

Judicial Review of Elections in Hong Kong: Resolving a Contradiction

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Abstract

Analysis of judicial review of elections in Hong Kong reveals a contradiction: strong review of restrictions on voting and candidacy, but weak review of serious institutional inequalities. Weak review occurs when the issue is within the scope of Hong Kong's political reform trajectory and of interest to the Chinese government. Beijing's assertive role in the 2013-15 reform exercise may influence courts to adopt an even more deferential posture. However, this should be resisted, as it would fail to accord sufficient importance to entrenched political rights and involve unwarranted deference by courts, especially if the reform trajectory has hit a wall.

Introduction

Judicial review of elections in Hong Kong is a relatively recent phenomenon.¹ It occurs in a unique milieu of entrenched political rights² and evolving political institutions on a gradual course to becoming fully democratic.³ In this milieu, a contradiction has become apparent, that while Hong Kong courts are prepared to strike down unreasonable restrictions on voting and candidacy, sometimes with significant consequences, they have done very little to impact the most unfair and illegitimate aspects of Hong Kong's electoral systems. These aspects include the functional constituencies that have returned at least half of all legislators since 1985,⁴ the 1200 member election committee that nominates and elects the chief executive, and the practice of corporate voting used in both the election committee and functional constituency elections.

From a critical examination of the relevant judicial review case law, this chapter explains how the contradiction came about and what sustains it. It then reflects on how the contradiction might be resolved going forwards, particularly after the 2015 failed attempt to introduce universal suffrage of the chief executive.⁵ Two opposite paths of resolution are

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¹ Direct elections to District Boards began only in 1982 (see Norman Miners, *The Government and Politics of Hong Kong* (5th edn OUP 1998) 170; Simon Young, 'The Meaning of the Right to Vote in Hong Kong' (1997) 42 *McGill LJ* 650, 656-658) and to the Legislative Council (LegCo) in 1991 (see Rowena YF Kwok, Joan YH Leung and Ian Scott (eds), *Votes Without Power: the Hong Kong Legislative Council Elections 1991* (HKU Press 1992) ch 1). See also Johannes Chan and CL Lim (eds), *Law of the Hong Kong Constitution* (Sweet & Maxwell 2011) ch 8.

² Hong Kong Bill of Rights Ordinance (Cap 383), s 8, art 21 (HKBORO); The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, 3d Sess, 7th National People's Congress, 4 April 1990, reprinted in 29 ILM 1519, art 26 (Basic Law).

³ Arts 45 and 68 of the Basic Law, *ibid*, provide that the methods for selecting the chief executive and electing legislators is to be specified in light of the actual situation and in accordance with the principle of gradual and orderly progress; the ultimate aim is universal suffrage.

⁴ Christine Loh and Civic Exchange (eds), *Functional Constituencies: A Unique Feature of the Hong Kong Legislative Council* (HKU Press 2006) chs 1 & 2.

⁵ Realising universal suffrage requires amendment of annex I (chief executive) or annex II (LegCo) of the Basic Law (n 2), which in both cases requires two-thirds support of all legislators, the consent of the chief executive, and approval by the Standing Committee of the National Peoples Congress (NPCSC). Annex II was amended in 2010, though the first attempt in 2005 failed. See The Interpretation by the Standing Committee of the National People's Congress of Article 7 of Annex I and Article III of Annex II of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, 8th Sess, 10th National People's Congress, 6 April 2004; Albert HY Chen, 'An unexpected breakthrough in Hong Kong's constitutional reform' (2010) 40 *HKLJ* 259; CL Lim, 'Right to vote and right to political participation' in Chan and Lim (n 1) 861-875.

discussed. One sees courts apply political rights even more robustly to chip away at those illegitimate aspects mentioned above. The other sees courts becoming even more deferential, declining judicial review of electoral laws on the ground that they are matters best left for political negotiations and legislative review. The chapter notes that the impact of the political reform exercise of 2013 to 2015, which was overshadowed by a more assertive role played by the Chinese central government, may influence a more deferential approach in the future. However arguments are made for why courts should resist taking such a path.

The Making of a Contradiction

Article 21 of the Hong Kong Bill of Rights (HKBOR) guarantees that every permanent resident has the ‘right and the opportunity... (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; [and] (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors...’ As it is based on Article 25 of the International Covenant on Civil and Political Rights (ICCPR), Hong Kong courts have made reference to the United Nations (UN) Human Rights Committee’s General Comment 25 in interpreting the rights in Article 21.⁶ The rights can be restricted so long as the restrictions are not ‘unreasonable’ and do not make distinctions based on ‘race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’ (non-discrimination clause).

From 1991 to 2015, there have been approximately 16 judicial review cases in which electoral rights in Article 21 (and/or Article 26 of the Basic Law) have been considered. The courts have been robust in striking down residency requirements for candidacy, exclusions in village elections, and criminal law related disqualifications for voting and candidacy. The courts have been far more reluctant, however, to address systemic inequalities and unfairness in core electoral institutions and practices. These institutions deny a vast part of the voting population an equal opportunity to take part in the conduct of public affairs and condone breaches of the ‘one person, one vote’ principle and significant disparities in voting power; but, the courts have found that these practices are not unreasonable or do not engage the political right guaranteed. This apparent contradictory approach to judicial review of elections begs the questions of whether the courts have been inconsistent in their approach or whether other reasons can be offered as an explanation.

Strong review of restrictions

TEN YEAR RESIDENCY REQUIREMENT

In the first Article 21 judicial review, Mr Lau San Ching persuaded the High Court to strike down a requirement of being ordinarily resident for 10 years preceding the date of nomination for District Board candidacy.⁷ He won his case on two grounds: first, he met the 10-year requirement even though for a good part of that period he was imprisoned in a mainland jail for sedition; second, the 10-year requirement violated the right to be elected and was neither rationally connected nor proportionate to a legitimate aim. To assess the reasonableness of the restriction, Justice Peter Cheung applied a rigorous three-step restrictions test modeled on the approach applied in Canada, by the European Court on Human Rights (ECtHR) and the UN Human Rights Committee.⁸ He found the ‘clearest

⁶ UN Human Rights Committee (UNHRC), ‘General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25)’, adopted 12 July 1996, UN Doc CCPR/C/21/Rev.1/Add.7.

⁷ *Lau San Ching v Apollonia Liu* (1995) 5 HKPLR 23 (HC).

⁸ *ibid* 49-50.

indication' of irrationality in the differential treatment of voters: permanent residents did not have to satisfy an additional residency requirement in order to vote.⁹ His response to an argument for judicial deference to Hong Kong's unique circumstance was sharp: 'Even taken into account the political situation of Hong Kong...and the historical context in which the Electoral Provisions Ordinance was enacted, by no means of imagination can it be said that [the requirement] is consistent with Article 21'.¹⁰ He referred to significantly shorter residency requirements in Canada, Australia and New Zealand as examples of ways of achieving the aims of having local connection and knowledge by less restrictive means.¹¹ A LegCo select committee may have conducted periodic reviews of the residency requirement, but the judge pointed out the absence of evidence that those reviews took into account the implications of Article 21.¹² The government did not appeal. The case set a liberal tone for Article 21 review.

VILLAGE REPRESENTATIVE ELECTIONS

The same robust approach resonated in the first Article 21 case before the Court of Final Appeal after 1997. The case of *Secretary for Justice v Chan Wah* concerned the election of village representatives for the over 600 villages in the New Territories.¹³ The two applicants were born, raised and had resided in their respective villages, but could not vote or stand as a candidate in their village election. This was because they were not indigenous villagers, i.e. they were not descendants through the male line of a person who resided in an established village in 1898.¹⁴ No legislation governed village elections but the practice was that only indigenous villagers could serve as village representatives. Since approval by the Secretary for Home Affairs resulted in the elected person serving as village representative and possibly other roles in different statutory bodies, this conferred sufficient government connection for bringing the challenge under Article 21(a).¹⁵

The Court found that village representatives engaged in the 'conduct of public affairs' and to exclude villagers like the applicants from voting or running in village elections was an unreasonable restriction on the right and opportunity to take part in the conduct of public affairs.¹⁶ Whether a restriction was reasonable had to be 'considered objectively' and the question might be answered differently from era to another.¹⁷ Chief Justice Andrew Li reasoned simply. Since a village representative was someone who 'is to and in fact does represent the village as a whole (comprising both the indigenous and non-indigenous villagers) and further has a role to play beyond the village level, the restriction on the ground of not being indigenous cannot be considered a reasonable restriction'.¹⁸ Arguments based on the 'principle of gradual and orderly progress' in Article 68 of the Basic Law and the opportunities provided by District Councils for the conduct of public affairs were dismissed shortly as being irrelevant.¹⁹ The decision had transformative consequences since the government had to devise a new scheme of village elections, consult extensively on the new scheme, and enact the necessary legislation; the whole process from the Court's decision

⁹ *ibid* 66.

¹⁰ *ibid*.

¹¹ *ibid* 65.

¹² *ibid* 67.

¹³ *Secretary for Justice v Chan Wah* (2000) 3 HKCFAR 459.

¹⁴ *ibid* 465.

¹⁵ *ibid* 467-471.

¹⁶ *ibid* 472-473.

¹⁷ *ibid* 474.

