of the 1965 federal statute were challenged in the case of *South Carolina v. Katzenbach* in 1966[13], but the challenges were firmly rejected by the Supreme Court, with Chief Justice Warren taking the opportunity to deliver a sweeping constitutional endorsement of the federal law's basic philosophy, in terms of the Fifteenth Amendment above all, of massive federal Governmental intervention and activism in support of voting rights. In a further statute, the federal *Voting Rights Act* of 1970, Congress went even further, prohibiting the use of literacy tests in all elections, where such tests were not already proscribed by the 1965 Act. This prohibition was upheld by the Court. With all the public evidence that literacy tests had reduced voter participation in a racially discriminatory manner, a nation-wide ban on literacy tests had become appropriate (*Oregon v. Mitchell*).[14]

The U.S. Courts had come a very long way, by now, from the judicial self-restraint and conscious judicial disengagement from the electoral processes, manifested in *Colegrove v. Green* in 1946.[15] The new judicial attitudes not merely reflected the conclusion, flowing from the *Carolene Products* case in 1938[16] that the judicial deference to the legislature and to legislative majorities, bound up in the Presumption of Constitutionality in favour of

13. 383 U.S. 301 (1966).

14. 400 U.S. 112 (1970).

15. 328 U.S. 549 (1946).

16. *Supra* note 12.

legislative action, is predicated upon the legislatures concerned being representative, and also on their being fairly and honestly elected in the first place. They also reflected an increasing judicial sophistication in the examination of the theory, and also the actual practice, of political representation and of different electoral plans, that is a necessary concomitant of any judicial activism in regard to the electoral processes generally.

IV. POLITICAL PARTIES AND THE DOCTRINE OF CONSTITUTIONAL EQUALITY

The West German Constitution, the Bonn Constitution, adopted in 1949, contains some major sections devoted to political representation generally and to political parties in particular.[17] Article 38 lays down the basic principle that members of the lower House (the *Bundestag*) of the federal legislature are to be

> *elected in general, direct, free, equal, and secret elections. They shall be representatives of the whole people, not bound by orders and instructions, and shall be subject only to their conscience [Article 38(1)].*

Some other constitutional provisions, such as the establishment of the legal age for voting as eighteen [Article 38(2)], and the prescribing of a fixed, four-year term for the *Bundestag* [Article 39(1)], need not now concern us. But one other major constitutional provision, Article 21 (Political Parties), lays down constitutional ground rules for the character, organisation and conduct of political parties

> *(1) The political parties shall participate in the forming of the political will of the people. They may be freely established. Their internal organisation must conform to democratic principles. They must publicly account for the sources of their funds.*
>
> *(2) Parties which, by reason of their aims or the behaviour of their adherents, seek to impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany, shall be unconstitutional. The Federal Constitutional Court shall decide on the question of unconstitutionality [Article 21].*

There is a certain relation of tension between Article 21 (Political Parties) and Article 38 (Elections), in the actual legislative practice within the *Bundestag*. Is the *Bundestag* member to have his own freedom-of-decision, or should he conform to the policy of his political party? Both Articles reflect key objectives of the Founding Fathers of the Bonn Constitution in 1949. They had endeavoured to profit from the lessons of past German history and to constitutionalise, within the new constitutional charter, institutional and procedural safeguards that would effectively prevent any recurrence of the perceived governmental failures of the

17. For the case-law material that follows, see also E. McWhinney, *Foderalismus und Bundesverfassungsrecht* (1961), E. McWhinney, *Constitutionalism in Germany and the Federal Constitutional Court* (Leyden, W. Germany: Sythoff, 1962).

