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# The Meaning of the Right to Vote in Hong Kong

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From 1982 to 1997, Hong Kong went from having no form of elected government to having a fully elected Legislative Council (though not entirely by geographical constituencies). Under Chinese sovereignty after 1 July 1997, Hong Kong has regressed to its pre-democracy days as a result of the establishment of appointed provisional bodies in place of the elected ones. Against this changing context of the right to vote in Hong Kong, this article seeks to explicate fundamental principles and purposes which underlie the meaning of that right.

After considering its constitutional and human-rights status, the text of Hong Kong's *Bill of Rights*, and the historical, social and political context of Hong Kong, it is argued that the meaning of Hong Kong's right to vote is informed by two purposes: the protection of all other human rights and the achievement of self-government. Applying these principles, it is argued that the Hong Kong High Court was correct to find that the ten-year residency requirement for candidacy unreasonably infringed the right to vote. However, in a subsequent case challenging the system of functional constituencies, both the High Court and Court of Appeal provided unsatisfactory decisions, which are critically assessed in this article.

It is hoped that the principles of interpretation and purposes of the right to vote outlined here will be adopted in the new Hong Kong, where legal and political encroachments on the right to vote and other human rights appear imminent.

Entre 1982 et 1997, Hong-Kong est passée d'un gouvernement non-élu à un gouvernement entièrement élu (bien que ces élections n'aient pas été entièrement basées sur des circonscriptions géographiques). Depuis le 1<sup>er</sup> juillet 1997, Hong-Kong, désormais sous juridiction chinoise, est revenue à son système pré-démocratique, suite à la mise en place d'un Conseil législatif entièrement nommé. Le présent article vise à expliciter les principes de base et les buts qui sous-tendent le droit de vote.

Après avoir considéré le statut du droit de vote dans la contexte du droit constitutionnel et des droits de la personne, ainsi que le texte du *Bill of Rights* de Hong-Kong et le contexte historique, social et politique de Hong-Kong, l'auteur propose une analyse double du droit de vote. D'une part, le droit de vote sert à assurer le respect des autres droits fondamentaux ; d'autre part, il vise à garantir l'autodétermination interne. À la lumière de ces principes, l'auteur conclut que la *High Court* de Hong-Kong a eu raison de conclure que l'exclusion des candidats qui n'avaient pas résidé à Hong-Kong pendant au moins dix ans constituait une violation du droit de vote. Toutefois, dans une affaire subséquente, qui attaquait la validité des circonscriptions fonctionnelles, tant la *High Court* que la *Court of Appeal* ont rendu un jugement inadéquat. Ces décisions sont ici analysées de manière critique.

Il est à souhaiter que les principes d'interprétation du droit de vote qui sont présentés ici seront adoptés à Hong-Kong, où de graves violations du droit de vote et d'autres droits de la personne semblent imminents.

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## Introduction

### I. The Changing Context of the Right to Vote in Hong Kong

#### A. Introduction

#### B. A Political Framework in Transition

1. The Political Framework under British Rule
  - a. *Fundamental Institutions*
  - b. *Hong Kong's Three-Tiered Structure of Representative Government*
    - i. District Boards
    - ii. Municipal Councils
    - iii. Legislative Council
    - iv. Summary of Observed Trends
2. The Political Framework under China's Basic Law
3. Impact of the *Hong Kong Bill of Rights Ordinance*

### II. The Meaning of the Right to Vote under the *Bill of Rights*

#### A. A Constitutional Right

1. Implication for Interpretation
  - a. *Generous Interpretation*
  - b. *Constitution As a "Living Tree"*
  - c. *Purposive Approach*
2. Insights from Jurisdictions with Constitutionally Entrenched Rights
  - a. *Canada*
  - b. *United States*

#### B. A Human Right

1. Significance of Status
2. Insights from International Human-Rights Law
  - a. International Covenant on Civil and Political Rights
  - b. European Convention on Human Rights

#### C. Text and Context of the Bill of Rights

### III. Purposes Underlying the Right to Vote in Hong Kong

#### A. Protection of All Other Human Rights

#### B. Achievement of Self-Government

1. External Right of Self-Determination: Missed Opportunities
2. Internal Right of Self-Determination: Self-Government

#### **IV. Hong Kong's Right-to-Vote Cases**

- A. *Residency Requirement Impugned: Lau San-ching*
- B. *Functional Constituencies Challenged: Lee Miu-ling*
  - 1. "One Person, One Vote"
  - 2. Size of Functional Constituencies
  - 3. Subsidiary Complaints

#### **V. The Future of the Right to Vote in Hong Kong**

- A. *Constitutional Impediments*
- B. *Real and Anticipated Encroachments*
  - 1. The Provisional Legislature: Democracy in Reverse
  - 2. Abolition of the *Hong Kong Bill of Rights Ordinance*
  - 3. Implementing Article 23 of the Basic Law: Restrictions on Expression and Assembly

#### **Conclusion**

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## Introduction

Hong Kong is a place that has only recently come to acquire the right to vote. For well over a century, the people of Hong Kong had no legal right to determine the conduct of public affairs. From time to time, certain sectors of Hong Kong society were consulted in the development of government policy, but Hong Kong people had to wait until 1982 before they received any form of elected popular representation. Full democracy in 1982 was not an option; instead, a process of democratization was planted to devolve political power gradually to Hong Kong residents.

Despite its short history, the right to vote has brought about significant changes to the social and political fabric of Hong Kong. In 1991, the right to vote itself underwent a significant change, being elevated to the status of a constitutional norm with the passage of the *Hong Kong Bill of Rights Ordinance*<sup>1</sup> ("B.O.R.O."). Because of the nature and history of the *Hong Kong Bill of Rights*,<sup>2</sup> the right to vote also acquired the status of a fundamental human right, which has its roots in the United Nations' *International Covenant on Civil and Political Rights*.<sup>3</sup> The arrival in 1992 of Governor Christopher Patten, with his package of constitutional reforms, was another significant event in the life of Hong Kong's right to vote. His reforms materialized in the 1994-95 elections, making Hong Kong the most democratic it ever was. On 1 July 1997, the right to vote evolved once again as a result of Hong Kong's transfer of sovereignty. China's unilateral action to replace the 1995 elected Legislative Council with an appointed provisional legislature marks a fundamental step backwards in the progress of Hong Kong's right to vote. The establishment of a new constitutional order under the Basic Law<sup>4</sup> also has significant implications for the right to vote.

The overall purpose of this article is two-fold: first and foremost, to determine the meaning of the right to vote in Hong Kong and to illustrate its application with a critical analysis of two important cases; second, to demonstrate a purposive method of interpretation which could presumably be applied to the interpretation of rights contained in the Basic Law. In Part I, the article begins with a description of the changing political and constitutional context of the right to vote in Hong Kong. Although somewhat lengthy, this background is necessary for understanding its implications for the legal meaning of the right to vote. In Part II, a review of the jurisprudence from the United States, Canada, and the United Nations and European international human-rights regimes and an analysis of the text and context of the *Bill of Rights* discloses some important ideas about the substance of the right to vote and a method for deriving the meaning of that right in terms of its underlying purposes. These purposes emerge from a critical analysis of the political, social and constitutional context of

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<sup>1</sup> Cap. 383 [hereinafter B.O.R.O.].

<sup>2</sup> The *Bill of Rights* itself (comprising 23 articles) is Part II (s. 8) of the B.O.R.O., *ibid.* [hereinafter *Bill of Rights*].

<sup>3</sup> 19 December 1966, Can. T.S. 1976 No. 47, 999 U.N.T.S. 171 [hereinafter I.C.C.P.R.].

<sup>4</sup> The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, 3d Sess., 7th National People's Congress ("N.P.C."), 4 April 1990, reprinted in 29 I.L.M. 1519 [hereinafter Basic Law]. Also available at <http://www.cityu.edu.hk/Basic Law/bl.htm> (17 June 1997).

Hong Kong. In Part III, it is argued that the two purposes underlying the right to vote in Hong Kong are the protection of all other human rights and the achievement of self-government. While these purposes are theoretically grounded, they have also found expression in actual events in Hong Kong. Part IV illustrates the application of these two purposes by way of a critical analysis of two pre-transition right-to-vote cases under the *Bill of Rights*. In the first case, the issue of residency requirements was considered; in the second case, Hong Kong's system of functional constituencies. Finally, in Part V, a preliminary overview of some potential and live issues relating to the future of the right to vote under the Basic Law and the new sovereign administration is undertaken.

Notwithstanding the provisional legislature, if the right to vote continues to exist in one legal form or another, the struggle for democracy will necessarily find a forum in the courts of Hong Kong. While much has been written on the progress of democracy in Hong Kong, very little of this literature has viewed the issues from a strictly legal perspective. Given the real and anticipated encroachments on the right to vote after 1 July 1997, commentary in this area will hopefully assist in resolving some of the difficult legal problems emerging from the transition.

## I. The Changing Context of the Right to Vote in Hong Kong

### A. Introduction

When the United Kingdom acquired Hong Kong in the middle of the nineteenth century, it was done in three distinct phases corresponding to three distinct geographical areas of Hong Kong.<sup>5</sup> In 1842, China ceded Hong Kong Island to Britain,<sup>6</sup> and in 1860, the Kowloon peninsula.<sup>7</sup> Then, in 1898, Britain acquired the New Territories, a significant parcel of land between the mainland and Kowloon, by lease for 99 years.<sup>8</sup> China has always condemned the three treaties as being unequal, but had never made any formal demands to take back Hong Kong until 1982, when negotiations commenced. The British have always maintained that the treaties were legal and binding; but, like the Chinese, they had never taken any steps to discuss with their counterpart what would happen after 1997, when the New Territories lease would expire. In 1982, representatives from both countries entered into private discussions about the future of Hong Kong. After two years of negotiations, the two sides came to an agreement on the process of decolonization. The product of these discussions was the *Sino-British Joint Declaration on the Question of Hong Kong*,<sup>9</sup> a binding international

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<sup>5</sup> See P. Wesley-Smith, *Constitutional and Administrative Law in Hong Kong*, 2d ed. (Hong Kong: Longman Asia, 1994) at 23-26.

<sup>6</sup> *Treaty of Nanking*, 29 August 1842, China-U.K., 93 Cons. T.S. 465.

<sup>7</sup> *Convention of Friendship*, 24 October 1860, China-U.K., 123 Cons. T.S. 71.

<sup>8</sup> *Convention Respecting an Extension of Hong Kong Territory*, 9 June 1898, China-U.K., 186 Cons. T.S. 310.

<sup>9</sup> 19 December 1984, U.K.T.S. 1984 No. 26, reprinted in 23 I.L.M. 1366 [hereinafter *Joint Declaration*].

treaty signed in 1984. Over the course of approximately six years, the Chinese Government, in conjunction with the Basic Law Drafting Committee and the Basic Law Consultative Committee, put together the constitutional document that would govern Hong Kong once it reverted to Chinese sovereignty in 1997.<sup>10</sup>

## B. A Political Framework in Transition

### 1. The Political Framework under British Rule

#### a. Fundamental Institutions

Hong Kong's political framework<sup>11</sup> under British rule remained relatively unchanged since 1843. The main institutions in Hong Kong were the Governor, Executive Council and Legislative Council. Their powers and functions were set out in a written constitution, consisting of the *Letters Patent* and *Royal Instructions*, both originally issued in 1843 by way of the Queen's prerogative power.<sup>12</sup> The first six articles of the *Letters Patent* established the office of the Governor, the Executive Council and the Legislative Council. It had often been said that Hong Kong had a "gubernatorial government":

[T]he ultimate responsibility within the colony for the performance of the government lies in the Governor and the Governor alone. The Governor is head of the executive branch. He makes policy, he directs its implementation, he is accountable for it to the Secretary of State for Foreign and Commonwealth Affairs.<sup>13</sup>

The Governor had complete executive authority in the colony. With his power to refuse assent to bills passed in the Legislative Council, he also had an effective veto over the Legislative Council's legislative powers.<sup>14</sup> The people of Hong Kong had no

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<sup>10</sup> See N. Miners, *The Government and Politics of Hong Kong*, 5th ed. (Hong Kong: Oxford University Press, 1995) at 1-67 for a more comprehensive account of Hong Kong's political history and future.

<sup>11</sup> "Political framework" refers to the key political institutions that make up Hong Kong's government and their inter-relationships.

<sup>12</sup> See Wesley-Smith, *supra* note 5 at 42-46. For a complete text of the *Hong Kong Letters Patent* (1917-1991) and the *Hong Kong Royal Instructions* (1917-1991) as amended to March 1993, see A. Byrnes & J. Chan, eds., *Public Law and Human Rights: A Hong Kong Sourcebook* (Hong Kong: Butterworths, 1993) 18-37. The modern versions of the two documents are based on the 1917 editions, but they have since been amended a number of times. Although both documents are of equal status (the courts have so held, despite the *Royal Instructions*' apparent subordinate status, being subsidiary legislation coming from art. XII of the *Letters Patent* (see *Lam Yuk-ming v. Hong Kong (A.G.)*, [1980] H.K.L.R. 815 (C.A.); see also Wesley-Smith, *ibid.* at 43-45)), the *Letters Patent* are more fundamental in that they lay out the constitutional framework for Hong Kong, while the *Royal Instructions* flesh out the details of that framework.

<sup>13</sup> P. Wesley-Smith, "The Present Constitution of Hong Kong" in P. Wesley-Smith & A.H.Y. Chen, eds., *The Basic Law and Hong Kong's Future* (Hong Kong: Butterworths, 1988) 5 at 10.

<sup>14</sup> See *Letters Patent*, *supra* note 12, art. X.

power to impeach the Governor,<sup>15</sup> nor had they ever had any democratic say as to who should occupy this post.

The only domestic constraint on the executive powers of the Governor was the requirement to consult the Executive Council prior to executing his authority.<sup>16</sup> But the Governor could suspend, "upon sufficient cause", any member thereof, and with the Crown's confirmation, revoke such member's appointment.<sup>17</sup> Although the Governor was not bound to follow the Council's advice, he had to report all unilateral action to the Crown with reasons.<sup>18</sup> The Council's constitution in the *Royal Instructions* provided for three *ex-officio* members: the chief secretary, the attorney general and the financial secretary of the colony.<sup>19</sup> Since the Executive Council had never had an elected member,<sup>20</sup> its evolution, in terms of composition, had been towards acquiring more "unofficial" membership over "official". Official members were those with an existing official position in the Hong Kong or British Government. Unofficial members did not have such a position, and were supposed to be more independent and representative of local views. Since 1966, there had been a majority of unofficial members on this Council.<sup>21</sup>

Article VI of the *Letters Patent* provided for a Legislative Council and set out its composition. The only statement in the *Letters Patent* of the purpose and function of the Legislative Council was contained in a single sentence in article VII(1):

The Governor, by and with the advice and consent of the Legislative Council, may make laws for the peace, order, and good government of the Colony.

Although this article purported to give the Legislative Council a law-making function, its wording suggests that it was the Governor who had the exclusive law-making authority, and that the Legislative Council was only supposed to provide advice and a "check" on the Governor's discretion.<sup>22</sup> Nevertheless, the power to introduce private member's bills was suggested by article XXVII of the *Royal Instructions*, which elsewhere set the first restriction on the introduction of "private bills": any ordinance, the object or effect of which was to place a charge on the Government's revenue, was to receive the Governor's consent before it could even be proposed.<sup>23</sup> Second, before

<sup>15</sup> On July 12, 1995, the Democratic Party moved a vote of no confidence against Governor Patten for his handling of the Court of Final Appeal issue. The motion was defeated by 35 votes to 17, with four abstentions. It would be interesting to consider what would have happened had the motion passed. See "A-G rejects attack on rule of law" *South China Morning Post* (13 July 1995) 4.

<sup>16</sup> See *Royal Instructions*, *supra* note 12, art. X.

<sup>17</sup> See *Letters Patent*, *supra* note 12, art. V.

<sup>18</sup> See *Royal Instructions*, *supra* note 12, art. XII.

<sup>19</sup> See *ibid.*, art. II.

<sup>20</sup> There was some discussion of including elected members in 1984 (see Hong Kong, *Green Paper: The Further Development of Representative Government in Hong Kong* (Hong Kong: Government Printer, 1984) [hereinafter 1984 *Green Paper*] at para. 51).

<sup>21</sup> See *The Government and Politics of Hong Kong*, *supra* note 10 at 74.

<sup>22</sup> This weak foundation allows China to argue that the Legislative Council was and ought to be no more than an advisory body (see *Facts about Sino-British Talks*, *infra* note 78 at 51).

<sup>23</sup> See *Royal Instructions*, *supra* note 12, art. XXIV(2)(c).

any bill became law, it had to receive the assent of the Governor, a matter left to his absolute discretion.<sup>24</sup>

Finally, the Crown had reserved for itself in Hong Kong's constitution an enormous amount of power. In addition to having absolute authority to choose the Governor and dictate his decision-making, the Crown had the power to disallow laws passed by the territory,<sup>25</sup> and the power to make laws for "the peace, order, and good government of the Colony."<sup>26</sup> Also, the power to amend the *Letters Patent* itself was expressly reserved for her Majesty under article XX.

In the early 1980s, Hong Kong set out on a path to representative government. Three statutory institutions emerged as part of this development. The District Boards were created to look after district administration;<sup>27</sup> two municipal councils — the Urban Council<sup>28</sup> and Regional Council — were established to manage more regional matters.<sup>29</sup> Together with the Legislative Council, the District Boards and municipal councils came to be known as Hong Kong's "three-tiered system" of representative government. As will be demonstrated in the next section, the history of the right to vote in Hong Kong is intimately tied with Hong Kong's history of representative government.

### *b. Hong Kong's Three-Tiered Structure of Representative Government*

In 1982, a three-tiered structure of representative government was established in Hong Kong. At the top of this structure was the Legislative Council, followed by the municipal councils and the District Boards. The two municipal councils — the Urban Council and the Regional Council — had limited executive authority to address particular social, cultural and health issues in the urban and rural areas of Hong Kong. The eighteen District Boards, scattered throughout the territory, had even less executive authority, and served primarily an advisory function.

#### *i. District Boards*

The establishment of the District Boards in 1982 represented a new era of district administration in Hong Kong.<sup>30</sup> It was a significant event in Hong Kong's political

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<sup>24</sup> See *Letters Patent*, *supra* note 12, art. X.

<sup>25</sup> See *ibid.*, art. VIII.

<sup>26</sup> See *ibid.*, art. IX.

<sup>27</sup> *District Boards Ordinance* (Cap. 366).

<sup>28</sup> Note that the Urban Council was well established prior to 1982, but it was in 1982 that it first became a body with directly elected members.

<sup>29</sup> See *Urban Council Ordinance* (Cap. 101); *Regional Council Ordinance* (Cap. 385).

<sup>30</sup> Before this time, there existed a District Officer scheme, District Advisory Boards in the New Territories, and City District Committees in the urban areas. See annex I and II of Hong Kong, *Green Paper: A Pattern of District Administration in Hong Kong* (Hong Kong: Government Printer, 1980) [hereinafter 1980 *Green Paper*] for a detailed description of the district administration scheme in 1980.

history for a number of reasons. First, it was part of a comprehensive review of the existing system of district administration, leading to an improved system of local administration, standardized across the territory. And for the first time in Hong Kong's history, a statutory advisory body was to have a number of members directly elected from a territory-wide franchise. Representative government in Hong Kong therefore began with the 1982 District Board elections.

Between 1980 and 1982, the Hong Kong Government consulted the public in designing a rational system of district administration "directed towards better co-ordination of and responsiveness by the administration at [the] district level and towards greater participation by the inhabitants of each district."<sup>31</sup> In the Government's 1981 *White Paper*, two main reasons were given for the proposed reforms.<sup>32</sup> The scheme was designed to address some of the problems associated with the migration of people from the over-crowded urban area to the new towns formed just outside the northern boundary of Kowloon peninsula. The second main factor was the "increasing complexity of administering Hong Kong particularly at the district level ..."<sup>33</sup> It was recognized that districts would have their own individual needs, and a system of District Boards with elected members would improve monitoring of the Government's programmes, and provide greater opportunity for Hong Kong people to express their views.<sup>34</sup>

To achieve the above objectives, the Government set up eighteen District Boards (ten in the urban areas, eight in the New Territories) and a corresponding number of District Management Committees, which were the official Government counterpart to the District Boards. These committees consisted of Government officials from a number of departments, usually the ones which were of most relevance to the needs of individual districts. The District Management Committees were on the receiving end of the advice given by the District Boards and were expected to take measures to effectively resolve district problems. By statute, the District Boards were to advise on a wide number of issues, including matters affecting people's well-being, the provision and use of public facilities and services, the adequacy and priorities of government programmes, and the use of public funds for local public works and community activities.<sup>35</sup> In addition, a Board could apply for funds to undertake environmental improvements and to promote recreational and cultural activities within the district.<sup>36</sup>

Since 1982, the statutory terms of reference of the District Boards remained unchanged; however, the Government gradually increased their budgets for undertaking local projects, and enhanced their advisory role. For example, in the Government's 1988 *White Paper* on the development of representative government, the Board's advisory role was enhanced by requiring Government departments to consult the Boards

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<sup>31</sup> Hong Kong, *White Paper: District Administration in Hong Kong* (Hong Kong: Government Printer, 1981) at 3 [hereinafter 1981 *White Paper*].

<sup>32</sup> See *ibid.* at 4.

<sup>33</sup> *Ibid.*

<sup>34</sup> See *ibid.*

<sup>35</sup> See *District Boards Ordinance*, *supra* note 27, s. 20(1)(a).

