JUDICIAL REVIEW AND THE COMPOSITION OF THE HOUSE OF REPRESENTATIVES

BY GEOFFREY J. LINDELL*

Through an examination of the relevant authorities, including American and Australian cases, Mr Lindell comments on the justiciability of, and nature of the duty imposed on the legislature by, sections 24 and 29 of the Commonwealth Constitution. The main conclusion is that if the House of Representatives did not conform with the constitutional requirements concerning the number of members to be chosen from each State and electoral redistribution, the House may no longer legally exist. The High Court would naturally be reluctant to reach such a conclusion without first providing the opportunity for defects to be rectified and Mr Lindell suggests that measures could be adopted by the Court which would enforce compliance with the relevant provisions without invalidating previous actions of the Parliament. Mr Lindell also deals with the related issues of locus standi *and jurisdiction, concluding than an action could lie in the High Court to enforce compliance with the relevant constitutional and other provisions concerning the composition of the House of Representatives.*

The purpose of this article is to examine the justiciability of the constitutional provisions which deal with the composition of the Australian House of Representatives.[1] As will be seen later some of these provisions have been thought to create duties that are not capable of being enforced by the courts. This article does not attempt to deal with the precise nature and scope of the obligations and requirements which govern the legal composition and existence of the House of Representatives. The only issue discussed is whether the relevant provisions are capable of creating *any* legal duties at all and, if so, whether there are any procedures available to compel the performance of those duties in the courts.

* LL.M. (Adel.); Practitioner of the Supreme Court of South Australia; Senior Assistant Secretary, Advisings Division, Attorney-General's Department, Canberra. The views in this article are expressed as the personal views of the author, and are not necessarily those of the Department.

[1] This article is based on a chapter of the author's thesis, "Justiciability of Political Questions under the Australian and United States Constitutions" which was presented for the Degree of Master of Laws in the University of Adelaide. For other writing on the subject dealt with in this article, Lane, "Note on Commonwealth Electors' Constitutional Voting Rights" (1968) 42 A.L.J. 139; Paterson, "Federal Electorates and Proportionate Distribution" (1968) 42 A.L.J. 127, and Else Mitchell (ed.), *Essays on the Australian Constitution* (2nd ed. 1961) Ch.II, "The Parliament of the Commonwealth" by F. R. Beasley.

Relevant Provisions

The most important provisions that deal with the composition of the House of Representatives are those of sections 24 and 29 of the Constitution, which read as follows:

> 24. 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 latest statistics of the Commonwealth, 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.
>
> 29. 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.

It will be seen that the provisions quoted above deal with the following matters. First, they provide a formula for determining the number of members to be chosen by the people of each State. Secondly, they provide authority to legislate in respect of the divisions to be represented by each member and the number of members to represent each division. Thirdly, they require that, as nearly as practicable, the number of the members of the House of Representatives shall be twice the number of senators (commonly referred to as the "nexus" provisions in the Constitution). This article is only concerned with the first two of these matters.

For the sake of completeness, passing reference should be made to the other constitutional provisions that concern the composition of the House of Representatives. These are sections 25 and 26 which, how-

ever, are unlikely to have any operation at the present time, and also section 27 which provides the Parliament with the authority to make laws to alter and diminish the number of members of the House of Representatives.

Reference should also be made to the provisions of the Representation Act 1905-1964 (Cth) and Part III of the Commonwealth Electoral Act 1918-1973, which have been passed in connection with sections 24 and 29 of the Constitution.

Under the Representation Act the Chief Australian Electoral Officer (hereinafter referred to as the Chief Electoral Officer)[2] is required to ascertain the number of the people of the Commonwealth and of each of the States at certain prescribed times and also after the holding of any census of the people of the Commonwealth.[3] Once this information is obtained the Chief Electoral Officer is required to prepare and forward to the Minister administering the Act two certificates. The first of these certificates must show the number of people of the Commonwealth and of each State. This certificate must be gazetted and a copy of it must be laid before both Houses of the Parliament.[4]

The second certificate must show the number of members to be chosen from each State after a determination is made in accordance with the formula provided in section 24 and elaborated in section 10 of the Act. This certificate is in fact referred to in the Act as a "notification".[5] It is important to note that the determination made in the notification does not take effect until

(a) a redistribution of the electoral divisions of a State in respect of which the numbers of members to be chosen has been altered takes place; and

(b) a general election for the House of Representatives is held.[6]

It follows from this, that while the Act provides the machinery for enabling the provisions of section 24 to be complied with, compliance with those provisions ultimately depends upon whether the machinery is invoked and an electoral redistribution of the divisions of the States concerned actually takes place.

The provisions of Part III of the Commonwealth Electoral Act are concerned with the matters mentioned in section 29 of the Constitution.[7]

---

[2] The powers and duties previously performed by the "Chief Electoral Officer of the Commonwealth" are now performed by the above-mentioned officer: Australian Electoral Office Act 1973, s. 5 (Cth).

[3] Ss. 2, 3, 4.

[4] Ss. 6, 7.

[5] Ss. 9, 10, 11.

[6] S. 12.

[7] The source of constitutional authority to pass the statutory provisions is to be found in s. 51(xxxvi) of the Constitution read in conjunction with s. 29.

Each State is distributed into electoral divisions and each of those divisions is represented by only one member of the House of Representatives.[8] The number of electoral divisions in each State must of course equal the number of members who are to be chosen by the people in each of the respective States concerned.

The legal authority for initiating a redistribution of those divisions rests with the Governor-General of the Commonwealth,[9] who may set the process in motion whenever an alteration is made in the number of members of the House of Representatives to be chosen from any of the States under the Representation Act, or whenever the number of electors in a certain number of electoral divisions differs from the quota to be mentioned below, or at such other times as the Governor-General thinks fit.[10] For this purpose the Governor-General may appoint three Distribution Commissioners who are authorized to put forward proposals for the redistribution of the electoral divisions of a State.[11] In doing so they are required to observe, within a prescribed margin, a quota which is ascertained by dividing the number of electors in the State by the number of members to be chosen from that State, and the margin prescribed is one fifth less or one fifth more than the quota.[12]

The recommendations of the Distribution Commissioners are not effective to alter the electoral divisions of a State unless they are approved by both Houses of the Parliament and also proclaimed into effect by the Governor-General.[13] The relevant provisions of the Act do not suggest that either the Houses of Parliament or the Governor-General are obliged to give their approval to the recommendations. If the proposed redistribution is approved it takes effect at the next ensuing general elections for the House of Representatives.[14]

In the United States it has been held that the constitutional provisions which correspond with those of section 24 in the Commonwealth Constitution require the electoral divisions of the House of Representatives in Congress to be apportioned in such a way that, to use the

---

[8] S. 15.

