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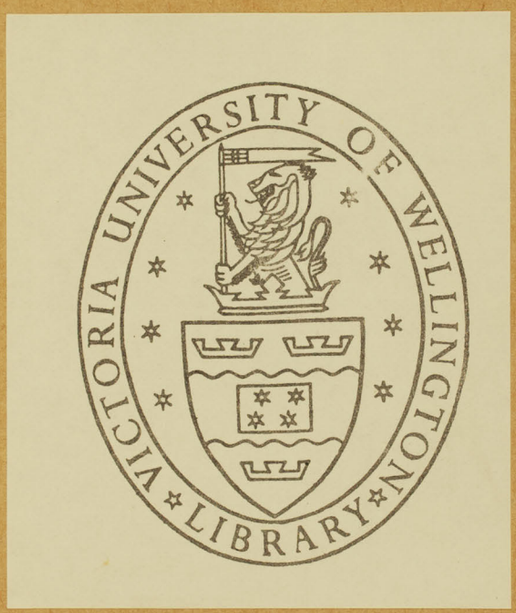
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FAILING DEMOCRACY:
THE 1978 GENERAL ELECTION

Submitted for the LL.B (Honours) Degree at the Victoria University of Wellington

August 1979

INTRODUCTION

FAILING DEMOCRACY

The 1978 General Election must certainly rate as one of the most debated in New Zealand's history. The intense media coverage accentuated the widespread dissatisfaction with both the pre-election administration and the form of the election process itself.

The closeness of the results led to a large number of challenges. Magisterial recounts were sought in Kapiti, Hastings and Western Hutt; an action was started to allow the Manurewa roll to be inspected[1]; and electoral petitions were considered in Lyttleton, Hunua, Kapiti and Western Hutt.

The only petition to finally be determined by the Electoral Court[2] was that brought by Winston Peters, the defeated National candidate, and two others alleging that National's (LABOURS) Malcolm Douglas with a majority of 301 had not been duly elected and that Peters was entitled to be elected. Subsequent to the Electoral Courts finding that it must follow the Hunua decision, a petition brought in the Kapiti electorate was dropped[3].

The purpose of this paper is to evaluate the administration and procedures for elections in New Zealand as provided for by the relevant sections of the Electoral Act 1956, (and amendments) and raised currently by the recent judgement in the Hunua Election Petition[4].

The broad areas to be considered are:

PART I THE REGISTRATION AND ENROLMENT OF ELECTORS

PART II THE METHOD OF VOTING AND COUNTING OF VOTES

PART III THE PETITION MACHINERY ITSELF

PART IV ELECTORAL ACT LEGISLATION IN GENERAL

Underlying Assumptions

Before embarking on a discussion of the substantive issues in this paper it is necessary to firstly outline the precepts on which this paper will proceed.

1) There must be an appreciation that New Zealanders have long been proud of their extension of the franchise to a wide percentage of the population and indeed were the first country to extend the vote to women. It must be stated at the outset therefore, that New Zealanders expect and must have their wide voting rights continued; and any reforms or changes to the electoral process must in no way be seen to abrogate that democratic tradition.

2) It must be understood also that there are two distinct views on electoral administration. The conservative stand is that the Government should provide the necessary facilities and opportunities for enrolment and registration of voters, but ultimately the burden of responsibility is with the voter himself. If he fails to avail himself of the facilities available no action will be taken against, or to aid him but on polling day his vote simply will not be allowed.

The second school of thought is that since the State has decreed enrolment to be compulsory, it is the Government's responsibility to ensure the voter has enrolled and so has every opportunity to exercise his right to vote and have that vote counted.

This paper will proceed on the premise that the latter view is preferable and indeed vital to uphold "democracy" in this country. The reasons are obvious. Democracy must not be a

passive process whereby opportunities exist only to those who actively seek them. The danger of an electoral administration based on such a view is that the power is then given to Government to rule by default. Where the responsibility is left mainly on the voter, the system is prone to abuse since it becomes too tempting for the party in power to maintain the status quo by failing to ensure that the whole population actively exercises its right to choose its leaders.

PART I REGISTRATION AND ENROLMENT OF VOTERS

Out of the eleven grounds set out by the petitioner Peters in support of the relief sought, and the list of ten objections filed by Douglas as respondent; a majority relate directly or indirectly to the state of the rolls and the registration administration.

The procedure for enrolment and registration of electors leading to polling day is important to our democratic system of voting and now needs careful re-evaluation in the light of the 1978 General Election.

A history of the registration process serves as a useful insight into the reasons for the current dissatisfaction.

A. The History

Up until 1975 the electoral rolls were prepared manually under section 60 of the Electoral Act 1956[5]. This provided for the Registrar for each district or Maori district to compile a roll based on electoral cards filled in by those entitled to vote. The roll so compiled came into being as the electoral roll for that district on the dissolution or expiry of the then existing Parliament and continued until a new electoral roll was compiled. In election year a main roll was printed[6] usually about July and then from time to time a supplementary roll was also prepared incorporating all the additions and alterations[7].

In 1969 a Public Expenditure Sub-Committee chaired by Michael Connelly concluded that the present system of enrolment for both Parliamentary and Local Body elections was unsatisfactory The Committee recommended that a single agency with the help

of computers should undertake the responsibility of enrolling parliamentary and Local Body elections.

Computer enrolment was considered to be potentially more efficient, accurate, expedient and cheaper. The computer would incorporate on a single card all the information necessary for local and licencing elections, and would be held in a central place with a method by which individual electorates could receive printouts for each election[8].

It was hoped that this procedure would make supplementary rolls unnecessary and it would be possible to produce completely up-dated rolls at any given time.

Although computerised rolls were introduced in some electorates in the 1972 and 1975 elections, computerisation of the main roll was not fully introduced until 1978.

In 1973 the Labour Government again considered electoral reform in a committee of that year chaired by Johnathon Hunt.

The Committee recommended that the responsibility for enrolling electors and compiling the rolls to the stage where the names could be given to the Chief Electoral Officer be transferred to the Post Office.

Also to ensure greater percentage enrolment, enrolment cards would be distributed with, but separate from the quinquennial census and all adult persons qualified to vote would be required to register at this time. A person would also elect at this stage whether he wished to be on a General or a Maori roll.

The Electoral Amendment Act 1975 introduced into legislation

many of their recommendations.

B. The 1978 Election: The Problems

For the first time in the 1978 election, New Zealand had census re-enrolment, centralised rolls, the Post Office in charge of enrolling electors, and computerisation of the rolls. A number of problems became immediately obvious and were reflected in the Hunua petition.

1. Census re-enrolment

Under the new section 43 as amended by the Electoral Amendment Act 1975 section 20, voters in 1976 were expected to register by completing new enrolment cards with their census forms only four months after the last election. Many could not understand the need to re-enrol when they had been on the rolls for the previous election. The period immediately succeeding an election is always one when political interest is at its lowest ebb and this factor combined with inadequate advertising and explanation compelled the Electoral Court to estimate that 50,000 people did not bother to complete electoral re-enrolment cards[9].

The redistribution of seats under section 16 occurs after the census. Many who did enrol at the census found that due to boundary changes they were now enrolled in the wrong electorate. Again a large percentage did not realise or understand the need to alter their registrations.

2. Separate Local Body Elections

The recommendation of the Connelly Committee incorporating

Local Body elections with the General Election were never carried out due to administrative difficulties. Thus electors in 1977 enrolled again - this time for Local Body elections adding further to the confusion and uncertainty[10].

3. Centralisation of the rolls

Although there were obvious advantages in centralising the rolls as far as expediency and efficient administration went, centralisation did not have statutary authority.

In section 2 the Electoral Officer is defined:

> "Electoral Officer in relation to any district, means the Electoral Officer appointed for that district under section 7A of this Act and includes his deputy".

The Chief Electoral Officer is defined separately and referred to specifically in section 58(1)[11].