<sup>36</sup> See *ibid.*, s. 20(1)(b).

about all district matters, and to provide reasons if the Board's advice was not heeded.<sup>37</sup> Later, in his 1992 annual address, Governor Patten opined that the District Boards were "far too limited in their function", and that they should be given "full authority in managing funds for minor environmental improvement projects, local public works projects and community building activities."<sup>38</sup> Governor Patten also felt that they should be responsible for managing community halls and for making appointments to different local boards.

The composition of the first District Boards reflected the Government's reluctance to move too quickly in devolving power to the people. All Boards had official and unofficial appointed members, as well as directly elected members from geographical constituencies. In addition, *ex-officio* seats on rural District Boards were provided for Rural Committee<sup>39</sup> chairmen, and in the urban area, seats were reserved for Urban Council members. The 1981 *White Paper* recognized that the proportion of unofficial membership would differ from district to district; but the overall goal was to have an "unofficial majority on all District Boards."<sup>40</sup> Table 1 shows the composition of, and percentage of directly elected members on, all the District Boards from 1982 to 1994.

TABLE 1: Composition of District Boards (1982-1994)

| Election Year | Appointed (Official) | Ex-officio | Appointed (Unofficial) | Directly Elected | % Directly Elected |
|---------------|----------------------|------------|------------------------|------------------|--------------------|
| 1982          | 167                  | 54         | 137                    | 132              | 27                 |
| 1985          | 0                    | 57         | 132                    | 237              | 56                 |
| 1988          | 0                    | 27         | 141                    | 264              | 61                 |
| 1991          | 0                    | 27         | 140                    | 274              | 62                 |
| 1994          | 0                    | 27         | 0                      | 346              | 93                 |

Source: P.K.W. Fong, *District Administration in Hong Kong* (Hong Kong: Centre of Urban Studies and Urban Planning, 1984) at 16; *Hong Kong 1983, 1986, 1989, 1992, 1995* (Hong Kong: Government Printer).

Over the twelve year period there was a gradual increase in representativeness. The first major increase in the number of directly elected members took place in 1985, when official appointed seats were made into elected seats, and an arms-length relationship was established between the District Boards and the Government. The

<sup>37</sup> See Hong Kong, *White Paper: The Development of Representative Government: The Way Forward* (Hong Kong: Government Printer, 1988) at para. 48 [hereinafter 1988 *White Paper*].

<sup>38</sup> Rt. Hon. C. Patten, "The Governor's Annual Address to the Legislative Council on 7 October 1992" (Hong Kong: Government Printer, 1992) at para. 139 [hereinafter "1992 Governor's Address"].

<sup>39</sup> Rural Committees were non-statutory bodies that looked after the affairs of local people in the New Territories.

<sup>40</sup> 1981 *White Paper*, *supra* note 31 at 10.

Boards' composition was then relatively stable for a period of nine years, with the exception of the abolition of the thirty Urban Council *ex-officio* seats in 1988. In 1994, Governor Patten's reforms to fully democratize the District Boards were implemented by abolishing all of the remaining appointed seats.

When the first District Board election was being designed, considerable government and public attention was paid to the details of the electoral franchise. These details were codified in the general *Electoral Provisions Ordinance*,<sup>41</sup> whose application extended immediately to the Urban Council elections and later to the Regional and Legislative Council direct elections. There were two sets of hurdles to overcome before one could exercise the right to vote: a qualifying set and a disqualifying set. To qualify, one had to be twenty-one years or older, and be ordinarily resident in Hong Kong for seven years immediately preceding the closing date for registration.<sup>42</sup> An exception to the latter condition could be made if the person proved that he or she was a "Hong Kong believer" (as defined in the *Immigration Ordinance*<sup>43</sup>) at the time or had previously registered to vote in an Urban Council election. Once qualified, a person could still be disqualified by the second set of conditions.<sup>44</sup> Finally, an elector could only vote in respect of the constituency of his or her residence (as entered in the final register).<sup>45</sup>

The qualifying and disqualifying conditions for candidacy were more restrictive. To qualify as a candidate, one had to be entitled to register as an elector, and in addition, must have been ordinarily resident in Hong Kong for the ten years immediately preceding the date of nomination.<sup>46</sup> Furthermore, some of the disqualifying grounds for being an elector were made stricter for candidacy.<sup>47</sup> Interestingly, a candidate need

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<sup>41</sup> Cap. 367.

<sup>42</sup> See *ibid.*, ss. 7-10. It is interesting to note that the 1981 *White Paper*, *supra* note 31, did not state that it was necessary to reside seven years "immediately preceding" the date of registration. Somewhere in the drafting process, this qualification was added.

<sup>43</sup> Cap. 115.

<sup>44</sup> For example, persons who had been sentenced to death or to a term of imprisonment greater than six months in Hong Kong or any other country and had not suffered the punishment or received a free pardon, those who were of unsound mind, members of the regular armed forces of the Crown but not including locally enlisted personnel, persons convicted in the past seven years of specific corruption and bribery offences, and anyone serving a prison sentence on the date of registration or election were all disqualified from voting (see *Electoral Provisions Ordinance*, *supra* note 41, s. 11).

<sup>45</sup> See *ibid.*, s. 12.

<sup>46</sup> See *ibid.*, s. 18.

<sup>47</sup> See *ibid.*, s. 19. For example, the disqualification on the basis of not having suffered punishment after sentence was broadened to custodial sentences exceeding only three months, and the disqualification period for having committed a corruption or bribery offence was extended to ten years instead of seven. A number of additional categories of persons were also disqualified from being a candidate (see also 1981 *White Paper*, *supra* note 31 at paras. 48-49).

Since 1982 and prior to the impact of the B.O.R.O., *supra* note 1, the qualifying and disqualifying conditions for voting and candidacy remained relatively unchanged. During the 1987-88 round of consultations on representative government, there were discussions about changing the minimum age requirement for voting and candidacy. In the 1988 *White Paper*, *supra* note 37, the Government refused to lower the age requirement to 18, observing that "[m]any people felt that more civic education

not have been a resident in the constituency or district in which he or she was running. The Government felt that such a restriction would inhibit or prevent good candidates from being members.<sup>48</sup>

To achieve full equality in voting and representation, it is necessary to draw constituencies and distribute seats so as to secure equal-size voting populations. In Hong Kong, there does not appear to be much study of this issue, at least in the context of the District Boards, and statistics have not been obtained for this article to enable a thorough study. Nevertheless, in the 1981 *White Paper* on district administration, the Government stressed that “[t]he number of constituencies in a district and their sizes will vary according to the characteristics of the district concerned ...”<sup>49</sup> There was no overall goal to try to achieve equality in constituency sizes. Instead, the Government emphasized that in the New Territories there would be a wide range of factors determining the drawing of boundaries, in particular, “the uneven distribution of population between new towns and rural areas, the continuing rapid expansion of the new towns, and the significant different geographical, social and political characteristics of the districts.”<sup>50</sup>

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was needed before people below [21] would be ready for the vote” (*ibid.* at para. 69). The age requirement for voting had to wait until Governor Patten’s reforms in 1994 before it was lowered to 18 (see *Electoral Provisions (Miscellaneous Amendments) Ordinance* (Ord. No. 10 of 1994), s. 7 [hereinafter *Electoral Amendments Ordinance*]). One change that did take place in 1987 was that the “Hong Kong believer” exception to the seven-year residency requirement for becoming a voter was expanded to include all Hong Kong “permanent residents”. This meant that a large group of individuals known as “Chinese residents” who had continuous residence in Hong Kong for at least seven years could qualify to vote without meeting the slightly stricter general standard of being ordinarily resident for seven years “immediately preceding” the date of registration (see *Electoral Provisions Ordinance, ibid.*, s. 8). In 1994, the candidacy disqualification of being a parliamentary member outside of Hong Kong was narrowed to not include those officials from the People’s Republic of China (see *Electoral Amendments Ordinance, ibid.*, s. 9).

<sup>48</sup> See 1981 *White Paper, ibid.* at para. 42.

<sup>49</sup> *Ibid.* at para. 59.

<sup>50</sup> *Ibid.* The Boundary and Election Commission, a part of Governor Patten’s reforms, was an independent body set up in 1993 to draw boundaries for geographical constituencies according to statutory criteria, and to act as a watchdog over the conduct of elections. Of most interest is section 22 of its governing statute, which set out the criteria for demarcating boundaries which the Commission had to apply (see *Boundary and Election Commission Ordinance* (Cap. 432), s. 22). The starting principle was equality in voting population per representative; but where it was not practicable, it was possible to deviate up to 25% from the population quota or overall average. In drawing the boundary, the Commission was to have regard to existing boundaries, community identities or the preservation of local ties, and physical features such as size, shape, accessibility and development of the relevant area or any part thereof. The Commission had a discretion to deviate beyond the 25% mark, but only according to the latter two criteria and only when such deviation was necessary and desirable. See also *infra* note 66 for background on the Commission and disparities in the municipal-council elections.

Despite the relatively weak statutory powers of the District Boards, in practice they did play an important role in the everyday lives of Hong Kong people.<sup>51</sup> They were the vehicle for delivering public opinion to the central authorities. For example, it was routine for District Board members to hold "Meet the People" sessions approximately one night a week where they would listen to and try to help with public complaints.<sup>52</sup> The District Boards were also significant from a constitutional perspective. Although there was no mention of them in Hong Kong's constitution, their significance derived from a link they had with the Legislative Council. Since 1985, when the Legislative Council started having elected members, the District Boards sent some of their members to the Legislative Council by way of an electoral college. In the most recent Legislative Council election (1995), ten District Board members were so elected.

## ii. Municipal Councils

At the second tier of representative government were the municipal councils — the Urban Council and the Regional Council — responsible for local administration in the urban and rural areas of Hong Kong, respectively. Although both councils had similar constitutions, they did not share the same history. The Urban Council had a lineage dating back to 1887, when its predecessor, the Sanitary Board, was set up "to organize the cleansing of streets and houses and to draft public health regulations."<sup>53</sup> In 1936 it acquired its modern name and saw an expansion in its size and functions, gaining more responsibilities in the area of housing and recreation. The 1971 *White Paper* on the Urban Council set in motion its re-constitution, making it financially autonomous with a clear set of functions and powers set down by statute.<sup>54</sup> As part of the 1982 reforms in district administration, the Urban Council was given elected membership on the basis of a broad franchise in the urban area, departing from the previous method of electing Urban Council members, which excluded approximately eighty percent of the Hong Kong adult population from voting.<sup>55</sup>

The Regional Council had a shorter history, beginning in April 1986. Prior to its existence, there was an asymmetry in how local services were delivered to the urban and rural areas of Hong Kong. In the city, the Urban Council directed the Urban Services Department; in the country, the New Territories Services Department performed local work under the direction of the central government.<sup>56</sup> To correct this asymmetry, and to better address local problems of a rising rural population, it was

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<sup>51</sup> See S.K. Lau & H.C. Kuan, "The 1985 District Board Election in Hong Kong: The Limits of Political Mobilization in a Dependent Polity", Occasional Papers No. 8, Centre for Hong Kong Studies (Hong Kong: Institute of Social Studies, Chinese University of Hong Kong, 1985) at 7-8.

<sup>52</sup> See *The Government and Politics of Hong Kong*, *supra* note 10 at 175.

<sup>53</sup> J.Y.S. Cheng, *Government and Public Affairs (Main Book)* (Hong Kong: Summerson Eastern, 1987) at 48.

<sup>54</sup> See Hong Kong (Colonial Secretariat), *White Paper: The Urban Council* (Hong Kong: Government Printer, 1971).

<sup>55</sup> See Cheng, *supra* note 53 at 51.

<sup>56</sup> See *ibid.* at 52.

both fair and efficient to set up a Regional Council on the model of the Urban Council. Since 1986, it had held four elections, and had built close connections with its urban counterpart, the rural District Boards and many of the local organizations in the New Territories.<sup>57</sup>

The statutory functions, powers and composition of the two municipal councils were almost identical. In contrast to the District Boards, the scope of their functions was more than merely advisory. They were responsible for waste disposal, and had to ensure certain standards of public health and environmental cleanliness. A second head of duties related to the promotion of a variety of recreational and cultural activities in the community. Finally, they acted as a licensing authority for various establishments.<sup>58</sup> In addition, the municipal councils were given discretionary powers to establish facilities for recreational and cultural events, to acquire and hold property, to accept donations, and to charge reasonable fees for the use of their facilities and services.<sup>59</sup> Under their respective statutes, the functions of the municipal councils had to be discharged through an official implementing body entitled, respectively, the Urban or Regional Services Department.

Tables 2 and 3 show the history of the composition and representativeness of the municipal councils. It may appear from Table 2 that representative government in Hong Kong existed prior to the 1982 District Boards on account of the "elected" Urban Council seats (since 1952). However, as mentioned earlier, the elections prior to 1982 were based on an extremely narrow franchise and were not of any real democratic value. Representativeness is a function of both the proportion of elected members in a public body and the proportion of the potential electorate responsible for electing those members. To qualify to vote before 1982, one had to be over twenty-one, have lived in Hong Kong for "only" three years, and fit into one of twenty-three categories:<sup>60</sup>

[T]hese included all those who had passed the School Certificate Examination or a similar or high certificate or diploma, who were jurors, salarie[d] taxpayers, ratepayers or businessmen, or who were members of some listed professional organizations, ranging from airline pilots and barristers to midwives, nuns and newspaper reporters.<sup>61</sup>

Clearly the categories favoured those who were educated, could speak English, and were relatively wealthy, which explains why less than twenty percent of Hong Kong's adult population in 1979 could vote in these elections. Hence, these elected members could not be said to be representative of Hong Kong people in general.

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<sup>57</sup> See *The Government and Politics of Hong Kong*, *supra* note 10 at 166-67.

<sup>58</sup> See *Urban Council Ordinance*, *supra* note 29, s. 24; *Regional Council Ordinance*, *supra* note 29, s. 25. See also *The Government and Politics of Hong Kong*, *ibid.* at 158.

<sup>59</sup> See *Urban Council Ordinance*, *ibid.*, s. 25; *Regional Council Ordinance*, *ibid.*, s. 26.

<sup>60</sup> See Cheng, *supra* note 53 at 51.

<sup>61</sup> *Ibid.*

Table 2: Composition of Urban Council (1946-1994)

| Election Year | Appointed Members | Ex-officio Members | Directly Elected Members | Elected by District Boards | Total | % Elected Members |
|---------------|-------------------|--------------------|--------------------------|----------------------------|-------|-------------------|
| 1946          | 6                 | 5                  | 0                        | 0                          | 11    | 0                 |
| 1952          | 6                 | 5                  | 2                        | 0                          | 13    | 15                |
| 1953          | 6                 | 5                  | 4                        | 0                          | 15    | 27                |
| 1956          | 8                 | 6                  | 8                        | 0                          | 22    | 36                |
| 1965          | 10                | 6                  | 10                       | 0                          | 26    | 38                |
| 1973          | 12                | 0                  | 12                       | 0                          | 24    | 50                |
| 1983          | 15                | 0                  | 15                       | 0                          | 30    | 50                |
| 1986          | 15                | 0                  | 15                       | 0                          | 30    | 50                |
| 1989          | 15                | 0                  | 15                       | 10                         | 40    | 63                |
| 1991          | 15                | 0                  | 15                       | 10                         | 40    | 63                |
| 1994          | 0                 | 0                  | 32                       | 9                          | 41    | 100               |

Source: J. Cheng, *Government and Public Affairs (Main Book)* (Hong Kong: Summerson Eastern, 1987) at 48; N. Miners, *The Government and Politics of Hong Kong*, 5th ed. (Hong Kong: Oxford University Press, 1995) at 156; *Electoral Provisions (Miscellaneous Amendments) Ordinance 1994* (Ord. No. 10 of 1994), s. 14.

Table 3: Composition of Regional Council (1986-1994)

| Election Year | Appointed Members | Ex-officio Members | Directly Elected Members | Elected by District Boards | Total | % Elected Members |
|---------------|-------------------|--------------------|--------------------------|----------------------------|-------|-------------------|
| 1986          | 12                | 3                  | 12                       | 9                          | 36    | 58                |
| 1989          | 12                | 3                  | 12                       | 9                          | 36    | 58                |
| 1991          | 12                | 3                  | 12                       | 9                          | 36    | 58                |
| 1994          | 0                 | 3                  | 27                       | 9                          | 39    | 92                |

Source: N. Miners, *The Government and Politics of Hong Kong*, 5th ed. (Hong Kong: Oxford University Press, 1995) at 166; *Electoral Provisions (Miscellaneous Amendments) Ordinance 1994* (Ord. No. 10 of 1994), s. 27.

In 1983, the Urban Council held its first elections with the same franchise used in the 1982 District Board elections. From a legal point of view, the voting conditions in the *Electoral Provisions Ordinance* were merely extended to the Urban Council and

later to the Regional Council. It is important to note that, between 1983 and 1991, the number of directly elected members remained equal to the number of appointed members. It was the addition of the ten members elected from the District Boards starting in 1989 which accounted for an apparent increase in the percentage of elected members in that year and 1991.<sup>62</sup> Finally, in 1994, as part of Governor Patten's democratic reforms, the Urban Council saw the abolition of appointed seats and for the first time became a fully elected body.<sup>63</sup>

The Regional Council's composition changed far less than the Urban Council's. When it was set up in 1986, it had a balanced composition of appointed, directly elected, *ex-officio*, and indirectly elected members. The *ex-officio* members were the chairman and two vice-chairmen of the Heung Yee Kuk, a well-established statutory body set up to advise the Government on New Territories affairs.<sup>64</sup> During the 1987-88 review, the Government reported little public interest in changing the role or composition of the Regional Council.<sup>65</sup> Hence, the composition remained unchanged until 1994, when Governor Patten's reforms eliminated all the appointed seats.

The qualifying and disqualifying conditions for voting and candidacy mentioned earlier with respect to District Board elections were the same for elections to the municipal councils. Naturally, urban residents could only vote for Urban Council representatives, and rural residents could only vote in the Regional Council elections. However, as with the District Boards, candidates faced no residency requirement. On the issue of equal voting power and constituency size, there had been very little discussion from either the Government or the academic community.<sup>66</sup>

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<sup>62</sup> Prior to 1989, the link between the District Boards and the Urban Council was made in the opposite direction (*i.e.*, members from the Urban Council would go to sit on the District Boards). But the usefulness of this arrangement was questioned during the 1987-88 round of review, and the link was reversed, making it more consistent with the existing practice of sending Urban Council members up to the Legislative Council (see 1988 *White Paper*, *supra* note 37 at para. 51-55).

<sup>63</sup> Governor Patten's reforms were a bone of contention with the Chinese authorities during the rounds of negotiations which got under way soon after the Governor proposed his reforms in 1992 (see text below, accompanying note 78, for a more detailed discussion of the Sino-British dispute over Governor Patten's reforms). The Chinese side opposed the total abolition of appointed seats in the municipal councils and District Boards at all costs. But the British side did not budge, insisting that the abolition was "an essential part of the gradual development of Hong Kong's electoral system ...", and that it would be hard to justify appointed membership on the bottom two tiers when the Legislative Council was fully elected (U.K., Secretary of State for Foreign and Commonwealth Affairs, *White Paper on Representative Government in Hong Kong* Cm 2432 (London: H.M.S.O., 1994) at para. 53 [hereinafter 1994 *White Paper*]).

<sup>64</sup> See *Heung Yee Kuk Ordinance* (Cap. 1097).

<sup>65</sup> See 1988 *White Paper*, *supra* note 37 at para. 56-58.

<sup>66</sup> In the 1981 *White Paper*, *supra* note 31, the Government made casual reference to the constituency size for the Urban Council elections by saying that "the elected members should each be elected by a single geographical constituency of broadly 250,000 population each" (*ibid.* at para. 61). Later, in the 1987 *Green Paper* on representative government, a passing reference was made to discrepancies in constituency size in the New Territories, but it was not seen as an issue (see Hong Kong, *Green Paper: The 1987 Review of Developments in Representative Government* (Hong Kong: Government Printer, 1987) at para. 67). It was reported that constituency sizes for the 1986 Regional

### iii. Legislative Council

While the Legislative Council was the oldest public body of the three tiers, it was the last to acquire an elected element, in 1991. When plans for developing representative government came together in 1980-81, the thought of democratizing the central government was seen as too radical and was far from contemplation. The Government repeatedly invoked the "special circumstances" of Hong Kong in order to justify the slow and bottom-up democratization. An example of its narrative is found in the Government's 1980 *Green Paper* on district administration:

The Executive and Legislative Councils, the central organs of Government, have evolved, and will continue to evolve as circumstances require, within the imperatives of stability and dependability which the special circumstances of Hong Kong dictate.<sup>67</sup>

Although the Government had accepted, by 1984 and for 1988, that there should be some form of elected representation on the Legislative Council and that the proportion of official members should be reduced, it still strongly resisted any form of direct elections (see Table 4).<sup>68</sup> In its Green and White Papers, the Government continued to recount the "special political circumstances of Hong Kong" and describe how direct elections would cause instability and uncertainty in Hong Kong.<sup>69</sup> It backed up its position with the added reason that the balance of public opinion agreed with the gradual approach.<sup>70</sup>

The system of elections used in 1985 and 1988 could hardly be described as democratic. The functional-constituency system was a means of entrenching an existing practice of appointing elite members from the business and professional sectors to the Legislative Council, only now with an added air of accountability to the public.<sup>71</sup> From Table 6 it can be seen that the first functional constituencies consisted of the commercial, industrial, financial, and other professional sectors of the economy. As

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Council election ranged from 45,000 in the Sai Kung area to 240,000 in the Tsuen Wan constituency (see *ibid.*). In a recent report from a Legislative Council Select Committee on elections, the problem of equal voting power and constituency size was given some attention (Hong Kong, Select Committee on Legislative Council Elections, *Report of the Select Committee on Legislative Council Elections*, vol. 1 (*Report and Minutes of Proceedings*) (Hong Kong: Legislative Council, 1992) at 12-18 [hereinafter *Select Committee Report*]). Although the report only cited problems related to the 1991 Legislative Council election, its strong recommendation for an independent Boundary and Election Commission (see *ibid.*, c. 2) suggested the need to scrutinize the relative equality of constituency sizes at all tiers of government. The Boundary and Election Commission that was established in 1993 was in charge of drawing boundaries for the 1995 municipal elections. This Commission was required to draw boundaries which met certain statutory criteria (see discussion and references *supra* note 50).