preceding Weimar Republic. The express constitutional stipulation as to "unconstitutional" political parties [Article 21(2)] reflected the informed view, among West German political leaders in 1948-49, that the political extremist parties of both the Right and the Left, in the era between the two World Wars, had deliberately undermined the stability and coherence of the Weimar constitutional system in a studied contempt for its democratic principles. In two decisions in the early 1950s, the Federal Constitutional Court (*Bundesverfassungsgeright*) applied Article 21(2) to outlaw, first, in 1952, the neo-Nazi Socialist Reich Party, and to order its immediate dissolution and the vacation of all parliamentary seats held by its members;[18] and then, in 1956, after a process arising at the same time as the Socialist Reich Party case, to ban the West German Communist Party.[19] Most of the West German Court's early jurisprudence on political representation and the electoral processes flowed from its main judicial *rapporteur* in those cases, Judge Gerhard Leibholz who, in his pre-War career, as a University Professor and writer, had been responsible for the development of critical, scientific-legal theory as to political representation in the modern democratic state and its concrete expression in constitutional ground rules as to political parties and election processes.[20] Judge Leibholz conceived the "received" experience of the Weimar Republic years as demonstrating a passivity or supineness of democratic political parties in face of the totalitarian, anti-democratic parties of the Right and the Left, and also as demonstrating a political fractiousness and indiscipline of the myriad of moderate, centrist, liberal democratic and social democratic groupings when confronted with the deliberately disruptive tactics of the extremist parties. Leibholz was led, from this analysis, to posit the formation of a vibrant, operational constitutional democracy under the new Bonn system of 1949 upon the achievement of several key principles:

1. *A vigilant, combative democracy that would not be afraid to fight to defend its constitutional principles.*

2. *The maintenance of a genuine, plural-Party state in which the system of political representation would be grounded in effectively-functioning, cohesive political parties, controlled through democratic principles, under law, as to their internal organisation and practice, and also exercising unity and self-discipline as to the maintenance of intra-parliamentary consensus in support of Party policies.*

3. *The guarantee that the Party Political system, while necessarily plural and not monolithic, so as to ensure a genuinely dialectical, inter-Party, give-and-take in the making of parliamentary decisions, would not disintegrate in a mass of small splinter-parties or fractions that would be mutually destructive and prevent formation of stable, coalition majorities of the centre, as had happened under the ill-starred Weimar Republic.*

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18. Decision of 23 October 1952, 2 B Verf GE 1 (1953) (First Senate).

19. Decision of 17 August 1956, 5 B Verf GE 85 (1956) (First Senate).

20. G. Leibholz, *Das Wesen der Reprasentation unter besonderer Berucksichtigung der Reprasentativsystems* (1929); G. Leibholz, *Die Gleichheit vor dem Gesetz* (1925; 2nd rev. ed., 1959); G. Leibholz, *Der Strukturwandel der modernen Demokratie*, 3rd ed. (1967).

The last point in the Leibholz philosophy of political representation was the necessary application of the keystone constitutional principle of Equality before the Law (Article 3 of the Bonn Constitution) to the electoral processes,in order both to ensure constitutionally fair and honest electoral representation, and also to earn public respect for the integrity of the election system as a whole. All these principles were present, in measure, in the Bonn constitutional charter in 1949; but giving them teeth was the work, essentially, of an activist judicial majority within the Federal Constitutional Court, with Leibholz's own role as intellectual animator being a vital one, even though it was veiled for most of the time because of the German judicial tradition and practice of collegiality and anonymity of decision-making.