Section 60 charges the Electoral Officer with the duty of compiling the roll and keeping it up to date. If an enrolment card is in form E1 as proscribed by the Electoral Regulations 1975 and has been checked, the Electoral Officer marks the card with his stamp, so registering the elector in terms of section 43 of the Act.

The Electoral Court in considering the issue as to the authority of the compilation of the rolls defined the "electoral rolls" as the collection of such cards processed by the Electoral Officers and the assembling of them together under section 49[12].

Further sections 60 to 63, providing for the printing of the main and supplementary rolls, refer only to the duties of the <u>Electoral Officer</u>[13].

All the sections as found by the Court, clearly envisage that the duty of compilation will be performed by the Local Electoral Officer. The Electoral Court's conclusion therefore was that the centralisation of the rolls was "a method of keeping the rolls not proscribed by the Act"[14].

The consequences of this illegal method of assembling the rolls were evidenced immediately following the election by the bringing of an action in the Supreme Court under section 64 of the Electoral Act. The Manurewa candidate Mr O. Douglas pursuant to section 64(2)(c) requested the Court for an interim order requiring the Electoral Officer in Manurewa to obtain the roll and the applications for special votes from that electorate, and to allow him and his agents to inspect them[15].

It was found however, that all applications to register except those received after October 27 had been filed in the Lower Hutt Central Electoral Office in an alphabetical file for the whole country. Under this procedure the original applications were not available for examination in district electoral offices.

The case resulted in an out of court settlement whereby it was agreed that the parties contesting the election would appoint a representative who would be shown the entire procedure used for determining the eligibility of special voters in Lower Hutt.

It would appear from the case that the clear words of section 64 have been derogated:

> Section 64(2): "Any person may inspect at the Electoral Officer's office without payment at any time when the office is open for the transaction of business ...
> (c) The applications of any persons who have applied to be registered as electors of the district but whose names are not on the electoral roll".

Under the new system the district Electoral offices could

be advised from time to time approximately every fourteen days by computor printouts from the centralised roll. It appears further that the cards were not only held at Lower Hutt, but in two other offices. Although in practice even under the old system, there may have been some delay, the amount of time lapse and inconvenience has been greatly increased. The rolls therefore are now not available for public inspection "at any time" and so the intent of the section is thereby defeated.

The Electoral Court, although agreeing that centralisation was illegal, considered its powers under the proviso to section 167:

> "No election shall be declared invalid ..... if the Court is satisfied that the election was conducted so as to be substantially in compliance with the law as to elections and that the failure, ommission, irregularity, want, defect, absence, mistake, or breach did not affect the result of the election".

The Court held that the overall result was not affected by the breach of duty by the Electoral Officer and the compilation of the roll was conducted substantially in compliance with the law. It stated its reasons thus:

> "It is true that some minor advantages might have accrued if all the cards had been retained locally in accordance with the strict requirement of sections 60 to 64 but a far greater potential for erroneous registration was avoided by the infinitely superior scheme of the National Alphabetical sort"[16]. (emphasis added)

The minor advantages of the legal rights of the public to ensure they are on the roll have been displaced by the greater potential of ensuring double or erroneous registration is deleted. The Court's pragmatic approach here is rather surprising in the light of their later strictly conceptual decision[17].

If centralisation of the rolls is to be continued it should be authorised by insertion in the Act so that problems illustrated by the test case in Manurewa and the anomalies created by the present disparities of personnel (in sections 43 to 65) do not create continuing uncertainty.

Amendment must now by made specifically providing for printouts of electoral rolls to be available frequently at district offices. The public's right to inspect and purchase main and supplementary rolls must be maintained.

4. Computerisation

The main roll based on the 1976 census re-enrolment was released as was usual in July 1978. It was realised however that a large number of errors existed. Not only were names misspelt and addresses and occupations misstated, but many people failed to get on the roll despite several attempts to do so. Due to the problems outlined: the large numbers who did not initially enrol, the change in boundaries and the large gap in time between re-enrolment and the election, the computer rolls were highly inaccurate.

A number of reasons have been advanced for the state of the rolls. The Post Office do not seem to have satisfactorily performed their new role of initially compiling the rolls. Government funding allocated to electoral preparation was not spent with the result that staff in the Chief Electoral Office had neither the numbers, time nor skill needed to check and amend the rolls.

As a desperate measure to improve matters, the old 1975 Electoral registration cards were fed in with the new computer roll in a process called "carrying over"[18]. Unfortunately the

computer could not cancel information which differed from that already printed. A large number of duplications resulted whenever information supplied was even fractionally different (an extra name, slightly different description of address or occupation) making it necessary to print two supplementary rolls before the election.

From evidence given by a Mrs Atkinson, administrative officer in charge of the Chief Electoral Office, it was alleged in the Hunua case that 45,000 electoral registration cards had not been processed by any Electorate Officer or the Chief Electoral Officer at the time of the election[19].

The Electoral Court again however seemed anxious to avoid the issue of the numbers actually disenfranchised by the admission and hesitently stated:

> "That the figure of 45,000 might include other registrants ..... we are satisfied for the most part they were changes of address cards within an electorate and thus persons qualified to claim a special vote"[20] (emphasis added).

Whether one accepts the Court's explanation or not, such an example illustrates the kinds of problems encountered due to inaccurate and unsatisfactory rolls which led, as seen to the large number of electoral challenges[21].

C. The 1981 Election - Suggested Reforms

What then of the future? Census re-enrolment has been shown to be an unsuitable method of enrolling voters. The census being every five years while elections are every three will inevitably lead to the same problems encountered in 1978.

If the Government is to be responsible for ensuring the best possible methods and opportunities for total enrolment - this system must obviously be repealed.

Instead a more practical and efficient method would be the instigation of a pre-enrolment drive the same year as the election when interest is high and boundaries are settled. A return to the old card system aided now by legalised centralisation and computerisation would seem to be the answer. The Chief Electoral Office has now completed at least two printouts of the rolls using information gained after the election and has eliminated many of the errors and inaccuracies.

What methods could now be employed to ensure that the rolls are updated and enrolment percentages kept at a maximum in election year?

The Hunt Committee in considering this question looked to the Australian situation. Here elected officers employ canvassers to check in fact that all residents are enrolled. They go from door-to-door and record on a schedule the names and addresses of residents entitled to vote.

The schedule is then checked at the Electoral Office and if the name does not appear a card is sent to the particular resident with a time limit within which to enrol. If a voter does not enrol, a fine is automatically imposed. It must of course be remembered that voting has been compulsory in Australia since 1922 and has led to percentage enrolments of between 91 and 95 percent[22].

Because of the similarities of our electoral processes, it is convenient to compare the British system to our own. Britain has approximately fifty million people broken up into 635 constituencies. Registration is the duty of the registration officer of each district. A form is sent to every household in the area requesting the names of all those entitled to vote

and provision is also made for a house to house inquiry if necessary. A preliminary list is then prepared and published and the registration officer then receives claims that people should not be on the roll or have failed to be included. There is an appeal to the County Court and then to the Court of Appeal, which is final.

The registers are prepared annually and are based on circumstances existing on the 10th of October each year, which is the qualifying date (not qualifying period.) The new register comes into force on the 16th of February and applies to every election held during the following twelve months, including Local Body elections[23].

From both examples it is clear that what is needed is a more direct and personal contact with the people in the months prior to the release of the main roll.

The Hunt Committee in 1973 recommended the use of the Post Office as the best department to ensure greater enrolment due to its close contact with the public. "Posties", through their working knowledge of the habitation of the people on their rounds, could leave enrolment forms at each residence in the early months of election year. A nominal reward could be given for each completed enrolment card then collected and returned to the Post Office for subsequent addition to the rolls.