<sup>67</sup> 1980 *Green Paper*, *supra* note 30 at para. 2.

<sup>68</sup> See 1984 *Green Paper*, *supra* note 20 at paras. 33-47; Hong Kong, *White Paper: The Further Development of Representative Government in Hong Kong* (Hong Kong: Government Printer, 1984) at para. 25 [hereinafter 1984 *White Paper*].

<sup>69</sup> See 1984 *Green Paper*, *ibid.* at para. 27.

<sup>70</sup> See 1984 *White Paper*, *supra* note 68 at para. 25.

<sup>71</sup> See 1984 *Green Paper*, *supra* note 20 at para. 38.

shown in Table 5, the potential electorate for these constituencies was 68,900 in 1985 and 97,838 in 1988, representing less than three percent of the potential electorate for the District Board elections in 1988.<sup>72</sup> The other electoral system that was used claimed to offer indirect geographical representation via an electoral college composed of all the District Board and municipal council members.<sup>73</sup> However, at the time, both these tiers of government consisted of a significant number of appointed or *ex-officio* members, and hence the accountability of these elected Legislative Council members was far removed from the general electorate.

Table 4: Composition of Legislative Council (1984-1995)

| Election Year | Officials (including the President) | Appointed Members | Elected by Functional Constituencies | Elected by Electoral College | Directly Elected | Total | % Elected Members |
|---------------|-------------------------------------|-------------------|--------------------------------------|------------------------------|------------------|-------|-------------------|
| 1984          | 17                                  | 30                | 0                                    | 0                            | 0                | 47    | 0                 |
| 1985          | 11                                  | 22                | 12                                   | 12                           | 0                | 57    | 42                |
| 1988          | 11                                  | 20                | 14                                   | 12                           | 0                | 57    | 46                |
| 1991          | 3                                   | 18                | 21                                   | 0                            | 18               | 60    | 65                |
| 1995          | 0                                   | 0                 | 30                                   | 10                           | 20               | 60    | 100               |

Source: N. Miners, *The Government and Politics of Hong Kong*, 5th ed. (Hong Kong: Oxford University Press, 1995) at 116.

Table 5: Voter Participation in Functional Constituencies (FCs) (1985-1995)

| Year | # of FCs | # of FC Seats | # of Contested Seats | Potential Electorate (Contested Seats) | Registered Voters | Actual Voters |
|------|----------|---------------|----------------------|--|-------------------|---------------|
| 1985 | 11       | 12            | 7                    | 68,900                                 | 46,645            | 24,806        |
| 1988 | 13       | 14            | 4                    | 97,838                                 | 61,052            | 32,968        |
| 1991 | 20       | 21            | 9                    | 104,609                                | 69,825            | 22,918        |
| 1995 | 29       | 30            | 21                   | 2,900,000                              | 1,133,125         | 434,706       |

Source: *Hong Kong 1986, 1989, 1992* (Hong Kong: Government Printer); "The Results in Full" *South China Morning Post* (19 September 1995) 4; "Anger at voters' list delay" *South China Morning Post* (21 June 1995) 2.

<sup>72</sup> *Hong Kong 1989* (Hong Kong: Government Printer) at 32 reports a potential electorate of 3.6 million for the 1988 District Board elections.

<sup>73</sup> See 1984 *Green Paper*, *supra* note 20 at para. 21.

Against the backdrop of the Beijing massacre in Tiananmen Square in June 1989, Hong Kong held its first-ever territory-wide direct elections for eighteen of the sixty Legislative Council seats in 1991. The introduction of these seats was not triggered only by the events in Beijing, since the promise of directly elected membership in 1991 had already been made in the Government's 1988 *White Paper*. Nevertheless, the crackdown on the pro-democracy movement in China and its subsequent chilling effect in Hong Kong was enough to prompt the British Government to go further than its original promise of having only ten directly elected members for 1991.<sup>74</sup> Although the Government was very concerned about Hong Kong's level of confidence and what impact it might have on its future economic stability and prosperity, there were important reasons not to go beyond eighteen directly elected members, despite a strong appeal for more by the people of Hong Kong.<sup>75</sup> In particular, Hong Kong's future constitution, the Basic Law,<sup>76</sup> had already been promulgated by the Chinese president and National People's Congress on 4 April 1990. Since the passing of the Basic Law, China had always urged the British Government to follow the "principle of convergence" in its administration of Hong Kong during the period of transition. This principle meant that all constitutional changes in Hong Kong should be designed so as to converge with the provisions of the Basic Law. As far as the composition of the Legislative Council goes, the Basic Law specifies that the number of directly elected members in 1997 shall be twenty. Hence, in respecting the principle of convergence, the Hong Kong Government did not go beyond that limit, settling for twenty directly elected members in 1995 and only eighteen in 1991.

When Governor Patten arrived in Hong Kong, the Government position on the development of democracy seemed to make a complete turn around. In his 1992 annual address to the Legislative Council, he spoke less about the unsettling problems tending to be associated with democracy and more of its benefits, such as democracy's role as the ultimate preserver of the rule of law.<sup>77</sup> He recognized the principle of convergence as a necessary constraint on what he could propose for 1995, but was willing to take advantage of the Basic Law's "silences" to try to extend the right-to-vote to more people and devolve more power with that right. During the initial stages of the Sino-British talks on electoral arrangements, the British were prepared to relax a number of Governor Patten's proposals in hopes of reaching a compromise agreement with the Chinese authorities. But neither compromise nor agreement was to happen; having reached an impasse, the British acted unilaterally. Of course, the Chi-

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<sup>74</sup> C.-K. Lo, "Constitution and Administration" in Y.W. Sung & M.K. Lee, eds., *The Other Hong Kong Report 1991* (Hong Kong: The Chinese University Press, 1991) 1 at 2.

<sup>75</sup> In 1990, "[t]he non-government members of the Executive and Legislative Councils (OMELCO) reached the consensus that by 1995, half of the seats in the Legislative Council should be directly elected, and that by 1991, the number of directly elected seats should be increased from ten to twenty" (Lo, *ibid.*).

<sup>76</sup> *Supra* note 4.

<sup>77</sup> See "1992 Governor's Address", *supra* note 38 at para. 107.

nese were not very happy about this conduct and both sides published documents blaming the other side for the failure to reach a consensus.<sup>78</sup>

Governor Patten's reforms' most significant impact was probably on the system of functional constituencies. Prior to 1995, functional constituencies were heavily criticized by the public,<sup>79</sup> and were not taken very seriously, as evidenced by the high number of uncontested seats (see Table 5). There were essentially three significant ways that Governor Patten made the right to vote more meaningful under this electoral system. By introducing nine new functional constituencies (see Table 6), he increased the size of the potential electorate from 104,609 to approximately 2.9 million people. In doing so, the right to vote was extended to a new class of people — the paid labour force. It was hoped that this broadening of the franchise would allow the system to gain greater credibility.<sup>80</sup> Secondly, the abolition of corporate voting eliminated some of the abuses that afflicted the 1991 elections. For example, the electorate for one of the seats under the Commercial functional constituency consisted of registered corporations of the Hong Kong General Chamber of Commerce. It was reported that some candidates took advantage of corporate voting by engaging in "ballot-stuffing": their supporters would register all their business subsidiaries to increase their number of votes.<sup>81</sup> Finally, Governor Patten responded to the problem of corruption in small constituencies by trying to expand the size of existing constituencies, and by ensuring that new ones were sufficiently large to deter collusion.<sup>82</sup>

Despite these changes, there were still two important issues left unaddressed, both concerned with equality of voting power. From the point of view of the Hong Kong electorate, there was still the fundamental problem that some people had two votes, while others only had one: some had "more representation" than others. The second issue was an inequality in voting power seen from within the functional-constituency system itself. The potential-electorate size of functional constituencies could range from thirty-nine in the case of the Regional Council constituency, to 487,000 in the Community, Social and Personal Services constituency. The voting power of a single elector in the former constituency was clearly much greater than the voting power of an elector in the latter. A response to these two issues was subsequently given by the

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<sup>78</sup> For the British interpretation of events, see 1994 *White Paper*, *supra* note 63, and U.K., Foreign Affairs Committee (House of Commons), "First Report: Relations Between the United Kingdom and China in the Period up to and Beyond 1997", vol. I (London: HMSO, 1994) (Chairman: Rt. Hon. D. Howell) [hereinafter "U.K.-China Relations"]. For the Chinese interpretation and response, see Ministry of Foreign Affairs of the People's Republic of China, *Facts about a Few Important Aspects of Sino-British Talks on 1994/95 Electoral Arrangements in Hong Kong* (Hong Kong: Joint Publishing (H.K.), 1994) [hereinafter *Facts about Sino-British Talks*].

<sup>79</sup> See S. Mosher, "Seats of Power" *Far Eastern Economic Review* (29 August 1991) 18; *Select Committee Report*, *supra* note 66 at 24-31; M. Meadowcroft & P. Bradley, *Delegation to Hong Kong Report* (London: Electoral Reform Society, 1991) at 4-6.

<sup>80</sup> See "1992 Governor's Address", *supra* note 38 at para. 133.

<sup>81</sup> See Mosher, *supra* note 79 at 19.

<sup>82</sup> See 1994 *White Paper*, *supra* note 63 at para. 73.

High Court and Court of Appeal as a result of a *Bill of Rights* challenge. The details of these decisions will be discussed in Part IV, below.

Table 6: Development of Functional-Constituency Seats

| 1985   | 1988   | 1991                                       | 1995  |
|--|--|--|---|
| 1. Commercial 1                                | 1. Commercial 1  | 1. Commercial 1                            | 1. Commercial 1   |
| 2. Commercial 2                                | 2. Commercial 2  | 2. Commercial 2                            | 2. Commercial 2   |
| 3. Industrial 1                                | 3. Industrial 1  | 3. Industrial 1                            | 3. Industrial 1   |
| 4. Industrial 2                                | 4. Industrial 2  | 4. Industrial 2                            | 4. Industrial 2   |
| 5. Financial                                   | 5. Finance   | 5. Financial                               | 5. Finance  |
| 6. Labour (2)                                  | 6. Accountaroy   | 6. Financial Services                      | 6. Financial Services   |
| 7. Social Services                             | 7. Labour (2)  | 7. Labour (2)                              | 7. Labour (2)   |
| 8. Medical                                     | 8. Social Services   | 8. Social Services                         | 8. Social Welfare   |
| 9. Education                                   | 9. Medical   | 9. Medical                                 | 9. Medical  |
| 10. Legal                                      | 10. Health Care  | 10. Health Care                            | 10. Health Services   |
| 11. Engineers and<br>associated<br>professions | 11. Education  | 11. Education                              | 11. Education   |
|  | 12. Legal  | 12. Legal                                  | 12. Legal   |
|  | 13. Engineering,<br>Architectural,<br>Surveying & Planning | 13. Engineering                            | 13. Engineering   |
|  |  | 14. Architectural,<br>Surveying & Planning | 14. Architocatural,<br>Surveying & Planning                   |
|  |  | 15. Accountancy                            | 15. Accountancy   |
|  |  | 16. Real Estate &<br>Construction          | 16. Real Estate &<br>Construction                             |
|  |  | 17. Tourism                                | 17. Tourism   |
|  |  | 18. Urban Council                          | 18. Urban Council   |
|  |  | 19. Regional Council                       | 19. Regional Council  |
|  |  | 20. Rural                                  | 20. Rural   |
|  |  |  | -----   |
|  |  |  | 21. Primary<br>Production, Power &<br>Construction            |
|  |  |  | 22. Textiles &<br>Garments                                    |
|  |  |  | 23. Manufacturing   |
|  |  |  | 24. Import & Export   |
|  |  |  | 25. Wholesale & Retail  |
|  |  |  | 26. Hotels & Catering   |
|  |  |  | 27. Transport &<br>Communication                              |
|  |  |  | 28. Finance,<br>Insurance, Real Estate<br>& Business Services |
|  |  |  | 29. Community, Social<br>& Personal Services                  |

Source: *Hong Kong 1986, 1989, 1992* (Hong Kong: Government Printer); "The Results in Full" *South China Morning Post* (19 September 1995) 4.

The qualifying and disqualifying conditions for voting and candidacy contained in the *Electoral Provisions Ordinance* applied equally to direct elections at all three tiers. Of course, the most significant change in the voting conditions from the 1991 to 1995 elections was the lowering of the voting age from twenty-one to eighteen. In terms of the issue of equal voting power, the 1991 electoral boundaries were criticized for the disparity in population size between constituencies (e.g., Kowloon Central with a population of 789,500 and New Territories North with 367,800).<sup>83</sup> With the establishment of the Boundary and Election Commission in 1993, there was a conscious effort to correct any inequalities in voting power due to constituency size differentials. Judging from the number of registered voters in the twenty geographical constituencies for 1995, it appears that the Commission was successful in drawing fairer boundaries.<sup>84</sup> The largest differential in terms of registered voters was between New Territories North with 99,352 voters and New Territories Southeast with 147,995.<sup>85</sup>

#### iv. Summary of Observed Trends

The trends that emerge from the preceding sections are significant because they help to form the historical background for the legal analysis of the meaning of the right to vote. A summary of these trends can be organized around the "functional" and "intrinsic" dimensions of the right to vote. It is a truism to say that the right to vote means more than the physical exercise of inserting a piece of paper in a box every three or four years. The right to vote is intimately related to the idea of democracy, that the people freely determine the life of their country. If the right is to have more than its literal meaning, then its exercise must give rise to and be manifested in public bodies that have real political power. Electing members to a "puppet institution", with no effective voice in how the affairs of a country are to be conducted, is to deny the functional value of the right to vote. Even if there are elections to effective political bodies, the right to vote is still a mockery if there exists a majority of appointed members that can always out-vote the elected ones.

Apart from this functional dimension, the exercise of the right to vote can also affirm basic intrinsic values. Democracy implies that all the people of a nation have an opportunity to express their political choices. There would be no democracy nor a meaningful right to vote if only a select group of individuals could have such expression. It is equally repugnant if certain groups have more votes than others. A related problem is ensuring that everyone's vote has the same weight in determining the likely candidate; that is to say, there should be equal voting power, in the same way that everyone should have the same number of votes. In elections based on geographical constituencies, one's voting power depends on the number of electors in the

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<sup>83</sup> See *Select Committee Report*, *supra* note 66 at 14.

<sup>84</sup> It is interesting to note that the Boundary and Election Commission's *Report on the 1995 Legislative Council Election* (Hong Kong: Constitutional Affairs Branch, Government of Hong Kong, 1996) contains no discussion whatsoever about constituency sizes. For future study, it would be interesting to see what precise impact the Commission has had on the voting power of electors.

<sup>85</sup> "The Results in Full" *South China Morning Post* (19 September 1995) 4. The parallel differential for 1991 was 121,989 voters in New Territories North and 287,373 in Kowloon Central.

voting constituency. Hence, the relative size of voting constituencies is an important factor in ensuring equal voting power. Values of equality, universality and expression are part of the intrinsic dimension of the right to vote.

From the perspective of the functional dimension of the right to vote, there are two important trends in Hong Kong's history under British rule that are worth noting. First, the democratization of the three tiers began at the tier with the least political power, the District Boards, and gradually developed to the tier with the most power, the Legislative Council. While direct elections were introduced to the District Boards in 1982, the Legislative Council had to wait until 1991 before acquiring directly elected members. Second, within each tier there was a gradual increase in the proportion of elected members. In other words, there was a gradual devolution of power to the Hong Kong people along each tier. These two trends show clearly that Hong Kong did not get democracy "overnight".

The trends associated with the intrinsic dimension of the right to vote show far less change. For the geographical direct elections, the qualifying conditions for voting and candidacy in all three tiers remained relatively constant from 1982 to 1994. It was only after Governor Patten's reforms (and, as we will see, the impact of the B.O.R.O.) that there was greater liberalization in these conditions. With respect to the issue of equal voting power in the geographical constituencies, the Hong Kong Government has traditionally paid little attention to differences in constituency sizes. Again, it was only after the arrival of Governor Patten and his introduction of a Boundary and Election Commission<sup>86</sup> in 1993 that an attempt was made to equalize the size of constituencies. Despite all of Patten's reforms, the functional constituencies still presented a great challenge to ensuring the equality of the right to vote in Hong Kong. In a single move, his reforms expanded the functional-constituency electorate almost thirty fold. Nevertheless, the disparity in constituency size remained great, and a significant portion of the population were excluded, restricted to their vote in the geographical constituencies.

## 2. The Political Framework under China's Basic Law

On 1 July 1997 the *Letters Patent* and *Royal Instructions* expired and the Basic Law became the governing constitutional document of what is now known as the Hong Kong Special Administrative Region ("H.K.S.A.R."). The Basic Law is a Chinese law, adopted by the National People's Congress and promulgated by the president of the People's Republic of China on 4 April 1990. The document derives its authority from two separate sources. First, article 31 of the Constitution of the People's Republic of China<sup>87</sup> empowers the State to establish special administrative regions when necessary, and to enact a law for this purpose "in the light of the specific conditions" of that region. The second source is the *Sino-British Joint Declaration on*

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<sup>86</sup> See *Boundary and Election Commission Ordinance*, *supra* note 50.

<sup>87</sup> The Constitution of the People's Republic of China, 5th Sess., 5th N.P.C., 4 December 1982. An English version was published by the Foreign Languages Press (Beijing: 1983).

the *Question of Hong Kong*,<sup>88</sup> signed on 19 December 1984. Under article 3 of the *Joint Declaration* are listed the policies of China regarding Hong Kong, ending with sub-article 12, which states that the "basic policies ... will be stipulated, in a Basic Law ... and they will remain unchanged for 50 years."

The Basic Law consists of a preamble, nine chapters, and three annexes. At the time that the Basic Law was passed, a number of written decisions, which appear to interpret or otherwise fill the gaps in the Basic Law, were also adopted by the National People's Congress. The fundamental principle that informs the whole document and is mentioned in the preamble is the principle of "one country, two systems". The principle is most succinctly captured by the first two articles of the first chapter, which sets out the general principles of the Basic Law. Article 1 affirms the first part of the principle by declaring that the H.K.S.A.R. "is an inalienable part of the People's Republic of China." Article 2 then elaborates on what the concept of "two systems" means:

The National People's Congress authorizes the Hong Kong Special Administrative Region to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of this Law.

Chapter II goes on to describe the relationship between the Central Authorities and the H.K.S.A.R., and further delineates what is meant by a "high degree of autonomy". On its face, the autonomy promised is far greater than that enjoyed by provinces or regimes in most federal states. Except for defence and foreign affairs,<sup>89</sup> the H.K.S.A.R. has almost exclusive jurisdiction to manage its social, political and economic affairs. It also has its own separate legal system, which will continue to apply the common law, rules of equity, ordinances, subordinate legislation and customary law.<sup>90</sup> Chapter III of the Basic Law enumerates Hong Kong residents' fundamental rights and duties. For the purposes of this paper, there are two articles worth highlighting. The guarantee of the right to vote is contained in article 26: "Permanent residents of the Hong Kong Special Administrative Region shall have the right to vote and the right to stand for elections in accordance with law." And in article 39, there is an explicit recognition that the provisions of the *International Covenant on Civil and Political Rights*<sup>91</sup> "as applied to Hong Kong shall remain in force and shall be implemented through the laws of the [H.K.S.A.R.]."

The political structure of the H.K.S.A.R. is detailed in chapter IV of the Basic Law. Despite the earlier promise of a high degree of autonomy, some of the most significant decisions in setting up the political structure have been left to the Central People's Government. The appointment of the Chief Executive and the principal officials of the executive authorities of the H.K.S.A.R. are exclusively in the hands of

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<sup>88</sup> *Joint Declaration*, *supra* note 9.

<sup>89</sup> See Basic Law, *supra* note 4, art. 13.

<sup>90</sup> See *ibid.*, arts. 8, 18.

<sup>91</sup> I.C.C.P.R., *supra* note 3.

the Central People's Government.<sup>92</sup> Furthermore, there are special rules for the establishment of the first government and Legislative Council of the H.K.S.A.R., contained in one of the accompanying decisions of the National People's Congress.<sup>93</sup> This decision empowered the Standing Committee of the National People's Congress to appoint members to a Preparatory Committee, which had sole responsibility for setting up the Selection Committee for the first Chief Executive.<sup>94</sup> The Preparatory Committee was also to be responsible for confirming the members of the H.K.S.A.R.'s first Legislative Council.<sup>95</sup>

In designing the political structure of the H.K.S.A.R., the Chinese Government opted to retain the essential elements of the old colonial system. The Chief Executive, like the Governor before him, enjoys supreme executive powers.<sup>96</sup> He (we now know the first Chief Executive is Tung Chee-hwa) has the ultimate power to appoint and remove judges and holders of public office, to promulgate bills passed by the Legislative Council, to decide on government policies and to issue executive orders. The people of the H.K.S.A.R. will not vote to select the Chief Executive for the first ten years (two terms). The only official vehicle for public input on the selection of the Chief Executive is through the prescribed Election Committee, consisting of only 800 Hong Kong residents from selected sectors of society.<sup>97</sup> Under articles 49 and 50 of the Basic Law, the Chief Executive has the power to dissolve the Legislative Council in three separate situations: (1) a Legislative Council bill has been turned back twice on the grounds that it is "not compatible with the overall interests of the Region"; (2) the Legislative Council has refused to pass a budget; or (3) the Legislative Council has refused to pass any other "important bill introduced by the government". The only limitation on this power is that the Chief Executive must first try to reach a consensus by way of consultations and consult the Executive Council before exercising the power. The corollary power of the Legislative Council to impeach the Chief Executive is far from equal and has many more preliminary hurdles. The Legislative Council must pass two motions, give the Chief Justice of the Court of Final Appeal a mandate to set up an independent investigation committee, receive a favourable recommendation from the committee, pass another motion (by a two-thirds majority), and finally report the decision to the Central People's Government, which itself ultimately decides whether to impeach the Chief Executive.<sup>98</sup>

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<sup>92</sup> See Basic Law, *supra* note 4, art. 45 & annex I. Annex I stipulates that the Chief Executive is to be elected by the Election Committee and appointed by the Central People's Government.