[9] In the provisions of Part III of the Commonwealth Electoral Act the term "Governor-General" means the Governor-General acting with the advice of the Executive Council: Acts Interpretation Act 1901-1973, s. 16A (Cth).

[10] S. 25.

[11] S. 16.

[12] S. 19. In 1973 the Federal Government introduced in the Commonwealth Parliament legislation designed to reduce the allowable margin to one tenth less or one tenth more than the quota. The legislation in question, namely, the Commonwealth Electoral Bill (No. 2) 1973, was twice rejected by the Senate and formed one of the grounds of the double dissolution of Parliament granted by the Governor-General on 11 April 1974. The Bill has now been passed by a joint sitting of both Houses of Parliament in accordance with the special deadlock procedure set out in section 57 of the Commonwealth Constitution.

[13] S. 24.

[14] S. 24.

words of the American Supreme Court, "as nearly as is practicable one man's vote in a Congressional election is to be worth as much as another's".[15] The question arises whether the provisions of section 24 would be given a similar construction by the High Court,[16] in which case the provisions mentioned above in the Commonwealth Electoral Act would probably be invalid. Even if the provisions do comply with whatever legal requirement exists concerning the number of electors in each division, the fact that the machinery for complying with such a requirement exists does not guarantee that the machinery will always be invoked to ensure compliance with the provisions of section 24 of the Constitution.

Nature of the Issue

The proposal in 1934 to reduce the number of members to represent South Australia gave rise to conflicting legal opinions on the enforceability of section 24.[17] These opinions serve to highlight the nature of the issues involved in considering the justiciability of the provisions of that section.

The opinions were referred to by the then Attorney-General when the matter was debated in the Federal Parliament. One view was that the section created what was referred to as a "duty of imperfect obligation" and this was probably the view expressed by Sir Edward Mitchell K.C., part of whose opinion was quoted by the Attorney-General. The relevant extract which appears in the Parliamentary Debates reads as follows:

> No doubt there is in one sense an obligation on Parliament to give effect to any change in numbers which affects the proportionate representations of the States, but this constitutional obligation is not capable of direct enforcement in any court, which cannot give any directions to Parliament. If, through failure to pass the necessary resolutions within any given time, the revision remained inoperative, the courts would be bound to act on the assumption that Parliament was doing its duty and that its approval had been withheld for some good and sufficient reason. The courts cannot impute bad faith to Parliament, and would be bound to assume that Parliament, in withholding any approval to a redistribution scheme, had grounds for its non-approval. If the real facts were

---

[15] *Wesberry* v. *Sanders* (1964) 376 U.S. 1, 8; 11 L.Ed. 2d 481, 486-487.

[16] One of the proposals to amend the Commonwealth Constitution which was defeated at the referendums held on 18 May 1974 sought to expressly provide for equality of electoral divisions. The proposal, known as the Constitution Alteration (Democratic Elections) 1974 sought to deal with the electoral divisions of the State legislatures, as well as those of the House of Representatives: clauses 4 and 7.

[17] Paterson, *op. cit* 130, 131 and generally Sawer, *Australian Federal Politics and Law 1929-1949* (1963) 63, 64, 65, and H.R.Deb. Vol. 144, 193 (4 July 1934).

> that the persistent refusal by Parliament to approve of any scheme of re-distribution was actuated by a desire of sitting members to retain their seats in defiance of the Constitution, then a situation would be created which could not, I think, be dealt with by the courts, but would have to be dealt with by the Governor-General who could dissolve Parliament and keep on dissolving Parliament until a Parliament was elected which was willing to obey the Constitution.[18]

In another part of the opinion which was quoted in the Parliamentary Debates Sir Edward Mitchell had said:

> The Constitution has left the matter to Parliament and is to be construed on the footing that the Imperial Parliament which granted the Constitution trusted to the Parliament to do its duty.[19]

Although he was by no means as definite, it appears that the opposing view was taken by Sir Robert Garran, a former Solicitor-General of the Commonwealth, who was also consulted on the matter. The Parliamentary Debates indicate that Sir Robert Garran had expressed the view that he would have grave doubts about the validity of an election which was held if either House, having had ample opportunity to approve of a redistribution, abstained from doing so with the object of preventing the alteration of the number of members to be chosen in a State.[20]

The Government of the day reluctantly accepted the proposals to reduce the number of members representing South Australia.[21] In the circumstances it seems that the factor which was regarded as decisive by the Government was the importance of complying with the Constitution whatever doubts may have existed in regard to the legal enforceability of the relevant requirements. What is significant here is that it was suggested that the provisions of section 24 were not capable of being enforced in a court of law.

At the outset it is important to appreciate that the judicial review of any action taken under sections 24 and 29 of the Constitution will not be the same as the judicial review of legislation passed by the Parliament, although that may also be involved if, for example, an attempt is ever made to challenge the validity of legislation which deals with the number of electors in each electoral division represented by a member in the House. The consequences of judicial review in this area are far more fundamental in that they could involve a court passing on the legal existence of the Parliament. While it may be one thing to find that an Act is invalid, it is quite another to find that there is no Parliament in existence to pass any Acts at all. It is not unreasonable to assume

---

[18] *Id.* 204.
[19] *Ibid.*
[20] *Ibid.*
[21] Sawer, *op. cit.* 63, 64.

that a court would seek to avoid dealing with any issues which arise under sections 24 or 29 of the Constitution if this could lead to such a result.

Judicial decisions on the composition of legislative bodies

There does not appear to be a report of any case in which an Australian Court has been faced with the task of determining issues arising out of the application of the constitutional provisions referred to above.[22] There have, however, been a number of decisions in relation to other legislative bodies which show that matters affecting the composition of legislative bodies are justiciable in some circumstances. In particular, they show that merely because a question concerns the composition of a legislative body, that fact by itself will not be sufficient to make the question non-justiciable. The cases have involved legislative bodies in Australia,[23] Canada,[24] and other countries,[25] including the United States.[26]

---

[22] The observations made by Isaacs J. in *Vardon* v. *O'Loghlin* (1907) 5 C.L.R. 201, 212-216 and Barton A-C.J. in *Buchanan* v. *The Commonwealth* (1913) 16 C.L.R. 315, 327-328, were of a purely incidental character, not specifically related to the issue here under consideration.

[23] Cases involving electoral redistribution are *McDonald* v. *Cain* [1953] V.L.R. 411 and *Tonkin* v. *Brand* [1962] W.A.R. 2. There are also the cases where the High Court dealt with the abolition of State Upper Houses: *Taylor* v. *Attorney-General of Queensland* (1917) 23 C.L.R. 457; *Attorney-General for New South Wales* v. *Trethowan* (1931) 44 C.L.R. 394 and *Clayton* v. *Heffron* (1960) 105 C.L.R. 214.