¹⁸ *ibid*.

¹⁹ *ibid*.

until the first village elections under the new legislation took approximately two and a half years.²⁰

PRISONER DISQUALIFICATION CASES

A final set of cases to illustrate the courts' strong review of restrictions on voting and candidacy is the prisoners or criminal law related disqualification cases. Prisoner disenfranchisement cases have been politically controversial in many places. In the United Kingdom, despite more than a decade after the ECtHR (Grand Chamber)'s 2005 judgment in *Hirst v The United Kingdom*, there has yet to be legislative reform to remove or minimise the ban on prisoners' voting.²¹ The experience in Hong Kong has been very different.

In *Chan Kin Sum v Secretary for Justice*, the three applicants (a legislator and two prisoners serving terms of imprisonment for offences of robbery) applied to the court to have struck down the blanket bans on persons sentenced to or serving a term of imprisonment of any length from voting and registering to vote in LegCo elections.²² Remanded persons awaiting trial were also barred from voting, not by law, but simply because no arrangements had been made to allow them to vote while detained. The court found the bans on voting and registering violated the prisoners' right to vote as protected by Article 21 of the HKBOR and Article 26 of the Basic Law. It also declared that the Electoral Affairs Commission had a statutory duty to make all necessary arrangements to enable registered remanded persons held in custody to vote on an election day.²³

In identifying the proper restrictions test to be applied, Justice Andrew Cheung followed *Lau San Ching*'s proportionality test and rejected less rigorous approaches, such as a *Wednesbury* reasonableness test.²⁴ He stated: 'In a society governed by the rule of law, the courts must be vigilant in the protection of fundamental rights and must vigorously examine any restriction that may be placed on them'.²⁵ The judge noted the breadth of the restriction, which applied not only to imprisoned convicted persons, but also to those on bail pending appeal, those serving a suspended sentence, and parolees. Citing authorities from Canada, Australia, the ECtHR, and South Africa, all of which upheld similar challenges, the judge noted, 'the modern trend is against disenfranchisement'.²⁶ The statement in *Chan Wah* that determinations of reasonableness may vary from era to era was used to reason that the position at the time of the decision in 2009 'may well be very different from that in 1997 when [the law was passed] in the infancy of the HKSAR'.²⁷ The court was critical of the absence of evidence from government on the rational connection between the restriction and the legitimate aims of crime prevention, and enhancing civic responsibility and respect for the rule of law.²⁸ The court concluded: 'the general, automatic and indiscriminate restrictions on the right to vote and the right to register as an elector cannot be justified under the proportionality test'.²⁹

²⁰ See Village Representative Election Ordinance (Cap 576); *Lai Tak Shing v The Secretary for Home Affairs* (2007) 10 HKCFAR 655, [7]-[10]; Swati Jhaveri and Anne Scully-Hill, 'Executive and legislative reactions to judicial declarations of constitutional invalidity in Hong Kong: Engagement, acceptance or avoidance?' (2015) 13 *International Journal of Constitutional Law* 507, 517-519.

²¹ *Hirst v The United Kingdom* (2006) 42 EHRR 41; Alexander Home and Isobel White, 'Prisoners' voting rights', UK House of Commons Library, Standard Note SN/PC/01764, 11 February 2015.

²² *Chan Kin Sum v Secretary for Justice* [2009] 2 HKLRD 166 (CFI).

²³ *Chan Kin Sum Simon v Secretary for Justice*, unreported judgment on relief, HCAL79/2008, 11 March 2009, CFI, [32]; *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, 230 & 234 (HL).

²⁴ *Chan Kin Sum* (n 22) [72]-[73].

²⁵ *ibid* [81].

²⁶ *ibid* [110].

²⁷ *ibid* [111].

²⁸ *ibid* [139]-[140].

²⁹ *ibid* [164].

The court's treatment of arguments for deference is noteworthy. The argument for deference due to Hong Kong's unique context and gradual development towards full democracy was turned on its head. The judge stated, 'where only 50% of the LegCo members are elected by universal suffrage, that makes the right to vote doubly important and precious.'³⁰ The argument for deference because the matter concerned questions of 'penal philosophy and policy' was brushed aside since the court recognised that it was not being asked to draw the line of reasonableness, which is for the legislature and executive, but to examine the restrictions and decide whether they are unreasonable.³¹ An argument for deference or a margin of appreciation was also made on the basis that LegCo had considered relaxing the restrictions on previous occasions but rejected it. The court accepted that due respect and deference should be paid to these legislative choices; however, this did not immunise the provisions from scrutiny and the court still had to exercise its constitutional role of examining 'the choices, as made, closely and see whether the restrictions on voting rights...can be justified'.³² After paying due respect and deference, it made no difference in the result.³³

The court made clear it was not saying no restrictions could be imposed on prisoners' voting, but where to draw the line was a matter for government.³⁴ In order to give government the time and space to consult the public and pass new legislation, the judge, on the government's application, ordered a temporary suspension of its declarations for approximately seven and a half months.³⁵ The temporary suspension meant that the status quo would effectively continue and government could not be found in contempt for non-compliance during the period of suspension.³⁶ In effect the temporary suspension served as a catalyst for government action. In contrast to events in the UK, the Hong Kong government consulted the public and passed legislation not to impose any restrictions, in accordance with public opinion and the court's judgment, all within the suspension period.³⁷

The other two cases concern criminal law related disqualifications for candidacy. In *Tse Hung Hing v The Medical Council of Hong Kong*, the applicant was a doctor who wanted to be elected to serve as a member of the Medical Council, a public body whose affairs came within the meaning of 'public affairs' in Article 21(a).³⁸ But since he had a conviction for careless driving, for which he was fined HK\$1000, he was disqualified from being nominated because he had been convicted in Hong Kong of any offence punishable with imprisonment (careless driving being punishable up to six months imprisonment). On the heels of the *Chan Kin Sum* decision, the judge in a short judgment accepted the parties agreed position that the restriction violated Article 21(a).³⁹ While the aim of the restriction to ensure that Council members are trustworthy persons of high moral probity was legitimate, the indiscriminate

³⁰ *ibid* [106].

³¹ *ibid* [148]-[149].

³² *ibid* [156].

³³ See analysis by Cora Chan, 'Judicial deference at work: some reflections on *Chan Kin Sum* and *Kong Yun Ming*' (2010) 40 HKLJ 1, 11.

³⁴ *Chan Kin Sum Simon* (relief) (n 23) [165].

³⁵ *ibid* [87].

³⁶ *Koo Sze Yiu v Chief Executive of the Hong Kong Special Administrative Region* (2006) 9 HKCFAR 441, [33].

³⁷ See Voting by Imprisoned Persons Ordinance, Ord 7 of 2009, partially in force on 3 July 2009 (LN 162 of 2009), fully on 30 October 2009 (LN 216 of 2009); LegCo Secretariat, 'Voting rights of prisoners', paper for Panel on Constitutional Affairs meeting on 18 May 2009, LC Paper No CB(2)1539/08-09(01); 'Voting by Imprisoned Persons Ordinance fully beings today', HKSAR Government Press Release, 30 October 2009, accessible at <<http://www.info.gov.hk/gia/general/200910/30/P200910300146.htm>> accessed August 2015; Jhaveri and Scully-Hill (n 20) 519-522.

³⁸ *Tse Hung Hing v The Medical Council of Hong Kong* [2010] 1 HKLRD 111, [7] (CFI).

³⁹ *ibid* [8].

means was disproportionate as exemplified by the facts of the case, where the conviction was minor and of ‘no apparent relevance to the applicant’s suitability to be a Council member.’⁴⁰

Wong Hin Wai v Secretary for Justice was heard and decided expeditiously, a few months before the September 2012 LegCo elections.⁴¹ Both applicants wanted to be candidates in this election but were disqualified because they had been recently convicted of minor offences and sentenced to short terms of imprisonment.⁴² Although granted bail pending appeal, the disqualification still applied to them because their sentence of imprisonment had yet to be served or pardoned. The court held the restriction to be unconstitutional, finding no rational connection or proportionality between the restriction, when applied to persons on bail pending appeal and sentenced to less than 3 months imprisonment, and the aim of maintaining public confidence in LegCo and the electoral process.⁴³

While the court’s approach could be said to be rigorous, there are two important differences in Justice Johnson Lam’s approach in this case when compared to that of Justice Cheung in *Chan Kin Sum*. First, Justice Lam was more influenced by recent ECtHR authorities that emphasised a wide margin of appreciation, which a court of supranational jurisdiction would be expected to adopt in respect of member states in cases concerning democratic rights.⁴⁴ This led Justice Lam to apply a different ‘proportionality test’ that does not assess whether the restriction was ‘no more than necessary’.⁴⁵ Instead the restriction should not ‘curtail the rights in question to such an extent as to impair their very essence or to deprive them of their effectiveness’, words taken from the ECtHR case law.⁴⁶ The court ‘must also have regard to the historical and current state of political development in Hong Kong’.⁴⁷ This suggests a more deferential test of proportionality, especially with the endorsement of what Lord Collins said in *R (Barclay) v Lord Chancellor*, that electoral ‘features which would be unacceptable in the context of one system may be justified in the context of another’.⁴⁸ The approach signals the end of comparative law assistance. Justice Lam did not address an important point made in *Chan Kin Sum* that the strong proportionality test (as applied in equality cases) would still need to be applied if the challenge was based on an Article 1(1) distinction, i.e. the non-discrimination clause.⁴⁹ In the by-election disqualification case, concerned with a newly enacted provision that disqualified LegCo members, who resign from office, from being a candidate in the by-election for the same seat within a six-month period from the date of resignation, Justice Thomas Au in *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs* also applied the more deferential proportionality test: ‘the court should only interfere if it finds that, upon scrutiny, the restriction is manifestly without justifiable foundation’.⁵⁰

The second departure from what was said in *Chan Kin Sum* is in the treatment of legislative history and debates. Justice Cheung stated that deference should be accorded to

⁴⁰ *ibid.*

⁴¹ *Wong Hin Wai v Secretary for Justice* [2012] 4 HKLRD 70 (CFI).