A land-mark decision in the historical-dialectical development of the Court jurisprudence was the ruling in the Party Financing case in 1966. A central element in the conception of an effectively functioning plural-Party system, as the foundation of modern constitutional democracy, was the notion that political parties should have proper economic resources for financing their general operations and election campaigns. The Federal Constitutional Court, in 1958, had invalidated a federal law permitting private individuals and Corporations to deduct from their taxation assessments a percentage of their own financial contributions to political parties.[21] This Court decision was understandable enough since it would clearly have favoured those political parties supported by the more affluent sections of the community and by the large corporations and thus have necessarily violated the constitutional Equality principle. A new federal law then met the problem of federal Governmental support for political parties head-on, by providing for direct public financing, across the board, to all main political parties represented in the *Bundestag*. The Federal Constitutional Court ultimately rejected this law in 1966, by a very narrow, four-to-three vote on the substantive issue of constitutionality.[22] For the purposes of contesting the federal law before the Court, an un-Holy Alliance had formed between extreme Right-wing political splinter groups and more conventional Left-wing political forces. The Right-wing groups objected to the new federal law because, in recognition of the post-Weimar lesson of encouraging a plurality of stable, competing political parties but not a multiplicity of minor splinter-parties or fractions, that federal law designedly excluded from the federal Government financial subsidies to political parties those parties that failed to obtain a certain minimum percentage of the popular vote in the general election and thus a certain minimum number of seats in the federal legislature. On the other hand, the main federal Opposition Party, the Social Democrats, joined in opposing the new federal law since, with their own large independent sources of funds from trade unions and similar labour syndicalist groups, they had little need for extra financial subsidies in comparison to the federal Government (Christian Democratic) parties. The majority opinion of the Federal Constitutional Court, perhaps because of the very close nature of the internal division within the Court's own ranks, is not always too clear or too concrete in its formulation of its constitutional grounds.[23] It refers, rather, to general constitutional principles of the "free democratic basic order," and to a "free-from-the-state, and open, popular, opinion and will-formation," which it relates to Article 20(2) (Basic principles of the Constitution), and which it considers as "guarding

21. Decision of 24 June 1958, 8 B Verf GE 51 (1959) (Second Senate).

22. Decision of 19 July 1966, 20 B Verf GE 56 (1966) (Second Senate, the Party Financing Case).

23. *Ibid.*

against any form of state-institutional consolidation of the activity of the political parties, and as forbidding their insertion in the sphere of organised state authority." If the majority opinion of the Court thereby declared unconstitutional the *general* financing statute actually before it, which provided *general* subsidies by the state to political parties, it did not, however, in terms, purport to invalidate all possible schemes of public financing of political parties. Insofar as political parties were constitutional organs of the state for purposes of securing popular input into government, the state might reimburse them for "necessary expenses" incurred during the course of an election campaign. To finance parties between campaigns, or to provide for their general support, however, would involve an unconstitutional interference with the freedom of the political processes. Political parties, being in substance social organisations, were entitled to no greater claim to state support than other politically-oriented voluntary associations.

What followed upon the Court's decision of 1966 is a good illustration of the thesis that the courts and the other (executive and legislative) institutions of government do not have to be mutually antagonistic, and that a great deal can be achieved by their trying to work in tandem, as mutually complementary, community problem-solving institutions. The federal Government responded to the 1966 decision invalidating the *general* financing of political parties statute by enacting, in 1967, a new Statute on Political Parties which is really a comprehensive code of rules defining political parties, as such, and their constitutional role. This code laid down the legal principles as to parties' internal governance and administration. It set out the legal rights and duties of party members and rules as to the conduct of party assemblies. It also established the principle of the reimbursement of political parties' election expenses and gave detailed rules for its implementation, at the same time requiring the publication of the names and contributions of individual corporate donors to political parties, above a certain monetary limit. The 1967 statute's new scheme of public financing of political parties' election expenses was itself challenged before the Federal Constitutional Court. The Court, in 1968, in fact struck down certain elements of the 1967 statute. One of the vices of the earlier *general* financing scheme, struck down by the Court in its 1966 decision, had been that it was limited to the parliamentary parties already represented in the federal legislature, thereby excluding minor parties or new parties. The 1967 statute, in an endeavour to meet the "Open Society" test of allowing free and unobstructed access to the political processes, had predicated the state reimbursement of parties for their campaign expenses on their receiving a minimum of 2 and 1/2 per cent of the national popular vote. This 2 and 1/2 per cent floor the Court now ruled to be unconstitutional as violating the constitutional Equality principle.[24] The Court, noting that the 1967 statute thereby imposed a special hardship on such minor parties, went on to suggest in its judgment that a 0.5 per cent statutory floor, as a condition to reimbursement of electoral expenses, might meet the test of constitutional Equality. The federal Government immediately picked up the Court's implied invitation, and the 1967 Statute on Political Parties was promptly amended, in 1969, to lower the statutory floor to 0.5 per cent as suggested by the Court. The statutory provision, as amended, has been free from subsequent challenge, and the statute as a whole stands as a legal code defining and governing the operation of political parties as constitutional organs of government in West Germany.