[24] *Attorney-General for the Province of Prince Edward Island* v. *Attorney-General for Canada* [1905] A.C. 37 and *Attorney-General for Nova Scotia* v. *Legislative Council of Nova Scotia* [1928] A.C. 107. The former case is of particular interest because it involved the interpretation of provisions in the British North America Act which are similar to those of s. 24 of the Commonwealth Constitution. However both cases were decided pursuant to legislation which permits Canadian Courts to give advisory opinions without regard to the rules relating to *locus standi*: Strayer, *Judicial Review of Legislation in Canada* (1968) 111-113. In Australia it has of course been held that the High Court cannot be vested with jurisdiction to give advisory opinions: *In re Judiciary and Navigation Acts* (1921) 29 C.L.R. 257.

[25] In *Katikiro of Buganda* v. *Attorney-General* [1961] 1 W.L.R. 119 the Privy Council dealt with the composition of the Legislative Council of Uganda and in *Harris* v. *The Minister of the Interior* 1952(2) S.A. 428 [A.D.] *Sub. nom. Harris* v. *Donges* [1952] T.L.R. 1245 the Supreme Court of South Africa dealt with the composition of a sovereign legislative body in the sense that it was, in effect, determining what constituted the body having the power to pass laws in South Africa for two distinct purposes, namely laws for dealing with the representation of Cape Coloured Voters and laws for dealing with any other matters. In *Gladys Petrie* v. *Attorney-General* (1968) 14 W.I.R. 292 it was held that because of certain provisions in the Constitution of Guyana the High Court did not have jurisdiction to entertain certain questions relating to elections for the Guyana National Assembly except by way of election petitions taken out in the Court after the result of the elections were known.

[26] *Infra* p. 93.

Special mention should be made here of *Tonkin* v. *Brand*,[27] a case decided by the Full Court of Western Australia. The case involved the application of the provisions in section 12 of the Electoral Districts Act, 1947-1955 (W.A.) which dealt with the redistribution of electoral boundaries for the Legislative Assembly of that State. The Court held that the Governor in Council was under a legal obligation to set in motion the machinery for effecting a redistribution of the boundaries because of the use of the word "shall" in the relevant legislation.[28]

The willingness of the Western Australian Full Court to recognize the existence of a legal duty in electoral redistribution matters can be contrasted with the approach adopted by the English Court of Appeal in *Harper* v. *Home Secretary*.[29] The case concerned the redistribution of electoral boundaries for the House of Commons under the House of Commons (Redistribution of Seats) Act, 1949 and in particular, the legal validity of recommendations made on the subject by the Boundary Commission which was established under that Act. The Act set out in the schedule certain rules which the Commission was required to observe when making its recommendations. The recommendations made by the Commission were not effective to alter the nature and size of the constituencies until and unless the recommendations were tabled, in the form of a draft Order in Council, and approved by both Houses of Parliament, and the Order in Council embodying the recommendations was formally executed by the Sovereign in Council. The Act provided that once the Order in Council was executed its validity could not be questioned in a court of law.

The plaintiffs in the case sought an injunction to restrain the presentation to the Sovereign of a draft Order in Council which had been approved by both Houses of the Parliament, on the ground that the Commission had not prepared its report in accordance with the rules set out in the schedule to the Act. The Court refused to grant the relief sought because it took the view that the rules in the schedule did not require the Commission to perform its task in the manner submitted by the plaintiffs. The Court went on to hold that even if there had been a departure it was not a departure the nature of which was fundamental enough to justify the report being treated as a nullity in the light of the

---

[27] [1962] W.A.R. 2.

[28] The case had some novel procedural aspects. In *The King* v. *Governor of South Australia* (1907) 4 C.L.R. 1497 the High Court made it clear that mandamus does not lie against a Governor of a State. However, the Governor of Western Australia was not cited as a defendant in the case and the only relief sought was a declaration against the defendants who were Ministers of the Crown and members of the Executive Council. The declaration granted by the Court was that the defendants were under a legal duty to advise and consent to the Governor issuing a Proclamation under s. 12 of the Electoral Districts Act, 1947-1955 for the purpose of setting in motion the machinery for a redistribution.

[29] [1955] 1 Ch. 238.

opportunity given to both Houses of Parliament to deal with the matter. In doing so the Court followed and approved the unreported decision in the case of *Hammersmith Corporation* v. *Boundary Commission* where it had apparently been stressed that it was not a matter in respect of which a court ought to intervene having regard to the machinery established by the Act. Lord Evershed M.R. said on behalf of the Court of Appeal:

> My reading of these rules and of the whole Act is that it was quite clearly intended that, in so far as the matter was not within the discretion of the commission, it was certainly to be a matter for Parliament to determine. I find it impossible to suppose that Parliament contemplated that, on any of these occasions when reports were presented, it would be competent for the court to determine and pronounce on whether a particular line which had commended itself to the commission was one which the court thought the best line or the right line—whether one thing rather than another was to be regarded as practicable, and so on. If it were competent for the courts to pass judgments of that kind on the reports, I am at a loss to see where the process would end and what the function of Parliament would then turn out to be.[30]

The Court of Appeal left open for future decision what a court would do if there was a substantial or fundamental departure from the rules, but even then the Court saw fit to mention that such a departure would not, no doubt, pass "unnoticed by Parliament".

The case has been criticized for two reasons.[31] The first of these was that the Court of Appeal fell into the error of confusing the Parliament with both Houses of the Parliament acting individually pursuant to statutory authority, when it relied on the legal supremacy of the Parliament to justify the conclusion that either of the Houses was capable of curing any legal defect in the recommendations made by the Commission. The second, and perhaps the more important reason for the present purposes, was the alleged inadequacy, in practice, of leaving such defects to be cured by either of the Houses of Parliament. One of the grounds put forward to support this allegation was the difficulty created by the control exercised on members by their respective political parties which apparently occurred when the report of the Boundary Commission, which gave rise to the proceedings in *Harper's* case, was debated in Parliament. There may of course have been other difficulties such as the lack of adequate time for dealing with matters of comparative detail and complexity.

---

[30] *Id.* 251.

[31] Marshall and Moodie, *Some Problems of the Constitution* (4th ed. 1967) 81-89.