⁴² Mr Wong Hin Wai later had his conviction quashed in the Court of Final Appeal, see *HKSAR v Wong Hin Wai* (2013) 16 HKCFAR 837.

⁴³ *Wong Hin Wai* (n 41) [95] & [96].

⁴⁴ *ibid* [21]-[29] & [34].

⁴⁵ *ibid* [34].

⁴⁶ *ibid* [35].

⁴⁷ *ibid.*

⁴⁸ *ibid*, citing *R (Barclay) v Lord Chancellor* [2010] 1 AC 464, [56] (UKSC).

⁴⁹ *Chan Kin Sum* (n 22) [74], now partially qualified by *Fok Chun Wa v The Hospital Authority* (2012) 15 HKCFAR 409, [61]-[78].

⁵⁰ *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs* [2014] 2 HKLRD 283, [50] (CFI). Note the similarity to the *Wednesbury* unreasonableness test (n 23).

the mere fact that the legislature had considered the matter without going too closely into what was actually said during the debates: ‘one should be very slow, in a domestic context, to evaluate the quality of the legislative debate, particularly with a view to lowering the deference or respect that the courts should have, in a given case, for the choice made by the legislature. That is, generally speaking, no business of the courts.’⁵¹ However, Justice Lam assessed the quality of the debates held in 1997 when he noted that legislators were ‘unwittingly misled’ by the administration on the purpose and effect of the amended restriction.⁵² For Justice Lam, this meant that the legislature had not properly considered the implications of the Article 21 right and thus little if any weight could be attached to the ‘judgment of the legislature’.⁵³ In conditioning deference to whether there had been legislative consideration of rights implications, the approach of Justice Lam was similar to that seen in *Lau San Ching*.⁵⁴ By contrast, in the by-election disqualification case, Justice Au held that the court ‘will be slow to interfere’ when the challenged provision is the ‘result of active and full debate in LegCo where competing interests were presented’.⁵⁵

The government chose not to appeal *Wong Hin Wai*, and as with the first prisoners’ right to vote case they chose to conduct a public consultation in July 2014 on different options for reform.⁵⁶ Though *Wong Hin Wai* is counted as a strong review case, it shows the signs of a more deferential approach to review. It will need to be left to future cases to reach greater clarity on the two issues of the intensity of the proportionality test and the proper consideration of the quality of legislative debates in assessing weight to be accorded to legislative choices.

Weak review of institutional inequality

As a society transitioning to full democracy, there are a number of institutional aspects of the political system that appear unfair and illegitimate from the standpoint of the fundamental right to vote. Criticisms are typically directed at the functional constituencies, which were introduced by the British in 1985, retained by the Chinese government after 1997 and replicated in the system of sectors and subsectors in the election committee for the chief executive. The functional constituencies are criticised for privileging business, industry and professional groups with additional political power and representation. These criticisms were voiced by many of the young protesters during the 79-day long Occupy Central protests in the second half of 2014.⁵⁷ In its periodic review of Hong Kong’s compliance with the ICCPR, the UN Human Rights Committee has criticised Hong Kong’s political system for falling short of Article 21 requirements.⁵⁸

⁵¹ *Chan Kin Sum* (n 22) [154]. See criticisms in Chan (n 33) 13; PY Lo, *The Judicial Construction of Hong Kong’s Basic Law* (HKU Press 2014) 297-311.

⁵² *Wong Hin Wai* (n 41) [57]-[62] & [79].

⁵³ *ibid* [99].

⁵⁴ *Lau San Ching* (n 7).

⁵⁵ *Kwok Cheuk Kin* (n 50) [94(4)].

⁵⁶ See Constitutional and Mainland Affairs Bureau (CMAB), *Consultation Paper on Disqualification of Candidates with Unserved Prison Sentences and other Related Matters*, 21 July 2014; CMAB, ‘Results of the public consultation on disqualification of candidates with unserved prison sentences and other related matters and proposed way forward’, paper for Panel on Constitutional Affairs, November 2014, LC Paper No CB(2)267/14-15(03).

⁵⁷ SCMP Editorial, ‘Government must reach out to young to win their trust and support’, *South China Morning Post*, 10 November 2014; Chris Buckley and Michael Forsythe, ‘Hong Kong’s Democracy Supporters Chafe at Inequality and Beijing’s Sway’, *International New York Times*, 27 June 2014.

⁵⁸ UNHRC, ‘Concluding Observations of the Human Rights Committee Hong Kong Special Administrative Region’, 86 Sess, UN Doc CCPR/CHKG/CO/2, 21 April 2006, [18]; UNHRC, ‘Concluding observations on the third periodic report of Hong Kong, China, adopted by the Committee at its 107th session (11-28 March 2013)’, UN Doc CCPR/C/CHN-HKG/CO/3, 29 April 2013, [6].

FUNCTIONAL CONSTITUENCIES

When functional constituencies were introduced, they brought diversity to a legislature made up solely of appointed and official members.⁵⁹ Members returned by functional constituencies and a new electoral college made up 42 per cent of all legislators in 1985.⁶⁰ It was not until 1991 with the introduction of 18 directed elected seats (to replace the electoral college seats) that unfairness with the functional seats became apparent. While all registered voters had one vote to elect a geographical constituency member, some 69,825 registered voters (consisting of individuals and corporate bodies) had a second vote in the functional constituencies and thus a second representative in the legislature.⁶¹

The proportion of registered voters that had a second vote/representative widened to over one million in 1995, with Governor Chris Patten's controversial reforms, but this expansion was short-lived and rolled back to 138,984 (127,075 individuals and 11,909 bodies) in the 1998 election.⁶² The inequality of some having two votes continued in this extreme form in the 2000, 2004 and 2008 elections.⁶³ But for the 2012 election, as a result of a successful, but controversial, tri-partite negotiation, the inequality was removed by giving excluded voters a second vote in a new functional constituency in which only elected district council members could be nominated.⁶⁴ The five seats in this new district council functional constituency were known as 'super seats' because they had an electorate base of 3.2 million voters without any geographical delimitation.⁶⁵ China required functional and geographical seats to be in equal proportion,⁶⁶ but this reform in substance increased the proportion of popularly elected legislators to 57 per cent.

Even with the 2012 reform to extend a functional vote to all voters, there remains the problem of the gross disparity in voting power as between voters in differently sized functional constituencies. There are 12 traditional functional constituencies with less than 1,000 registered voters.⁶⁷ The smallest is Insurance, which consists of 135 authorised insurance companies. The other 11 also comprise of companies in different sectors of business, trade and industry. These small constituencies do not typically hold contested elections since leadership can be decided by consultation and consensus.⁶⁸ The largest amongst the traditional functional constituencies has always been Education (comprised of teachers) whose size was 92,957 in 2012.⁶⁹ Other large constituencies tend to consist of individuals practicing different professions.⁷⁰ With the new District Council (second)

⁵⁹ Miners (n 1) 114-117.

⁶⁰ *ibid* 116.

⁶¹ Young (n 1) 666.

⁶² *ibid* 667-668; Loh and Civic Exchange (n 4) app 5.

⁶³ Loh and Civic Exchange, *ibid*; Electoral Affairs Commission (EAC), *Report on the 2008 Legislative Council Election Held on 7 September 2008*, Hong Kong, 4 December 2008, app IV.

⁶⁴ EAC, *Report on the 2012 Legislative Council Election Held on 9 September 2012*, Hong Kong, 22 November 2012, p 2 ([1.4]).

⁶⁵ *ibid* 2 & app X(B).

⁶⁶ Decision of the Standing Committee of the National People's Congress on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2012 and on Issues Relating to Universal Suffrage, 35th Sess, 10th National People's Congress, 29 December 2007, [1].

⁶⁷ EAC (n 64) app IV.

⁶⁸ Simon NM Young, 'Elected by the elite: functional constituency legislators and elections' in Loh and Civic Exchange (n 4) 133-134.

⁶⁹ EAC (n 64) app IV.