In its main outlines, the Bonn constitutional charter's design of constitutionalising political representation has been confirmed and extended by the Court. Thus, the basic federal

24. 24 B Verf GE 300 (1968) (Second Senate).

electoral plan of a "mixed" system whereby one-half of the members of the *Bundestag* are elected in single-member, geographically-based electoral constituencies, and the other half on a party list system using proportional representation based on the actual party vote case, was upheld by the Court as early as 1952.[25] The system of proportional representation, as such, was upheld in 1957.[26] The five per cent rule, which requires a political party to attain that threshold in the popular vote before being eligible for representation in the *Bundestag*, and which was the key legislative instrument in the Bonn attempt to profit from the Weimar Republic lesson of the dangers of allowing too many splinter-parties or fractions in the legislature, was also upheld in 1957.[27] The "one person-one vote" rule was recognised by the Court in 1963.[28] Other Federal Constitutional Court decisions, in 1957[29] and 1961[30] establishing modalities of application of these principles, including the limitation of the political parties' discretion in the designation of order of priority on the party candidates' list before and after the actual popular vote,[31] help to reinforce the effective constitutionalisation of the electoral process and the role of the political parties in it.

There are no exact parallels in other Western or Western-"received" or Western-influenced systems to the Bonn Constitution's "entrenchment" of political parties as constitutional organs of the state. The Bonn Constitution of 1949, as a contemporary charter that benefited in its drafting from all the latter-day constitutional wisdom and experience, effectively demonstrates that constitutional institutions can no longer be limited today to the old, triadic, executive-legislative-judicial scheme of division of governmental powers; and that the constitutional ground rules must also take account of institutions like political parties and provide for their democratic conduct and governance. West Germany in 1949 with the adoption of the Bonn Constitution, thus led the way in terms of constitutional entrenchment and regulation of political parties; and went on from there to pioneer in the public reimbursement of such political parties for their direct campaign expenses, thereby serving as a model for other constitutional systems which had no express mention of political parties, as such, in their own constitutional charters.

In the United States, the Supreme Court had moved, through its case-law jurisprudence, to accord a degree of constitutional recognition and control of political parties as early as 1944, with the decision in *Smith v. Allwright*.[32] It had there been held that the political Party Primary elections, even though purportedly the activity of private (non-public) organisations, were in fact an integral part of the community electoral processes, virtually guaranteeing, in the case of effective one-party states, the final election results. The U.S. Supreme Court ruled in that case that the Party Primary elections should therefore be subject

25. Decision of 5 April 1952, 1 B Verf GE 208 (1952) (Second Senate).

26. Decision of 3 July 1957, 7 B Verf GE 63 (1958) (Second Senate).

27. Decision of 23 January 1957, 6 B Verf GE 84 (1957) (Second Senate).

28. Decision of 22 May 1963, 16 B Verf GE 130 (1964) (Second Senate).

29. Decision of 9 July 1957, 7 B Verf GE 77 (1958) (Second Senate).

30. Decision of 26 August 1961, 13 B Verf GE 127 (1962) (Second Senate).

31. *Ibid.*

32. *Supra* note 2.