<sup>93</sup> See Decision of the National People's Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region, 3d Sess., 7th N.P.C., 4 April 1990 [hereinafter First Formation Decision].

<sup>94</sup> See *ibid.*, paras. 2, 3.

<sup>95</sup> See *ibid.*, para. 6.

<sup>96</sup> See Basic Law, *supra* note 4, art. 48.

<sup>97</sup> Annex I of the Basic Law, *ibid.*, provides that its 800 members must be selected from specific listed sectors (para. 2), but the manner of selection is left to an electoral law enacted by the H.K.S.A.R. "in accordance with the principles of democracy and openness" (para. 3).

<sup>98</sup> See Basic Law, *ibid.*, art. 73(9).

The constitutional relationship between the Chief Executive, the Executive Council and the Legislative Council also bears a strong resemblance to the British colonial system. The Executive and Legislative Councils remain separate bodies; the members of the former are appointed by the Chief Executive,<sup>99</sup> while the latter body is constituted by election.<sup>100</sup> The relatively weak advisory function of the Executive Council continues<sup>101</sup> and, as was true with the former Governor, the Chief Executive is not bound by the advice of the Council.<sup>102</sup> In contrast to the *Letters Patent*, the powers and functions of the Legislative Council are clearly enumerated in article 73, which lists ten items, starting with the power “[t]o enact, amend or repeal laws, in accordance with the provisions of [the Basic Law] and legal procedures.” The term of office of the Legislative Council does not initially coincide with that of the Executive Council and the Chief Executive, both of which have a five year term beginning in 1997.<sup>103</sup> The first Legislative Council, while also originally meant to begin in 1997, was only to last for two years, and then be reconstituted every four years.<sup>104</sup> The originally intended composition of the Legislative Council for the first ten years is shown in Table 7.

Table 7: Composition of the Legislative Council under the Basic Law (1997-2003)

|      | Election Committee | Functional Constituencies | Direct Elections | Total |
|------|--------------------|---------------------------|------------------|-------|
| 1997 | 10                 | 30                        | 20               | 60    |
| 1999 | 6                  | 30                        | 24               | 60    |
| 2003 | 0                  | 30                        | 30               | 60    |

Source: Basic Law, *supra* note 4, annex II; First Formation Decision, *supra* note 93, para. 6.

Although the Basic Law gave explicit recognition to the precise number of legislators on the first Legislative Council of the H.K.S.A.R., it failed to define the composition of its election committee or of the electorate for its functional constituencies. It was this silence in the text that provided an opportunity for Governor Patten to democratize Hong Kong and still claim that the 1995 Legislative Council converged with the specifications in the Basic Law. Governor Patten wanted to ensure convergence because a decision of the National People’s Congress, adopted at the same time as the Basic Law, provided that the 1995 Legislative Council members could continue to sit in the 1997 body — so long as the composition was in conformity with the Basic Law, the members promised to uphold the Basic Law and to pledge allegiance to

<sup>99</sup> See *ibid.*, arts. 48(5), 55.

<sup>100</sup> See *ibid.*, art. 68.

<sup>101</sup> See *ibid.*, arts. 54, 65.

<sup>102</sup> See *ibid.*, art. 56.

<sup>103</sup> See *ibid.*, arts. 46, 55.

<sup>104</sup> See *ibid.*, art. 69.

the H.K.S.A.R., and were confirmed by the Preparatory Committee.<sup>105</sup> The possibility of this so-called “through train” for the Legislative Council members was frustrated by the Chinese Government in retaliation against Governor Patten’s unilateral action to press ahead with his reforms. In December 1996, the Chinese Government established a “provisional” legislature, with members chosen by a China-appointed selection committee, to replace the 1995 elected Legislative Council on 1 July 1997.<sup>106</sup>

The Basic Law provides that the method for composing the Legislative Council after 2007 can be changed, but it would require a two-thirds majority of the Council and the consent of the Chief Executive.<sup>107</sup> The only indication of how the Legislative Council might be formed in 2007 and thereafter is from the general statement found in article 68 of the Basic Law:

The method for forming the Legislative Council shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the election of all the members of the Legislative Council by universal suffrage.

One final element of the H.K.S.A.R.’s political structure mentioned in the Basic Law is “district organizations”. Article 97 provides that these may be established, not to be “organs of political power”, but to be consulted by the government “on district administration and other affairs, or to be responsible for providing services in such fields as culture, recreation and environmental sanitation.” It appears this section is referring to the system of District Boards, but it is not clear what the prohibition on being an organ of political power implies. While the Basic Law thus constitutionalizes the possibility of District Boards, it makes no mention of the municipal councils.

### 3. Impact of the *Hong Kong Bill of Rights Ordinance*

As early as 1987, there was already some public interest in establishing a constitutional bill of rights in Hong Kong.<sup>108</sup> But the Government was not entirely enthusiastic about this prospect and repeatedly said that the matter would have to wait until the Basic Law was passed, so as to achieve consistency.<sup>109</sup> However, the Government could not ignore the massacre in Tiananmen Square on 4 June 1989, nor could it shut its eyes to the over one million demonstrators who took to the streets of Hong Kong in support of the pro-democracy students in Beijing. In response to the shattered confidence of the colony, the Governor announced on 11 October 1989 that Hong Kong would get a bill of rights.<sup>110</sup> After a period of consultation and debate — primarily over how the bill of rights would be entrenched, whether it would apply between private

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<sup>105</sup> See First Formation Decision, *supra* note 93, para. 6.

<sup>106</sup> See R. Mickleburgh, “Hong Kong frets as rulers selected: Pro-China group picks legislators” *The [Toronto] Globe and Mail* (21 December 1996).

<sup>107</sup> See Basic Law, *supra* note 4, annex II, part III.

<sup>108</sup> See N. Jayawickrama, “The Bill of Rights” in R. Wacks, ed., *Human Rights in Hong Kong* (Hong Kong: Oxford University Press, 1992) 37 at 66.

<sup>109</sup> See Jayawickrama, *ibid.* at 66-70.

<sup>110</sup> See *ibid.* at 72.

citizens, and whether there would be a savings period to allow the Government to amend certain laws to comply with it — Hong Kong's *Bill of Rights* came into effect on 8 June 1991.<sup>111</sup>

When the B.O.R.O. — which contains the *Bill of Rights* — came into force, Hong Kong entered a new era in the protection of fundamental human rights. The move was motivated primarily by the crisis of confidence amongst the inhabitants of Hong Kong, a result of the violence directed at pro-democracy supporters in Beijing during the summer of 1989.<sup>112</sup> Since Britain was not ready to grant a right of abode to the entire population of Hong Kong, it had to come up with a bold alternative: an entrenchment of fundamental human rights in the territory that would survive past 1997.<sup>113</sup>

Although the B.O.R.O. is like any other Hong Kong ordinance in form, it has constitutional status in substance. The source of this status comes from the B.O.R.O. itself, Hong Kong's *Letters Patent*, the *Joint Declaration*, and the Basic Law. Within the B.O.R.O. itself, section 3 provides that all pre-existing legislation is to be construed so as to be consistent with the ordinance where possible (subsection 1); where it is not, the legislation is, to the extent of the inconsistency, repealed (subsection 2). Pre-existing legislation is defined to mean all legislation enacted before the date the B.O.R.O. came into operation.<sup>114</sup> As for all subsequent legislation, section 4 provides only that this legislation be construed so as to be consistent with the *International Covenant on Civil and Political Rights* ("I.C.C.P.R.") as applied to Hong Kong, "to the extent that it admits of such a construction"; it does not provide for its repeal if such construction is not possible. To ensure that the *Bill of Rights* would adequately police subsequent legislation, an amendment was made to Hong Kong's constitution. Article VII(3) was added to Hong Kong's *Letters Patent*, providing that "[n]o law of Hong Kong shall be made after [8 June 1991] that restricts the rights and freedoms enjoyed in Hong Kong in a manner which is inconsistent with [the I.C.C.P.R.] as applied to Hong Kong." The reference to "the I.C.C.P.R. as applied to Hong Kong" is equivalent to saying "the B.O.R.O.", since the content of the *Bill of Rights* (contained in section 8) is taken almost word for word from the I.C.C.P.R. The choice of words was deliberate since the same phrase is found in both the Basic Law<sup>115</sup> and the *Joint*

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<sup>111</sup> See *ibid.* at 72-73. As mentioned earlier, the *Bill of Rights*, *supra* note 2, comprising 23 articles, was enacted as Part II (s. 8) of the B.O.R.O., *supra* note 1.

<sup>112</sup> See *Jayawickrama*, *ibid.* at 70ff.; F. Ching, "Red Star over Hong Kong" (1989) 6 *World Policy J.* 657.

<sup>113</sup> See Byrnes & Chan, eds., *supra* note 12 at 215.

<sup>114</sup> See B.O.R.O., *supra* note 1, s. 2.

<sup>115</sup> Article 39 of the Basic Law declares: "The provisions of the [I.C.C.P.R.] ... as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administration Region."

*Declaration*.<sup>116</sup> It was felt that this was the most practical way to ensure that the B.O.R.O. would continue to apply effectively past 1997.<sup>117</sup>

The passage of the B.O.R.O. marked a significant chapter in the history of the right to vote in Hong Kong. Prior to 1991, the right to vote for all three tiers of government was defined by statute in the *Electoral Provisions Ordinance*<sup>118</sup> and the *Legislative Council (Electoral Provisions) Ordinance*.<sup>119</sup> A new expression of the right to vote is now found in article 21 of the *Bill of Rights*:

Every permanent resident shall have the right and the opportunity, without any of the distinctions mentioned in article 1(1) and without unreasonable restrictions —

- (a) to take part in the conduct of public affairs, directly or through freely chosen representatives;
- (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;
- (c) to have access, on general terms of equality, to public service in Hong Kong.

The grounds of distinction mentioned in article 1(1) are “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Articles 21 and 1(1) must also be read together with section 13 of the B.O.R.O., which is an explicit limitation on the article 21 right: “Article 21 does not require the establishment of an elected Executive or Legislative Council in Hong Kong.” The United Kingdom ratified the I.C.C.P.R. on 20 May 1976, at which time it also extended its application to Hong Kong. But in ratifying it, the U.K. made a reservation — similar to the one contained in section 13 — to article 25, the I.C.C.P.R.’s equivalent of article 21 of the *Bill of Rights*.<sup>120</sup>

Once the right to vote acquired its constitutional and human-rights status, it seemed to take on a life of its own. As more Hong Kong people and legislators became aware of this superior right, it began to evolve in ways which the Government

<sup>116</sup> Article XIII of annex I provides, *inter alia*, that “[t]he provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied in Hong Kong shall remain in force.”

<sup>117</sup> See Byrnes & Chan, eds., *supra* note 12 at 215-16.

<sup>118</sup> *Supra* note 41.

<sup>119</sup> Cap 381.

<sup>120</sup> The relevant reservation reads:

[T]he Government of the United Kingdom declare that:

...

- (c) In relation to Article 25 of the Covenant, they must reserve the right not to apply:
  - (i) Sub-paragraph (b) in so far as it may require the establishment of an elected legislature in Hong Kong ... (United Nations, *Multilateral Treaties in respect of which the Secretary General Performs Depositary Functions: List of Signatures, Ratifications, Accessions, etc. as at 31 December 1976* (New York, 1977) at 104 (UN Doc. ST/LEG/SER.D/10, Sales No. E.77.V.7)).

probably never expected.<sup>121</sup> The right was no longer a mere statutory creature, bestowed on the Hong Kong people at the pleasure of the Crown, but a fundamental human right that could be used to scrutinize past and future Government conduct. Debates over the meaning of the right to vote found a new home in the courts of Hong Kong. Despite Government reluctance to broaden the base of the potential electorate and candidates, the case of *Lau San-ching v. Apollonia Liu*,<sup>122</sup> in January 1995, successfully challenged the constitutionality of the ten-year residency requirement for candidacy. Several months later, another case, *Lee Miu-ling v. Hong Kong (A.G.)*,<sup>123</sup> questioned the validity of the functional-constituency system of elections. It was argued in both the High Court and the Court of Appeal that this system denied "equal suffrage" at various levels. Sadly, the arguments were rejected by the Court of Appeal and further leave to the Judicial Committee of the Privy Council ("Privy Council") was denied.

The B.O.R.O. also had a significant impact outside the courts, in the realm of the legislature. Many of the democratically minded legislators initiated their own reforms to discriminatory electoral laws and practices. One area of reform dealt with the traditional practice of excluding women from participating in rural elections (in a system of representative government that lay below but had links to the main three-tier system).<sup>124</sup> Another area of contention was the traditional exclusion of prisoners and ex-convicts from voting and eligibility for office.<sup>125</sup>

## II. The Meaning of the Right to Vote under the *Bill of Rights*

Deriving the meaning of any right is an exercise of interpretation. In interpreting the right to vote under the *Bill of Rights*, a justifiably comprehensive method will be employed. It is comprehensive since it seeks out as many sources as might disclose some truths about the right to vote. In particular, recognition of its constitutional and human-rights status has various implications for its meaning. Furthermore, it is necessary to recognize that the right may acquire a certain meaning when viewed through its particular historical, social and political context. The analysis is said to be justifiable not because of any single governing theory, but based on pronouncements from judicial decisions and legal scholars of prominent common-law jurisdictions, includ-

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<sup>121</sup> See generally M.C. Davis, "Human Rights and the Founding of the Hong Kong Special Administrative Region: A Framework for Analysis" (1996) 34 Colum. J. Transnat'l L. 301 at 318-21.

<sup>122</sup> (1995), 5 H.K.P.L.R. 23 (H.C.), Cheung J. [hereinafter *Lau San-ching*].

<sup>123</sup> (1995), 5 H.K.P.L.R. 181 (H.C.), Keith J. [hereinafter *Lee Miu-ling*], aff'd (1995), 5 H.K.P.L.R. 585 (C.A.) [hereinafter *Lee Miu-ling* (C.A.)].

<sup>124</sup> The *Sex Discrimination Ordinance* (Ord. No. 50 of 1995), passed in June 1995, provided that it was unlawful to discriminate on the grounds of sex or marital status with respect to the eligibility to vote for and to be elected or appointed as a village representative, a member of a Rural Committee or the Heung Yee Kuk. In case of a breach, a woman could bring a complaint to the Equal Opportunities Commission established under the statute, and the Secretary for Home Affairs was required not to approve a person as a village representative or not recognize the status of a Rural Committee.

<sup>125</sup> See *Electoral Provisions (Amendment) Bill 1995*, Hong Kong Government Gazette, C1941, cl. 7. This Bill proposed to eliminate all grounds of disqualification from voting related to criminal convictions and sentence.

ing Hong Kong itself. This broad analysis of the right to vote under the *Bill of Rights* will be followed by the identification of two purposes for the right to vote — protection of all other human rights and achievement of self-government — and a more specific discussion of the two recent Hong Kong cases mentioned earlier, *Lau San-ching* and *Lee Miu-ling*.

## A. A Constitutional Right

### 1. Implication for Interpretation

It is well established throughout the common-law world that there are special rules for interpreting a country's constitution as opposed to mere statutes. An often quoted sentence from a decision of the Privy Council captures this notion perfectly. The accepted approach is

to treat a constitutional instrument ... as *sui generis*, calling for principles of interpretation of its own, suitable to its character as already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law.<sup>126</sup>

These special rules are sometimes collectively known as the “organic” theory of interpretation.<sup>127</sup> For the sake of clarity, it is possible to identify three central principles behind this method of interpretation. These principles are not meant to be steps in any technical method, but together interact to give form to the exercise of constitutional interpretation.

#### a. Generous Interpretation

In a series of modern cases dealing with the interpretation of constitutions of past and present colonies, the Privy Council affirmed the principle that provisions in a constitution, particularly those protecting fundamental human rights, should be given a “generous interpretation” so as to avoid “the austerity of tabulated legalism”.<sup>128</sup> This principle recognizes that constitutions are often written in ambiguous language that can have a number of meanings. The problem is more acute when dealing with the “open-textured” nature of human-rights provisions.<sup>129</sup> A generous approach acts as a presumption against narrow definitions. But this is not to say that the more generous

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<sup>126</sup> *Minister of Home Affairs v. Fisher* (1979), [1980] A.C. 319 at 329, Lord Wilberforce [hereinafter *Fisher*].

<sup>127</sup> See P. Wesley-Smith, “Constitutional Interpretation” in P. Wesley-Smith, ed., *Hong Kong in Transition: Problems & Prospects* (Hong Kong: Faculty of Law, University of Hong Kong, 1993) [hereinafter *Problems & Prospects*] 51 at 60ff.

<sup>128</sup> *Fisher*, *supra* note 126 at 328. See also *Ong Ah Chuan v. Public Prosecutor* (1980), [1981] A.C. 648 at 670; *Attorney-General of the Gambia v. Jobe*, [1984] A.C. 689 at 700; *Hong Kong (A.G.) v. Lee Kwong-kut*, [1993] 2 H.K.C.L.R. 186 at 194 (P.C.).

<sup>129</sup> Madame Justice B. Wilson, “The Making of a Constitution: Approaches to Judicial Interpretation” [1988] Public Law 370 at 372, referring to H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) at 121-32.

interpretation will always be accepted as the proper one. "Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language."<sup>130</sup> Hence, the limits of the generous approach will be found in the text of the constitution itself and in its historical context.

### b. Constitution As a "Living Tree"

The "living tree" principle provides a clearer picture of the contours of the previous interpretive principle. The classic statement of this approach was given in a 1930 Privy Council case, *Edwards v. Attorney-General for Canada*,<sup>131</sup> dealing with Canada's constitution: "The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits."<sup>132</sup> Within this single sentence are two profound ideas which illuminate constitutional interpretation. It recognizes that the meaning of words in a constitution must be able to evolve and grow with changing social circumstances. At the same time, there are elements of the constitution which cannot be changed, such as its text and history, and which delineate the "natural limits" of its evolution.

### c. Purposive Approach

These last two principles provide only broad notions of how to approach constitutional interpretation. The purposive approach supplements them by focusing attention on the purpose of the provision or right being interpreted. This approach obviously has the most instrumental value when interpreting human rights. The Canadian constitutional jurisprudence has made repeated use of this approach in construing the *Canadian Charter of Rights and Freedoms*.<sup>133</sup> Madame Justice Bertha Wilson, a former justice of the Supreme Court of Canada, has described the purposive approach as an exercise at two levels:

Rights should be interpreted in accordance with the general purpose of having rights, namely the protection of individuals and minorities against an overbearing collectivity. ...

I would submit further that judges should strive to capture within their decisions the purpose of each individual right.<sup>134</sup>

In trying to find the purpose of a right, it is necessary "to delineate the nature of the interests it is meant to protect."<sup>135</sup> The Supreme Court of Canada has provided some guidance on how these interests should be determined. In *R. v. Big M Drug*

<sup>130</sup> *Fisher*, *supra* note 126 at 329.

<sup>131</sup> [1930] A.C. 124, Lord Sankey [hereinafter *Edwards*].

<sup>132</sup> *Ibid.* at 136.

<sup>133</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

<sup>134</sup> Wilson, *supra* note 129 at 381.

<sup>135</sup> *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 157, 11 D.L.R. (4th) 641, 14 C.C.C. (3d) 97, Dickson J.

*Mart Ltd.*,<sup>136</sup> Dickson J. describes this interpretive exercise in a comprehensive manner that encapsulates the essence of all three principles:

the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be ... a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore ... be placed in its proper linguistic, philosophic and historical contexts.<sup>137</sup>

In addition to the linguistic, philosophic and historical context of the right, the metaphor of the "living tree" also suggests that the broader social context is a fertile source from which to infer the interests that underlie the right. Professor Robert Sharpe has recognized this point when he writes that "[t]he concept of a constitutional right or freedom completely abstracted from social context ... is devoid of meaning."<sup>138</sup> Madame Justice Wilson makes a similar point when she says that "the scope of the right must be continually re-assessed in light of changing social circumstances and contemporary social theory."<sup>139</sup>

In Hong Kong, there is precedent for using this broad method of constitutional interpretation, described by the three principles above, to interpret both the *Letters Patent* and the *Bill of Rights*. In *Hong Kong (A.G.) v. David Chiu*,<sup>140</sup> the Hong Kong Court of Appeal followed a series of Privy Council cases, including the *Edwards* case, to give a generous interpretation to the Hong Kong *Letters Patent*. Justice Fuad stated,

I have no doubt, therefore, that a generous and purposive construction must be put upon Article XIV and the rest of the *Letters Patent*; this is not to say, of course, that the ordinary canons of construction have no place in constitutional interpretation.<sup>141</sup>

The issue in this case was whether the Governor could validly delegate the power to appoint magistrates to the Chief Justice, despite the Governor's apparently exclusive power contained in article XIV of the *Letters Patent*. The interpretation was indeed generous and contrary to normal strict constructions. The Court read into the article incidental powers to delegate even though there were other articles which expressly provided when the Governor could delegate authority. In accordance with the "living tree" metaphor, the Court was "driven by compelling force" — by the modern context

<sup>136</sup> [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321, 18 C.C.C. (3d) 385 [hereinafter cited to S.C.R.].