⁷⁰ Simon NM Young and Anthony Law, 'Privileged to vote: inequalities and anomalies of the FC system' in Loh and Civic Exchange (n 4) 80.

constituency, the largest functional constituency now has 643,951 registered voters per legislator.⁷¹

There has only been one judicial review (*Lee Miu Ling v Attorney General*) directed at the functional constituencies.⁷² In 1994, two applicants brought an Article 21 challenge to the Patten reformed functional constituencies, which had over a million registered functional voters and no corporate voters. As neither applicant had a functional vote, they challenged the functional constituencies for being in breach of the one person, one vote principle and for disparities in voting power (if indeed they had a functional vote). The High Court and Court of Appeal dismissed their challenge, and petition for leave to appeal to the Privy Council was refused.⁷³

In respect of the ‘one person, one vote’ challenge, Justice Bokhary in the Court of Appeal found that paragraph (3) of Article VII of the Letters Patent was a specific provision that insulated functional constituencies from Article 21(b) review.⁷⁴ The paragraph provided that nothing in Article VII ‘shall be construed as precluding the making of laws which, as regards the election of the Members of the Legislative Council, confer on persons generally or persons of a particular description any entitlement to vote which is in addition to a vote in respect of a geographical constituency’.⁷⁵ It was intended to qualify paragraph (5) of that same article, which entrenched the HKBOR and repealed laws made after 1991 that were inconsistent with the ICCPR as applied to Hong Kong.⁷⁶ Thus the court found the Article 21 rights were not engaged and no question of reasonable restriction had to be addressed. After the 2012 reform, which conferred both functional and geographical votes on all voters, this issue has now become academic.

As for the unequal voting power challenge, the court addressed the issue of whether the disparity was an unreasonable restriction. Justice Bokhary reduced the test to a question of would ‘sensible and fair-minded people condemn [the] arrangement as irrational or disproportionate’.⁷⁷ This is a high threshold, implying a light approach to proportionality, less rigorous than what was applied in *Lau San Ching* and *Chan Kin Sum*, although similar to the test articulated in *Wong Hin Wai* and *Kwok Cheuk Kin*. As it was in the ‘very nature’ of functional constituencies ‘to vary in size’, they could not be faulted from the standpoint of ‘sensible and fair-minded people’.⁷⁸ The court was not interested in assessing whether it was possible to allocate seats to the constituencies in a fairer manner; as Justice Godfrey remarked, ‘that...is a matter with which this court can have nothing to do’.⁷⁹ This is true if what his Lordship meant was that the court should not attempt to redraw the constituency lines (like attempting to draw the line of which prisoners could be lawfully disenfranchised). As with the prisoners’ right to vote cases, if, by applying a rigorous proportionality test, it was found reasonably practicable to devise a more rights compliant arrangement then the ball could be thrown back to government to come up with a better scheme.⁸⁰ This would be the beginning of a judicial-government dialogue that would lead to a position consistent with human rights requirements yet reflective of societal interests.⁸¹

⁷¹ EAC (n 64).

⁷² *Lee Miu Ling v Attorney General* [1996] 1 HKC 124 (CA), aff’d (1995) 5 HKPLR 181 (HC).

⁷³ Leave to Privy Council was refused 6 June 1996 (Lords Goff, Steyn and Hoffmann).

⁷⁴ *Lee Miu Ling* (CA) (n 72).

⁷⁵ *ibid* 133.

⁷⁶ *ibid* 132.

⁷⁷ *ibid* 130.

⁷⁸ *ibid* 131.

⁷⁹ *ibid* 134.

⁸⁰ See Young (n 1) 719-720.

⁸¹ See generally Po Jen Yap, *Constitutional Dialogue in Common Law Asia* (OUP 2015).

It is interesting to note that the court was not prepared to show deference to government simply because of Hong Kong's 'embryonic stage' of democratic development.⁸² However, the court noted the drastic political consequences of declaring functional constituencies unconstitutional, before putting the concern to one side.⁸³ It would invalidate the legislature and, as Justice Bokhary remarked light-heartedly, 'so much for local democracy' since English legislation would be needed to pass the new legislature law.⁸⁴ These consequences would be of less concern today. In 2006, the Court of Final Appeal held that when a court is prepared to strike down legislation for unconstitutionality it also has the power to suspend the declaration of invalidity for a fixed period.⁸⁵ This remedy was ordered in *Chan Kin Sum* with positive consequences for law-making.⁸⁶ However, given the need to have complete confidence in the legality of the legislature and its actions pending corrective legislation, it would probably be necessary to seek a temporary validity order to protect the legislature in the interim period.⁸⁷ It remains unsettled, however, whether Hong Kong courts have the power to make such an order.⁸⁸

CORPORATE VOTING

Corporate voting was an original feature of the functional constituencies. In delineating these constituencies, well-established trade and business organisations were used as reference points for conferring votes on the membership of such organisations. Naturally many of these umbrella organisations had corporate members. For example, the Hong Kong General Chamber of Commerce's corporate members constitute the electors of the Commercial (First) constituency, the Chinese General Chamber of Commerce's corporate members constitute the electors of the Commercial (Second) constituency, the Federation of Hong Kong Industries' corporate members constitute the electors of the Industrial (First) constituency, and so on.⁸⁹ In 1998, functional constituencies, such as Transport and Agriculture and Fisheries, were added and given corporate electors by directly listing them in a schedule within primary legislation.⁹⁰

Hong Kong is probably the only place that allows companies and other bodies to vote, alongside individual voters, in the election of its legislative members. As mentioned earlier, the corporate voters tend to populate the smaller sized constituencies, which do not typically hold contested elections.⁹¹ Their representatives tend to put their respective sector's interest before the interest of the general public, even though they have constitutional responsibilities as legislators that go beyond the interests of their sector.⁹² They are said by government to provide balanced participation in the legislature and contribute to sustaining Hong Kong's

⁸² *Lee Miu Ling (CA)* (n 72) 129.

⁸³ *ibid* 128.

⁸⁴ *ibid*.

⁸⁵ *Koo Sze Yiu* (n 36).

⁸⁶ *Chan Kin Sum Simon* (relief) (n 32).

⁸⁷ See the similar state of necessity in *Re Manitoba Language Rights* [1985] 1 SCR 721.

⁸⁸ *Koo Sze Yiu* (n 36) [32]-[33]; *ibid* [89]-[91]; *Vallejos Evangeline Banao v Commissioner of Registration* [2011] 6 HKC 469, [9] (CFI).

⁸⁹ *Loh and Civic Exchange* (n 4) apps 2 & 3.

⁹⁰ *ibid*.

⁹¹ *ibid* apps 9 & 26.

⁹² See *Mandy Tam Heung Man v The Hong Kong Institute of Certified Public Accountants* [2008] 1 HKLRD 238, [97] (CFI): the elected representative from the Accountancy functional constituency 'has a number of constitutional responsibilities, primarily set out in Article 73 of the Basic Law. These constitutional responsibilities plainly extend beyond the scope of matters affecting the professional interests of the accountancy profession.'

capitalist system.⁹³ They are also typically known as ‘pro-establishment legislators’ given their tendency to support both the Hong Kong and central governments on policy matters.⁹⁴

Corporate voting in LegCo has often been criticised. To give functional constituencies more credibility, Governor Patten abolished corporate voting for the 1995 election, giving the votes to the directors of the previously enfranchised companies.⁹⁵ There are two main criticisms generally directed at corporate voting. First, as a result of inadequate safeguards, one corporate voter through the vehicle of subsidiaries and other controlled entities can effectively have more than one vote in breach of the one person, one vote principle.⁹⁶ It is well known that this already happens with many large conglomerates.⁹⁷ In constituencies with only corporate electors, the potential unfairness of this lapse is mitigated somewhat by the fact that each corporate voter has the same chance to pack the constituency with their own controlled entities. But some constituencies have mixed corporate and individual voters and the ability of individuals to pack constituencies with controlled corporate entities will be much less than that of large enterprises.⁹⁸

The second criticism is that the qualifying conditions for corporate voting are less strict than those for individual voting.⁹⁹ Corporate bodies vote by authorising a person to vote on its behalf and that authorised representative can be any employee or member of the body.¹⁰⁰ The problem arises because the qualifying conditions for voting apply only to the authorised representative and not to the corporate body itself. Take the permanent residency requirement as an example. Individuals must be permanent residents before they can qualify to vote. For corporate voters the authorised representatives must be a permanent resident, but the corporate body itself need not have any ties to Hong Kong.¹⁰¹ So foreign consular posts, international organisations, agencies of foreign government, through their membership in commerce and trade umbrella organisations, could register to vote, until these loopholes were closed by amendments made in 2011 and 2012.¹⁰²

In a judicial review challenging the constitutionality of corporate voting (*Chan Yu Nam v Secretary for Justice*),¹⁰³ the applicants were a taxi driver and renovation worker who did not have the right to vote in any functional constituency.¹⁰⁴ Their main argument was that conferring the vote in LegCo elections on corporate bodies, which are incapable of having permanent residency status, was inconsistent with Article 26 of the Basic Law and Article 21 of the HKBOR, which only allow the right to vote to be given to individual permanent residents. It was also argued that corporate voting discriminated against individuals who lacked the financial means to form companies and thereby enjoy the additional political rights of corporate electors. The Court of First Instance and Court of

⁹³ HKSAR Government, *Green Paper on Constitutional Development* (Hong Kong July 2007) 10 & 36, but see Jake van der Kamp, ‘Functional constituencies undermine our economy’, *South China Morning Post*, 9 February 2014.

⁹⁴ Loh and Civic Exchange (n 4) 4-5.