The conclusion to be drawn from *Harper* v. *Home Secretary* and *Hammersmith Corporation* v. *Boundary Commission* is that the approach adopted in both cases exhibits an unwillingness on the part of the courts to deal with problems concerned with electoral redistribution.[32] This is reflected by the reliance placed in both cases on the availability of political remedies for dealing with such matters as a sufficient reason for showing that certain breaches of the relevant rules in question could not have been intended to have the effect of invalidating the recommendations made by the Commission—a concept which is not unlike treating statutory provisions as only directory rather than mandatory.

In the United States since 1962, when the Supreme Court decided the case of *Baker* v. *Carr*,[33] the Supreme Court has not only been prepared to intervene in electoral redistribution disputes and acknowledge the existence of certain constitutional requirements in that respect, but has also held that the Courts are capable of granting appropriate equitable relief to ensure compliance with those requirements. The essential requirement is that members of the House of Representatives in the Congress and also of State Legislatures should be elected to represent districts that comply, as nearly as practicable, with the principle of "one man, one vote".[34] The relief granted by the Courts has taken the form of an injunction to prevent officials from holding any further elections if the legislature concerned has failed to avail itself of the opportunity to pass appropriate legislation to remedy the malapportionment.[35] Other

---

[32] In *The Queen* v. *Secretary of State for the Home Department*; *Ex parte McWhirter* [1969] C.L.Y. 2636 it was asserted that the Home Secretary was under a legal obligation to table the report of the Boundary Commission in Parliament. However, the Court did not determine whether the House of Commons (Redistribution of Seats) Act, 1949 gave rise to the legal obligation asserted by the plaintiff because the action was dismissed with the consent of both parties after an undertaking to table the report was given, even though the existence of the legal obligation was denied by the Home Secretary.

[33] (1962) 369 U.S. 186; 7 L.Ed. 2d 663. The case was a landmark in American constitutional law since it departed from earlier decisions that had held that matters of this kind were "political" and non-justiciable.

[34] In the case of the House of Representatives the requirement is based on Article 1 Section 2 clause 1 of the United States Constitution while in the case of State legislatures it is based on the "Equal Protection Clause" of the Fourteenth Amendment of the same Constitution: *Gray* v. *Sanders* (1963) 372 U.S. 368; 9 L.Ed. 2d 821 (State); *Wesberry* v. *Sanders* (1964) 376 U.S. 1; 11 L.Ed. 2d 481 (Congressional); since these cases were decided there have been a number of other cases decided by the Supreme Court which have applied and elaborated the requirement: *e.g. Kirkpatrick* v. *Preisler* (1969) 394 U.S. 526; 22 L.Ed. 2d 519 (Congressional) and *Mahan* v. *Powell* (1972) 35 L.Ed. 2d 320 (State). As was made clear in the latter case a stricter test of equality is applied for the reapportionment of Congressional districts than that applied for the reapportionment of electoral districts of State legislatures.

[35] *E.g. Reynolds* v. *Sims* (1964) 377 U.S. 533, 585-587; 12 L.Ed. 2d 506, 541-542; *W.M.C.A., Inc.* v. *Lomenzo* (1964) 377 U.S. 633, 654-655; 12 L.Ed. 2d 568, 581; *Davis* v. *Mann* (1964) 377 U.S. 678, 692-693; 12 L.Ed. 2d 609; 618-619; *Roman* v. *Sincock* (1964) 377 U.S. 695, 710-712; 12 L.Ed. 2d 620, 630-631;

remedies have included apportionment by judicial decree carried out by the Courts themselves, and an order directing that elections for the members of a legislature should take place at large so that members no longer represent a particular district.[36] Equitable principles govern the grant of these remedies, and the court exercises its discretion as to when and whether the relief should be granted in each particular case.

Although most of the authorities discussed above suggest that matters affecting the composition of a legislative body can be justiciable in some circumstances, this should not be taken to suggest that a court would be prepared to treat the failure to comply with any law as having the effect of destroying the legal existence of a legislative body—at least in cases where the court is unable to conclude that the legislative body no longer exists without first giving the responsible authorities an opportunity to comply with the law *after* the non-compliance is raised in any action or proceeding. The reluctance of a court to treat the failure to comply with any law as having such a drastic effect is illustrated by the case of *Simpson* v. *Attorney General.*[37] In that case the New Zealand Supreme Court held that the failure of the Governor-General to issue writs for the election of members of the House of Representatives within a certain period after the expiration or dissolution of the House of Representatives in 1946, as required by section 101(1) of the Electoral Act, 1927 (N.Z.), did not have the effect of invalidating the election of each succeeding House of Representatives; or consequently, the Acts passed by the New Zealand Parliament since 1946. The requirement in the Electoral Act was treated as "directory" and not "mandatory" in accordance with the principle in *Montreal Street Railway Co.* v. *Normandin.*[38]

With the background of the cases so far discussed in this article in mind, it is now proposed to examine the justiciability of sections 24 and 29 of the Commonwealth Constitution.

Jurisdiction

The first question which arises in determining whether the provisions

Lucas v. *Colorado General Assembly* (1964) 377 U.S. 713, 739; 12 L.Ed. 2d 632, 649.

[36] *E.g. Scott* v. *Germano* (1966) 381 U.S. 407; 14 L.Ed. 2d 477; *Parsons* v. *Buckley* (1965) 379 U.S. 359; 13 L.Ed. 2d 352; *Burns* v. *Richardson* (1966) 384 U.S. 73; 16 L.Ed. 2d 376; also note in (1966) 79 Harvard Law Review 1226, 1226-1229 on remedies generally.

[37] [1955] N.Z.L.R. 271 and see the note of this case entitled "Annulment of a General Election" (1955) 18 M.L.R. 495. The same reluctance in relation to the existence of lawful authority in general is evident in the cases cited by the Supreme Court in *Baker* v. *Carr* (1962) 369 U.S. 186, 223-225; 7 L.Ed. 2d 663, 689-690; which dealt with the effect of a failure to comply with the guarantee of a "Republican Form of Government" contained in Article IV Section 4 of the United States Constitution.

[38] [1917] A.C. 170.

of sections 24 and 29 of the Constitution are justiciable is whether a court, and in particular the High Court, would have jurisdiction to deal with an action which sought to invoke the application of those sections.[39]

It is desirable at this point to indicate the sense in which the term "jurisdiction" is used.