<sup>137</sup> *Ibid.* at 344.

<sup>138</sup> R.J. Sharpe, "A Comment on David Beatty's 'A Conservative's Court: The Politicization of Law'" (1991) 41 U.T.L.J. 469 at 479.

<sup>139</sup> *Supra* note 129 at 383.

<sup>140</sup> [1992] 2 H.K.L.R. 84.

<sup>141</sup> *Ibid.* at 96.

in which the Governor would have to personally appoint the approximately 190,000 civil servants if he could not delegate his authority.<sup>142</sup>

Hong Kong's *Bill of Rights* has been given similar interpretive treatment by both the Hong Kong Court of Appeal and the Privy Council. One of the first pivotal *Bill of Rights* cases decided by the Court of Appeal laid down basic interpretive principles, which have been repeatedly cited in subsequent cases. In *R. v. Sin Yau-ming*,<sup>143</sup> the Court held that the *Bill of Rights* was *sui generis*, deserving a generous interpretation.<sup>144</sup> In particular, Silke V.P. held,

the glass through which we view the interpretation of the Hong Kong Bill is a glass provided by the Covenant [I.C.C.P.R.]. We are no longer guided by the ordinary canons of construction of statutes nor with the dicta of the common law inherent in our training. We must look, in our interpretation of the Hong Kong Bill, at the aims of the Covenant and give "full recognition and effect" to the statement which commences that Covenant. From this stems the entirely new jurisprudential approach to which I have already referred.<sup>145</sup>

Although none of the judges explicitly recognized the "living tree" or "purposive" approaches to interpretation, these approaches were nevertheless implicit in the spirit of the decision. Perhaps the purposive approach was not explicitly mentioned or applied because there existed a rich body of jurisprudence from domestic and international sources and it was not necessary to derive the meaning of the right in question from fundamentals. In construing the right to be presumed innocent contained in article 11(1), the three judges, particularly Silke V.P. and Kempster J.A., borrowed jurisprudence primarily from the Canadian and American constitutional experience, and from the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.<sup>146</sup>

In the course of its decision, the Court had some significant comments to make on how to approach the limitation of rights under the Hong Kong system. The Court explicitly rejected the two-step approach used in Canada, where the analysis of the violated right and the justification of the violation (under section 1 of the *Charter*) is kept analytically distinct.<sup>147</sup> Section 1 guarantees the rights and freedoms in the *Charter* "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." There is no corresponding provision in Hong Kong's *Bill of Rights*, and for this reason, the Court held that there must be an implied justification test for the article 11(1) right. As for the substance of this test, the Court was quite ready to accept the Canadian section 1 jurisprudence despite the fact that a "free and democratic society" did not accurately describe Hong Kong at the time. The Court held that a "free and democratic" society was the ultimate goal, and

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<sup>142</sup> *Ibid.* at 100.

<sup>143</sup> (1991) 1 H.K.P.L.R. 88, [1992] 1 H.K.C.L.R. 127 [hereinafter *Sin Yau-ming* cited to H.K.P.L.R.].

<sup>144</sup> *Ibid.* at 106.

<sup>145</sup> *Ibid.* at 107.

<sup>146</sup> 4 November 1950, Eur. T.S. 5, 213 U.N.T.S. 221 [hereinafter *European Convention on Human Rights*].

<sup>147</sup> See *Sin Yau-ming*, *supra* note 143 at 108-109.

that it was necessary for the Crown to show that the limit was rational and proportional to legitimate state interests.

Almost two years later, the first *Bill of Rights* case reached the Privy Council, and Lord Woolf had an opportunity to confirm and modify some of the comments made by the Court of Appeal. Again dealing with article 11(1), *Hong Kong (A.G.) v. Lee Kwong-kut*<sup>148</sup> approved the generous method of interpretation set down in *Sin Yau-ming*. It went on to recognize the value of jurisprudence from other jurisdictions, but warned against being bound by external decisions, especially when “the situation in those jurisdictions may not necessarily be identical to that in Hong Kong.”<sup>149</sup> On the issue of limitation, Lord Woolf also spoke favourably of the approach taken by the Court of Appeal in *Sin Yau-ming*, and examined, in addition to the Canadian jurisprudence, decisions from other jurisdictions. “[A]ll of the many decisions in different jurisdictions,” he wrote, “... recognize that provisions similar to Article 11(1) are always subject to implied limitations ...”<sup>150</sup> In delineating the proper implied limitation test to be used in this case, Lord Woolf wanted to distance the *Bill of Rights* from the rigid Canadian approach:

[I]t is their Lordships’ opinion that, in applying the Hong Kong Bill, it is not necessary, at least in the vast majority of cases, to follow the some what [*sic*] complex process now established in Canada in order to assess whether an exception to the general rule that the burden of proof should rest upon the prosecution throughout a trial is justified.<sup>151</sup>

He went on to describe a flexible approach: “the prosecution is required to prove the important elements of the offence; while the defendant is reasonably given the burden of establishing a provision or an exemption or the like ...”<sup>152</sup> However, he thought the Canadian section 1 framework could be used in borderline cases, but only for purposes of guidance.

It is important to note that Lord Woolf qualifies his approach to limitation with the words “provisions similar to article 11(1)”, which implies that he was thinking strictly of articles that lack an express limitation clause. It will later be argued that the right to vote in article 21 is not “similar to” article 11(1) — it has an express “unreasonable restriction” clause. Lord Woolf’s emphasis on having a flexible implied-limitation test may therefore not be so apt with respect to the right to vote.

## 2. Insights from Jurisdictions with Constitutionally Entrenched Rights

Notwithstanding Lord Woolf’s warning in *Lee Kwong-kut* against being bound by jurisprudence from outside Hong Kong, it is still useful to look at this jurisprudence, if only for its methodology in arriving at the meaning and purposes of the right to vote. The arena of dispute in both Canada and the United States has primarily been

<sup>148</sup> *Supra* note 128 [hereinafter *Lee Kwong-kut*].

<sup>149</sup> *Ibid.* at 195.

<sup>150</sup> *Ibid.* at 196.

<sup>151</sup> *Ibid.* at 200.

<sup>152</sup> *Ibid.*

the context of challenging electoral boundaries. The jurisprudence in these two countries is quite different, which can be explained by their dissimilar political histories and manners of constitutional interpretation.

### a. Canada

There are obvious differences in the textual expression of the right to vote between the Canadian and Hong Kong constitutions. In Canada, section 3 of the *Charter*<sup>153</sup> declares that “[e]very citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.” The Canadian expression is much simpler than the one in Hong Kong’s *Bill of Rights*. It will be argued that this noticeable difference should influence how much weight is accorded to the Canadian jurisprudence when construing the right to vote in Hong Kong.

In *Reference re Provincial Electoral Boundaries (Sask.)*,<sup>154</sup> the Supreme Court of Canada had its first opportunity to construe the core meaning of the right to vote in the *Charter*. In giving her decision, McLachlin J. borrowed heavily from an earlier decision of hers, *Dixon v. British Columbia (A.G.)*,<sup>155</sup> decided while she was chief justice of the British Columbia Supreme Court. The issue in both cases was whether a scheme of provincial electoral boundaries violated section 3 of the *Charter* because the varying size of constituencies diluted the voting power of electors in certain constituencies. Since section 3, on its face, made no reference to equal voting power, McLachlin J. (for the majority) had to construe the meaning of the right to determine if such a concept was included. Furthermore, the Court was asked to adopt the American jurisprudence, which had found that near-absolute voter parity was protected by the U.S. Constitution.

In construing the right to vote in Canada, McLachlin J. adopted a comprehensive approach. In a general statement of principle, she held that “[t]he content of a *Charter* right is to be determined in a broad and purposive way, having regard to historical and social context.”<sup>156</sup> She went on to describe how the “living tree” approach should be applied in this case:

The right to vote, while rooted in and hence to some extent defined by historical and existing practices, cannot be viewed as frozen by particular historical anomalies. What must be sought is the broader philosophy underlying the historical development of the right to vote — a philosophy which is capable of explaining the past and animating the future.<sup>157</sup>

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<sup>153</sup> *Supra* note 133.

<sup>154</sup> [1991] 2 S.C.R. 158, (*sub. nom. Reference re: Electoral Boundaries Commission Act, ss. 14, 20 (Sask.)*) 81 D.L.R.(4th) 16 [hereinafter *Electoral Boundaries Reference* cited to S.C.R.].

<sup>155</sup> (1989), 35 B.C.L.R. (2d) 273, (*sub nom. Re Dixon and Attorney-General of British Columbia*) 59 D.L.R.(4th) 247 (S.C.) [hereinafter *Dixon* cited to B.C.L.R.].

<sup>156</sup> *Electoral Boundaries Reference*, *supra* note 154 at 179.

<sup>157</sup> *Ibid.* at 181.

This passage is significant since it gives structure to historical analysis; history is only important in so far as it discloses an underlying philosophy or purpose of the right. There were two other considerations which affected McLachlin J.'s method of interpretation. First, she applied a general principle that "practical considerations must be borne in mind in constitutional interpretation."<sup>158</sup> Secondly, she confirmed that

[t]he Court must be guided by the values and principles essential to a free and democratic society which ... embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.<sup>159</sup>

In applying this method of interpretation, McLachlin J. would not adopt the American jurisprudence, principally because the Canadian history of democracy was more evolutionary than in the United States. Instead, she held that "the philosophy underlying the development of the right to vote in [Canada] is the broad goal of effective representation."<sup>160</sup> In setting down the law, she recognized that effective representation begins with absolute voter parity, but that deviations from this ideal would be permissible on grounds of "practical impossibility or the provision of more effective representation."<sup>161</sup> The latter could be effected where legislatures, when drawing electoral boundaries, take into consideration factors such as geography, community history, community interests and minority representation.

It would be a mistake to transplant blindly the result of this case onto Hong Kong soil by suggesting that "effective representation" is the underlying interest of the right to vote in Hong Kong. The purpose of this paper is to derive independently a meaning for that right. Nevertheless, the method of analysis used by McLachlin J., it is suggested, is impeccable and will be adopted in the analysis to follow. This analysis will go to show that there are interests other than effective representation that more accurately underlie the meaning of the right to vote under Hong Kong's *Bill of Rights*.

#### b. *United States*

In a series of decisions by the United States Supreme Court on cases contesting the apportionment of electoral districts,<sup>162</sup> it has been consistently held that the U.S. Constitution ensures absolute voter parity "as nearly as is practicable". The text of the U.S. Constitution is different from both the Hong Kong and Canadian texts since it contains no explicit "right to vote". Nevertheless, in the foundational case of *Baker v.*

<sup>158</sup> *Ibid.*

<sup>159</sup> *Ibid.*, citing Dickson C.J.C. in *R. v. Oakes*, [1986] 1 S.C.R. 103 at 136, 26 D.L.R. (4th) 200 [hereinafter *Oakes*].

<sup>160</sup> *Electoral Boundaries Reference*, *ibid.* at 187.

<sup>161</sup> *Ibid.* at 185.

<sup>162</sup> See *Baker v. Carr*, 369 U.S. 186 (1962); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969); *White v. Weiser*, 412 U.S. 783 (1973); *Karcher v. Daggett*, 462 U.S. 725 (1983).

*Carr*<sup>163</sup> the Supreme Court held that the issue of inequality of voting power was justiciable under the Fourteenth Amendment, which provides for the equal protection of the law. In subsequent cases, the Court began locating the right in a different part of the Constitution. In *Wesberry v. Sanders*,<sup>164</sup> it was held that the words "by the People of the several States" in article I, §2<sup>165</sup> protects the people's right to equality of representation in the House of Representatives. In arriving at this construction, Mr. Justice Black applied a narrow version of historical analysis by looking at the historical context of the Constitution, and primarily at the intentions of the framers. In the course of his decision, Black J. was particularly influenced by the "Great Compromise" struck among the drafters of the Constitution. The compromise meant that the House of Representatives would represent the "People" while the Senate would represent the "States". Since only one branch would represent the "People", many drafters insisted that this representation be fair and equal.

In the cases that followed *Wesberry*, the Supreme Court consistently applied its *ratio* with little regard for changing social circumstances. Judges were unwilling to read into the qualifier "as nearly as is practicable" any leeway for community or group interests.<sup>166</sup> Even the slightest variation in constituency size would be struck down.

In light of the differences in constitutional texts and the U.S. Supreme Court's very narrow approach to interpretation, the American experience is not very helpful in either result or method for the project at hand. Applying the framers' intention approach<sup>167</sup> would not be very useful in the context of Hong Kong's *Bill of Rights*. The "package nature" of the *Bill of Rights* leaves little room for speculating on the reasons behind the text of particular articles. The *Bill of Rights* was an almost wholesale adoption of the I.C.C.P.R. While some conclusions may be drawn from omissions and variations from the I.C.C.P.R., on the whole, the intentions behind individual articles of the *Bill of Rights* are likely to be those behind the whole document. There is not the luxury of intense and thoughtful debate about the precise wording of the *Bill of Rights* that exists for the U.S. and Canadian constitutions.

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<sup>163</sup> *Ibid.*

<sup>164</sup> *Supra* note 162 [hereinafter *Wesberry*].

<sup>165</sup> Article I, §2 provides, *inter alia*:

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

<sup>166</sup> See *e.g.* *Karcher v. Daggett*, *supra* note 162 at 742-44.

<sup>167</sup> See generally L. Levy, *Original Intent and the Framers' Constitution* (New York: MacMillan, 1988).

## B. A Human Right

### 1. Significance of Status

The *Bill of Rights* has human-rights status by virtue of being implementing legislation for an international human-rights treaty. The preamble of the B.O.R.O. clearly states that its purpose is “to provide for the incorporation into the law of Hong Kong of provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong.” Furthermore, section 2(3) provides that the interpretation and application of the B.O.R.O. should take place in light of this fact. The legal implications of “implementing legislation” was readily recognized by Silke V.P. in *Sin Yau-ming*. Citing a decision of Lord Diplock,<sup>168</sup> Silke V.P. held that

there exists a well established principle of common law relating to the construction of statutes which are intended by the legislature to domesticate an international treaty to which the state — here the United Kingdom in the name of Hong Kong — is a party. The words of the statute should be interpreted by the court as being intended to carry out the state’s international treaty obligations and not in any manner inconsistent therewith ...<sup>169</sup>

The significance of recognizing that article 21 has a human-rights status lies in the consequent acceptance of international human-rights law for interpretation purposes. It becomes permissible to look to the various human-rights systems to see how they have interpreted the right to vote, and the limitations thereon. Human-rights instruments are multilateral treaties, which are interpreted according to the rules of the *Vienna Convention on the Law of Treaties*.<sup>170</sup> Article 31 of the *Vienna Convention* provides that a treaty is to be interpreted in accordance with the ordinary meaning of its terms in the context of the treaty and in the light of its object and purpose. Both the European and United Nations systems have already adopted broad purposive methods of interpreting rights.<sup>171</sup>

### 2. Insights from International Human-Rights Law

In *Sin Yau-ming*, a warning was issued against too readily adopting international jurisprudence because of an important difference between the role of domestic courts and international tribunals in their application of law to protect human rights.<sup>172</sup> The decisions of international bodies are often influenced by the concept of “margin of

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<sup>168</sup> *Garland v. British Rail Engineering Ltd.*, [1983] 2 A.C. 751 at 771 (H.L.).

<sup>169</sup> *Sin Yau-ming*, *supra* note 143 at 105.

<sup>170</sup> 23 May 1969, 1155 U.N.T.S. 331 [hereinafter *Vienna Convention*].

<sup>171</sup> For a discussion of interpreting rights under the European system, see J.G. Merrills, *The Development of International Law by the European Court of Human Rights*, 2d ed. (Manchester: Manchester University Press, 1993) c. 4. For a comment on the United Nations system in the context of Hong Kong, see M. Nowak, “Interpreting the Hong Kong Bill of Rights: Techniques and Principles” in J. Chan & Y. Ghai, eds., *The Hong Kong Bill of Rights: A Comparative Approach* (Hong Kong: Butterworths, 1993) 143.

<sup>172</sup> See *Sin Yau-ming*, *supra* note 143 at 108.

appreciation", which is a form of deference to the unique customs of individual States in their methods of implementing human rights.<sup>173</sup> Although the margin of appreciation has no role in domestic law, it would be premature to dismiss international human-rights law because of this phenomenon. Rather, since there is no need to defer to the political compromises that go into the formation of a treaty, the level of review of a domestic court should be at least as strict as that of the international tribunal. Hence, the margin of appreciation is not a barrier to the use of international jurisprudence, but a benchmark.

#### a. International Covenant on Civil and Political Rights

The only significant difference between the text of article 21 of the *Bill of Rights* and article 25 of the I.C.C.P.R. is that the former begins with "[e]very permanent resident" while the latter with "[e]very citizen". A large percentage of Hong Kong people would have been excluded from the benefit of the right had the word "citizen" been retained. In fact, it is not entirely clear whether there even is such a thing as a "Hong Kong citizen". The Basic Law refers only to permanent and non-permanent residents.<sup>174</sup> In any event, the similarity of the texts will mean that the experience of the I.C.C.P.R. system will be especially influential on Hong Kong, and even more so than the European system, whose provision is less strongly worded.<sup>175</sup>

Article 25 guarantees both the right and the opportunity to take part in the conduct of public affairs. Manfred Nowak and the Human Rights Committee have noted that to guarantee "opportunity" requires States to assume positive obligations to ensure that the rights in article 25 are realized in fact.<sup>176</sup>

Just as domestic courts might look to the intentions of "framers" to construe the meaning of a constitution, international tribunals consult the preparatory work of treaties, or *travaux préparatoires*. Under the *Vienna Convention*, the *travaux* can only be used to confirm a derived meaning of the treaty, or to determine a meaning when the derived meaning is ambiguous, obscure or manifestly absurd or unreasonable.<sup>177</sup> Part of article 25's history illuminates the intention behind the clause "universal and equal suffrage" found in sub-article (b). A number of members of the Commission on Human Rights expressed the opinion that this clause was redundant and should not have been included in the article since a non-discrimination clause already figured at

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<sup>173</sup> See Merrills, *supra* note 171, c. 7.

<sup>174</sup> See Basic Law, *supra* note 4, art. 24.

<sup>175</sup> See text below, accompanying note 185.

<sup>176</sup> See M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Strasbourg: N.P. Engel, 1993) at 439-40. *Ibid.* at 440, Nowak mentions two Human Rights Committee cases which recognize this point (*Aumeeruddy - Cziffra and other Mauritian women v. Mauritius* (No. 35/1978) in *Selected Decisions of the Human Rights Committee under the Optional Protocol* (2d-16th Sess.) (New York, 1985) at 67 (UN Doc. CCPR/C/OP/1, Sales No. E.84.XIV.2) [hereinafter *HRC Decisions 1985*]; and *C.F. et al. v. Canada* (No. 113/1981) in *Selected Decisions of the Human Rights Committee under the Optional Protocol* (17th-32d Sess.), vol. 2 (New York, 1990) at 13 (UN Doc. CCPR/C/OP/2, Sales No. E.89.XIV.1)).

<sup>177</sup> See *Vienna Convention*, *supra* note 170, art. 32.

the beginning of the article.<sup>178</sup> However, the majority view was that the principle of “universal and equal suffrage” was so fundamental that it had to be included. “This provision, it was thought, would leave States parties to the covenant free to regulate their own electoral systems, provided each vote carried equal weight.”<sup>179</sup> More recently, the United Nations Human Rights Committee adopted a “General Comment” on article 25,<sup>180</sup> wherein an elaboration of “universal and equal suffrage” is contained:

Although the Covenant does not impose any particular electoral system, any system operating in a State party must be compatible with the rights protected by article 25 and must guarantee and give effect to the free expression of the will of the electors. The principle of one person, one vote must apply, and within the framework of each State’s electoral system, the vote of one elector should be equal to the vote of another. The drawing of electoral boundaries and the method of allocating votes should not distort the distribution of voters or discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely.<sup>181</sup>

One final element of the United Nations experience valuable to Hong Kong is how the Human Rights Committee has interpreted the “without unreasonable restriction” limitation in the opening clause of article 25. In six individual communications against Uruguay,<sup>182</sup> the Human Rights Committee had an opportunity to define a test for “unreasonable restriction”. The issue in these cases was whether a law that deprived certain members of Marxist political parties of all political rights for a period of fifteen years violated article 25. In finding for a violation, the Committee applied a principle of proportionality (are the restrictions proportionate responses to the achievement of some legitimate objective), and held that the limitation was unreasonable.<sup>183</sup> Nowak has also noted that the “reasonableness” of the limitation may depend on the political context of the country in question:

whether specific restrictions on various political rights are reasonable may only be evaluated on a case-by-case basis by drawing on the principle of propor-

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<sup>178</sup> See generally UN ESCOR Comm. H.R., 9th Sess., 363d Mtg., UN Doc. E/CN.4/SR.363 (1953) at 12-13; 364th Mtg., UN Doc. E/CN.4/SR.364 (1953) at 13; 365th Mtg., UN Doc. E/CN.4/SR.365 (1953) at 7, 15, 18; 366th Mtg., UN Doc. E/CN.4/SR.366 (1953) at 5; 367th Mtg., UN Doc. E/CN.4/SR.367 (1953) at 13-15; see generally M.J. Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights* (Dordrecht: Martinus Nijhoff, 1987) at 474-75.