This system would probably work well in the smaller areas where "posties" have a closer personal knowledge of the inhabitants of their area. In the larger urban areas where the density of population would mean an impossible task for Post Office employees, extra personnel could be employed by the electoral officers of that electorate. As now happens with the

census, sub-enumerators could visit every residence and enrol electors eligible at that time, even if that means employing people on Saturdays when householders are more likely to be at home.

The Government, with its clear responsibility to ensure the best possible methods of enrolment would fund the cost of such an operations in the local electorates.

Further to the need for more aggressive enrolment is the need to enforce the offences under the Act. Section 43 provides for compulsory registration and section 43 (4) and (5) makes it an offence not to do so. Historically no one has ever been prosecuted in New Zealand perhaps in part due to the wide exemption clause contained in section 43(4):

> "Every person commits an offence against this section who, being required by this section to apply for registration as an elector during any period fails to become so registered during that period, unless he proves that he duly applied for registration or that his failure to apply for registration was not due to wilful default". (emphasis added)

If the offence became one of strict liability, and a few people were prosecuted, their example would mean that people would become aware of their obligations and by so doing, ensure their own democratic rights are upheld.

The enforcement of fines could be co-ordinated with provision under the Act for voters whose votes were not counted to be informed after the election. The Electoral Office could send to such people notification of their need to re-enrol correctly within a specified time to do so. If they did not do so - then fines could be imposed. This would prevent the situation at present where voters whose votes are not counted, vote for elections on end without their votes ever being

counted.

A number of other recommendations can be made:
The present Act provides for the Register of Births and Deaths[24] to notify the Electoral Officer on the death of any adult person so the rolls can be amended. Similarly the Register of Marriages[25] informs the Electoral Officer of the marriage of any woman. The Department of Internal Affairs could also be added and advise the Officer of the naturalisation of any adult. The Immigration Department could confer with the Electoral Officer using its arrival and departure forms.

At the beginning of each election year, a consolidated Act, together with any amendments and regulations should be printed in pamphlet form along with simple explanatory notes to enable voters to be aware of their rights and obligations[26].

The enrolment cards and ballot forms need to be carefully scrutinised to ensure that the functional literacy is at an acceptable level. Research indicates that the 1976 census enrolment card needed a reading level of about a seventeen year old[27], which means that many below that level (probably the majority of New Zealanders) or people whose first language is not English, were discriminated against. Also interpreters must be on hand at every polling booth. There was evidence that in Hunua, a predominantly multi-racial area, this was not the case[28].

Notwithstanding the Electoral Courts refusal to allow evidence as to the levels of comprehension of various sectors of the community, it is important that <u>all</u> New Zealanders of every race, creed and ability should have equal opportunity to vote for their representatives.

D. The Winston Peters Question

The 1975 Amendment Act while introducing census re-enrolment also provided for voters to elect whether they wished to be on a Maori or General roll subject to section 43(b) which made it illegal for a voter to change his mind once he had exercised his option.

It can be argued that the enrolment form used for this purpose was ambiguous and required one answer for in effect two questions:

> "I am a Maori and I wish to be registered as an elector of a Maori electoral district. Tick square if statement applies".

Compounded by the problems already outlined with census re-enrolment, misunderstandings occured resulting in many voters electing to be on a Maori roll in 1978 but in election year enrolling in a General roll thereby invalidating their registration.

The Labour candidate in the Hunua electorate, Douglas, alleged that is exactly what happened in the case of Winston Peters the National candidate. The Court found that in the 1975 election Peters lived at an address in Auckland 3 and was registered as an elector in the Northern Maori Roll. After the census in March 1976 he opted again to be on the Maori roll on the enrolment form. Subsequently he won the National party nomination for the newly created Hunua electorate and moved to an address in Howick (in Hunua and Western Maori electorate). He should then have registered in the Western Maori electorate but in fact he applied and was enrolled in Hunua. Section 43(b) of the Act specifically disqualifies Maoris from changing between Maori and General rolls once they have exercised their option.

Douglas claimed therefore that Peters was not registered as an elector of any electoral district and therefore under section 25 was not entitled to be a candidate[29].

The court in the Hunua petition looked at the sections relating to residential qualifications:

> Section 2(1):" "Elector" in relation to any district means a person registered or qualified to be registered as an elector of that district".
>
> Section 28: "Effect of registration on wrong roll. The nomination of any person as a candidate for election, or his election as a member of Parliament, shall not be questioned on the ground that, though entitled to be registered as an elector of any district, he was not in fact registered as an elector of that district but was registered as an elector of some other district".

The court decided the issue on this section. Sir Ronald said that in view of the court Mr Peters was entitled to be registered as an elector of Western Maori. He was not in fact registered there, but was registered as an elector of Northern Maori. In the court's view this determined the argument in Mr Peters' favour.

The decision raises many issues. The first question is whether in fact Peters was still entitled to be registered in Northern Maori.

Section 39 needs careful examination. The section is headed Qualification of Electors.

> "1) Subject to the provisions of this Act every adult person shall be qualified to be registered as an elector of an electoral district if he be
>
> a) 18 years of age
>
> b) He is ordinarily resident in New Zealand and
>
> c) He has at some period resided continuously in New Zealand for not less than one year".

and then one of the three other criteria. Both subs. (d) and (f) do not apply to Winston Peters but subs. (e) needs close attention.

"e) He has not resided continuously in that electoral district for not less than three months and has not subsequently resided continuously for three months or upwards in any one electoral district".

The subsection (with the Act's tendency to torturous double negatives) does not make sense unless the word 'other' is impliedly included, i.e.

"and has not subsequently resided continuously for three months or upwards in any other one electoral district".

On such a reading Peters was clearly therefore no longer entitled to be registered as an elector of Northern Maori since he had lived for more than three months in Hunua.

Yet on the authority of section 28 the Court allowed Peters to continue as a candidate even though he had not fulfilled the necessary criteria of being registered as an elector of some other district.

Peters' own vote was among the ones disallowed by the Court in Hunua where voters had exercised the Maori option at the census and then subsequently enrolled in Hunua. Their votes were thereby invalidated due to the operation of section 43(b) and section 40:-

"A person shall not be entitled to be registered as an elector of more than one electoral district".

There was evidence that many such cases were either the result of political parties pressuring voters to enrol and failing to check whether they had previously exercised a Maori option, or in some cases sub-enumerators had mistakenly (and illegally) filled in the Maori option themselves unbeknown to the voter.

The Court again disallowed votes of voters who had been on a European roll prior to 1976, then exercised the Maori option but

but were subsequently "carried over" to a European roll again without their knowledge or consent[30].

The Court concluded:

> "Had the present petition related to a Maori electorate, it seems difficult to see how a Court could have avoided declaring all the elections in Maori electorates to have been invalid on the grounds the rolls contained an unspecified number of unqualified persons. Such election for the Maori seats were not conducted in substantial compliance with electoral law"[31].

Both the fact that so many were disenfranchised (often through no fault of their own); and that Peters himself, a supposedly intelligent voter for whom the Electoral Act plays a large part in his life could make such a fundamental error; points to the ambiguity and confusion in the law at present.

The reforms to the enrolment procedure already suggested would solve the problems encountered here also. If an elector could choose in the year of the election (and if the cards were simplified), less confusion would occur, and the problems of electors changing rolls would be dramatically reduced.

E. Summary of Part I

It is useful at this stage to summarise the reforms discussed which would make the registration and enrolment administration more 'democratic', i.e. enable more voters to be enrolled correctly and therefore be sure of their votes being counted.

1. Repeal the census re-enrolment and return to the electoral card system.
2. Legalise the centralisation of the rolls.
3. Institute a pre-election enrolment drive in the early months of election year.

4. Use 'posties' to enrol electors wherever possible.
5. Employ sub-enumerators to enrol those not enrolled by posties.
6. Enforce offences.
7. Provide adequate staffing and resources at the chief electoral office.
8. Inform voters if their votes were not counted on polling day.
9. Provide for other departments to inform the Electoral Office of changes needed on the roll.
10. Provide for adequate advertising such as the printing of a consolidated Act in election year.
11. Ensure the forms and cards are at an acceptable reading level and are multi-lingual.
12. Revise the sections in the Act relating to qualification for registration.
13. Repeal the census re-enrolment Maori option.

