

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

Theme 1 – Election Management Bodies

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

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

Theme 2 – Electoral Boundaries

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

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

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

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

Theme 3 – Registration of Voters

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

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

Theme 4 – Nomination of Candidates

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

Theme 5 – Voting

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

Theme 6 – Election Irregularities

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

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

Theme 7 – Political Parties

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

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

Theme 8 – Election Expenses

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

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

Theme 9 – The Media and Elections

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

Theme 10 – Miscellaneous

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