to constitutional regulation and control under the Fourteenth and Fifteenth Amendments to the Constitution. In *Buckley v. Valeo*, in 1976,[33] the U.S. Supreme Court struck down, on First Amendment free speech grounds, provisions of the *Federal Election Campaign Act* of 1971 limiting independent political expenditures by individuals and groups, and fixing ceilings on overall campaign expenditures by election candidates. These statutory limitations, the Court held, were constitutionally impermissible burdens on the right of free expression under the First Amendment, and could not be sustained on the argument of countervailing governmental interests in preventing the actuality or appearance of corruption, or in equalising the resources of candidates. The Supreme Court, however, at the same time upheld the imposition by the *Federal Election Campaign Act* of ceilings on political contributions, against the objection of violation of First Amendment speech and association rights or invidious discrimination against non-incumbent candidates and minority party candidates. The Supreme Court deferred, here, to what it felt to be substantial governmental interests in limiting corruption and the appearance of corruption. In *Democratic Party of U.S., and Edward Mezvinsky v. National Conservative Political Action Committee*, in 1983,[34] a U.S. District Court extended the protection of the First Amendment Free Speech guarantee to the activities of the so-called Political Action Committees, operating independently of the main political parties and seeking to spend their own monies during election campaigns to influence the outcome of those campaigns. The U.S. District Court reasoned that the attempt, under the *Presidential Election Campaign Fund Act* of 1974, to limit financing of election campaigns to the major, political parties was to "give the institutionalised political parties an almost impervious monopoly over the agenda and terms of debate in presidential electoral campaigns". In its judgment, the U.S. District Court directly invoked *Buckley v. Valeo* as authority for the proposition that expenditures by Political Action Committees constitute speech that is constitutionally protected by the First Amendment. The U.S. District Court decision, and the Supreme Court decision in *Buckley v. Valeo* on which it relied, were both expressions of the Open Society ideal and its proclaimed imperative of keeping political parties and other political interest groups (here the Political Action Committees) on the same plane of constitutional equality and as being entitled, equally, to First Amendment Free Speech protections.

33. 424 U.S. 1 (1976).

34. U.S. District Court for the Eastern District of Pennsylvania, decision of Becker, J. (Circuit Judge sitting by designation), 12 December 1983.

V. JUDICIAL SELF-RESTRAINT AND THE CONSTITUTIONAL EQUALITY PRINCIPLE

The evident success of Bonn constitutionalism as to Political Parties and Electoral questions, and the lack of timidity of the West German and latter-day U.S. judges in approaching the constitutional surveillance of the electoral pre-conditions to any democratic decision-making by legislatures and legislative majorities, plus the degree of skill such judges have displayed in acquiring and applying any specialist or technical knowledge required for scrutinising the internal operations of political parties and the practical workings of the electoral laws, suggest that Courts in other jurisdictions may have deferred too much, in the past, to doctrines of judicial self-restraint in regard to "political questions". Such judicial self-restraint has too often been predicated upon the alleged difficulty or impossibility of the Courts' comprehending the electoral processes or prescribing effective, operational remedies for alleged abuses in them.

The post-War Japanese Constitution of 1946, like the Bonn Constitution of 1949, contains specific stipulations as to the electoral processes, and also key general constitutional principles, such as the principle of "equality under the law" (Article 14) that the Supreme Court has had no difficulty in holding as fully applicable to guarantee fairness in the electoral system and its practical operation. Article 43 of the Constitution states that both Houses of the legislature are to consist of "elected members, representative of all the people." Article 44 requires that, in fixing the qualifications of members of both Houses and also their electors, there shall be "no discrimination because of race, creed, sex, social status, family origin, education, property or income." Article 47 states that electoral districts, method of voting, and other matters pertaining to the method of election of members of both Houses, are to be fixed by statute law. These Articles all fall within Chapter IV of the Constitution, dealing with the Diet (legislature). In Chapter III (Rights and Duties of the People), we have Article 14:

> *All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.*

Article 15 adds to this, in regard to elections, that "the people have the inalienable right to choose their public officials and to dismiss them"; and it also guarantees "universal adult suffrage ... with regard to the election of public officials," plus "in all elections, secrecy of the ballot."