PART II THE METHOD OF VOTING AND COUNTING VOTES

Right at the heart of the Hunua petition is the issue as to the validity of informal votes - those in which the voter has not precisely followed the form set out by the statute.

The contested votes in Hunua were in a variety of forms but the two that warrant mention are where voters had ticked or crossed their ballot paper to indicate their intention, or had crossed out the party affiliations and not the candidates name.

In considering the Court's decision it is convenient to divide the analysis into three parts:

A. Statutory Interpretation

B. Case Analysis

C. Policy Grounds

A. Statutory Interpretation

The main sections in issue were section 106 and the provisos to section 115.

> Section 106 "Method of Voting (1) the voter having received a ballot paper shall immediately retire into one of the inner compartments provided for the purpose and shall there alone and secretly exercise his vote by marking the ballot paper by striking out the name of every candidate except the one for whom he wishes to vote".

> Section 115 "Counting the votes ...
> 2(a) He shall reject as informal -
> (ii) Any ballot paper that does not clearly indicate the candidate for whom the voter desired to vote:
> Provided that no ballot paper shall be rejected as informal by reason only of some informality in the manner in which it has been dealt with by the voter if it is otherwise regular, and if in the opinion of the Ret rning Officer the intention of the voter in voting is clearly indicated:
> Provided also that no ballot paper shall be rejected as informal by reason only of some error or omission on the part of an official, if the Returning Officer is satisfied that the voter was qualified to vote at the election".

Section 106 was held to be mandatory by the judges. According to the Court this was due to it being the sole provision for outlining the method of voting, it being entrenched in section 189 therefore affording it special significance[32], and there being specific provision for the blind, disabled and illiterate voter under section 108.

The word "method" itself and the fact that the section does not indicate that votes not marked in this way will not be allowed, can arguably suggest that the section is merely directory. Such an interpretation is afforded support by a comparison with the more strongly and authoritative wording of section 115 which may overrule section 106.

> "... No ballot paper shall be rejected as informal by reason only".

The Court held further that "striking out" meant putting a line through. They refused to consider evidence of other interpretations of these words although they conceded that section 106 does not say how a candidate's name is to be struck out[33]. One of the primary rules of statutory interpretation is to firstly take the common meaning of the words. Yet the Court simply refused to address itself to meanings other than their own[34]. In a multi-cultural area such as Hunua the common meaning of "strike out" was not that attributed to it by the Supreme Court judges[35]. The complete lack of discussion could compel one to conclude that the words had not been given a "fair, large, and liberal meaning[36].

Similarly the words "name of every candidate" were strictly interpreted. The section was enacted in 1881 when the ballot papers usually only included two names and there were no party affiliations. In 1973, for the first time, party affiliations

were added after the names of the candidates with the intention to aid the voter in his or her choice.

It is arguable therefore that the word 'name' now includes the affiliation of the candidate as well as his surname as it has become part of his overall title. The anachronistic nature of the section and the new interpretation added by the 1973 amendment were not discussed by the Court however, and it was decided on policy grounds that all votes where voters had struck out only the party affiliations and not the candidates actual name, were informal[37].

The proviso to section 152 2(a)(ii) was carefully considered by the Court in its relationship to section 106. The proviso was held to mean that for a vote to be allowed, the ballot paper must be in accordance with section 106 (a line drawn through all candidate's names except one) and then the intention of the voter clear. The words forming the basis of the decision are

> "By reason only of some informality in the manner in which it has been dealt with by the voter if it is otherwise regular and if in the opinion of the Returning Officer the intention of the voter is clear".

In the Court's view "regular" meant strict compliance with section 106. Due to the insertion of the second proviso in 1956, it was held further that the Legislature had separated informality in voting which might arise from the actions of the voter on the one hand, and actions of officials on the other.

Council's contention 'that otherwise regular' refers to the regularity of issuing, numbering and officially marking the ballot paper, failed as the Court regarded this as wholly covered by the second proviso.

Such an interpretation can be criticised on a number of

grounds. If the Court's view is accepted, the words "and the intention of the voter is clear" are rendered unnecessary as the vote will already be regular - every name but one will be struck out.

The judgement also appears contradictory. At page 98:

"When a ballot paper has been prepared in accordance with the Statute and issued to a voter - it is on the face of it regular".

It follows therefore that the words "some informality by the voter" is action by the voter distinct from the state of the voting paper already regular on its face. Therefore if the ballot paper is regular on its face (prepared in accordance with statute) and the voter deals with it with some informality (non-compliance with section 106) and the intention is still clear the Returning Officer should allow it. The second proviso section 115 2(a)(ii) states ".... only if some error or omission on the part of an official...." and so could arguably be construed as referring to an error in issuing the paper by an official at the time of voting rather than an error in preparing the ballot paper.

Elsewhere in the Act and specifically in section 115 the Returning Officer is given discretion (1a) "... if the Returning Officer is satisfied" and in the controversial proviso: "... and if in the opinion of the Returning Officer" "... if the Returning Officer is satisfied". Under the Court's interpretation however his discretion is limited to merely ascertaining whether section 106 has been strictly complied with. His opinion as to the intention of the voter being clear has all but been displaced and he is now reduced to "the level of an adding machine"[38].

In 1956 a new section was inserted into the Electoral Act following the example of the Commonwealth Electoral Act 1918 section 193 (Australia):

Section 166: "Real justice to be observed - On the trial of any election petition.

(a) The Court shall be guided by the substantial merits and justice of the case witnout regard to legal forms and technicalities.

(b) The Court may admit such evidence as in its opinion may assist it to deal effectively with the case, notwithstanding that the evidence may not be otherwise admissible in the Supreme Court".

The Court dismissed the effect of this section as dealing only with what is to occur at the trial of an electoral petition which is an event subsequent to voting.

This narrow interpretation ignores the spirit and intent of the words themselves. "...Justice of the case" surely refers to the issues involved in that case to prevent section 166(a) becoming an abstract entity. What is to occur at an election trial if it is not precisely the issue involved here - the validity of contested votes? The words must be read to mean that an electoral Court in deciding the import of legal form and technicalities of rules such as to the method of voting, must be guided by the substantial merits of justice.

Such an interpretation is advanced by 167(b) which specifically provides for the actual process of the trial, the rules governing its format and procedures. Therefore this same meaning cannot be attributed to 167(a). On the introduction of the Act it was stated:

> "Where an election is contested, the Court should look to the substance and not to the technicality in deciding whether or not votes should be allowed"[39].

B. Cases

To support its argument the Court relied on a number of previous election petition cases. The interpretation afforded to those also needs consideration.

The first case relied on by the Court was Hawkes Bay Election Petition 1 (1915) 34 N.Z.L.R. 507. Here votes were held invalid where voters had crossed the christian name of the candidate leaving the surname intact. The Electoral Court held that the instruction on the ballot paper was similar in effect to that contained on the ballot papers now in consideration and therefore the case was good authority for the Hunua decision. The words were:

> "The voter is to strike out the name of any candidate for whom he does not intend to vote by drawing a line through the name with a pen or pencil". (emphasis added)

The extra phrase however, specifies exactly how the vote is to occur making the instruction for clearer and more precise than the ambiguous "strike out". The case is therefore clearly distinguishable.

The Electoral Court found that if the case of McCaulay v Rushworth[40] had decided the Hunua case the same findings would have resulted. In the McCauley case votes were held invalid where no names on the ballot paper had been crossed out but lines drawn alongside two out of three of the candidates' names. The case turned on the issue as to whether the intention of the voters was clear. If that same Court had now to decide whether a clear voters intention was shown where voters had crossed out three out of four party affiliations but not the actual names, it is more likely that they would hold such votes to be valid. The Electoral Court's finding again is arguably equivocal at least on this case.