⁹⁵ Young and Law (n 70) 71-72; Young (n 1) 667-668.

⁹⁶ Young and Law, *ibid* 98-99.

⁹⁷ Loh and Civic Exchange (n 4) app 13.

⁹⁸ Young and Law (n 70) 99.

⁹⁹ *ibid* 95-98.

¹⁰⁰ *ibid* 96.

¹⁰¹ *ibid* 101.

¹⁰² Legislative Council (Amendment) Ordinance 2011, Ord 2 of 2011, s 14; Electoral Legislation (Miscellaneous Amendments) Ordinance 2012, Ord 11 of 2012, s 34.

¹⁰³ *Chan Yu Nam v Secretary for Justice* [2010] 1 HKC 493 (CFI).

¹⁰⁴ The Transport constituency only specified corporate bodies as voters; the second applicant had to be an individual or corporate voting member of the Real Estate Developers Association of Hong Kong, The Hong Kong Construction Association Ltd or The Hong Kong E&M Contractors’ Association Ltd in order to have a vote in the Real Estate and Construction constituency.

Appeal rejected the challenge,¹⁰⁵ and both the Court of Appeal and Court of Final Appeal refused leave to appeal.¹⁰⁶ In the brief reasons of the appeal committee of the final court, the Court of Appeal's conclusion that Article 26 did not preclude corporate voting was found to be supported by the references to 'corporate bodies' in the annexes of the Basic Law, the 'history of legislative constitutional development in Hong Kong' and relevant extrinsic materials used as an aid to constitutional interpretation.¹⁰⁷

The case raised an important question about the scope of application of the rights protected in Articles 26 and 21, specifically whether they applied to functional constituency elections. The first instance judge, Justice Cheung (surprisingly the same judge in *Chan Kin Sum*) held that the rights did not apply to this type of election; but if they did, he accepted the applicants' submission that the right was engaged and the issue would be whether the restriction could be justified.¹⁰⁸ In the Court of Appeal, Vice-President Frank Stock, without deciding the correctness of Justice Cheung's decision on this point, postulated an 'alternative and tenable view' to reaching the same result.¹⁰⁹ His alternative view was that Article 26 'inalienably accorded to permanent residents...the right, through elections, to take part in the conduct of public affairs of the Region', but without precluding government from conferring the right on anyone else.¹¹⁰ Although not explicitly stated, his Lordship was apparently attempting to read the rights in Article 26 harmoniously with the rights in Article 21(a) and (b) of the HKBOR. He summarised his view in the following passage, which was emphasised in his subsequent leave decision and endorsed in the Court of Final Appeal:¹¹¹

What is clear is that art. 26 is part of a mosaic which includes arts. 45, 68 and Annexes I and II of the Basic Law the effect of which is that in the early years of Hong Kong's new constitutional dispensation, there is room for participation through election in public affairs by all permanent residents but for a simultaneous continuation beyond 1997 of corporate participation in such affairs by or through major organizations and associations at elections.¹¹²

While Stock VP was reluctant to reject outright Justice Cheung's approach, which effectively immunises functional constituencies from Article 26 (and Article 21 of the HKBOR) review, the reference in the above passage to 'room for participation through election in public affairs' implies a broader interpretation of Article 26. According to this view, Article 26 applies to functional constituency and other elections, but, based on textual and contextual considerations, cannot be construed to preclude the continuity of corporate voting as originally conceived in the functional constituency system. This must be the better view since Cheung J's holding significantly narrows the scope of political rights, an approach inconsistent with giving fundamental rights a generous and purposive interpretation.

Stock VP's approach to Article 26 is also more aligned with the Court of Appeal's approach in *Lee Miu Ling*, which did not categorically hold the non-application of Article 21 to functional constituencies. This approach gives effect to the rights in Article 26 'in accordance with law', that law by virtue of Article 39 of the Basic Law includes the ICCPR as applied to Hong Kong, taking into account Justice Brian Keith's approach in *Lee Miu Ling*

¹⁰⁵ *Chan Yu Nam v Secretary for Justice* [2012] 3 HKC 38 (CA), aff'g *Chan Yu Nam* (CFI) (n 103).

¹⁰⁶ *Chan Yu Nam v Secretary for Justice*, unreported, FAMV39/2011, 18 January 2012, CFA AC; *Chan Yu Nam v Secretary for Justice*, unreported, CACV3/2010, 21 October 2011, CA.

¹⁰⁷ *Chan Yu Nam* (CFA AC) *ibid* [5].

¹⁰⁸ *Chan Yu Nam* (CFI) (n 103) [61]-[65] & [88].

¹⁰⁹ *Chan Yu Nam* (CA) (n 105) [93].

¹¹⁰ *ibid*.

¹¹¹ *Chan Yu Nam* (CFA AC) (n 106) [5]-[6]; *Chan Yu Nam* (CA) (n 106) [7]-[9].

¹¹² *Chan Yu Nam* (CA) (n 105) [105].

to the election reservation to the ICCPR.¹¹³ Justice Keith held that the reservation no longer had relevance after the Letters Patent was amended in 1995 to provide for an ‘elected’ LegCo.¹¹⁴ However, Justice Cheung in *Chan Yu Nam* noted that under Justice Keith’s approach (assuming it was correct) the reservation would be spent only from 1995, but of importance was that in 1990 when the Basic Law was promulgated, the election reservation had full effect in limiting the scope of the ICCPR political rights applicable to Hong Kong.¹¹⁵ But, with respect, to freeze the meaning of fundamental rights to a snapshot of the legal position on the date of promulgation is to ignore the living tree principle of interpretation.¹¹⁶ Article 26 rights are exercised in accordance with a dynamic law, which in this instance removes any constraint imposed by the election reservation once LegCo has become ‘elected’ (which has been the case since 1995). What this achieves is the same scope of protection afforded by electoral rights in the Basic Law and HKBOR.

Swati Jhaveri notes that both courts ‘relied heavily on a historical approach to interpreting the provision’.¹¹⁷ However there is a subtle but important difference to how each made use of the historical context. Stock VP relied upon historical context to test the applicants’ submission that the words of Article 26 intended to bring about a new state of affairs in which the right to vote in LegCo elections could only be conferred on individual permanent residents. He found this context to provide no logical or realistic support for this position.¹¹⁸ Cheung J, on the other hand, referred to historical context to find that the drafters of the Basic Law and the National People’s Congress intended the pre-1995 practice of corporate voting to continue after 1997.¹¹⁹ From this finding, he leaped to the conclusion that Article 26 was never intended to apply to functional constituency elections.¹²⁰ This leap, not found in Stock VP’s alternative view, goes too far and was unnecessary to decide the issue.

The applicant’s challenge based on permanent residency faced a steep hill from the outset, but it was regrettable the judges did not treat the challenge based on discrimination more seriously, having found shortcomings in the standing of the applicants (not being functional voters) to bring the challenge and in the terms of relief sought.¹²¹ As Jhaveri writes, the case ‘undermines the possibility of a more robust role for the various provisions in the Basic Law as tools for reducing the inequalities and anomalies in electoral rights’.¹²²

ELECTION COMMITTEE FOR THE CHIEF EXECUTIVE

The election committee system for nominating and electing the chief executive is the least democratic electoral institution in Hong Kong, but also the most resistant to judicial review. It is criticised in the Chinese and English media as holding ‘small circle elections’, since the committee was as small as 400 individuals in 1996, grew to and stayed at 800 from 1998 to 2011, and reached its present size of 1200 for the 2012 chief executive election.¹²³ Critics of

¹¹³ At the time of ratification, the UK qualified the rights in Art 25(b) ‘in so far as it may require the establishment of an elected Executive and Legislative Council in Hong Kong’. See Andrew Byrnes and Johannes Chan (eds), *Public Law and Human Rights: a Hong Kong Sourcebook* (Butterworths 1993) 215, 262.

¹¹⁴ *Lee Miu Ling* (HC) (n 72) 197-198.

¹¹⁵ *Chan Yu Nam* (CFI) (n 103) [115]-[116].

¹¹⁶ Recognised in *Ng Ka Ling v The Director of Immigration* (1999) 2 HKCFAR 4, [73].

¹¹⁷ Swati Jhaveri, ‘Judicialising politics: a role for the courts in electoral reform in Hong Kong’ [2011] *Public Law* 227, 232.

¹¹⁸ *Chan Yu Nam* (CA) (n 105) [85].

¹¹⁹ *Chan Yu Nam* (CFI) (n 103) [82] & [87].

¹²⁰ *ibid* [83] & [88].

¹²¹ *ibid* [120]-[137]; *Chan Yu Nam* (CA) (n 105) [109]-[115].

¹²² Jhaveri (n 117) 232.