All these provisions of the Constitution came together in the *Koshiyama* case, decided by the Grand Bench of the Supreme Court of Japan in February, 1964[35]. There, the 1962 election of Tokyo representatives to the upper House of the Japanese legislature had been challenged on the grounds that the apportionment of seats was based on a 1946 census, and that the electoral law violated the constitutional guarantee of Equality under the Law in Article 14. The argument was advanced that the Constitution required the number of representatives to be proportionate to population, and that, having regard to the principle of constitutional Equality and consideration of the "value of a vote," the Courts should establish

35. Supreme Court of Japan, Grand Bench, Decision of 5 February 1964.

and enforce maximum limits of tolerable imbalance in numbers of electors as between different electoral districts. However, the Supreme Court of Japan rejected this complaint, on the ground that while the apportionment of Diet (legislature) seats to each election district in proportion to the population was definitely desirable in terms of the constitutional equality principle, there was no impediment to the consideration of many additional factors. As examples, such other factors might include historical background, and a desirable balance between the number of members and the number of separate administrative divisions. The key consideration was that the Diet possessed a discretionary authority, as legislature, to determine the number of members in each House, the election districts, and the apportionment of members to each election district. The Court concluded that, except in situations in which the number of Diet members in an election district created an *extreme inequality*, the percentage of seats apportioned to each election district was a matter of legislative policy and subject, as such, to the Diet's authority as the legislative branch of government. The mere fact that the apportionment of Diet seats was not proportionate to the population of electorates did not make it contrary to the Article 14 constitutional Equality principle.

The Supreme Court of Japan judgment reduced to much the same considerations of judicial self-restraint and judicial deference to the legislature's judgment in electoral apportionment matters, that we saw in the United States Supreme Court early landmark judgment in *Colegrove v. Green* in 1946[36] that was put aside in *Baker v. Carr* in 1962.[37] The Japanese Supreme Court's identification of the exceptional situation, when it might opt to intervene, "*extreme inequality* in the voter's enjoyment of the right to elect," (which it did not find to exist on the facts of the instant case) drew a supplementary (specially concurring) opinion from Justice Saito,[38] who invoked Justice Frankfurter's dissenting opinion to *Baker v. Carr* to resist even this mild limitation to the policy of judicial self-restraint, and judicial abstention, on the ground of "political questions", from review of constitutional fairness or equality of the election processes. In fact, the practical result of the electoral apportionment complained of in the *Koshiyama*[39] case was that the "value" of a vote for upper House elections in the Tokyo prefecture remained as only one-quarter of its value in some other prefectures.

In April, 1974, the First Petty Bench of the Supreme Court of Japan followed the jurisprudence of the Grand Bench (full Court) in *Koshiyama* in 1964, and rejected a similar constitutional petition complaining of a value difference between electoral districts of five-to-one, again involving upper House elections.[40] On the other hand, in the case of lower House elections, the Grand Bench of the Supreme Court of Japan ruled, in the *Kurokawa* decision in April, 1976, that apportionment of representatives in the House should be prorated to the number of voters in each electoral district.[41] In the *Kurokawa* case, the attempt was to annul the lower House elections of December 1972, on the ground that votes in the Hyogo

36. *Supra* note 2.

37. *Supra* note 8.

38. *Supra* note 35.