<sup>179</sup> Bossuyt, *ibid.*

<sup>180</sup> *General Comment Adopted by the Human Rights Committee under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights*, 57th Sess., 1510th Mtg. (12 July 1996), Addendum: “General Comment No. 25 (57)”, UN Doc. CCPR/C/21/Rev.1/Add.7 (1996) [hereinafter “General Comment No. 25”].

<sup>181</sup> *Ibid.* at para. 21.

<sup>182</sup> *Ramirez v. Uruguay* (No. 4/1977) in *HRC Decisions 1985*, *supra* note 176 at 3, 4; *Altesor v. Uruguay* (No. 10/1977) in *ibid.* at 105; *Weisz v. Uruguay* (No. 28/1978) in *ibid.* at 57; *Touren v. Uruguay* (No. 32/1978) in *ibid.* at 61; *Silva et al. v. Uruguay* (No. 34/1978) in *ibid.* at 65; *Pietraroia v. Uruguay* (No. 44/1979) in *ibid.* at 76.

<sup>183</sup> See *Pietraroia v. Uruguay*, *ibid.* at para. 16.

tionality and taking into account the overall political situation of the State concerned.<sup>184</sup>

### b. European Convention on Human Rights

Based only on the respective wording of the right to vote, it appears that the *European Convention on Human Rights* provides weaker protection than the I.C.C.P.R. The relevant provision is article 3 of *Protocol No. 1*:

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.<sup>185</sup>

For a number of years, there was much doubt as to whether this section guaranteed any individual rights, such as the right to vote and to run for election. In 1976, the European Commission on Human Rights finally confirmed that it did.<sup>186</sup> The issue then was whether the article protected equality in the exercise of those rights. There was thus a tendency to argue violations of article 3 of *Protocol No. 1* along with article 14, which provides that rights are to be secured without discrimination on a number of grounds.<sup>187</sup>

In the *Mathieu-Mohin and Clerfayt Case*,<sup>188</sup> the European Court of Human Rights had its first opportunity to delineate the parameters of article 3 of *Protocol No. 1*. The Court confirmed the Commission's generous interpretation of the article, adopting the latter's decisions that held that the article protected an individual right to vote and a right to stand for election to the legislature.<sup>189</sup> The Court held that the article also implied "the principle of equality of treatment of all citizens in the exercise of their right to vote and their right to stand for election."<sup>190</sup> However, it was not prepared to say that all votes must necessarily have equal weight. Despite a generous approach, the decision was clearly tempered by its "margin of appreciation". In particular, the Court stated that

[f]or the purposes of Article 3 of Protocol No. 1, any electoral system must be assessed in the light of the political evolution of the country concerned; features that would be unacceptable in the context of one system may accordingly be justified in the context of another at least so long as the chosen system provides for conditions which will ensure the "free expression of the opinion of the people in the choice of the legislature".<sup>191</sup>

<sup>184</sup> Nowak, *supra* note 176 at 455.

<sup>185</sup> *Protocol to the [European] Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, Eur. T.S. 9, art. 3 [hereinafter *Protocol No. 1*].

<sup>186</sup> *W, X, Y and Z v. Belgium* (Nos. 6745 & 6746/74) (1975), 2 Eur. Comm. H.R. D.R. 110 at 116, 18 Y.B. Eur. Conv. H.R. 236 at 244.

<sup>187</sup> See *The Liberal Party v. United Kingdom* (No. 8765/79) (1980), 21 Eur. Comm. H.R. D.R. 211.

<sup>188</sup> (1987), Eur. Ct. H.R. Ser. A, No. 113, 30 Y.B. Eur. Conv. H.R. 114, (*sub. nom. Mathieu-Mohin and Clerfayt v. Belgium*) 10 E.H.R.R. 1 [hereinafter *Mathieu-Mohin* cited to Eur. Ct. H.R. Ser. A].

<sup>189</sup> See *ibid.* at para. 51.

<sup>190</sup> *Ibid.* at para. 54.

<sup>191</sup> *Ibid.*

On the issue of restrictions, the Court held that the rights contained in article 3 were subject to implied limitations.<sup>192</sup> Although it was recognized that States would have a “wide margin of appreciation” in this area, the Court still insisted on a structured method to deal with limitations:

[I]t is for the Court to determine in the last resort whether the requirements of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate.<sup>193</sup>

It would be inappropriate for Hong Kong to follow strictly the European jurisprudence, given the great differences between the two systems in the textual expression of the right to vote and the latter’s reliance on the margin of appreciation. But the fact that even the deferential European and U.N. systems insist on a demonstration of “legitimate aim” and “proportionality” before allowing a limitation on the right to vote is instructive for Hong Kong.

### C. Text and Context of the Bill of Rights

The next step in deriving the meaning of the right to vote is to read closely the words of article 21, by themselves first, and then in the context of the whole ordinance. In performing this exercise one is trying to achieve two objectives. First, the text of article 21 can be a fertile source for deriving the purpose of the right that is being protected. Second, it is necessary to construe the words of article 21 according to their plain and ordinary meaning, ensuring that similar words have a consistent meaning throughout the ordinance and that all words and clauses are given some meaning. However, purposive interpretation generally requires that the plain and ordinary meaning of words conforms to the purpose of the right. In most cases, conformity is achieved by exploiting the inherent ambiguity of words. But where a clear inconsistency between the ordinary meaning of the words and the purpose of the right exists, as is the case with a reservation, it is necessary to give effect to the ordinary meaning.

Article 21 consists of an opening clause followed by three distinct entitlements:

Every permanent resident shall have the right and the opportunity, without any of the distinctions mentioned in article 1(1) and without unreasonable restrictions—

- (a) to take part in the conduct of public affairs, directly or through freely chosen representatives;
- (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;

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<sup>192</sup> See *ibid.* at para. 52.

<sup>193</sup> *Ibid.*

(c) to have access, on general terms of equality, to public service in Hong Kong.

The opening clause grants the rights to "permanent residents", which is a narrower category than "everyone" or "all persons", used in the other articles of the *Bill of Rights*. Permanent residency is a well-defined term in Hong Kong law. It would not be contrary to the purpose of the entitlements to apply the definition given in the *Immigration Ordinance*, as was done in *Lau San-ching*.<sup>194</sup> As already mentioned, the significance of guaranteeing both the right and the opportunity to vote means that the Government has positive obligations to facilitate the exercise of the rights contained in article 21.<sup>195</sup> Not only must the State guarantee the rights on paper but also in the actual conduct of elections. Any form of systemic discrimination, such as polling stations consistently inaccessible to disabled individuals, would likely violate article 21.

The opening clause concludes with an explicit limitations clause which applies to all the entitlements. There are two hurdles that all potential limitations must overcome in order to be valid. First, they cannot be based on the distinctions mentioned in article 1(1), which include "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."<sup>196</sup> Second, they cannot be "unreasonable restrictions". This inherently ambiguous formulation must be interpreted in the context of the entire ordinance and with the help of experience from other jurisdictions.

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<sup>194</sup> See *supra* note 122 at 48, where the Court recites the *Immigration Ordinance* (*supra* note 43) definition of "permanent resident":

1. Any person who is wholly or partly of Chinese race and has at any time been ordinarily resident in Hong Kong for a continuous period of not less than seven years.
2. Any person who is a British Dependent Territories citizen and who —
  - (a) belongs to a class or description of persons specified in [article] 2 of the Hong Kong (British Nationality) Order 1986 (L.N. 233/1986) as having a connection with Hong Kong; or
  - (b) is such a citizen by virtue of his having a connection with any of the British Dependent Territories (other than Hong Kong) mentioned in [Schedule] 6 to the British Nationality Act 1981 [(U.K.), 1981, c. 61] and has at any time been married to a person specified in subparagraph (a).
3. Any person who is a Commonwealth citizen and who immediately before 1 January 1983 had the right to land in Hong Kong by virtue of [section] 8(1)(a) as then in force.

<sup>195</sup> See Nowak, *supra* note 176 at 439-40.

<sup>196</sup> Many writers on the I.C.C.P.R.'s equivalent have noted that it is somewhat redundant to repeat this first hurdle, since articles 2 and 3 of the I.C.C.P.R. should be sufficient (see *e.g.* Nowak, *supra* note 176 at 456-57; Bossuyt, *supra* note 178 at 474; K.J. Partsch, "Freedom of Conscience and Expression, and Political Freedoms" in L. Henkin, ed., *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981) 209 at 238). An explanation for its inclusion is that it goes to emphasize the importance of non-discrimination in the context of political rights.

The wording and structure of limitations on rights vary from jurisdiction to jurisdiction. As was recognized in both *Sin Yau-ming* and *Lee Kwong-kut*, Hong Kong's *Bill of Rights*, where each article has its own individually expressed or implied limitation, is structurally different from the Canadian *Charter*, with its single overarching limitation clause. Despite this difference, it would be wrong to ignore in all respects the Canadian approach, or to adopt blindly the flexible approach in *Lee Kwong-kut*. For a number of reasons, in interpreting the limitations clause in article 21, it is much more appropriate to adopt the more structured Canadian test than the flexible approach described by the Privy Council. The most compelling reason is that *Lee Kwong-kut* was dealing with a completely different right (article 11(1)), which has no express limitation clause. Indeed, Lord Woolf seemed to qualify the reach of his comments to "provisions similar to Article 11(1)."<sup>197</sup> Article 21 is not similar to article 11(1) since it expressly prohibits "unreasonable restrictions". In fact, article 21 is the only article in the *Bill of Rights* that contains a limitation expressed in those terms, which must be given meaning. Even under the European system, where the expression of the right to vote is sparse and contains no express limitation, the European Court of Human Rights, in *Mathieu-Mohin*, required the State to prove that the limitations are "in pursuit of a legitimate aim ... and that the means employed are not disproportionate."<sup>198</sup> Similarly, the U.N. Human Rights Committee has interpreted the words "unreasonable restriction" to include a proportionality test. Although Nowak has cautioned that what is "reasonable" must depend on a country's political context, in the case of Hong Kong, the political and historical context militates for a rigorous limitation test. Although not as precise as the Canadian section 1 test, an acceptable approach to understanding "unreasonable restriction" is to ask

- (a) What objectives ... are to be achieved [by the restrictions] (legitimate objectives);
- (b) Whether there is a rational connection between the objectives to be achieved and the means or restrictions employed (rationality test); and
- (c) Whether the restrictions are proportionate responses to the achievement of the legitimate objectives (proportionality test).<sup>199</sup>

The three entitlements listed after the opening clause appear to relate to distinct interests, but they all have their origins in the purpose of promoting self-government. Article 21(a) captures the essence of self-government: Hong Kong permanent residents shall have the right and the opportunity to participate in the conduct of Hong Kong public affairs. It does not specify the mode of participation, but there are only two options: "directly", viz. by referenda, or "through freely chosen representatives", viz. by elections.<sup>200</sup> Taking part in the "conduct of public affairs" is more general than

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<sup>197</sup> *Lee Kwong-kut*, *supra* note 128 at 196.

<sup>198</sup> *Supra* note 188 at para. 52.

<sup>199</sup> *Lau Sau-ching*, *supra* note 122 at 50.

<sup>200</sup> See Nowak, *supra* note 176 at 440-43.

taking part in government; nevertheless, it implies a minimum standard of effective political participation in relation to important affairs affecting the territory.<sup>201</sup>

Article 21(b) elaborates on the content of this minimum standard by giving all permanent residents the right to vote and to be candidates in genuine periodic elections. These elections must comply with four "fairness principles": universal suffrage, equal suffrage, secret ballot, and free elections.<sup>202</sup> These dictates of fairness are consistent with the values enshrined in the preamble of the I.C.C.P.R. They also resonate in the new political and social culture that Hong Kong had become accustomed to under British rule. The principles of "secret ballot" and "free elections" are fundamental to self-government, drawing a distinct and much needed line between resident participation and State interference.<sup>203</sup>

As was mentioned earlier, the drafters of the I.C.C.P.R. considered removing from article 25 the words "universal and equal suffrage", but the majority prevailed, insisting on their fundamental importance. "Universal suffrage" emphasizes that the right should be enjoyed by everyone without discrimination. If some are to be denied the right then the State must justify the restriction as being reasonable. "Equal suffrage" means that everyone's vote should carry the same weight. As has every other jurisdiction that has struggled with the meaning of this concept, Hong Kong must deal with the question: Does "equal suffrage" mean absolute equality? In thinking about this question, it is important to note that unlike the Canadian, American or European human-rights regimes, the right to vote in Hong Kong is expressly qualified by those words — "equal suffrage". Furthermore, the word "equal" in article 21(b) is unquali-

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<sup>201</sup> Paragraph 5 of "General Comment No. 25", *supra* note 180, states:

The conduct of public affairs, referred to in paragraph (a), is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels. The allocation of powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs protected by article 25 should be established by the constitution and other laws.

<sup>202</sup> See Nowak, *supra* note 176 at 444, who describes them as "voting principles".

<sup>203</sup> "General Comment No. 25", *supra* note 180 at paras. 19-20, discusses these two fairness principles in these terms:

Persons entitled to vote must be free to vote for any candidate for election and for or against any proposal submitted to referendum or plebiscite, and free to support or to oppose government, without undue influence or coercion of any kind which may distort or inhibit the free expression of the elector's will. Voters should be able to form opinions independently, free of violence or threat of violence, compulsion, inducement or manipulative interference of any kind. ...

States should take measures to guarantee the requirement of the secrecy of the vote during elections including absentee voting, where such system exists. This implies that voters should be protected from any form of coercion or compulsion to disclose how they intend to vote or how they voted, and from any unlawful or arbitrary interference with the voting process. Waiver of these rights is incompatible with article 25 of the Covenant.

fied (in article 21(c), in contrast, access to public service is guaranteed only on "general terms of equality"). These two points together with the emphasis on non-discrimination in the opening of article 21 suggest that a high degree of equality should characterize voting power in Hong Kong. Absolute equality should therefore be the starting point, and, as will be elaborated in the next part, only those deviations that further the project of self-government or the entrenchment of fundamental human rights should lie within the parameters of article 21(b).

For example, in drawing a geographical or functional constituency, it should be permissible to depart from equal-size constituencies in order to give a voice to minority groups that have been poorly represented in the past. The grounds of distinction mentioned in article 1(1) of the *Bill of Rights* suggest which groups may be the most vulnerable and deserving of greater relative voting power. Achieving true equality between vulnerable minority groups and powerful business groups may require that the former receive greater political representation to compensate for their lack of economic power. In view of China's current honeymoon with the conservative business community in Hong Kong, economic power and affluence seem to be the shield against likely reprisals from China; for those outside that community, it is very important to provide at least some protection in the form of political representation.<sup>204</sup>

Article 21(c) guarantees equal opportunity within Hong Kong's civil service. This right has special relevance in Hong Kong, where historically many of the top posts in the civil service were taken by expatriates.<sup>205</sup> Ensuring that Hong Kong people manage all the organs of government is a necessary step in achieving self-government in Hong Kong.<sup>206</sup>

Finally, an understanding of article 21 would not be complete without discussing the meaning and effect of the reservation in section 13 of the B.O.R.O.: "Article 21

<sup>204</sup> This understanding of the right to vote is not too far from what was proposed by the 1992 Legislative Council Select Committee on democratic reform. In discussing the creation of new functional constituencies, it was suggested that accommodations should be made for "special interest groups, like the disabled and handicapped, who believe they might be better represented if they are themselves designated as functional constituencies" (*Select Committee Report, supra* note 66 at 30).

<sup>205</sup> Miners writes:

The slowest growth in the proportion of Chinese has been in the directorate class (Heads of departments and deputy heads, senior professional officers, and those of similar status) ... This is the result of the relatively low intake of Chinese in the 1950s, especially into the administrative grade [the elite of the public service] from which many of the top posts are filled. Between 1947 and 1960 only seven Chinese were appointed as administrative officers, compared to 41 expatriates (*The Government and Politics of Hong Kong, supra* note 10 at 94).

<sup>206</sup> Paragraph 23 of "General Comment No. 25", *supra* note 180, specifies that

[b]asing access to public service on equal opportunity and general principles of merit, and providing secure tenure, ensure that persons holding public service positions are free from political interference or pressures.

For recent judicial interpretation of Art. 21(c), see *R. v. Hong Kong (Secretary for the Civil Service and A.G.), ex parte The Association of Expatriate Civil Servants of Hong Kong*, (1995) 5 H.K.P.L.R. 490 (H.C.), where the Government's localization scheme for civil servants was challenged.

does not require the establishment of an elected Executive or Legislative Council in Hong Kong." When the Government of the United Kingdom ratified the I.C.C.P.R., "[it reserved] the right not to apply sub-paragraph (b) of Art. 25 in so far as it may require the establishment of an elected Executive or Legislative Council in Hong Kong ..."<sup>207</sup> The reservation in the B.O.R.O. is somewhat broader, reserving against all of article 21. But significantly, article 21's application is similarly excluded only to the extent that it requires an elected Executive or Legislative Council. In *Lee Miu-ling*, Keith J. of the High Court held that section 13 cannot be used to justify the disparities in voting power caused by the functional constituencies. Essentially, he held that the reservation was only applicable where either the Legislative or Executive Council still lacked any elected element. It was most meaningful at the time of ratification of the I.C.C.P.R. in 1976, when neither body had any elected members; it continued to have meaning for the Executive Council, which was still unelected. But with respect to elections to the Legislative Council,

[s]ince the *Letters Patent* now require the establishment of an elected Legislative Council, [section] 13 of the *Bill of Rights Ordinance* is, to the extent that it relates to the Legislative Council, a dead letter until such time as the *Letters Patent* are amended to remove the requirement for the elected Legislative Council. That is why [section 13] cannot now be used to justify a departure from the rights guaranteed by [article] 21 of the *Bill of Rights*.<sup>208</sup>

Keith J. limited the scope of section 13 without doing injustice to its plain meaning. A strict interpretation was necessary in order to avoid nullifying the meaning of the rights in article 21. His decision was consistent with the treatment of reservation clauses in international law.<sup>209</sup> Article 19(c) of the *Vienna Convention*<sup>210</sup> declares that "[a] State may ... formulate a reservation unless ... the reservation is incompatible with the object and purpose of the treaty." Arguably, a reservation that nullified the meaning of the right to vote would be incompatible with the object and purpose of Hong Kong's *Bill of Rights*.

### III. Purposes Underlying the Right to Vote in Hong Kong

Having established the significance of the constitutional and human-rights status of the right to vote, and the *prima facie* meaning of its expression in the B.O.R.O., it is time to consider how the meaning of the right is informed by the unique circumstances of Hong Kong. Following the Canadian approach, a purposive interpretation requires a search through the historical, social and political context of Hong Kong for

<sup>207</sup> Byrnes & Chan, eds., *supra* note 12 at 262. See also *supra* note 120.

<sup>208</sup> *Lee Miu-ling*, *supra* note 123 at 197-98.

<sup>209</sup> This opinion is also consistent with the views of the Human Rights Committee. In its concluding observations on the last report of the United Kingdom relating to Hong Kong under the I.C.C.P.R., the Committee held that notwithstanding the U.K.'s reservation, "once an elected Legislative Council is established, its election must conform to article 25 of the Covenant" (UN GAOR, 51st Sess., Supp. No. 40, UN Doc. A/51/40 (1995) para. 65, partially reprinted in (1996) 17 HRLJ 469-471 [hereinafter HRC Observations]).

<sup>210</sup> *Supra* note 170.

the philosophical truths behind the right to vote. What are the interests protected by the right that are reflected in its past and should continue to inform its future? A close reading of Hong Kong's history reveals two distinct interests that underlie the right to vote: (a) the protection of all other human rights, and (b) the promotion of self-government. How these interests come about and how they have been manifested in actual events will be discussed below.

### A. *Protection of All Other Human Rights*

The right to vote serves the functional purpose of protecting and preserving all other human rights. One commentator on the I.C.C.P.R. has stated this notion in these terms:

[O]nly where there is authentic popular sovereignty can the individual hope to enjoy the other rights enshrined in the Covenant as well as the economic, social, and cultural rights guaranteed in the other Covenant.<sup>211</sup>

In *Dixon v. British Columbia (A.G.)*, McLachlin J. (she was then chief justice of the British Columbia Supreme Court) acknowledged this paramount function of the right to vote in the context of section 3 of the Canadian *Charter*:

[T]he right to vote and participate in the democratic election of one's government is one of the most fundamental of the *Charter* rights. For without the right to vote in free and fair elections all other rights would be in jeopardy. The *Charter* reflects this. Section 3 cannot be overridden under s. 33(1); it is, in this sense, a preferred right.<sup>212</sup>

As noted by McLachlin J., the right to vote is different from most other rights in the *Charter* in that it is not subject to the "notwithstanding" clause, which permits provincial and federal governments to expressly override protected rights.<sup>213</sup>

The historical context of the B.O.R.O. and Hong Kong's system of representative government reveal that this human-rights purpose underlies the right to vote in Hong Kong. The enactment of Hong Kong's *Bill of Rights* was not an isolated act of benevolence from London, especially since England herself does not have a written human-rights instrument. As was described earlier, the *Bill of Rights* was motivated by the realization that Hong Kong was to be handed over to the intolerant and powerful sovereign authority responsible for the unmistakable horrors of the 1989 Beijing massacre. Article 21, together with the other rights in the Bill, were meant to entrench a system and culture of human rights in Hong Kong prior to 1997 in the hope that these rights would be more difficult to take away under Chinese sovereignty.

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<sup>211</sup> Partsch, *supra* note 196 at 244.

<sup>212</sup> *Dixon*, *supra* note 155 at 284 [references omitted].

<sup>213</sup> Section 33(1) of the *Charter*, *supra* note 133, provides that "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter."