¹²³ Simon NM Young and Richard Cullen, *Electing Hong Kong’s Chief Executive* (HKU Press 2010) app 2; Amendment to Annex I to the Basic Law of the Hong Kong Special Administrative Region of the People’s

the chief executive, Mr. Leung Chun-ying, gave him the pejorative nickname ‘689’ to highlight the total number of votes he obtained to be elected.¹²⁴ The 250,000 odd voters who elect committee members are delineated in an intricate arrangement of sectors and subsectors that reflect an expanded version of the functional constituencies; hence the system shares the problems and criticisms of functional constituencies and corporate voting.¹²⁵ Elections in subsectors, when they are held, are unpopular; they have the lowest voter turnout rates of all elections in Hong Kong.¹²⁶ Over 90 per cent of registered voters have no opportunity to participate in chief executive elections.¹²⁷

It is a small improvement from the colonial era when the local population had no input on the selection of Hong Kong’s governor. But the balance of interests amongst election committee members is such that the central government can decisively influence the final election result. What gave people hope was that Article 45 of the Basic Law stated that the ‘ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures.’ In December 2007, these hopes grew stronger when the Standing Committee of the National People’s Congress (NPCSC) gave Hong Kong a timetable for universal suffrage: 2017 for the chief executive and, if this was implemented, 2020 for LegCo.¹²⁸ Pan-democrat legislators, who tend to make-up almost 40 per cent of all legislators, are typically the first to attack the legitimacy of chief executive elections, yet with the aim of universal suffrage in sight they fielded candidates in both the 2007 and 2012 elections.¹²⁹ With the relatively low nomination threshold of 12.5 per cent, both candidates were nominated but with no chance of winning the election.

To everyone’s disappointment, all hopes of realising universal suffrage in 2017 were extinguished on 18 June 2015 when the pan-democrat legislators vetoed the government’s proposal for reform by precluding the two-thirds legislative majority needed to pass the proposal.¹³⁰ The apparent irony of pan-democrat legislators vetoing democracy belies their principled objections against the nomination restrictions imposed by the NPCSC on 31 August 2014. Those restrictions (i.e. the nominating committee, taking the same size and form as the 2011 election committee, would nominate two to three candidates, each of whom must have majority support from committee members) would continue to give the central government de facto control over nominations.¹³¹ Pan-democrats could not accept this ‘fake’ system of universal suffrage, and the polls leading up to the vote showed that those who supported the veto had risen to more than 40 per cent.¹³²

Republic of China Concerning the Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region, 16th Sess, 11th National People’s Congress, 28 August 2010.

¹²⁴ ‘Why are Hong Kong’s protesters rallying around the number 689?’, *The Guardian*, 1 October 2014.

¹²⁵ Young and Cullen (n 123) 58-59.

¹²⁶ *ibid* 71-74.

¹²⁷ *ibid* 1.

¹²⁸ Decision of the NPCSC (n 66).

¹²⁹ Young and Cullen (n 123) 86-90; Suzanne Pepper, ‘A Chief Executive Election: pan-democrats and the Election Committee’, *China Elections and Governance Blog*, 16 January 2012, accessible at <<http://chinaelectionsblog.net/hkfocus/?p=327>> accessed August 2015.

¹³⁰ Simon NM Young, ‘Rethinking the Process of Political Reform in Hong Kong’ (2015) 45 HKLJ 381.

¹³¹ Decision of the Standing Committee of the National People’s Congress on Issues Relating to the Selection of the Chief Executive of the Hong Kong Special Administrative Region by Universal Suffrage and on the Method for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2016, 10th Sess, 12th National People’s Congress, 31 August 2014; Simon NM Young, ‘Realising Universal Suffrage in Hong Kong After the Standing Committee’s Decision’ (2014) 44 HKLJ 689.

¹³² Survey results from the Joint-University Rolling Surey on 2017 Chief Executive Election Proposal showed more than 40 per cent opposed from 1 to 13 June 2015, accessible at <<http://hkupop.hku.hk/english/features/jointUrollingSurvey/#3>> accessed August 2015.

No attempt has been made to challenge the core inequalities of the system of electing the chief executive, including the election committee. From existing case law, the courts might follow three possible approaches to a judicial review of this system. First, the court might hold that since the system (and change to the system) is so fully provided for in the Basic Law and the various decisions and interpretation of the NPCSC, no rights or other constitutional provisions could in any way be engaged by the operation of this system. This approach would be similar to the one followed by Cheung J in *Chan Yu Nam* in holding that Article 26 did not apply to functional constituencies.

The second more nuanced approach is to hold that while the system cannot be challenged for failing to provide for equal and universal suffrage (because this has been specifically excepted), political and other rights can still be engaged by the operation of the system. The focus would then be on justifying the reasonableness of any restriction. This approach was followed by the Court of Appeal in *Lee Miu Ling* and by Stock VP in *Chan Yu Nam*. Similarly, in a case concerning whether judicial review was available to challenge the outcome of a chief executive election, Justice Lam held that, by virtue of Article 45, Annex I of the Basic Law and various NPCSC decisions and interpretation, the right to election by equal and universal suffrage was not engaged, but the ‘concept of free election (‘freely chosen representatives’ and ‘free expression of the will of the electors’) is applicable to an election pursuant to Article 45’; there was a need to ensure ‘fundamental safeguards for free election’.¹³³

The third approach is to follow the prisoner disqualification cases and treat the right to vote as being engaged by the system, whereupon the issue becomes one of reasonableness and proportionality. It is highly unlikely, however, that this approach will be followed. The second approach is to be preferred because it maintains a role for courts consistent with the dictates of the rule of law but has regard to constitutional realities.

With both the second and third approaches, there is still the issue of how rigorously will courts apply the justifications test. As mentioned earlier, there is uncertainty in both the scope of the proportionality test and approach to margin of appreciation. In one recent case, *Leung Lai Kwok Yvonne v The Chief Secretary for Administration*, that challenged not the system itself but the government’s consultation and 2015 universal suffrage proposal, margin of appreciation was given as a reason for refusing leave to apply for judicial review on grounds of prematurity.¹³⁴ The applicant was a University of Hong Kong law student who argued that the government, in misapprehending the legal effect of the NPCSC’s August 31st decision, conducted a tainted public consultation that also failed to take into account relevant considerations, namely the rights in Articles 26 and 21, and thus unreasonably restricted those rights. Justice Au refused leave on two grounds: immateriality (that the alleged correct understanding of the NPCSC’s decision would not have affected the consultation or proposal) and prematurity (that the challenge could still be brought after LegCo approved the proposal). To buttress the latter point, Justice Au reasoned that since election law is an area, on which ‘a due margin of appreciation’ is accorded, citing Chief Justice Geoffrey Ma’s judgment in *Leung Chun Ying v Ho Chun Yan Albert*, the matter should be allowed to be debated in LegCo before a court considers a review of the matter.¹³⁵

¹³³ *Ho Chun Yan, Albert v Leung Chun Ying* [2012] 5 HKLRD 149, [60]-[61] & fn 6 (CFI).

¹³⁴ *Leung Lai Kwok Yvonne v The Chief Secretary for Administration*, unreported, HCAL31/2015, 5 June 2015, CFI. See also *Kwok Cheuk Kin v The Chief Executive of the HKSAR*, unreported, HCAL103/2014, 25 June 2015, CFI, where leave to challenge the fairness of the consultation process was also refused on the ground that it was academic after the NPCSC’s decision.

¹³⁵ *Leung Lai Kwok Yvonne*, *ibid* [57], applying *Leung Chun Ying v Ho Chun Yan Albert* (2013) 16 HKCFAR 735, [45].

Explaining the contradiction

One way to begin to explain the contradiction in the Hong Kong courts' strong review of restrictions and weak review of institutional inequality is to consider the consequences and impact of the cases. The strong review cases addressed isolated disqualifying provisions that had limited policy support and could be struck down without too great an impact. The weak review cases, however, challenged systemic inequalities and would have had significant institutional and policy ramifications. But a distinction based only on the extent of the impact cannot account for the Court of Final Appeal's strong review decision in *Chan Wah*, which had significant and transformative institutional ramifications for village elections, albeit outside the spheres of chief executive and LegCo elections.

A better approach is to consider the nature of the potential consequence. Where the matter is of interest to the central government and within the scope of Hong Kong's political reform trajectory, courts are likely to be hands off even where fundamental rights are engaged. Village elections and disqualifying conditions, based on residency or conviction and punishment, are not reform issues along that trajectory, nor are they important enough to catch the central government's interest. However, functional constituencies, the election committee, the election of the chief executive and corporate voting are all matters of great interest to both the central and Hong Kong governments and reserved for consideration in the reform exercises leading to universal suffrage. They are matters that go to the heart of the relationship between the central authorities and the Hong Kong Special Administrative Region and are of international importance. They concern China's authority over Hong Kong and, as stated in the August 31st decision, 'the long-term prosperity and stability of Hong Kong and the sovereignty, security and development interests of the country are at stake'.¹³⁶ Thus they are matters that courts tolerate, even to the extent of holding fundamental rights in abeyance, while giving time and space to governments, legislators and the people to work out the proper way forward.

Hong Kong courts have adopted different strategies to tolerate and avoid confronting the institutional inequality in the political system. One is to narrow the ambit of rights making them wholly inapplicable to certain types of elections under the Basic Law (*Chan Yu Nam*, per Cheung J). Another is to refuse to extend the scope of the right unless that extension has support in legislative and historical contexts (*Chan Yu Nam*, per Stock VP). A third is to find a derogation from a certain aspect of the right expressly condoned in another part of the constitution (*Lee Miu Ling*; *Leung Chun Ying v Ho Chun Yan Albert*, per Lam JA). A fourth is to apply a deferential proportionality test to find that the restriction on the right is justified (*Lee Miu Ling*; *Kwok Cheuk Kin*). Whatever strategy is applied, the upshot is the appearance of a contradiction, that while rights matter, rights matter less when the issue lies along Hong Kong's political reform trajectory, over which Beijing has great interest.