The Court rejected the decision in O'Brian v Seddon[41] where ballot papers marked by crosses were held to be valid votes. One of the grounds relied on in O'Brien was that at the time, the use of a cross was a common method of voting at municiple elections

Although the Electoral Court stated:

> "It does appear that a standard method of voting in all elections is to be preferred as it very much lessens the chances of mistakes and subsequent argument"[42].

it did not feel constrained to allow crosses notwithstanding that the Local Body election method of voting is now the same as in 1932.

It appears also that the Court failed to mention the case of McCombs v Lyons[43] where O'Brien v Seddon was followed and votes marked by crosses allowed.

The cases prior to 1973 do not consider the effect of party affiliations and are therefore all strictly dicta.
Many deal with elections involving the choice of only two candidates where a tick or cross is more equivocal and as mentioned section 166 has only been in force subsequent to these decisions.

The Electoral Court's assertion therefore that:

> "The preponderance of the New Zealand cases is against any system of voting by ticks and crosses and by any other method that that authorised by statute"44.

seems more hopeful than honest.

C. Policy Grounds

Perhaps more serious than the arguably technical and contradictory statutory interpretation and the generalised case law is the underlying policy grounds the decision reflects.

Overall the Court seems to have disregarded evidence as to the practical difficulties for voters in interpreting ballot papers and registration procedures. Despite evidence as to the different levels of comprehension in the community, different

cultural means of the word "strike out"[45], and even the lack of interpreters in some booths[46]; the Court stated

> "The voter must follow the instructions on the ballot paper and if they cannot read them for any reason, then they must obtain the assistance which is authorised"[47].

The disallowing of party votes can also be seen as a finding in favour of the legal rather than the real and practical[48]. Research into voting behaviour reveals that voters vote overwhelmingly in favour of parties rather than candidates. Both the original intention of adding party affiliations, and the present anachronistic statutory provisions (106 and 115) were factors similarly disregarded by the Court.

The judgement goes so far as to say at Page 106:

> "The purported party vote is in our view a particularly objectionable method to allow because all it may indicate is that a voter has a preference for one particular party but that the candidate who is representing the party is not one for whom the voter wishes to vote".

The same considerations apply to the disregarding of Local Body practice and the use of crosses[49].

Not only can it be argued that the voters intention has been overridden by the strict requirements of legal form, but the same lack of consideration has been applied to the Legislators original intention. In 1956 while introducing the new Electoral Bill, Mr J.R. Marshall (as he then was) expressed the view of Parliament by saying:

> "The principle that should be followed is that if the intention of the voter is clear, then his vote ought to count"50.

Such sentiment has been applied by Returning Officers throughout the country for the past twenty years. Immediately prior to the 1978 Election they received from the Chief Electoral Officer a memorandum laying down guidelines for dealing with

"party" (as distinct from "candidate") votes and voters indicated by ticks and crosses.

It stated in part:

> "It is fundamental to our electoral system that everyone qualified as an elector should cost a vote and it follows that an informal vote is only where the intention of the voter is NOT CLEAR"51.

A clear statement of an electoral interpretation is contained in the early case of O'Brien v Seddon (supra)[52] which held that the presumption is in favour of the validity of all votes placing the onus heavily on the challenging side. (emphasis added)

This rule however, applied apparently without question through successive elections, has not been followed by the Hunua judges.

Suggestions for the future

Problems will continue while sections like 106 remain in force in the same form as enacted in 1881.

Following England's example the cross-marking method could now replace the present confusing and outdated "strike-out" method. Voting by placing a cross by the name of the favoured candidate was initiated in Local Body elections to cope with the large number of candidates (voters also often having to indicate more than one choice). Now with increasing numbers of candidates in General electorates it is surely a more appropriate method here, also ending the uncertainty as to party votes. Putting a cross at the end of the name and party affiliation in a specially provided square, would be a more positive, simple and potentially less erroneous method of voting and should be seriously considered in the light of the difficulties encountered in Hunua.

PART III THE PETITION MACHINERY

The judgement in the Hunua election petition was not finally decided until the 11 of May and it was a further thirteen days until the result was effected. On that day Malcolm Douglas, the election night candidate for Hunua, was replaced in the House by successful petitioner Winston Peters.

On the 15th of May, Labour candidate Margaret Shield was forced to concede defeat in her effort to overturn the Kapiti election result, as the ruling in Hunua destroyed any chance of her bringing a successful election petition[53].

In two electorates therefore the public was without their sure representative for six months following the election. The candidates themselves, involved in researching evidence and the Court hearings; had less time for their normal constituent duties, could not participate fully in committee work and were not favoured with port-folios due to their tenuous positions.

Not only is the time involved in bringing an election petition a serious deficiency, but also the cost. National estimated it would cost the party ten to twenty thousand dollars[54] The money involved in preparing a case and ensuring adequate legal representation in practice rules out legal action for the average citizen. Although section 156[55] of the Act sets out wide criteria for who can bring a petition, a party-backed challenge is in reality the only remedy.

The right to appeal against a polling result is fundamental to our democratic tradition ensuring that corruption and irregularities do not go unchecked. Since there is no right of appeal from election petitions necessarily due to the need for

finality, petitions must be available on unrestricted grounds.

New Zealand's petition machinery is therefore clearly in need of reform.

A committee in Britain set up in 1946 considered steps that should be taken to reduce obstacles to presenting an election petition. The Committee felt that the expense often acts as a deterrent to a petitioner. Therefore whenever a prima facie case was made out it was suggested that a petition should be conducted by the Treasury solicitor[56].

Both time and cost would be reduced by the provision of Government funding. This could be determined at a separate hearing to take place between the magisterial recount and the time for the presentation of an election petition: forty nine days after the day on which the Returning Officer has publicly notified the result of the poll[57].

The court hearing would take only two or three days after which time a judge could rule on whether reasonable grounds existed by which it could be shown that some irregularity or corruption had occurred sufficient to cast doubt on the validity of the election result.

Once such a ruling had been given, the Government would be responsible for funding the costs involved in bringing the petition.

Such a procedure would also enable the parties to clarify the areas of contention, agreement and substantial issues between them at an early stage and so enable them to better prepare their cases. The time taken for the petition hearing itself would

then be reduced as many of the issues would have been resolved at this preliminary stage. The Court would be relieved of some of the problems encountered recently in the Hunua petition where the judge ruled that the Court considered it a waste of time examining all votes where there was no challenge on the facts. This comment came after the Court had spent four hours examining the first fifty cards out of 300 where voters were registered on both Hunua and Western Maori rolls.

Before however, one can discuss what form such a hearing should take, it is necessary to consider whether there are any historical constitutional bars to such a step.

Originally an election petition was presented to Parliament and a committee was set up to adjudicate on it. Fears of political interference and corruption led to the House of Representatives delegating its jurisdiction to the Courts in 1880 pursuant to the Election Petitions Act. A specially constituted Electoral Court would hear the case and make a report to the Speaker, such report being final[58].

In 1927 the Legislature Act was repealed and the Electoral Act of that year increased the number of judges in the Electoral Court to three. In the Electoral Act 1956 the court and place of trial of an election petition was contained in section 161(1):

> "Every election petition shall be tried by the Supreme Court, and the trial shall take place before three Judges of the Court to be named by the Chief Justice".

On the introduction of the 1956 Act it was stated:

> "The provisions relating to the hearing of election petitions have been rewritten and the necessity for setting up a separate election court has been abolished. Election petitions will in future go to the Supreme Court to be heard by three judges. These judges will now sit as members of the Supreme Court"[59].

From the debates and the words of the Act it appears now that the Electoral Court has been replaced by three judges of the Supreme Court. Parliament has therefore delegated to jurisdiction in this area as far as the Supreme Court and arguably would now be willing to abrogate further its privilege to sanction a preliminary hearing.