For present purposes the term is intended to mean the limits which are imposed upon the power of a "validly constituted court"—

> to hear and determine issues between persons seeking to avail themselves of its process by reference (1) to the subject-matter of the issue or (2) to the persons between whom the issue is joined or (3) to the kind of relief sought, or to any combination of these factors.[40]

It will be convenient, however, to deal with the question of "relief" and the availability of judicial remedies later in this article.[41]

The "subject matter" of the action would not appear to raise any difficulties, at least so far as the High Court is concerned, having regard to the provisions of sections 75(v), 76(i) and 76(ii) of the Constitution and section 30(a) of the Judiciary Act 1903-1973. It is unlikely that section 47 of the Constitution[42] would be interpreted in such a way as to withdraw from the Court the jurisdiction to determine questions which involve the interpretation and application of sections 24 or 29 of the Constitution, although it is interesting to note that, at one time, some American Judges thought it possible that similar provisions in the

---

[39] It is significant to note that the proposed Constitution Alteration (Democratic Elections) 1974 referred to in n. 16 *supra* included provisions designed to ensure that the High Court would have jurisdiction to deal with matters arising under sections 24 and 29 of the Constitution and the same provisions also sought to ensure that an elector of the Commonwealth would have sufficient standing to invoke this jurisdiction: clause 6.

[40] Diplock L.J. in *Buck* v. *Attorney-General* [1965] Ch. 745, 770 citing *Garthwaite* v. *Garthwaite* [1964] P. 356, 387.

[41] *Infra* pp. 97-99.

[42] S. 47 reads as follows:

> Until the Parliament otherwise provides, any question respecting the qualification of a senator or of a member of the House of Representatives, or respecting a vacancy in either House of Parliament, and any question of a disputed election to either House, shall be determined by the House in which the question arises.

But see *Gladys Petrie* v. *Attorney-General* (1968) 14 W.I.R. 292 where the contrary view may have been taken by the High Court of Guyana. It was held in that case that provisions in the Constitution of Guyana, which were not unlike those of the foregoing, had the effect of depriving the Court of jurisdiction to deal with challenges to the validity of the Acts of Parliament and regulations which dealt with elections and electoral divisions, where the judicial relief sought was to prevent elections for the National Assembly of Guyana from being held. However, the constitutional provisions were not identical with those of section 47 of the Commonwealth Constitution and in any event it seems to have been assumed that the provisions allowed the Court to entertain such challenges by way of election petitions lodged *after* the elections were held.

United States Constitution could provide support for the now discarded view that re-apportionment questions could only be determined by the legislative branch of the government.[43] Furthermore, while it is true that in the case of *The King* v. *Governor of South Australia*[44] the High Court decided that, until Parliament should otherwise provide, the question whether a vacancy existed in the representation of a State in the Senate within the meaning of section 15 of the Constitution should be decided by the Senate itself,[45] it seems improbable that the Court would extend the application of section 47 beyond the determination of the qualifications of *individual* members in either Houses of the Parliament where both of those Houses are otherwise validly constituted.

The parties to the action could, however, pose a more difficult problem, especially having regard to the application of the rules of *locus standi* to constitutional litigation as well as any other kind of litigation. In Australia there have been two cases decided by the State Supreme Courts in which the interest of an elector has been recognized for the purpose of bringing actions in connection with electoral redistribution matters.

In *McDonald* v. *Cain*[46] the plaintiffs sought to challenge the validity of legislation which dealt with the redistribution of electoral districts for the Victorian Legislative Assembly.[47] The plaintiffs were both duly elected members of the Legislative Assembly and also duly enrolled as electors of the electoral districts which they represented. The legislation in question followed the usual pattern for these matters, with the power to proclaim a new electoral district being vested in the Governor in Council acting in accordance with recommendations made by electoral commissioners and approved by both Houses of Parliament.

It was held by the Victorian Full Court that the plaintiffs had sufficient standing to challenge the validity of the legislation mainly on the ground that electors had a right to vote in *particular* electorates. There was also some suggestion, however, that they had sufficient standing because of their status as members of the Legislative Assembly.[48]

This case was followed by the Full Court in Western Australia in *Tonkin* v. *Brand*[49] where, it will be recalled,[50] the Court held that the

---

[43] The relevant provisions are to be found in Article I Section 5 clause 1. Rutledge J. in *Colegrove* v. *Green* (1945) 328 U.S. 549, 564; 90 L.Ed. 1432, 1442.

[44] (1907) 4 C.L.R. 1497.

[45] As a result of the decision the Disputed Elections and Qualifications Act 1907 (Cth) was passed and the question of the vacancy was subsequently resolved by the High Court in the case of *Vardon* v. *O'Loghlin* (1907) 5 C.L.R. 201. See now Commonwealth Electoral Act 1918-1973, ss. 183(2), 203 (Cth).

[46] [1953] V.L.R. 411.

[47] The case was decided on grounds that were not relevant to the issues discussed in this article except in so far as they relate to *locus standi*.

[48] *Id.* 420 *per* Gavan Duffy J., 427 *per* Martin J. and 438-439 *per* O'Bryan J.

[49] *Supra* n. 27.

[50] *Supra* p. 91.

Governor in Council was under a legal duty to set in motion the machinery for an electoral redistribution. The plaintiffs were members of the Legislative Assembly and were also entitled to vote in the electoral divisions they represented by reason of certain provisions of the relevant Act. It was held by the Court that the plaintiffs had sufficient standing to bring the action as electors. Wolff C.J.[51] and Hale J.[52] were content to rely on the plaintiff's standing as electors while the remaining member of the Court, Jackson S.P.J.[53] expressed the view that the plaintiffs had sufficient standing as both electors and members. It is significant to mention that Hale J. thought that the interest which the plaintiffs had as electors was not merely an interest which all members of the public had in having the law "ascertained and obeyed". Furthermore, he took the view that not only did the law recognize that an elector had a right to vote, but it also recognized that an elector had a right to cast a vote of a "predetermined approximate weight".

Although there can be no assurance that the cases discussed above will be followed by the High Court, in the absence of any decisions to the contrary on the matter they must be regarded as strong authority in favour of the view that electors have sufficient standing to maintain actions which seek to enforce compliance with laws concerning electoral redistribution.[54]

If the cases are followed in the future, it would seem that electors would have sufficient standing to compel the Distribution Commissioners to perform the statutory duties (on the assumption that such duties exist in law) imposed upon them under the Commonwealth Electoral Act. Apart from the standing accorded to electors, it is probable that the Attorney-General of the Commonwealth would also have sufficient standing to bring proceedings of this nature, although it should be noted that there appears to be an absence of judicial authority to support such a view. Nevertheless in view of the traditional role played by the Attorney-General in protecting the rights of the public in a number of areas, it seems difficult to envisage that the Attorney-General would be denied standing for this purpose. These areas it might be mentioned include the right to commence proceedings for the purpose of restraining statutory bodies from exceeding the powers given to them (i.e. *ultra vires*[55]), restraining the commission of public nuis-

[51] [1962] W.A.R. 2, 14-15.
[52] *Id.* 21.
[53] *Id.* 19.
[54] This writer is not persuaded by the criticism of the decision in *Tonkin* v. *Brand* made in the note by Beasley, "A Constitutional Extravaganza" (1962) 5 University of Western Australia Law Review 591.
[55] *E.g. The Commonwealth* v. *Australian Commonwealth Shipping Board* (1926) 39 C.L.R. 1.

ance and finally the restraining of breaches of the criminal law where the penalties provided are inadequate.[56]

Likewise, it would seem that both an elector and the Attorney-General for the Commonwealth would also have sufficient standing to challenge the validity of the provisions in the Commonwealth Electoral Act which deal with electoral redistribution, on the ground that the quota for determining the required number of electors which each division may contain does not comply with the *constitutional* requirements which flow from sections 24 and 29 of the Constitution.