One might be tempted to argue that the right to vote is not essential to the preservation of other rights because, for a number of decades, Hong Kong's civil liberties were fairly well protected without democratic rights. However, this reply is misleading. Prior to 1991, the civil liberties in Hong Kong were indirectly linked to the democratic rights and traditions of England. Human-rights violations in Hong Kong, perpetrated by the Hong Kong authorities, would certainly have had negative political repercussions on the administration back in England. Hence, it is incorrect to believe that the history of civil liberties in Hong Kong would have been possible without democratic vigilance. Now that Hong Kong has reverted back to China, where "democratic supervision" takes on the inverted meaning of the State "supervising" pro-democrats, the continued protection of human rights in Hong Kong is all the more pressing. And article 21 is central to ensuring that human rights will not be easily overridden by either Hong Kong or Chinese state actors.

The results from the 1991 and 1995 Legislative Council direct elections provide evidence of how the right to vote in practice is linked to the protection of human rights. In both elections, an overwhelming majority of the seats was taken by members of the Democratic Party and other democratically-minded independent members.<sup>214</sup> These so-called "liberal" legislators adamantly used the tools of their trade (e.g., question period, motions, private member's bills, amendments, etc.) to question the administration about the current and future state of human rights.<sup>215</sup> They also initiated their own legislative programme to protect rights using the more restrictive vehicle of private bills. The 1995 election results confirmed the public's approval of

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<sup>214</sup> In the 1991 elections, of the 18 directly elected seats, 12 were won by members of the United Democrats of Hong Kong, the predecessor to the Democratic Party, led by barrister Martin Lee. Three more seats were occupied by members of Meeting Point, another pro-democracy party that would later join with the United Democrats to form the Democratic Party on 2 October 1994. One other member worth mentioning is independent member Emily Lau, an extremely outspoken critic of the Government, who would later go on to acquire the title of "most popular legislator" in the 1995 elections. With two more United Democrats in the functional constituencies, and two appointed members, who generally identified with this "liberal camp", the liberals could have, on average, a voice of 20 votes, which was clearly insufficient for a majority on any reading or motion (see generally appendix A of R.Y.F. Kwok, J.Y.H. Leung & I. Scott, eds., *Votes Without Power: The Hong Kong Legislative Council Elections 1991* (Hong Kong: Hong Kong University Press, 1992) [hereinafter *Votes Without Power*]; see also C. Chan, "Emily hits top of popularity parade", *South China Morning Post* (19 September 1995) 3).

In the September 1995 Legislative Council elections, voters re-affirmed their support for the Democratic Party, which won a total of 19 seats, two more than in 1991. Allies of the Democrats, including members from the Confederation of Trade Unions, the Association for Democracy and People's Livelihood, and independent members such as Emily Lau and Christine Loh, accounted for another eight seats. As in 1991, overwhelming support for these liberal candidates came primarily from the direct elections (see generally W.K. Fung & L. Wong, "Democrats dominate LegCo" *South China Morning Post* (19 September 1995) 1).

<sup>215</sup> See *Debates of the Hong Kong Legislative Council* (6 November 1991) at 386-87 (E. Lau, "Bill of Rights Ordinance's bearing on law enforcement"); *Debates of the Hong Kong Legislative Council* (8 July 1992) at 4031-32 (C. Lam, "Bill of Rights Ordinance's bearing on the Public Order and Summary Offences Ordinances"); *Debates of the Hong Kong Legislative Council* (8 July 1992) at 4006-10 (J. To, "Publicity activities on the Hong Kong Bill of Rights Ordinance").

what the Democrats and the other liberal legislators had done, and provided the mandate for them to continue their human-rights work.

What are the legal ramifications of recognizing this purpose for the right to vote? First, article 21 and section 13 should not be interpreted in a way that is inconsistent with the other human rights protected in the I.C.C.P.R. The standard of the I.C.C.P.R. is chosen over that of the B.O.R.O. because the purpose underlying the right is the protection of human rights in general, without reference to any particular country's conception of human rights. The I.C.C.P.R. approximates a universal expression of human rights and is therefore the appropriate standard. Second, when there is any ambiguity in the interpretation of article 21 or section 13, the interpretation that tends to enhance human rights should be adopted.<sup>216</sup>

### **B. Achievement of Self-Government**

The principle of self-determination is a norm in international law that has come to be closely identified with the post-war independence of many African states.<sup>217</sup> However, independence is only one possible outcome of exercising the right:

The right of self-determination is the right of peoples to freely determine their political status. It comprises both their international status and their domestic political status, sometimes known as external self-determination and internal self-determination. External self-determination is the right of peoples to choose, free from foreign interference, their status within the international community. Such status may be that of a sovereign independent state; free association with an independent state; integration with an independent state; or emergence into any other political status. Internal self-determination is the right of peoples to choose freely the form of government under which they wish to live. This, of course, is a continuing right ...<sup>218</sup>

#### **1. External Right of Self-Determination: Missed Opportunities**

Commentators have remarked on the peculiarity of Hong Kong's process of decolonization in relation to Britain's other dependent territories. It has been written that

<sup>216</sup> I have restricted the application of these principles to only civil and political rights not because social, economic and cultural rights are not a protected interest of the right to vote but rather because of the controversy over whether they in fact are "human rights" in the same sense as we think of "civil and political rights". They are often perceived to be in tension with civil and political rights, and given their imprecise definitions, to include them would add confusion to these interpretive principles (see generally K. Vasak, "Les différentes catégories des Droits de l'Homme" in A. Lapeyre, F. de Tinguy & K. Vasak, eds., *Les Dimensions Universelles des Droits de l'Homme*, vol. 1 (Bruxelles: Bruyant, 1990) 297, cited in S.J. Toope, "Cultural Diversity and Human Rights (F.R. Scott Lecture)" (1997) 42 McGill L.J. 169 at 179 n. 28).

<sup>217</sup> See e.g. E.A. El-Obaid & K. Appiagyei-Atua, "Human Rights in Africa — A New Perspective on Linking the Past to the Present" (1996) 41 McGill L.J. 819, especially at 824 and 838ff.

<sup>218</sup> N. Jayawickrama, "The Right of Self-Determination" in P. Wesley-Smith, ed., *Hong Kong's Basic Law: Problems and Prospects* (Hong Kong: Faculty of Law, University of Hong Kong, 1990) (Proceedings of a seminar held at the University of Hong Kong on 5 May 1990) 85 at 86.

[t]he decolonisation of Hong Kong will be totally different from the normal post-war pattern, and will more closely resemble the transfers of territory without the consent of the inhabitants which took place between the imperial powers in the nineteenth century.<sup>219</sup>

Unlike other British colonies, Hong Kong has never been given the chance to exercise the external right of self-determination. Although Hong Kong was on the agenda of the United Nations Special Committee on Decolonization in 1961, it was later taken off a list of colonial territories contained in the *United Nations Declaration on the Granting of Independence to Colonial Territories and Peoples*.<sup>220</sup> The move was initiated by China, and Britain did not protest at the time.

Despite Hong Kong's removal from the list in 1972, many commentators still argue that Hong Kong is entitled to the right of self-determination.<sup>221</sup> In its report, the International Commission of Jurists ("I.C.J.") stated that recognition of this right would have required "the British Government [to obtain] the authority of a referendum conducted by the Hong Kong Government before entering into the negotiations which led up to the *Joint Declaration*."<sup>222</sup> This, of course, was not done. At the strict request of China, the people of Hong Kong were shut out from the negotiations, and only after a draft text had been initialled by both sides did the British seek public acceptance of the document. Although the consultations were extensive and in the end favourable, the I.C.J. noted that they were inadequate to fulfill the requirements of the right of self-determination, since the Hong Kong people were not presented with any other alternative. The I.C.J. concluded in part that "[t]he only way in which the United Kingdom can ... compensate [residents] in Hong Kong for the loss of the right to self-determination is by the provision of rights of residence in the UK itself or acceptable third countries."<sup>223</sup> But this compensation was not forthcoming. Only after the major crisis of confidence brought about by the events in Tiananmen Square did the British Government pass the *British Nationality (Hong Kong) Act 1990*,<sup>224</sup> which gave 50,000 selected Hong Kong families (approximately 225,000 people) the right of abode in the United Kingdom.<sup>225</sup>

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<sup>219</sup> N. Miners, "The Normal Pattern of Decolonisation of British Dependent Territories" in Wesley-Smith & Chen, eds., *supra* note 13, 44 at 53.

<sup>220</sup> GA Res. 1541 (XV), UN GAOR, 15th Sess., Supp. No. 16, UN Doc. A/4684 (1961) 66, reproduced in *Human Rights: A Compilation of International Instruments* (New York: UN Centre for Human Rights, 1988) at 47ff. See R. Mushkat, "Hong Kong As an International Legal Person" (1992) 6 *Emory Int'l L. Rev.* 105 at 114.

<sup>221</sup> See Jayawickrama, *supra* note 218; L. Feng, "Electoral Reform in Hong Kong: A Comment" (1994) 3:2 *Asia Pac. L. Rev.* 73 at 78-9; E.M. Amberg, "Self-Determination in Hong Kong: A New Challenge to an Old Doctrine" (1985) 22 *San Diego L. Rev.* 839; International Commission of Jurists, *Countdown to 1997: Report of a Mission to Hong Kong* (Cambridge: E. & E. Plumridge, 1992) (Chairman: Sir W. Goodhart) c. 5, especially at 51 [hereinafter *Countdown to 1997*].

<sup>222</sup> *Countdown to 1997, ibid.* at 53.

<sup>223</sup> *Ibid.* at 56.

<sup>224</sup> (U.K.), 1990, c. 34.

<sup>225</sup> See M.K. Chan, "Democracy Derailed: Realpolitik in the Making of the Hong Kong Basic Law, 1985-90" in M.K. Chan & D.J. Clark, eds., *The Hong Kong Basic Law: Blueprint for "Stability and*

The people of Hong Kong were further distanced from a right of self-determination by their effective exclusion from the Basic Law drafting process. That the I.C.J. has noted many inconsistencies between the final version of the Basic Law and the *Joint Declaration* only goes to weaken the credibility of this undemocratic process.<sup>226</sup> The Basic Law Drafting Committee was in charge of drafting the text and submitting it to the Standing Committee of the National People's Congress for ultimate approval. It consisted of thirty-six mainland members and only twenty-three from Hong Kong. The Basic Law Consultative Committee (B.L.C.C.) was to be responsible for gathering public opinion on the draft versions of the text. It consisted of 180 members, all Hong Kong residents. However, all members on both committees were appointed by China, and the Hong Kong members "were overwhelmingly drawn from professional and business sectors of the economy ..."<sup>227</sup> Despite its attempts to get public input, the operations of the B.L.C.C. were plagued by a considerable amount of Chinese influence through appointments made to the B.L.C.C. Executive Committee and Secretariat.<sup>228</sup>

One final act indicating that external self-determination would not be available to Hong Kong was the failure to include in the *Bill of Rights* a provision corresponding to article 1 of the I.C.C.P.R., one of the few omissions. Article 1 recognizes that "[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." When Great Britain extended application of the I.C.C.P.R. to Hong Kong in 1976, there was a reservation to article 1 to the effect that Britain's obligations under the *Charter of the United Nations* would prevail where there was a conflict. This reservation did not seem to diminish Britain's obligations with respect to self-determination, however, since there are strongly worded provisions in the *U.N. Charter* that also uphold the principle of self-determination.<sup>229</sup> Hence, when the United Kingdom went before the Human Rights Committee under the periodic reporting system of the I.C.C.P.R., they were repeatedly asked about the extent of their article 1 obligations with respect to Hong Kong. Recognizing the external and internal aspects of the right of self-determination, the Committee members routinely questioned the United Kingdom about their article 1 and article 25 (right to take part in

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*Prosperity" under Chinese Sovereignty?* (Hong Kong: Hong Kong University Press, 1991) 3 at 29; J.M.M. Chan, "Constitutional Developments in Hong Kong 1989-1993" in A.P. Blaustein, ed., *Constitutions of Dependencies and Special Sovereignities*, vol. 8 (Booklet 4) (New York: Oceana Publications, 1993) 1 at 10-12.

<sup>226</sup> See *Countdown to 1997*, *supra* note 221, c. 14.

<sup>227</sup> M.K. Chan, *supra* note 225 at 7.

<sup>228</sup> See *ibid.*

<sup>229</sup> See articles 1, 2 and 73 of the *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7, 59 Stat. 1031, 145 U.K.T.S. 805. When the United Kingdom attended the Human Rights Committee meetings for consideration of its Third Periodic Reports Under art. 40 of the I.C.C.P.R. (UN Doc. CCPR/C/58/Add 11 and Add 12), one of its representatives confirmed that the reservation to article 1 "did not purport to limit the right of self-determination" (UN HRC, 45th Sess., 1046th Mtg., UN Doc. CCPR/C/SR.1046 (1991) at para. 40 [hereinafter HRC 1991]).

conduct of public affairs) obligations at the same time.<sup>230</sup> In reply, the British representatives argued that self-determination did not mean independence. They pointed to their efforts to consult the Hong Kong people before signing the *Joint Declaration* and to the various other attempts at consultation during the drafting of the Basic Law. Finally, they highlighted the developments in representative government in Hong Kong despite their reservation to article 25.<sup>231</sup>

## 2. Internal Right of Self-Determination: Self-Government

While the British repeatedly stated that self-determination, as applied in Hong Kong, did not mean independence, they never went so far as to say that the principle of self-determination, especially its internal dimension, had no application to Hong Kong. Rather, against the backdrop of missed opportunities for allowing the people of Hong Kong to exercise external self-determination, there emerges the right to vote. Seen against this backdrop, the right to vote becomes the only legal means for Hong Kong people to directly exercise the internal right of self-determination and thus to have some say about their present and future lives. While Hong Kong people were denied the opportunity to decide the external legal status of their territory, the right to vote provided a limited basis for them to contribute to the internal ordering of their government.<sup>232</sup> In this context, the purpose of the domestic right to vote is necessarily informed by the significance of the international norm of (internal) self-determination. This significance lies in the concept of self-government — that the people of a country or dependent territory have an effective opportunity to determine freely their own social, economic, legal and political systems.<sup>233</sup> The application of the internal right of self-determination in Hong Kong indicates that the purpose of the right to vote has been the achievement of self-government. One can complain about the level of self-government established by the British, but such criticisms cannot change the teleological nature of the right to vote.

The purpose of the right to vote in Hong Kong could also be described as “effective representation” (as the Supreme Court did in Canada); however, to restrict

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<sup>230</sup> See UN HRC, 34th Sess., 856th Mtg., UN Doc. CCPR/C/SR.856 (1988) at paras. 21, 27, 28 [hereinafter HRC 1988]; HRC 1991, *ibid.* at paras. 14-18.

<sup>231</sup> See HRC 1988, *ibid.* at paras. 18, 32-43, 47; HRC 1991, *ibid.* at paras. 40-52.

<sup>232</sup> See Mushkat, *supra* note 220 at 143-46.

<sup>233</sup> See generally R. Higgins, “International Law and the Avoidance, Containment and Resolution of Disputes: General Course on Public International Law” (1991-V) 230 *Rec. des Cours* 9 at 159-166. Higgins writes:

The Human Rights Committee has consistently told States appearing before them for examining of their periodic reports that the right of self-determination requires that a free choice be afforded to the peoples, on a continuing basis, as to their system of government, in order that they can determine their economic, social and cultural development. It has been made clear — and not just recently — that this is virtually impossible to achieve in a one-party State. Even in one-party systems that allow some form of participatory democracy, the system itself is predetermined: the range of political, economic and social choices is thereby already narrowed (*ibid.* at 165).

See also T.M. Franck, “The Emerging Right to Democratic Governance” (1992) 86 *AJIL* 46.

the meaning to this single purpose would not adequately capture the unique colonial circumstances of Hong Kong. The value of self-government is less functionally defined, but lies in the psyche of a colonial people who, for the first time in over one hundred years, was given the opportunity to participate in the determination of its country's future. It is the autonomy of a people that is affirmed with the institution of self-government.

Two further observations confirm this interpretation of the right to vote. First, the British Government chose to democratize Hong Kong at a time when its colonial future was already settled. Second, the gradual development of representative government has politicized Hong Kong in a manner that is consistent with the values of self-government.

It is no mere coincidence that representative government at all three tiers was initiated when the *Joint Declaration* had just been signed and the future of Hong Kong was already settled. The 1984 *Green Paper* was published while the *Joint Declaration* negotiations were already near completion. The initialized text was published on September 26, followed by the publication of the *White Paper* on November 21.<sup>24</sup> If Britain believed in the virtues of "democracy for its own sake", why did they wait over 140 years to democratize Hong Kong? There were attempts between 1946 and 1952 to try to bring democratic changes to Hong Kong, but for a number of reasons, including "fear that communist candidates might be preferred by the Hong Kong electorate" or that the proposals might otherwise "provoke an adverse reaction from China", these plans never materialized.<sup>25</sup> Having signed the *Joint Declaration*, Britain's fear that China might take unilateral action to recover the territory dissipated. Since the *Joint Declaration* meant the complete end of British rule, the vested interest to ensure absolute British control over the organs of government also disappeared. In fact, the British Government was quite ready to start preparing for the future. The *Joint Declaration* specified some very positive political aspirations for Hong Kong that seemed unachievable were Hong Kong to remain a British colony. For example, it promised the H.K.S.A.R. a "high degree of autonomy", that it would be "vested with executive, legislative and independent judicial power, including that of final adjudication", that its government would "be composed of local inhabitants", and that the legislature would "be constituted by elections". Given the certain deadline of British rule and the promise of a relatively "autonomous" future, a strong impetus behind Hong Kong's democratic reforms must have been self-government. Since the Hong Kong people were going to run Hong Kong after 1997, it seemed only logical to give them some experience in doing so during the transition period. One of the aims of the 1984 *White Paper* proposals tends to confirm this view:

[T]o develop progressively a system of government the authority for which is firmly rooted in Hong Kong, which is able to represent authoritatively the

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<sup>24</sup> See N. Miners, "Moves Towards Representative Government 1984-1988" in K. Cheek-Milby & M. Mushkat, eds., *Hong Kong: The Challenge of Transformation* (Hong Kong: Centre of Asian Studies, University of Hong Kong, 1989) 19 at 19-21.

<sup>25</sup> Miners, *supra* note 219 at 51; see also N. Miners, "Plans for Constitutional Reform in Hong Kong, 1946-52" (1986) 107 *China Q.* 463.

views of the people of Hong Kong, and which is more directly accountable to the people of Hong Kong.<sup>236</sup>

Representative government at all three tiers was set in motion in 1985; subsequent developments reflected a people reaching gradual maturity in its self-government. Many observers have noted how recent political developments in Hong Kong and China have brought about a "rapid politicization of the Hong Kong people."<sup>237</sup> Indeed, there has been an increasing awareness of political issues in the Hong Kong electorate, and strong political parties and vocal representatives have emerged.<sup>238</sup>

In the 1991 and 1995 Legislative Council direct elections, among the candidates were those with interests leaning towards the policies of either Britain or China — the electorate chose neither. Instead, the party that won the majority of the directly elected seats in both elections was the Democratic Party. This party's track record shows that it is not afraid to criticize either the British or Chinese governments, and that it promotes the interests of the Hong Kong people. It is the party of self-government. At the same time several democratically-minded independent members have won the public's favour. The introduction of democratic legislators in the Legislative Council changed the nature of that institution. It polarized the Government and the legislators, and challenged the executive-led system of government. The democratic legislators critically examined the Government's programme and started to introduce their own legislation when the Government was reluctant to do so. This practice came to interrupt the Government programme to such an extent that in his 1995 policy address, Governor Patten explicitly referred to the use of his constitutional power to refuse assent to bills passed by the Legislative Council where it would be in the "best interests of Hong Kong".<sup>239</sup>

It can no longer be said that Hong Kong is in its infantile stages of democracy. It has been over a decade since the first territory-wide elections were held, and the history of representative government culminated in Governor Patten's abolition of all appointed members in 1995. Until July 1997, the project of self-government was well on its way and the right to vote continued to fuel its progression.

The introduction of article 21 of the *Bill of Rights* can also be understood from the perspective of self-government. In the earlier review of the history of the right to vote (Part I), it was evident that there had been a gradual devolution of power to the Hong Kong people between 1982 and 1991. This devolution was marked by the increasing percentage of elected members on each tier, and by the bottom-up direction of democratization. Initially, the process of devolution was heavily guided by the British authorities, but over time, it became evident that a strong public interest in the

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<sup>236</sup> 1984 *White Paper*, *supra* note 68 at para. 2(a).

<sup>237</sup> M.K. Chan, *supra* note 225 at 9 [footnote omitted].

<sup>238</sup> See J.T.M. Lam & J.C.Y. Lee, *The Dynamic Political Actors in Hong Kong's Transition* (Hong Kong: Writers' and Publishers' Cooperative, 1993) at 4-6.

<sup>239</sup> Rt. Hon. C. Patten, 1995 Policy Address (to the Legislative Council, 11 October 1995) at para. 131, available at "Working with LegCo", [http://www.info.gov.hk/isd/speech/p\\_legco.htm](http://www.info.gov.hk/isd/speech/p_legco.htm) (7 August 1997).

process had developed. When the *Bill of Rights* came into force, the District Boards and Urban Council had already undergone four rounds of elections. The newer Regional Council had witnessed three elections, while the Legislative Council had had two elections and was about to welcome its first directly elected members (in September 1991). Hence, the *Bill of Rights* appeared at a time when the process of self-government was well under way. The incorporation of article 21 into the law of Hong Kong was just a natural step in this process, notwithstanding the events in Tiananmen Square. British control of the process may have been necessary at the beginning to lend guidance and interest in representative government; but it eventually became necessary to "hand over" the reins of governance. After nine years of guided democracy, the purpose of article 21 was to effect this handing over by way of an individual human right.