Special rules distinguish the election petition hearing from an ordinary Supreme Court trial. Section 166(2) allows evidence not otherwise admissible to be heard[60] and there is no right of appeal under section 168.

Section 169 provides that the Court shall certify in writing the determination of the petition to the Speaker which is final to all intents and purposes.

Under section 171 the Court may make a special report to the Speaker on any matter arising in the course of the trial which in the judgement of the court ought to be submitted[61].

The most symbolic remaining vestige of Parliamentary Privilege evident in the Act is the entering of the Court's report in the Journals of the House (section 172). In the United Kingdom, provision exists under section 111 of the Representation of the People Act (equivalent to our Electoral Act) for a shorthand writer of the House to be present and take notes of evidence. There also the petition court is still a special Electoral Court. Dicy writes however:

> "By the act of resolving that the report be recorded in the Journals of the House the empty shell of the ancient privilege of the House is preserved"[62].

In New Zealand therefore where there is no shorthand writer and the Court although still called an Electoral Court and retaining some peculiar features, is now constituted as part of the Supreme Court, it can be said that even the "empty shell" of privilege has all but disappeared.

Thus there would now appear to be no constitutional bar on the grounds of Parliamentary privilege to prevent a further step to be added to the election petition structure. As an Electoral Court will be in the main bound by the rules of the Supreme Court it would seem appropriate that a Magistrate Court would serve as the trial court for determining the provision of Government funding. The form would take that of depositions enabling the magistrate to find that a prima facie case was made out.

The petition machinery must be freely available to all and not just to political parties who can afford the time and expense involved at present. In light of the second concept outlined at the start of this paper[63] the Government must now take responsibility to provide adequate funding to individuals seeking redress. Steps must be taken immediately to introduce the necessary judicial procedures before the next election to prevent the political 'battlefield' the election petition procedure has become.

PART IV ELECTORAL ACT LEGISLATION IN GENERAL

For the last eight years in New Zealand there have been six legislative amendments to the Electoral Act, including three recent amendments to section 189 of the Act. This section places a restriction on amendment or repeal of certain listed provisions. The entrenchment provision is contained in subs.(2):

> "No reserved provision shall be repealed or amended unless the proposal for amendment or repeal -
>
> (a) Is passed by a majority of 75 per cent of all the members of the House of Representatives; or
>
> (b) Has been carried by a majority of the valid voters cast at a poll of the electors of the General and Maori electoral districts.

Provided that this section shall not apply to the repeal of any reserved provision by a consolidating Act in which that provision is re-enacted without amendment and this section is re-enacted without amendment so as to apply to that provision as re-enacted".

On the introduction of the 1956 bill containing this section J.R. Marshall again (supra) stated that such entrenchment was:

> "An attempt to place the structure of the law above and beyond the influence of Government and party .... the effect of the reserved sections is not in their legal force to bind future Parliaments, but in their moral force as representing the unanimous view of Parliament .... These reserved provisions, and the obstacles placed in the way of their amendment, are there to provide the best safeguard we can work out to protect what in the unanimous view of Parliament are essential safeguards for our democratic method of electing the people's representatives"[64].

Traditionally Governments have been unwilling to risk amending the provisions (which under the proviso they are able to do).

The Electoral Amendment Act 1974 substituted the

expression '18' years in section 189(1)(e) for 20 years.

The Electoral Amendment Act, 1975, section 6(4) substituted 1(c) for the original para. (c) and also in that in the previous Amendment/section 189(2)(b) the word "General" was substituted for the word "European" by section 6(2).

Although these changes can be considered as merely a change in semantics (the word "European" being considered offensive), the lowering of the voting age does affect the whole voting process. The number of amendments to a previously considered 'sacred' section can be regarded with some alarm. The Electoral Act may be becoming too casually amended and consequently merely a political tool.

More graphic examples can be seen in the "unentrenched" provisions and in particular the Amendment Act 1975, introduced by the Labour Government and its subsequent repeal in 1977 by the National Government.

In accordance with its more aggressive policy on electoral registration (or the higher the percentage of electoral 'turn-out' the more votes Labour tends to get), the Labour Government reduced the qualifying period of residency from three months to one month making it easier for people to qualify to vote.[65]

Further they added a proviso to section 99:

> "(f) Any person who is qualified to be registered as an elector of the district pursuant to section 38 of this Act but is not so registered if he believes on reasonable grounds (to be set out in his application for a special vote pursuant to section 100 of this Act) that he is or should have been registered as an elector of that district and he completes and delivers to the issuing officer a form of application in the prescribed form for registration as an elector of the district"66.

Section 15 of the Amendment amended section 37 of the principal Act by adding the following subsection (8):

"A person who is detained in a penal institution pursuant to a conviction shall be deemed to reside in the electoral district in which he resided at the time of his conviction".

In 1977 the National Government in pursuance of its policy of individual responsibility (and wishing to preserve its own power by re-introducing the status quo) introduced a further amendment to the Act.

Section 4 reverted the qualifying period back to three months, the proviso to section 99 was repealed by section 7, and subsection (8) of section 37 giving prisoners the right to vote was also repealed.

Legislative "ball-games" between Governments do not enhance democracy.

The basic concept outlined at the start of this paper that voting rights once given cannot be taken away has been quietly ignored. For the first time in New Zealand's electoral history those newly entitled to vote have been dis-enfranchised. This precedent has frightening possibilities since if prisoners can be so easily barred from voting, what is to stop a Government in theory introducing a similar measure for instance relating to those on the dole.

To prevent future Governments avoiding their responsibilites to the voter and to ensure his rights are upheld despite the political cost, reform is needed to the Act.

It would now seem to be necessary to entrench more than those provisions contained within section 189 and now to "doubly-entrench" them.

Debate has ranged widely about the constitutional validity of double entrenchment. This is the situation where, as in the

present Electoral Act a piece of legislation is restricted in its amendment by provision that it must be passed in some special manner such as a two thirds majority of the House or a referendum. As distinguished from section 189 however, double entrenchment imposes similar restriction on legislation purporting to amend such a section.

In an essay by Northey, the opposing views as to the success of such legislative restriction are compared[67].

The first view is that it is not possible to bind successive Parliaments because Parliament is the sovereign body unable to be limited or restricted in its power to enact legislation. Consequently, there exists an "ultimate legal principle" in terms of which the courts must obey any rule enacted by the Legislature. An Act of Parliament therefore, passed subsequently to the adoption of a doubly entrenched provision would be a valid statute impliedly repealing any previous provision restricting amendment even though it was not passed in accordance with the constitutional requirements.

The opposing opinion is that the Courts are entitled even obliged to ensure that what appears to be an Act of Parliament has in fact been enacted within the law which for the time being proscribes the manner and form before the statute is enacted.

A number of cases have examined the question. The early decisions of Edinburgh v Wauchope[68] and Lee v Bude[69] have been cited as laying down the proposition that the Courts will not examine the procedures adopted by Parliament in enacting Legislation, if from the Parliamentary Roll it should appear that the bill has passed both Houses and received the Royal Assent.

This was affirmed recently in the case of British Railway Board v Pickin[70].

De Smith in commenting on the decision, noted however that the authoritative statement extracted from Edinburgh was merely dicta and that the sacrosanctity attached to the Parliamentary Roll may well now be outdated. He also cites a number of examples when the Courts may well be prepared to go behind the official text of the Act such as if it was asserted that the Bill had not obtained a majority[71]. Exceptions to the strict rule in Pickin can therefore be envisaged.

In Attorney General v Trethowan[72] the constitution of New South Wales provided that the Legislative Council could not be abolished unless it had first been approved by the General Electorate or a referendum and a similar restriction existed for a Bill purporting to amend or repeal such a provision.