Turning now to the standing of a plaintiff to bring legal proceedings in respect of a failure to comply with the provisions of the Constitution and the Representation Act that deal with the number of members of the House of Representatives who may be chosen from each State, it seems unlikely that an elector would be recognized as having a sufficient interest in the matter to justify him bringing the proceedings.

On the other hand, the obvious connection which is apparent from the nature of those provisions with the States makes it probable that the High Court would be prepared to recognize that an aggrieved State would have a sufficient standing to justify its commencing proceedings. In no sense could it be argued that the State would be meddling in something which did not concern it. If this view is correct the Court might seek to explain the basis upon which the States, through their Attorneys-General, have been accorded the standing to challenge the validity of federal legislation as being only an *example* of the interest which every State has, of ensuring that all the constitutional and other provisions which concern or affect the States *as such*, are obeyed. For these purposes it seems unlikely that the different explanations which have been advanced to justify the standing of a State Attorney-General to challenge the validity of federal legislation would make any difference.[57] If the Court was in fact prepared to recognize that a State had a

---

[56] De Smith, *Judicial Review of Administrative Action* (2nd ed. 1968) 446-451 for the discussion of the Crown's special interest in matters arising out of the exercise of the equitable jurisdiction of the courts. It appears that "Certiorari issues as of course when applied for by the Attorney-General", *id.* 432 and that he also had standing to apply for the writ of Quo Warranto to challenge the usurpation of a public office, *id.* 479. The view is expressed by the same learned author that:

> On principle it would seem that the Attorney-General should be able to obtain a mandatory injunction *ex proprio motu* or in a relator action to secure the performance of a public duty in a case where an application for mandamus might have been brought . . . *Id.* 458.

However there appears to be no discussion about his standing to apply for mandamus in either this work or the exhaustive article by Thio, "Locus Standi in relation to Mandamus" [1966] Public Law 133.

[57] Wynes, *Legislative, Executive and Judicial Powers in Australia* (4th ed. 1970) 419-420.

sufficient interest to bring proceedings for the enforcement of section 24, it would not be difficult to show that the Attorney-General of that State was either suing to protect the "rights" of his public or suing to protect the "rights" of the Crown in right of the State which he represents, these being the two views which have been put forward in the past to support the standing accorded to a State Attorney-General for the purpose of challenging the constitutional validity of federal legislation.

Leaving aside the question of *locus standi*, it is of course also necessary to consider who could be sued as a defendant in an action. In both kinds of challenges described above, that is, in connection with the number of members who may be chosen from each State and the redistribution of electoral divisions represented by members of the House of Representatives, the defendants could include both the Commonwealth and the Chief Electoral Officer. The remedy sought could take the form of a declaration and, if necessary, an injunction (at least in relation to the Chief Electoral Officer), in order to prevent elections from being held until the alleged defect was rectified.

The foregoing analysis has dealt with the position concerning jurisdiction on the assumption that the action would take the form of a direct challenge to the legal validity of any action taken under sections 24 and 29 of the Constitution where the sole purpose of the proceedings would be to establish that a failure to comply with those provisions had occurred. Such an action would, as has been seen above, raise what may be thought to be problems of a novel nature in some respects. These problems, however, would not arise if the action took the form of an indirect challenge by, for example, attacking the validity of legislation enacted at a time when the House of Representatives was not constituted or apportioned in accordance with the relevant constitutional and legal provisions. In other words, the validity of any legislation would be sought to be challenged on the ground that at the time the legislation was passed the House of Representatives was not legally in existence and it was therefore incapable of being passed by that House. While it may well be true that this form of proceeding would not raise any procedural or jurisdictional problems, its success would nevertheless still depend on the likelihood of a Court accepting the view that the failure to comply with the relevant provision would, of itself, be sufficient to destroy the legal existence of the House of Representatives from the time when the non-compliance first occurred. It will be suggested later in this article that this view of sections 24 and 29 of the Constitution is unlikely to gain acceptance even though the legal requirements created by those sections may be otherwise enforceable.[58]

[58] *Infra* p. 104.

Duty to Exercise Judicial Review

Given that the High Court has jurisdiction to deal with questions concerning the composition of the House of Representatives (and that the procedural requirements for exercising such jurisdiction have been complied with), the second question that must be considered in order to determine whether the provisions of sections 24 and 29 of the Constitution are justiciable is whether the Court is under an obligation to exercise its jurisdiction.

Notwithstanding the fundamental nature of the question or rather, perhaps because of it, the question has never been the subject of judicial discussion except for *dicta* in *The Queen* v. *Langdon*; *Ex parte Langdon*.[59] It was there suggested that the High Court could lawfully refuse to exercise its jurisdiction between residents of different States under section 75(iv) of the Constitution if the subject matter of the dispute could be adequately dealt with in an appropriate State Court.[60] Previous writing on the subject has, for the most part, concentrated on the question whether the High Court can lawfully decline to exercise jurisdiction that can adequately be dealt with by appropriate State or newly created Federal Courts.[61] The issue here however is whether *any* Court should deal with matters arising out of sections 24 and 29 of the Constitution.

The writer takes the view that even if the provisions of section 75(v) of the Constitution and section 30(a) of the Judiciary Act 1903-1973 (Cth) do not in express terms require the Court to exercise the jurisdiction conferred by those provisions, the duty to exercise the jurisdiction can and should be *implied* having regard to the fact that the Courts have traditionally regarded themselves as being obliged to exercise their jurisdiction.[62] The traditional attitude is reflected in the availability of

---

[59] (1953) 88 C.L.R. 158, 161, 163.

[60] *Faussett* v. *Carol* (1917) 15 W.N. (N.S.W.) No. 12 Cover Note (14th August 1917) and *Morrison* v. *Thwaites* (1969) 43 A.L.J.R. 452 (note of unreported decision) for the procedural means by which the High Court has sought to discourage litigants from invoking this jurisdiction.