39. *Ibid.*

40. Cited by Hayashi, (1978) 5:3 *Japan Echo* 17 at 19-20.

41. Supreme Court of Japan, Grand Bench, Decision of 14 April 1976.

Prefecture's fifth district had five times the weight of votes in the neighbouring Chiba Prefecture's first district. The Supreme Court held that this imbalance violated the Article 14-based constitutional equality principle, and that the apportionment of lower House seats should be proportionate to the population of the electoral districts. But the majority opinion was not in favour of nullification of the whole elections, the Court reasoning being that even an unconstitutional apportionment should not be invalidated if a review of all the circumstances indicates that invalidation is not wise.[42] The *Kurokawa* decision thus also evidences the general reluctance of the Japanese Supreme Court to intervene in election cases. It has been suggested that the opening to judicial activism made in the *Kurokawa* case in 1976 in regard to electoral apportionments to the *lower* House, as opposed to the jurisprudence following *Koshiyama* in 1964[43], as to electoral apportionments for the upper House, may stem from the fact that the lower House electoral districts are multi-member ones, each district having between three and five members. On the other hand, the Supreme Court's apparent partial shift from *Koshiyama* (1964) in *Kurokawa* (1976) might also be related to the conceptual breakthrough for the judges involved in their now separating the general principle in electoral review from the remedy. The general principle vindicated by the Supreme Court in *Kurokawa* in 1976 was the unconstitutionality of the lower House legislative apportionment, because of the "impermissible inequality" it had created in the individual votes from one electoral district to another; while the logical remedy — invalidation of the actual election result because of such unconstitutional inequality — was one that the Supreme Court refused to apply in *Kurokawa* as being, for practical reasons, unacceptable. The frequent step-by-step character, manifested in judicial legislation in a number of countries, in complex questions involving the legislature's discretion as to legislative apportionment, should not be overlooked here.

VI. GENERAL CONCLUSIONS AND RECOMMENDATIONS

The constitutional jurisprudence surveyed from the United States, West Germany and Japan stems, uniformly, from Western (or Western "received" or Western-influenced, in the case of Japan), post-industrial societies, all of which have adopted the institution of constitutional review of legislation through a standing constitutional tribunal. This varies from a specialised, Special Constitutional Court or equivalent tribunal operating *de jure* by virtue of the Constitutional Charter, in the case of West Germany, to the *de facto* Constitutional Courts that the regular Supreme Courts have now become in the case of the United States and Japan. In the case of West Germany, the "political", policy-making character of such specialised Constitutional Court is explicitly accepted in the constitutional provisions for the election of the judges on a basis that effectively ensures multi-party representation within the judicial ranks, and in the further provision that the tenure of the judges be limited to a single, non-renewable term of years.

A prime teaching of Comparative Legal Science is that it is a snare and a delusion to attempt to transpose the positive law — whether legislation or judicial decisions — from

42. *Ibid.*

43. *Supra* note 35.

one legal system to another unless the two societies concerned are more or less congruent, with rather similar basic social and economic conditions to which, of course, the positive law is, and must be, an informed response. Nevertheless, there are some general jurisprudential lessons to be derived from the disparate jurisprudence surveyed that have a more nearly universal and not particularistic application, as a sort of new, inter-systemic *Jus Gentium* on political representation in the contemporary democratic state:

1. *Fair and honest laws as to political representation (including both electoral laws in the strict sense and also the organisation and functioning of political parties) are basic to any claims by Executive Legislative authority to a Presumption of Constitutionality in favour of their actions and to judicial deference to them as coordinate institutions of constitutional government.*

2. *While it is obviously preferable, as in the case of the Bonn Constitution of 1949, that the Constitutional Charter itself should spell out the ordering principles as to political representation, there is nothing to stop the Courts from moving in to fill the gap in this area and, indeed, every reason why the Courts should do so affirmatively.*

3. *The old arguments as to lack of any Court expertise in regard to electoral and Party political questions — one of the mainstays of the doctrine of "political questions" as applied to this area — reveal themselves, on examination, to be grossly exaggerated at best. Ordinary common-sense and judicial notice seem enough to enable judicial questioning of gross abuses and the return of the relevant dossiers to executive-legislative authority for corrective action.*

4. *While the "great debate" over judicial legislation and the desirable limits of judicial activism is not terminated, the case for affirmative judicial policy-making to correct abuses in regard to political representation seems greater than in regard to other, currently highly contested, areas of community choice among competing social and economic values.*