Following a change of Government, bills were passed in both Houses removing the referendum provision and its entrenching provisions and abolishing the Upper House. Neither bill was submitted for referendum. This procedure was held unlawful and the bill failed. At the time New South Wales was a "non-sovereign" Legislature and so section 5 of the Colonial Laws Validity Act 1865, applied in this situation. The Act provided that a colonial legislature could make laws relating to its "constitution, powers and procedures in such manner and form as may be required by existing law".

Two modern cases have further held however that a "sovereign" Parliament must function also in the manner proscribed by the existing law in order validly to exercise the legislative will.

A South African Court refused to hold that a measure passed by both Houses sitting bicamerally when the constitution provided that a two thirds majority of both Houses sitting together was needed, was an authentic Act of Parliament[73].

In Bribery Commissioner v Rangasinghe (1965)[74] the Constitution provided that no bill for the amendment or repeal of any of the provisions of a particular order should be valid unless it had endorsed on it a certificate of the Speaker confirming that it had passed with a two-thirds majority in the House. Where a Bribery Amendment Act did not have a Speaker's certificate, then the Board rejected the Act and although the Legislature was sovereign it was stated in the case that "it did not have inherent power to ignore the conditions of law making that are imposed by the instrument which itself regulates its power to make law".

The assertion that Parliament is sovereign may now be tempered by the question of: What is Parliament? Dicy, although emphasising the sovereignty of Parliament states that this does not "prohibit either logically or in matter of fact the abdication of sovereignty"[75].

It follows as seen by the cases, that Parliament may assume a different character - a body composed of both Houses and a two-thirds majority as in Harris and Rangasinghe.

After de Smith had discussed the implications of Pickin (supra) and the above authorities he proposed an alternative view. He concluded that it was implied by the cases there can be a presumption of procedural conditions of manner and form to be adopted before Parliament could speak with an authoritative voice[76].

All the cases discussed however, deal with a Legislature receiving a Speaker's Certificate which is conclusive that the proscribed procedures of its constitution have been complied with. What is the situation therefore in regard to New Zealand?

We have no constitution and a copy of each Act with the Governor General's assent is lodged with the Supreme Court of Wellington. Presumably the Courts would refer to a signed copy of the Act.

De Smith in referring to the British situation (with its equivalent constitutional features to our own) could not see any "logical reason why the Parliament would be incompetent to so redefine itself (or redefine the procedure for enacting Legislation on any given matter) as to preclude Parliament as ordinarily constituted from passing a law on the matter"[77].

The forseeable problems are the Court's willingness to intervene or accept jurisdiction (as witnessed in Pickin) and the possible danger of Parliament binding itself so as to make any further Legislation impossible.

New Zealand does not have a traditional and historical common law background which writers have argued in Britain places the Acts of Parliament above and beyond the reach of the courts. Political legitimacy and mandate would supposedly prevent Governments adopting ridiculously restrictive rules.

The New Zealand Parliament has itself recognised the need and plausibility of double entrenchment. In 1964 the Government passed legislation making the Cook Islands a fully sovereign Legislative autonomy. Inclusive in the schedule to the Cook Islands Constitutional Act 1964 is contained a subclause (1) of

of article 41. This provides that no Bill repealing or amending or modifying or extending the Constitution shall be deemed to be passed except by two-thirds majority of the Legislative Assembly and it must be presented with a Certificate of the Speaker to that effect. Similarly a bill cannot repeal or amend the section unless it has passed with a two-thirds majority and a referendum of the voters at a poll.

It follows that a court in New Zealand may reject a signed copy of a bill as not an authentic Act of Parliament if the procedure for its enactment has not been observed as evidenced by a Speakers certificate.

J.R. Robson[78] in affirming this opinion (along with other commentators[79]) states: "Thus if it were provided that a Parliament for the purposes of amending the sections protected by section 189 of the Electoral Act 1956 including section 189 the entrenching section itself, is the Governor General, the House of Representatives and a majority of the referendum, why should the Courts not require an amendment to be made in this way? The area of the power of the Legislature is in no way affected".

Ideally the whole Electoral Act should be doubly entrenched so that Governments of the future cannot use any part for their own political ends. Section 189 should certainly be so restricted and with the added proviso that a Speakers Certificate should accompany any provision purporting to amend the section stating that the requirement of a two-thirds majority or referendum has been complied with.

Changes in electoral law are to a certain extent inevitable. A society undergoes social and moral transformation and

certain procedures and rules become outdated and impractical.

Entrenchment of Parts II, III and IV of the Act would leave the main administrative sections free while ensuring that the vital law as to qualification of electors and so on was safeguarded.

As discussed previously, various specific sections of the Act need immediate reform to ensure the problems illustrated by Hunua do not recur in 1981[80].

One further section warrants mention in this context.

Section 187 Validation of irregularities -

> "Where anything is omitted to be done or cannot be done at the time required by or under this Act, or is done before or after that time, or is otherwise irregularly done in matter of form, or sufficient provision is not made by or under this Act, the Governor General may by Order in Council gazetted, at any time before or after the time within which the thing is required to be done, extend that time, or validate anything so done before or after that time required or so irregularly done in matter of form, or make other provision for the case as he thinks fit".

On July 17th last year pursuant to the above section an Order in Council was gazetted entitled: The Electoral Act (Validation of Irregularities) Order 1978. Under the Order, the Governor General validated the late appointment of Electoral Officers made after the time specified under section 7A of the Act. Further the period within which the Electoral Officer for each General Electoral district or Maori electoral district was required pursuant to section 60(3) to compile an electoral roll for the district was extended and rolls declared valid on compilation. The period for notification of applicants for registration under section 49 was also extended.

All the provisions related to the extension of time within which electoral preparation could take place. As seen this

relates directly to the problems outlined in Part I. Such a section is clearly open to abuse since where a Government is lax in its electoral administration it can then legally and quietly correct such matters without having to account for its incompetance.

Even if it is considered administratively necessary to have such a section from which Orders in Council can validate changes in time, the section is worded so generally that any errors or mistakes could be later validated:".. or is otherwise irregularly done in matter of form, or sufficient provision is not made by or under this Act .... or so irregularly done in matter of form, or make other provision for the case as he thinks fit".

Retrospective legislation of this type is rare and dangerous. In an area such as electoral administration it is vital that such procedures as notification of electors and roll compilation occur within the specified time and in accordance with the Act. It must not be open for any Government to have power to avoid its responsibilities to democracy merely because it can use section 187 to excuse any irregularities in future.

Conclusion

This paper has attempted to analyse and evaluate some of the issues brought to the fore by the Hunua judgement and to suggest reforms to avoid similar problems occurring in the future.

Increasingly there have been calls for a Bill of Rights or Written Constitution in New Zealand[81] to ensure that certain basic rights are compiled into a written form and thereby elevated out of the political arena. Entrenchment of the Electoral Act anticipates such reaction and reflects the concern at the lack of certainty, finality and fairness created by politically motivated changes in the law.

What is needed now in the election area however is an independent investigation to update and amend the anomalies occurring at present. The Wicks Inquiry Committee set up in March of this year considered the current procedures for registration of electors, the compilation including computer printouts and centralisation of the rolls, the administration of the Chief Electoral Office by the Chief Electoral Officer, the Electoral Act and in general the administration of elections.

The Committee forwarded its Report to the deputy Prime Minister's office on the 14th of August. There has been however insufficient time for submissions to be prepared. At the time the Committee had already commenced sittings the Hunua decision was not available, neither were statistics from the last election. More significantly there were no public sittings and the findings have not been published.

The Government has recently announced its intention to establish a Parliamentary Select Committee. Although there will have been more time for submissions to be prepared and wide terms of reference are expected, problems still exist. The strong Government bias inevitable in such review will preclude the proposal of any change detrimental to the present Government. Even if changes are recommended the National Party, for whom the present administration is most favourable is unlikely to initiate reforms of any significance.

A Select Committee is not therefore the answer. The public of New Zealand for whom the triennial election is the most significant and symbolic means of expressing their choice of Government and their only effective control over executive power must be invited and actively encouraged to participate in a reappraisal of the system out of the context of political concerns.