[61] Cowen, *Federal Jurisdiction in Australia* (1959) 68-73; Barwick, "The Australian Judicial System: The Proposed New Federal Court" (1964) 1 F.L. Rev. 1, 9-15; Sawer, *Australian Federalism in the Courts* (1967) 39; Howard, *Australian Federal Constitutional Law* (2nd ed. 1972) 193-197. Although the question was not discussed in Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) there are passages in the book which suggest that the authors assumed the existence of the duty of the High Court to exercise its jurisdiction, *id.* 784, 791.

[62] *Dicta* in *Ashby* v. *White* (1703) 2 Ld.Raym. 938, 953; 92 E.R. 126, 137-138; *Ex part Mylecharane* (1898) 19 N.S.W.L.R. 7; *The Queen* v. *Commonwealth Industrial Court*; *Ex parte Amalgamated Engineering Union* (1960) 103 C.L.R. 368, 378, 382; *The King* v. *Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust.) Ltd* (1949) 78 C.L.R. 389, 398. The view expressed in the text seems to have the support of Professors Cowen and Sawer and also, perhaps, Quick and Garran. In the United States, the remarks of Marshall C.J. in

prerogative writs to compel inferior courts to exercise their summary jurisdiction,[63] although of course the position of the High Court is different in that respect because presumably the writs would not lie against the High Court itself. Such exceptions as have been argued in favour of enabling the High Court to decline to exercise its jurisdiction are not in point here because they are based on the availability of other Courts to deal with the same matter *i.e.* the doctrine of *forum non conveniens*.

The writer also takes the view that in Australia, courts of law, in the exercise of their jurisdiction, not only have the *power*, but are under a *duty*, to determine the validity of legislation passed by the Parliament.[64] If this view is correct it would, however, only go so far as to suggest that a court is under an obligation to deal with the validity of legislation passed in pursuance of sections 24 and 29 of the Constitution. It would not provide an answer to the question which arises here, namely, whether the Court must determine whether a failure to comply with those sections has the effect of destroying the legal existence of the House of Representatives. It may be noted, in this regard, that a failure to comply with the constitutional provisions of sections 24 and 29 may result from a failure to invoke machinery that is already provided for in existing legislation for the purpose of complying with those provisions, as well as by the enactment of legislation of the same kind which, however, is itself contrary to the provisions in question.

It could be argued, on the one hand, that such an obligation exists because it is the duty of a court of law to apply and give effect to whatever law may exist in relation to a matter. According to this view, the obligation to determine the validity of legislation would only be an example of the application of such a duty. On the other hand, it could perhaps also be argued that irrespective of whether a duty or obligation exists it should not apply in circumstances where it could have the effect of a court finding that the body responsible for making laws does

---

Cohens v. *Virginia* (1821) 6 Wheat 264, 404, 5 L.Ed. 257, 291 are usually referred to as supporting the view that the Supreme Court is under an obligation to exercise its jurisdiction, in the absence of express provision to the contrary. At the same time Judge Learned Hand has argued that the function of judicial review is essentially discretionary in nature: *The Bill of Rights* (1958) Ch.2 *Cf.* Wechsler, "Towards Neutral Principles of Constitutional Law" (1959) 73 Harvard Law Review 1 who disagreed with that view.

[63] *Halsbury's Laws of England* (3rd ed.) xi, 96 cases cited in note (y) and xxv, 320 cases cited in note (c). Also *Ah Yick* v. *Lehmert* (1905) 2 C.L.R. 593.

[64] However Lane, "Judicial Review or Government by the High Court" (1966) 5 Sydney Law Review 203, 203-208 stated that he was unable to find a constitutional basis for the doctrine of judicial review, also Sawer, *op. cit.* 76, n. 61. A further discussion of Lane's views appears in his book, *The Australian Federal System with United States Analogues* (1972) 914-919. Space does not permit a full examination of the issues in this article.

not exist in the eyes of the law, because of the obvious confusion and disruption which would result from such a finding.

Be that as it may, it will be suggested later in this article that the application of sections 24 and 29 will not necessarily have the effect of destroying the legal existence of the House of Representatives in the event of a failure to comply with those provisions—at least not without first giving the House, along with the Senate and the Governor-General an opportunity of rectifying the non-compliance.[65] If this suggestion is well founded it will be unnecessary to choose between either of the two views outlined above since it has already been seen that courts do not refuse to deal with questions merely because they concern the composition of legislative bodies. In other words, the view is put forward here that a court could and should apply and give effect to sections 24 and 29 at least so long as this did not bring about a situation where the existing Parliament was not given an opportunity of altering the composition of the House of Representatives so that it could comply with those sections, before it was found that the House of Representatives ceased to exist in law.

Existence of Legal Requirements

Given that the Court has jurisdiction to decide questions concerning the composition of the House of Representatives and that it is willing to exercise that jurisdiction, it remains to consider whether sections 24 and 29 of the Constitution, and the legislation passed in connection with those provisions, are capable of giving rise to legal obligations or requirements, in order to determine whether such questions are justiciable.

One possible view of the sections is that the principles laid down by them are not to be taken as legal rules but, instead, are to be regarded as rules of a political nature somewhat akin to the rules of constitutional convention. The fact that they appear in statutes (passed either by the Imperial Parliament in the case of the Constitution, or, by the Commonwealth Parliament in the case of the legislative provisions under discussion) need not necessarily mean that they *must* create legal rules unless the view is taken that everything in a statute must be of a legally enforceable character. It is significant to recall, in this connection, the Government's willingness to abide by the Constitutional requirements of section 24 in the incident mentioned earlier in this article, regardless of whether there existed legal remedies by which compliance with those requirements could be enforced.[66] At the same time, however, it must be recognized that it is unusual for statutory provisions to be construed in this way.

---

[65] *Infra* p. 105.
[66] *Supra* p. 89.

If the relevant provisions do create legal duties, it is important to examine carefully in what sense the term "duty" is used in this context. It will be noted that the provisions of section 24 in the Constitution do not specifically mention the body or person required to take the necessary steps to ensure that the requirements concerning the number of members to represent each State are complied with, although it does enable the Parliament to pass certain laws which determine the way in which the formula for determining this number is to be applied.[67] Even if the provisions had purported to oblige the Parliament to take those steps, the question would arise whether this obligation was intended to be enforceable having regard to the availability of legal remedies to compel the Parliament, as such, to do anything.

Overall the better view is, it is suggested, that the provisions do not oblige the Parliament to take any action but only contemplate that if it does not, such a failure could ultimately result in the House of Representatives, referred to in the Constitution, ceasing to exist, and thereby depriving the Parliament of the legal existence of the House of Representatives—one of its constituent bodies. In other words, it is a "duty", if at all, only in the practical sense that it requires the Parliament to act in order to ensure its continued existence at any given time.