Getting Beyond the Contradiction

There are two ways for the contradiction to be resolved; each takes an opposite path. The first path is for courts to take a robust approach to political rights in all cases and confront institutional inequality head on. As Jhaveri argues it would involve courts drawing and upholding baselines even in hard cases.¹³⁷ Yasmin Dawood has argued that courts can apply

¹³⁶ Li Fei, 'Explanations on the Draft Decision of the Standing Committee of the National People's Congress on Issues Relating to the Selection of the Chief Executive of the Hong Kong Special Administrative Region by Universal Suffrage and on the Method for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2016', 10th Sess, 12th National People's Congress, 27 August 2014, 3 (English translation).

¹³⁷ Jhaveri (n 117) 233-234.

a structural rights approach to address structural deficiencies of the political system.¹³⁸ This would involve recognition of a new democratic right, the right to a fair and legitimate democratic process.¹³⁹ However conceptualised, the courts on this path would adopt a more critical approach to deference and conduct a rigorous proportionality review to assess whether any restriction is no more than necessary. Courts will be more inclined to question whether societal circumstances have changed so as to render past restrictions no longer reasonable. Where it is reasonably practicable for government to devise a better scheme to achieve legislative aims, i.e. one that impairs rights less, then governments should be given a fair opportunity to achieve a new scheme after the legislation is struck down. Constitutional remedies of temporary suspension or temporary validity will help further a dialogue between courts and government that aims to realise a new legal position informed by constitutional values and reasonable public policy.¹⁴⁰

The other path sees courts becoming even more deferential, moving to a complete disengagement with entrenched political rights. Functional constituencies and corporate voting have already been constitutionalised by courts or made immune from scrutiny. Other areas, e.g. chief executive and election committee elections, will also become untouchable by courts. This process is already occurring with the application of the margin of appreciation in recent cases. In an almost automatic manner it has been said that since election law involves ‘political and policy considerations’, a ‘due margin of appreciation’ must be accorded even if drawing a line may result in a few ‘hard cases’ with ‘detrimental effect on individuals’.¹⁴¹ Where there has been active and full debate in the legislature, it was said, in the by-election disqualification case, ‘the proper place to resolve this political issue is LegCo and not the court’.¹⁴² Thus, on this path, all judicial reviews of elections become ‘political issues’ requiring a hands-off approach by the courts. The only possible exception is if a core right was engaged, but political rights would not be regarded as core rights.

The 2014 Occupy Central protests and the 2015 failed political reform vote impacted people’s political awareness, expectations and perceptions of Hong Kong’s relationship with the mainland. Will these events have any impact on the approach of courts to future judicial review of election cases? The statements and actions of the central and Hong Kong governments may influence judges to take a more deferential path. Unlike previous reform exercises, the central government played a prominent and assertive role in the reform debate. Foreign governments were told not to interfere with this internal matter.¹⁴³ Both the central and Hong Kong governments asserted that there were no international standards relevant to the reform issue and, in any case, the election reservation rendered the ICCPR irrelevant.¹⁴⁴ The central government made clear that it wanted to control the nominations process in order to keep the vote outcome predictable and manageable. Functional constituencies, corporate voting, the election committee structure, the restriction on the chief executive from being a member of a political party, and other aspects of the status quo would remain intact even after

¹³⁸ Yasmin Dawood, ‘Electoral fairness and the law of democracy: a structural rights approach to judicial review’ (2012) 62 UTLJ 499.

¹³⁹ *ibid* 553.

¹⁴⁰ See Jhaveri and Scully-Hill (n 20).

¹⁴¹ *Kwok Cheuk Kin* (n 50) [52] & [90].

¹⁴² *ibid* [93].

¹⁴³ Mo Hong’e, ‘China urges UK to stop interference in Hong Kong’s affairs’, *Ecns.cn*, 6 September 2014; ‘China repeats opposition to foreign interference in HK affairs’, *Xinhuanet*, 4 December 2014; ‘Back off HK, China tells other countries’, *Xinhuanet*, 27 February 2015.

¹⁴⁴ ‘Civic nomination not a must for democracy’, *news.gov.hk*, 24 October 2014; CY Leung, ‘On the Record: Reform must adhere to Basic Law’, *news.gov.hk*, 14 January 2015; Tang Danlu, ‘China Voice: An absurd Hong Kong report by UK MPs’, *Xinhuanet*, 6 March 2015.

the chief executive was elected by universal suffrage.¹⁴⁵ No concessions would be made in response to public protests or to gain the support of pan-democrat legislators.¹⁴⁶ These actions send a loud message to courts not to interfere under the guise of fundamental rights with an internal political matter in which the central government has a strong interest.

But all of these political statements and gestures amount to no more than that; they do not translate into legal edicts, though they may appear in legal submissions. In remaining independent, courts apply the law and safeguard rights and freedoms of individuals.¹⁴⁷ Granted there will be occasions when Hong Kong judges may need to consider if their decisions will trigger a constitutional crisis, such as the one in 1999 when the NPCSC interpreted the Basic Law to reverse part of the Court of Final Appeal's interpretation in the first right of abode case.¹⁴⁸ But these occasions are rare and only of concern to the final court. Experience has since been gained on how these controversial issues can be addressed in an orderly manner through the reference mechanism in Article 158 of the Basic Law.¹⁴⁹ Mindful of a strong public reaction and the detrimental effect on the rule of law, the Hong Kong government has not tried again to request an NPCSC interpretation to reverse a Court of Final Appeal interpretation.

Deference on grounds that the matter comes within Hong Kong's political reform trajectory may need to be reconsidered if the path of that trajectory hits a hard wall. If the relevant political actors are unable to realise the aim of universal suffrage, why should courts continue to hold rights in abeyance and tolerate deficient institutions while waiting for a political process that may never bear fruit? While courts cannot, on their own, bring about universal suffrage, they can give effect to political rights in ways conducive to the gradual and orderly progress and development towards universal suffrage. This would be consistent with the constitutional ambitions of Articles 45 and 68 of the Basic Law.

If the political reform trajectory hits a wall or diverts on an unknown course, courts need to move away from deference and to consider more carefully the relevant legal principles. Recognised in Hong Kong law though rarely applied in the election cases, is the interpretive principle of conformity with binding international law.¹⁵⁰ As Bennion puts it, 'It is a principle of legal policy that the municipal law... should conform to public international law.'¹⁵¹ In relation to incorporating statutes like the HKBOR, Shaheed Fatima describes them as 'portals through which treaties pass to be received into the corpus of domestic law'.¹⁵² By

¹⁴⁵ HKSAR Government, *Consultation Report and Proposals on the Method for Selecting the Chief Executive by Universal Suffrage*, Hong Kong, April 2015, ch 4.

¹⁴⁶ Jeffie Lam, 'Beijing's reform plan for Hong Kong is final so don't expect last-minute changes, CY Leung says', *South China Morning Post*, 2 June 2015.

¹⁴⁷ Basic Law (n 2) arts 4, 19, 35, 38, 84 & 85.

¹⁴⁸ *Ng Ka Ling* (n 116); Chief Executive, 'Report on Seeking Assistance from the Central People's Government in Solving Problems Encountered in the Implementation of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China', 20 May 1999; The Interpretation by the Standing Committee of the National People's Congress of Articles 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, 10th Sess, 9th National People's Congress, 26 June 1999; Johannes MM Chan, HL Fu and Yash Ghai (eds), *Hong Kong's Constitutional Debate: Conflict Over Interpretation* (HKU Press 2000).

¹⁴⁹ See *Democratic Republic of the Congo v FG Hemisphere Associates LLC* (2011) 14 HKCFAR 95 (referral); (2011) 14 HKCFAR 395 (merits); *Vallejos Evangeline Banao v Commissioner of Registration* (2013) 16 HKCFAR 45.

¹⁵⁰ *Cheung Ng Sheong Steven v Eastweek Publisher Ltd* [1995] 3 HKC 601, 610 & 623-4 (CA); *Solicitor (302/02) v Law Society of Hong Kong* [2006] 2 HKC 40, [81] (CA), but see *Leung Lai Fong v Ho Sin Ying* (2009) 12 HKCFAR 581, [41].

¹⁵¹ Oliver Jones, *Bennion on Statutory Interpretation: A Code* (6th edn LexisNexis 2013) 745 (Section 270). See also Melissa A Waters, 'Creeping Monism: the judicial trend toward interpretive incorporation of human rights treaties' (2007) 107 *Columbia Law Review* 628.