The Hunua judgement as discussed in Part II of this paper is to say the least narrow and technical. The decision reflects unhealthy attitudes in the judiciary toward placing the onus in election petitions on strict legality and to eliminating errors rather than upholding the rights of the voter to have his vote counted. There has been frequent and sharp criticism of the decision. It is clear that many New Zealanders are worried about increasing impediments placed in the way of individuals to exercise their franchise.

Before any revision of the Electoral Act or the procedures and administration of elections can produce legislation that is simple to understand and follow, just and firm in upholding the rights of all voters, provides adequate machinery to do so, and

is binding on successive Governments; consideration must first be given to the values such legislation will encompass.

The concepts outlined at the start of this paper must be reiterated and emphasised. The consciousness of New Zealanders must be "raised" by education and participation to expect and demand that their wide franchise is continued and that the State bears the responsibility of ensuring it does so.

A Royal Commission if properly advertised and if given sufficient time and power, may provide the wide-ranging independent forum that is necessary for New Zealanders at every level to voice their opinions.

J.S. Mill in his Consideration of Representative Government stated:[82]

> "It is a personal injustice to withhold from anyone unless for the prevention of greater evils, the ordinary privilege of having his voice reckoned in the disposal of affairs in which he has the same interest as other people".

Footnotes

1 post, P. 8

2 Electoral Court in name only see post, P. 33

3 post P. 53

4 re Hunua Election Petition [1979] 1 N.Z.L.R. 251 (hereafter referred to as Hunua)

5 Electoral Act 1956

6 Electoral Act, section 61

7 Electoral Act, section 62

8 For the effect of this recommendation see post, P. 7

9 Hunua, op. cit., P. 25. As noted by Alan McRobie (political scientist at Canterbury) the court seems to have miscalculated the figures. If there were 2,000 to 3,000 people in general electorates who did not make census returns, and 5,000 to 6,000 in Maori electorates (as the Court states on P. 25); then the figure is closer to 200,000 not 50,000 as they stated.

10 post, PP. 21-28

11 section 58: Purging the rolls (1) The Chief Electoral Officer may from time to time direct an inquiry to be made in such manner as he thinks fit as to the residential qualification of all persons whose names are on the roll for any district.
(2) The Electoral Office .....

12 Hunua, op. cit., P. 16

13 idem. P. 16

14 ibid. P. 18

15 ante, P. 1

16 Hunua, op. cit., P. 20

17 post, P.28. Note the comparison to the pragmatic approach in Simpson v Attorney-General [1955] N.Z.L.R. 273 post. n. 48

18 post, P. 19

19 Hunua, op. cit., P. 31

20 ibid. P. 32

21 ante, P. 1

22 D.W. Rawson, Australia Votes Melbourne University Press 1961 ch. 3, P. 59

23 T.C. Hartley and J.A.G. Griffin Government and Law Weidenfeld and Nicolson London 1975, P. 39

24 Electoral Act 1956, section 46

25 ibid. section 47

26 Also recommended by the Connelley Committee

27 Calculated by Mr A. McRobie (op. cit.,

28 Suggested by Dr Martyn Finlay, Hunua A Backward Step Listener June 23 1979

29 Electoral Act section 25: "Registered electors may be members unless disqualified
(1) Subject to the provisions of the Act every person registered as an elector of any electoral district; but no other person is qualified to be a candidate and to be elected a member of Parliament for that or any other electoral district".

30 ante, P.10

31 Hunua op. cit., P. 31

32 post, P. 35

33 Hunua op. cit., P. 100

34 ibid, P. 101

35 To many Maori and Pacific Islanders, particularly those working in unskilled occupations, the normally accepted meaning of "strike" is to withdraw one's labour. Even if a voter asked a Returning Officer for the meaning of the words "strike out" the most likely response would be to "cross out" see Alan McRobie Aftermath - The Election Petition a seminar paper 1979 at P. 29

36 Acts Interpretation Act 1924, section 5. General rules of construction. Section 5 subsection (j):
"Every Act .... shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent meaning or spirit".

37 post, P.28

38 Dr Martyn Finlay: Hunua A Backward Step op. cit., n. 28

39 New Zealand Parliamentary Debates 1956 vol. 310 PP. 2840-2841

40 McCaulay v Rushworth [1929] N.Z.L.R. 149

41 O'Brien v Seddon [1926] G.L.R. 141

42 Hunua op. cit., P. 95

43 McCombs v Lyons unreported The Press 13 March 1926. Although an unreported decision still significant due to its result and following of O'Brien v Seddon (supra)

44 Hunua op. cit., P. 105

45 op. cit., n. 35

46 op. cit., n. 28

47 Hunua op. cit., P. 105

48 Compare to the pragmatic decision taken over the centralisation of the rolls, ante. P. 7. Also Simpson v Attorney-General op. cit., n. 17. The Court of Appeal refused to hold a General Election void where the strict requirement of time for the return of the writ pursuant to the Electoral Act 1927, section 104 had not been complied with.

49 ante, P. 23

50 Parliamentary Debates op. cit., n. 39 P. 2842

51 Referred to in Aftermath - The Election Petition op. cit., n. 35 at P.

52 ante, P. 27

53 ante, P. 1

54 Evening Post 20 December 1979

55 Section 156
"(1) An election petition may be presented to the Supreme Court by one or more of the following persons -
(a) A person who voted or who had a right to vote at the election
(b) A person claiming to have had a right to be elected or returned at the election
(c) A person alleging himself to have been a candidate at the election".

56 Butler: Electoral System in the UK 1918-1951. P. 105 Committee headed by Mr Pole of the Home Office in England and composed of MP's party agents and official experts

57 Electoral Act section 157: Time for the presentation of an election petition

58 A summary of the history of election petitions in New Zealand is contained within Cook Islands Election Petitions 24th of July 1978 Misc. Nos. 18, 19 and 20/78. Donne C.J.

59 Parliamentary Debates op. cit., n. 39 P. 2843

60 ante, P. 25

61 The wording gives discretion to the Court

62 A.V. Dicy The Law of the Constitution. Macmillian, London 1902 6th ed.

63 ante, P. 2

64 op. cit., n. 39 at PP. 2839-2840

65 Electoral Act 1956, section 39(1) as amended by Electoral Amendment Act 1975, section 16(2)

66 Electoral Act 1956, section 99 as added by Electoral Amendment Act 1975, section 37

67 J.F. Northey "The New Zealand Constitution" ch. 6 The A.G. Davis Essays in Law Butterworths & co. N.Z. 1965 at PP. 166-168

68 Edinburgh and Dalkeith Raiway Co. v Wauchope (1842) 8 Cl. & F. 710

69 Lee v Bude & Terrington Junction Railway Co (1971) L.R. 6 C.P. 576

70 British Raiway Board v Pickin [1974] A.C. 765

71 S.A. de Smith, Constitutional and Administrative Law Penguin 3rd ed. 1977 at PP. 83-86

72 Attorney-General for N.S.W. v Trethowan [1932] A.C. 526

73 Harris v Minister of the Interior [1952] I.T.L.R. 1245

74 Bribery Commissioner v Rangasinghe [1965] A.C. 172

75 op. cit., n. 62 P. 64

76 op. cit., n. 71 P. 88

77 ibid. P. 89

78 J.L. Robson New Zealand. The Development of its Laws and Constitution London, Stevens 2nd ed. 1967 P.

79 op. cit., n. 65; E.K. Braybrooke A Written Constitution, reprinted from Political Science, 31 March 1957 P. 32-42

80 ante PP. 10, 14, 15, 19, 29, 34, 42, 43.

81 see collated essays Readings in New Zealand Government edited L. Cleveland and A.D. Robinson Reed Education 1972 Part 3 PP. 183-248

82 2nd edition 1861 at P. 166

LX DO DOWNS, L.J. Failing democracy.