While the provisions of sections 24 and 29 of the Constitution do not, perhaps, legally oblige the Parliament to take any action, they do provide a source of legislative authority in the exercise of which Parliament could enact laws to require statutory officials to perform certain legal duties in connection with the requirements laid down by those provisions. Thus the duties placed upon the Chief Electoral Officer and the Distribution Commissioners described earlier in this article[68] may be capable of being enforced in the same way as any other legal duties that are required to be performed by public officials.

In this regard, the decision in *Tonkin* v. *Brand* is not without significance because it does suggest that the Courts may be willing to recognize the existence of such duties in connection with electoral redistribution.

As against this decision, however, the English cases of *Harper* v. *Home Secretary* and *Hammersmith Corporation* v. *Boundary Commission* seem to point in the opposite direction in regard to the performance of the advisory functions performed by the bodies responsible for recommending alterations to the boundaries of electoral divisions. The reasoning relied on in these cases may apply to the functions performed by the Distribution Commissioners under Part III of the Common-

[67] In fact it appears that early in the history of the Commonwealth one government sought to take the necessary steps itself without Parliamentary action or approval. Paterson, "Federal Electorates and Proportionate Distribution" (1968) 42 A.L.J. 127, 128.

[68] *Supra* p. 86.

wealth Electoral Act in regard to whether they have acted in accordance with the statutory rules governing the performance of their functions. It will be remembered that those cases relied on the fact that the final approval for any proposals rested with the Houses of Parliament as is also the case in regard to proposals formulated by the Distribution Commissioners. Nevertheless it is submitted that the criticism made of these cases is well founded. There is no reason for thinking that the rules governing such matters as the electoral quota prescribed under the Commonwealth Electoral Act are not legal rules. If this is accepted a court should be able to apply those rules regardless of whether either of the Houses of Parliament have had an opportunity to rectify any legal defect which has occurred in the formulation of the proposals for the redistribution of electoral divisions. (Under the Act it is open to the Houses of Parliament to reject the proposals and require the Distribution Commissioners to put forward new proposals.)

If the provisions of sections 24 and 29 of the Constitution do give rise to legal duties in the sense explained above, it remains to consider the effect of a failure to comply with those duties.

One of the underlying assumptions throughout this article has been that a court would be unwilling to recognize the existence of legal requirements if the failure to comply with those requirements would result in the non-existence of the Parliament from the time when the non-compliance first occurred. There is, it is suggested, a number of ways open to a court which is prepared to recognize the existence of legal requirements and wishes to avoid such a result.

First, it does not follow that every departure from the provisions in question would affect the legal existence of the House of Representatives. In much the same way as the courts recognize the difference between mandatory and directory provisions in legislation, the courts could draw a distinction between fundamental and minor failures to comply with the relevant legal requirements, with the result that only the fundamental failures would have the effect of affecting the legal existence of the House of Representatives. That this is a familiar problem in the law generally is illustrated by the following remarks that were made by Dixon and Evatt JJ. in *Attorney-General for New South Wales* v. *Perpetual Trustee Co. (Ltd)* a case dealing with the validity of a charitable trust:

> The truth is that the time-honoured distinction between essential and accidental characteristics is at the root of the test provided by the modern law for ascertaining whether a trust for charitable purposes, found incapable of literal execution according to its tenor, is nevertheless to be administered *cy-près*. In other departments of the law, however, similar distinctions are in use. Analogies may be seen in the question whether a contractual provision is of

> the essence; whether a term is a condition or a warranty; in the question whether invalid provisions of a statutory enactment or other instrument are severable or form part of an indivisible whole; in the question whether a law is mandatory or directory, and perhaps in the question whether the substantial purpose of creating a special power of appointment was to ensure a benefit to the objects so that they take in default of its exercise by the donee.[69]

Secondly, even in the case of fundamental breaches the Court could still interpret the relevant provisions of the Constitution to mean that the existence of the House of Representatives would only be affected by the breach if a court ruled that such a breach occurred in proceedings that were commenced for the purpose of determining that issue, and then, only as and from the time when the Court was prepared to give such a ruling. This would be similar in some respects to the distinction which is drawn between "void" and "voidable" and would ensure that the validity of anything done by the Parliament *before* the Court gave its ruling could not be challenged on the ground that the relevant constitutional provisions had not been observed.

Thirdly, the American reapportionment cases suggest that the discretion vested in a court when dealing with equitable remedies such as a declaration and an injunction may be exercised in such a way as to give the existing House of Representatives an opportunity of rectifying any failure to observe the relevant constitutional provision before the court finds that the House of Representatives is invalidly constituted.[70] It may be that the American cases have themselves assumed that a failure to comply with the provisions is only "voidable" in the sense mentioned above although this does not appear to have been made clear from the relevant United States Supreme Court decisions on the subject.

It has been suggested that section 29 of the Constitution would provide a further means of dealing with any problems created by the Court finding that the House of Representatives was not validly constituted.[71] It will be recalled that the section provides that:

> In the absence of other provision, each State shall be one electorate.

According to that view new elections could be held under which the members to be chosen in each State could be chosen on a State-wide basis so that the members no longer represented separate electoral

---

[69] (1940) 63 C.L.R. 209, 226-227.

[70] *Supra* n. 35. Also *Kilgarlin* v. *Hill* (1967) 386 U.S. 120; 17 L.Ed. 2d 771 and *Connor* v. *Williams* (1972) 404 U.S. 549; 30 L.Ed. 2d 704. In both of these cases the Supreme Court assumed the validity of elections even though the electoral districts may not have been validly apportioned.

[71] Paterson, *op. cit.* 132-133.

divisions within a State. This view, however, is open to several objections.

First, there could be a reluctance on the part of the courts to abandon the principle of representing particular electorates. Secondly, the electoral laws themselves may presuppose that the members are to be chosen to represent particular divisions. Thirdly, the provisions relied on in section 29 may themselves have been displaced in their operation by the Commonwealth legislation on the subject since it should be remembered that they are prefaced by the words "in the absence of other provision(s)". Perhaps, however, the most important objection is that the view assumes that the existence of the House of Representatives is capable of being invalidated from the moment it fails to comply with the relevant constitutional provisions, thereby leaving open to challenge the validity of anything done by the Parliament since that moment.

Summary

To sum up, the foregoing analysis points to the possibility of a court being able to enforce any legal requirements governing the composition of the House of Representatives by adopting measures which fall short of ever finding that the House of Representatives ceased to exist without first giving that body an opportunity to rectify the situation. It is submitted that this would remove the only substantial obstacle in the way of recognizing the existence of any legal requirements under sections 24 and 29 of the Constitution.