¹⁵² Shaheed Fatima, *Using International Law in Domestic Courts* (Hart 2005) 65 ([3.11]).

virtue of this principle, international standards do matter in judicial review, and they have contributed to the results seen in the village elections and prisoners' disqualification cases. The relevant international legal obligations are Articles 1 and 25 of the ICCPR, which are binding on China in relation to Hong Kong, by virtue of China's acceptance of ICCPR obligations in the Sino-British Joint Declaration and notification to the UN at the time of the handover.¹⁵³ The only exception to these obligations is the election reservation, which applies to Article 25(b).¹⁵⁴ The precise effect and scope of this reservation remains unsettled in Hong Kong law. Since a reservation's effect is to restrict a right, the accepted approach on restrictions is to construe them narrowly.¹⁵⁵ The narrow construction, accepted by the UN Human Rights Committee and Justice Keith in *Lee Miu Ling*, is that the reservation is spent once an election of any form is used to elect legislators and the chief executive.¹⁵⁶ A less narrow interpretation, which would allow it to still have substantive effect, is to reserve against the whole of Article 25 any rights to elect the chief executive, members of the executive council, and members of LegCo by universal suffrage. This would be consistent with the letter and spirit of Articles 45, 55 and 68 of the Basic Law. However, the rights in Article 25 can still be engaged by unfairness or inequality in the electoral system so long as the complaint does not seek substantively to realise universal suffrage.

Another aspect of deference which higher courts will need to review in the near future is the knee-jerk reaction to defer because the election law context is said to involve 'political and policy considerations'. Recent judgments exhibiting this tendency have tried to find support from the Court of Final Appeal's decisions in *Fok Chun Wa v The Hospital Authority* and *Leung Chun Ying v Ho Chun Yan Albert*.¹⁵⁷ However on a close reading of both judgments, neither provides support for the knee-jerk reaction, which has had the effect of devaluing political rights in Hong Kong's constitutional framework. *Fok Chun Wa* was concerned with whether it was discriminatory to charge non-resident women from the mainland, who were awaiting residency status, higher fees than those charged to Hong Kong residents for delivering a child in a Hong Kong public hospital. In its analysis the Court considered how much deference should be accorded when the justification issue concerned socio-economic policy and the distribution of public funds. Chief Justice Geoffrey Ma noted that courts should allow more leeway when the context concerned 'socio-economic or other general policy matters'.¹⁵⁸ But courts would be more stringent in the application of the justification test in two categories of cases: (1) if the government's socio-economic or general policy has 'disregard for core-values'; or (2) if the subject matter of the challenge is concerned with 'fundamental concepts, in contradistinction to rights associated with social and economic policies'.¹⁵⁹ In relation to the first category, core-values relate 'to personal or human characteristics (such as race, colour, gender, sexual orientation, religion, politics, or social origin)'; they involve 'the respect and dignity that society accords to a human being'

¹⁵³ James Crawford, *Rights in One Country: Hong Kong and China* (Faculty of Law, HKU 2005) 28-29; Xiao Weiyun, *One Country, Two Systems: An Account of the Drafting of the Hong Kong Basic Law* (Peking UP 2001) 196-218; Sino-British Joint Declaration on the Question of Hong Kong, 19 December 1984, UKTS 1984 No 26, reprinted 23 ILM 1366, s XIII of annex I.

¹⁵⁴ See HKBORO (n 2), s 13, which incorporates the reservation against the whole of Article 21; compare with (n 113).

¹⁵⁵ *Ubamaka Edward Wilson v Secretary for Security* (2012) 15 HKCFAR 743, [116].

¹⁵⁶ UNHRC 2006 (n 58); *Lee Miu Ling* (HC) (n 72) 197-198; CL Lim, 'Britain's "treaty rights" in Hong Kong' (2015) 131 LQR 348, 353; Seren ST Tang, 'Status of the reservation to the right to vote in Hong Kong', CCPL Occasional Paper No 17, Faculty of Law, HKU, March 2008, 6; CL Lim, 'Right to vote and right to political participation' in Chan and Lim (n 1) 853-859.

¹⁵⁷ *Fok Chun Wa* (n 49); *Leung Chun Ying* (n 135).

¹⁵⁸ *Fok Chun Wa*, *ibid* [75(6)].

¹⁵⁹ *ibid* [77] & [79].

and are ‘fundamental societal values’.¹⁶⁰ In relation to the second category, fundamental concepts are ‘those which go to the heart of any society’ and include ‘the right to life, the right not to be tortured, the right not to be held in slavery, the freedom of expression and opinion, freedom of religion (among others)’.¹⁶¹ The right to a fair trial and presumption of innocence was also mentioned. Although political rights were not expressly mentioned by the Chief Justice, core-values can be triggered in right to vote cases by virtue of the non-discrimination clause in Article 21 of the HKBOR, and political rights are closely connected to freedoms of expression and opinion, which were expressly mentioned.

The Court revisited the concept of margin of appreciation in *Leung Chun Ying v Ho Chun Yan Albert*, a case concerned with election law but not political rights. At issue was whether the seven-day time limit to lodge an election petition with the court to question a chief executive election infringed the right of access to the courts protected by Article 35 of the Basic Law. There was no discretion to extend the time limit. The Court found the inflexible time limit to be a justified restriction on the access right. It noted that election petitions were made as of right, that it was important to have these challenges dealt with speedily, that the overall scheme also allowed for limited judicial review within 30 days, that persons likely to file the petition would be intimately involved in the election and could be expected to comply with the time limit, and that other jurisdictions had comparable limits.¹⁶² All of these reasons were stated in the Chief Justice’s judgment before he addressed margin of appreciation in a short paragraph.¹⁶³ He referred to his decision in *Fok Chun Wa* and found that a due margin of appreciation should be accorded because elections ‘involve political and policy considerations and it is in these areas where the legislature is involved’ and the determination of the seven-day limit ‘is one that does involve considerations other than legal ones’.¹⁶⁴ As to whether the issue concerned core-values or fundamental concepts, the Chief Justice did not address the question directly, noting only that ‘the right of access to the courts is not an unlimited one, particularly in the present context’;¹⁶⁵ this suggests a difficulty with conditioning the margin on the nature or type of right or issue involved. The case did not comment on the value or importance of political rights.

Neither of these two decisions can be read as authority for judicial deference in every case concerning political rights, which can hardly be said to ‘rights associated with purely social and economic policies’.¹⁶⁶ Relating to political and policy considerations may be one reason to allow the legislature some leeway, but the crucial prior question is whether the political right engaged is a ‘fundamental concept’, in which case courts should be more vigilant in protecting the fundamental right at stake. In considering this question, courts should bear in mind the following three aspects of political rights. First, it is often said that political rights serve to guarantee and protect other human rights.¹⁶⁷ ‘It figures in the International Covenant as a right so fundamental that the realization of many others depends upon it.’¹⁶⁸ Second, political rights are inextricably tied to other fundamental freedoms such that their restriction inevitably impacts on those other freedoms. ‘[T]he expressive rights to free speech, press, assembly and association must in some way inform any theory of participation. Their prominence in the International Covenant reminds us that Article 25

¹⁶⁰ *ibid* [77].

¹⁶¹ *ibid* [79].

¹⁶² *Leung Chun Ying* (n 135) [41]-[44].

¹⁶³ *ibid* [45].

¹⁶⁴ *ibid*.

¹⁶⁵ *ibid*.

¹⁶⁶ *Fok Chun Wa* (n 49) [79].

¹⁶⁷ *Wesberry v Sanders*, 376 US 1, 17 (1964); *Dixon v British Columbia* (1989) 35 BCLR (2d) 273, 284; *Young* (n 1) 697-699.

¹⁶⁸ Henry J Steiner, ‘Political participation as a human right’ (1988) 1 *Harvard HR Ybk* 77, 131.

should not be approached as an isolated provision, detached from the larger structure of rights in the Covenant.¹⁶⁹ Third, in the context of one country, two systems, the political rights exemplify Hong Kong's 'separate system', and Hong Kong courts, following the approach in *Ng Ka Ling*, should give a 'generous interpretation' to such rights.¹⁷⁰ The wide expression of views from the community during the 2013-2015 reform exercise, whether in support or against the government's proposal, is validation of the great importance of political rights and democratic institutions to Hong Kong people.

Conclusion

Like Hong Kong's journey on the road to democracy, judicial review of elections has also experienced a bumpy ride. Its current state of contradiction reflects a broader tension between Hong Kong's robust and international approach to constitutional rights review and China's authoritative approach to Hong Kong's political development. After the 2015 reform veto, there has been no official indication of when the universal suffrage reform process will begin again. Before too long, those frustrated with the deadlock in the political process will turn to courts seeking a consideration (or reconsideration) of the longstanding institutional inequalities in the political system. A dismissive response would render political rights under the Basic Law illusory and bring the two systems closer together, instead of marking their separateness. A too robust approach might provoke undesirable interference from the central government. The best way is to give Hong Kong permanent residents the full measure of their political rights by considering rights challenges with the same intensive scrutiny applied in previous cases concerned with the fundamental freedoms of expression, assembly, and association.¹⁷¹ Under this approach courts need not attempt to design or redesign political institutions. The articulation of legal principles that reflect the underlying purposes of Article 21 can serve as a catalyst for gradual progress in the direction of universal suffrage.

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¹⁶⁹ *ibid* 88; Henry J Steiner, 'Two sides of the same coin? Democracy and international human rights' (2008) 41 *Israel L Rev* 445, 446.

¹⁷⁰ *Ng Ka Ling* (n 116) [77].

¹⁷¹ See eg *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229; *Dr Kwok-Hay Kwong v The Medical Council of Hong Kong* [2008] 3 HKLRD 524 (CA).

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