It is difficult to outline the precise legal ramifications of recognizing this self-government interest. The precise implications of this interest will depend on the facts of each case. The overarching principle is that article 21 and section 13 ought to be interpreted in a manner that is consistent with the values of self-government. Self-government does not necessarily mean independence, but it does mean allowing the Hong Kong people to design and operate the key political, social, economic, legal and cultural institutions in Hong Kong. Most importantly, it means giving the Hong Kong people the choice over how and whom they want to run these key institutions. With respect to heads of power held exclusively by the sovereign, such as defence and foreign affairs, self-government implies that the people of Hong Kong ought genuinely to be consulted on any decision that might have an impact on their lives.

#### IV. Hong Kong's Right-to-Vote Cases

##### A. *Residency Requirement Impugned: Lau San-ching*

Mr. Lau wanted to be a District Board candidate in the 1994 elections, but his nomination was rejected on the grounds that he had not "ordinarily resided in Hong Kong for the 10 years immediately preceding the date of his nomination", as required by section 18(2) of the *Electoral Provisions Ordinance*.<sup>240</sup> The rejection of his nomination came as a shock to Mr. Lau, who was born and raised in Hong Kong. After obtaining a bachelor of science degree at the University of Hong Kong, he worked as a teacher and then as a sales engineer in a computer company in Hong Kong. In December 1980, Mr. Lau started making short trips into Guangzhou, China to meet with groups supporting political reforms on the mainland. On one such excursion in December 1981, Mr. Lau was detained by the Guangzhou authorities and was subsequently charged and convicted for the crime of counter-revolutionary sedition. He was then sentenced to ten years in prison, and after serving the full sentence he returned to Hong Kong on 26 December 1991. Since Mr. Lau was not physically in

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<sup>240</sup> *Supra* note 41.

Hong Kong for the whole ten-year period preceding 1994, his nomination was rejected by the returning officer.

After a failed attempt for judicial review of the returning officer's decision prior to the election,<sup>241</sup> Mr. Lau managed to file his complainant afterwards, by way of petition.<sup>242</sup> He challenged the officer's decision on two separate grounds: (1) that the officer misinterpreted section 18(2) (*i.e.*, Mr. Lau really was "ordinarily resident" the ten years preceding); and (2) that section 18(2) was inconsistent with article 21 of Hong Kong's *Bill of Rights*. Mr. Lau ended up winning on both grounds; but the decision on the *Bill of Rights* issue may have been *obiter dictum*,<sup>243</sup> and Cheung J. was in any event not prepared to declare repealed the legislation despite finding an inconsistency with article 21.

The decision on the first ground was relatively straightforward, since it was merely a matter of applying a leading House of Lords decision on the meaning of "ordinary residence" — *R. v. Barnet London Borough Council, ex parte Shah*.<sup>244</sup> This case held that "ordinary residence" means habitual and normal residence in a particular place, "apart from temporary or occasional absences of long or short duration."<sup>245</sup> Furthermore, the residence must be voluntarily adopted with a degree of settled purpose. Mr. Lau had been ordinarily resident in Hong Kong until his detention in 1981. However, his forced detention in China was neither voluntary nor for a settled purpose; the resulting period of absence, Cheung J. held, could be seen as nothing more than temporary and could not disrupt his period of ordinary residence in Hong Kong.<sup>246</sup>

The decision on the *Bill of Rights* ground is somewhat more interesting, since it was the first judicial opportunity to interpret article 21. In his approach, Cheung J. recognized the constitutional status of article 21, identifying a "*Bill of Rights* regime" in Hong Kong consisting of the B.O.R.O., the I.C.C.P.R., and article VII(5) of the *Letters Patent*.<sup>247</sup> He then borrowed from the existing jurisprudence and recognized the need to adopt a "purposive approach" in construing the *Bill of Rights*.<sup>248</sup> On a plain reading of the provision, Cheung J. found that article 21 gives every permanent resident in Hong Kong the right to vote and to run for election without unreasonable re-

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<sup>241</sup> See *R. v. Apollonia Liu, ex parte Lau San-Ching* (1994), 4 H.K.P.L.R. 400 (H.C.), Mayo J., aff'd (1994), 4 H.K.P.L.R. 415 (C.A.). The High Court and Court of Appeal held that judicial review prior to the District Board election was not available to Mr. Lau. He had to wait until after the election to bring his complaint by way of election of petition.

<sup>242</sup> See *Lau San-ching, supra* note 122.

<sup>243</sup> Cheung J. begins his discussion of the *Bill of Rights* issue by saying, "having decided that Mr. Lau was an ordinary resident, it was not necessary for me to reach a concluded view on the question regarding the *Bill of Rights*" (*ibid.* at 47).

<sup>244</sup> [1983] 2 AC 309.

<sup>245</sup> *Ibid.* at 342, affirming the words of Lord Denning M.R. ([1982] Q.B. 688 at 720).

<sup>246</sup> See *Lau San-ching, supra* note 122 at 47.

<sup>247</sup> See *ibid.* at 48-49.

<sup>248</sup> See *ibid.* at 49 (citing *R. v. Sin Yau-ming, supra* note 143).

restrictions.<sup>249</sup> He went on to say that it is the duty of the Crown to show that the residency requirement for candidacy is reasonable: "[T]he Crown must show that there is a legitimate objective by [*sic*] imposing the restrictions, and that the rationality and proportionality tests must be satisfied."<sup>250</sup>

Adopting parts of a Canadian decision,<sup>251</sup> Cheung J. acknowledged three legitimate objectives for having a residency requirement for voting and candidacy: (1) assurance of the integrity of the electoral process; (2) assurance that voters and candidates are properly informed of the issues in any election; and (3) assurance that voters and candidates have a sufficient connection with the territory.<sup>252</sup> He then went on to find that having a ten-year residency requirement for candidacy was neither rationally connected nor proportional to achieving the three legitimate objectives.<sup>253</sup> Although Cheung J. gave a number of reasons for drawing this conclusion, he was primarily moved by the great disparity in residency requirements between voters and candidates.<sup>254</sup> The legislative scheme at the time provided that all voters had to be ordinarily resident for seven years preceding the date of registration, but there was an exception for permanent residents of Hong Kong.<sup>255</sup> No such exception was made for the residency requirement for candidacy. An absurd result could therefore occur in the case of a permanent resident returning to Hong Kong, for example, after a short and unhappy attempt at living in Canada. This person would qualify to be a voter (because of the exception) but would have to wait another ten years in order to run as a candidate. No adequate reasons were given to justify this differential treatment between voters and candidates.

The Government tried to argue that the strict residency requirement was what the public originally wanted in 1981, and that in the subsequent reviews of developments in representative government, no real desire to alter the status quo emerged. Cheung J. completely rejected these arguments by noting that the constitutional fabric of Hong Kong had changed considerably since 1981.<sup>256</sup> Blind appeals to public opinion could not justify restrictions on fundamental human rights. There had to be rational reasons behind the restriction.<sup>257</sup> As for the silence of the subsequent Government reviews, Cheung J. wanted to see evidence that the *Bill of Rights* was considered before giving this basis any weight.

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<sup>249</sup> See *Lau San-ching*, *ibid.* at 64.

<sup>250</sup> *Ibid.*

<sup>251</sup> *Reference re Yukon Election Residency Requirements* (1986), 1 Y.R. 23 at 26, [1986] N.W.T.R. 213, 27 D.L.R. (4th) 146 (Yukon C.A.).

<sup>252</sup> See *Lau San-ching*, *supra* note 122 at 64-65.

<sup>253</sup> See *ibid.* at 65.

<sup>254</sup> See *ibid.* at 66.

<sup>255</sup> A status one could acquire by being wholly or partly of Chinese race and having ordinarily resided in Hong Kong for a continuous period of seven years (see *Immigration Ordinance*, *supra* note 43, schedule 1 (para. 1)).

<sup>256</sup> See *Lau San-ching*, *supra* note 122 at 67.

<sup>257</sup> See *ibid.*

Although having found an unjustified infringement of article 21, Cheung J. was not prepared to grant a remedy, since it was admitted by all parties that a residency requirement of some form was needed: neither repeal of, nor deletion of words in, the legislation would be satisfactory. He concluded: "It is hoped that the Government would consider a comprehensive review of the residential restriction in our election laws before yet another challenge is lodged in this area."<sup>258</sup> Within six months of the date of judgement, the Government did respond and on 13 July 1995, the residency requirement for candidacy was changed from "10 years" to "3 years" immediately preceding the date of nomination.<sup>259</sup> However, not all the Legislative Council members were content with this change. A private member's bill was introduced to reduce the period further, to 180 days.<sup>260</sup>

The decision in *Lau San-ching* represents a serious attempt to give the rights in article 21 a broad and effective meaning. The Court had no difficulty finding the residency restriction interfered with the right to vote and run for election; the only issue was whether the Government could justify it. By subjecting the restriction to a rigorous three-step limitations test, borrowed from the I.C.C.P.R. and Canadian jurisprudence, the Court gave meaningful content to the words "unreasonable restriction", avoiding unreasoned deference to Governmental action. But Cheung J. could have gone one step further with respect to the identification of the purposes underlying article 21. Although part of his decision did recognize that the right to vote should be given a purposive interpretation, he unfortunately failed to articulate the actual purposes and interests protected by article 21. Identifying the achievement of self-government and the protection of human rights as possible purposes could have assisted his limitation analysis: they represent the values that weighed against the Government's objectives for the residency restriction. Self-government was attenuated because the restriction arbitrarily restricted the pool of Hong Kong people who could run for elections. In terms of the protection of human rights, the restriction not only perpetuated an unjustifiable inequality between voters and candidates, but also arbitrarily diminished the potential representativeness of the elected body and the plurality of viewpoints in the electoral process. Such pluralism is essential to the preservation of human rights in a free and democratic society.<sup>261</sup> Nevertheless, Cheung J.'s dismissal of the Government's historical public-opinion argument has important implications for the meaning of the right to vote. This aspect of the decision affirmed the elevation of the right to vote to the level of a constitutional and human-rights norm in

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<sup>258</sup> *Ibid.* at 69.

<sup>259</sup> See *Electoral Provisions (Miscellaneous Amendments) Ordinance 1995* (Ord. No. 60 of 1995), s. 16.

<sup>260</sup> *Electoral Provisions (Amendment) Bill 1995*, *supra* note 125, cl. 6.

<sup>261</sup> As is recognized in paragraph 15 of "General Comment No. 25", *supra* note 180:

The effective implementation of the right and the opportunity to stand for elective office ensures that persons entitled to vote have a free choice of candidates. Any restrictions on the right to stand for election, such as minimum age, must be justifiable on objective and reasonable criteria. Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation.

1991, marking a fundamental evolutionary step in the system of representative government in Hong Kong. Hence, arguments that attempt to freeze the right to vote in pre-1991 colonial policies must be scrutinized, and rejected if they are inconsistent with the I.C.C.P.R., *Letters Patent* and B.O.R.O.

### **B. Functional Constituencies Challenged: Lee Miu-ling**

Ms. Lee and Mr. Law were permanent residents of Hong Kong who could register to vote in the geographical constituencies but not the functional constituencies. Ms. Lee was an assistant to a Legislative Councillor, and Mr. Law was a retired person; neither his nor her status was recognized under the 1995 system of functional constituencies. They challenged the system of functional constituencies on three levels.<sup>262</sup> First, functional constituencies, they argued, violated the principle of universal and equal suffrage because the system disenfranchised approximately one million Hong Kong people who were eligible to vote only in the geographical constituencies. Second, functional constituencies were repugnant to equal suffrage because the vast differences in their size created gross disparities in voting power. Finally, individual functional constituencies were attacked for their susceptibility to abuse and corrupt practices that were inconsistent with values enshrined in article 21. The plaintiffs ended up losing in both the High Court and the Court of Appeal, and leave to appeal to the Judicial Committee of the Privy Council was denied. The arguments and decisions for each part of the litigation will be discussed and analyzed below.

#### 1. "One Person, One Vote"

At the most general level, it was argued in both the High Court and the Court of Appeal that the system of functional constituencies breached the "one person, one vote" principle protected by article 21(b), namely the right to "universal and equal suffrage." Ms. Lee and approximately one million other Hong Kong electors were disenfranchised in the functional constituencies because their functional status was not recognized by the system. This seems unreasonable.

In the High Court, the Attorney General presented two main arguments to defend the scheme of functional constituencies. First, the Government pointed to the reservation to article 21 contained in section 13 of the B.O.R.O.: "Article 21 does not require the establishment of an elected ... Legislative Council in Hong Kong." *A fortiori*, went the argument, it certainly could not dictate the method of composing the Legislative Council. The second main argument was framed in constitutional terms. The functional constituencies derived their legality from articles VI(1) and VII(3) of the *Letters Patent*, and, it was argued, co-existed in their legislated form with article VII(5), the constitutional link to the B.O.R.O.<sup>263</sup> In the alternative — if co-existence was not

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<sup>262</sup> The legislative scheme challenged was contained in the *Legislative Council (Electoral Provisions) Ordinance*, *supra* note 119.

<sup>263</sup> Articles VI(1) and VII of the *Hong Kong Letters Patent* (1917-1995), as amended by L.N. 406 of 1994 (Hong Kong Government Gazette, vol. 136, no. 26 (1 July 1994) Supp. No. 2, B1462), provide:

possible — it was submitted that articles VI(1) and VII(3) formed an exception to the I.C.C.P.R., according to the principle that the “specific overrides the general”. On this point, the plaintiffs’ response was that article VII(3) had to be consistent with article VII(5) and the *Bill of Rights*, meaning that functional constituencies could be permitted in principle, but only if all geographical electors also had a functional-constituency vote.

In construing article 21, Keith J. of the High Court made a fairly generous initial statement recognizing the protection of equal voting power:

I have no doubt that the [right under article 21(a)], and the right of “universal” suffrage guaranteed by [article] 21(b), requires every permanent resident of

VI. (1) There shall be a Legislative Council in and for the Colony, and the said Council shall consist of sixty Members, being persons who are qualified for election and elected in accordance with laws in that behalf in force in the Colony and of whom —

- (a) twenty shall have been returned in respect of geographical constituencies;
- (b) thirty shall have been returned in respect of functional constituencies; and
- (c) ten shall have been returned by an election committee.

...

VII(1) The Governor, by and with the advice and consent of the Legislative Council, may make laws for the peace, order, and good government of the Colony.

(2) Without affecting the generality of paragraph (1), laws of the Colony may provide for the holding of elections as regards the election of Members of the Legislative Council. Such laws may provide for different categories of such Members and provide generally, or in relation to a particular category of Member, for-

- (a) different systems or methods of election;
- (b) determination of constituencies and the number of Members to be returned in respect thereof;
- (c) qualification or disqualification, as regards electors, candidates for election or such Members;
- (d) tenure of office of Members.

(3) Nothing in this Article 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.

(4) Laws of the Colony may provide, as regards the election of the Members of the Legislative Council, for the appointment of different dates for voting to take place in respect of constituencies of different descriptions or elections of different categories of Members.

(5) The provisions of the *International Covenant on Civil and Political Rights*, adopted by the General Assembly of the United Nations on 16 December 1966, as applied in Hong Kong, shall be implemented through the laws of Hong Kong. No law of Hong Kong shall be made after the coming into operation of the Hong Kong Letters Patent 1991 (No. 2) that restricts the rights and freedoms enjoyed in Hong Kong in a manner which is inconsistent with that Covenant as applied in Hong Kong.

Hong Kong to be entitled to vote in the election of members to the Legislative Council, and to be effectively represented by the members elected in their constituencies. I equally have no doubt that the right of “equal” suffrage guaranteed by [article] 21(b) requires every permanent resident of Hong Kong to have the same voting power and to be accorded votes of equal weight in such elections.<sup>264</sup>

In addressing the plaintiffs’ “one person, one vote” argument, Keith J. was prepared to find a *prima facie* violation of article 21:

[T]he concept of equal voting power can only be satisfied by a system which accords to each voter the same number of votes — the “one person, one vote” principle. Moreover, a restriction on the right of all voters to have the same number of votes cannot be regarded as reasonable if the system which accords more votes to some voters than to others does so by reference to distinctions based on their status.<sup>265</sup>

One other significant victory for the right to vote in Hong Kong was Keith J.’s interpretation of the section 13 limitation, which effectively rendered the section a “dead letter.”<sup>266</sup> He held that section 13 may have had some meaning before the Legislative Council had elected members (prior to 1985), but that since elections to the Legislative Council were established, they had to be conducted in accordance with article 21 of the *Bill of Rights*.<sup>267</sup> This holding appears to represent the authority on this issue, as there was no reference made to this argument in the Court of Appeal decision.

Despite finding a *prima facie* violation and rejecting the argument based on section 13, Keith J. accepted the Government’s constitutional argument that the functional constituencies were saved by article VII of the *Letters Patent*. Article VII(5), while preventing the laws of Hong Kong from derogating from the rights contained in the I.C.C.P.R., did not prevent the *Letters Patent* themselves from derogating from those rights. On a plain reading, he readily construed article VII(3) as a derogation from the right in article 25 of the Convention, and found added support for this conclusion in the fact that article VII(3) was added two years after article VII(5), which implied that the Government was trying to immunize its 1995 election proposals to challenges under the *Letters Patent*.

In the Court of Appeal, Bokhary J.A. wrote the majority decision on the substantive issues.<sup>268</sup> Godfrey J.A. concurred in the result but applied a slightly different approach. At the outset of his decision, Bokhary J.A. unhesitatingly rejected the Government’s so-called “growing pains” argument, that Hong Kong’s electoral system was at an embryonic stage and therefore had to be judged more sympathetically and less stringently. He held that the real issue was “whether or not an unconstitutional

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<sup>264</sup> *Lee Miu-ling, supra* note 123 at 189.

<sup>265</sup> *Ibid.*

<sup>266</sup> *See ibid.* at 197-98.

<sup>267</sup> *See ibid.*

<sup>268</sup> *See Lee Miu-ling (C.A.), supra* note 123 at 587-94. Litton V.P. adopted the reasons of Bokhary J.A. but added further comments on the issue of standing and the form of relief requested by the appellants (*see ibid.* at 595-97).

inequality of suffrage has found its way into Hong Kong's present electoral system and not with how that system may evolve in future."<sup>269</sup> However, Bokhary J.A. was also quick to note the serious consequences of accepting the plaintiffs' arguments: (1) the thirty functional-constituency members elected in 1995 would be disqualified; (2) there would be no Legislative Council because the *Letters Patent* required that there be sixty members; and (3) there would be no Legislative Council to enact the laws necessary to re-form the Legislative Council — this would have to be done by imperial legislation.<sup>270</sup>

In addressing the plaintiffs' "one person, one vote" argument, Bokhary J.A. upheld the legislation on the same constitutional basis used by the High Court. He noted that article VII(3) was in specific terms and that the system of functional constituencies came squarely within that article.<sup>271</sup> Since article VII "cannot be read as rendering unconstitutional something which goes no further than what it in terms permits",<sup>272</sup> it was held that the legislative scheme was justified. Godfrey J.A. appeared to apply a slightly broader approach by holding that irrespective of article VII(3), if the law "makes some distinction of status other than that of answering to a particular description, or imposes any unreasonable restriction on the right to vote, the law cannot stand with [article] VII(5)."<sup>273</sup> However, in applying these two additional tests, it appears that having already found it to be consistent with article VII(3), Godfrey J.A. had little difficulty saying that the law was neither unreasonable nor made any unjustified distinction of status.<sup>274</sup> Without further elaboration of these two tests, it is difficult to identify the practical difference between the approaches of Bokhary and Godfrey J.A.

The plaintiffs lost on this main issue not so much because of any article 21 analysis, since both Keith J. and the Court of Appeal were prepared to find a *prima facie* violation, or in the words of Bokhary J.A., "a departure from identical treatment".<sup>275</sup> The basis for the defeat was a more general constitutional-law problem arising from two inconsistent provisions in the constitution. The basic notion underlying the approaches to constitutional interpretation at both levels of court is that the State can give with one hand and take back with the other so long as its intention is sufficiently clear. Assuming this premise is acceptable as a general principle,<sup>276</sup> the question remains whether the text of article VII(3) and the circumstances surrounding its enactment demonstrated a sufficiently clear intention to derogate from article VII(5).

<sup>269</sup> *Ibid.* at 590.

<sup>270</sup> See *ibid.* at 588-89.

<sup>271</sup> See *ibid.* at 593-94.

<sup>272</sup> *Ibid.* at 593.

<sup>273</sup> *Ibid.* at 594.

<sup>274</sup> See *ibid.* at 595.

<sup>275</sup> *Ibid.* at 593.

<sup>276</sup> See *Reference re an Act to Amend the Education Act (Ontario)*, [1987] 1 S.C.R. 1148 at 1197-98, 40 D.L.R. (4th) 18, where there existed a potential conflict between a provision in the *Charter*, *supra* note 133, and another one in the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3; the majority of the Court resolved the conflict by holding "[i]t was never intended . . . that the *Charter* could be used to invalidate other provisions of the Constitution, particularly a provision such as s. 93 which represented a fundamental part of the Confederation compromise" (Wilson J.).

Of course, the answer to this question is a product of interpretation, and all the principles of constitutional interpretation discussed earlier should apply. Keith J. in the High Court was particularly influenced by the timing of the promulgation of article VII(3), as it was enacted some time after 1991, when the article constitutionalizing the B.O.R.O. — article VII(5) — was enacted. Bokhary J.A. did not even refer to timing and, without much reasoning at all, concluded that the functional-constituency legislation was clearly permitted by article VII(3).

Both courts failed to recognize one important common-law principle of interpretation that has been used by courts for years to infer a legislature's intention. Speaking in the context of Canada's *Charter*, Professor Anne Bayefsky has described the principle in the following manner:

There is a presumption at common law that Parliament and the legislatures do not intend to act in breach of international law, either customary or conventional. Concomitantly, there is a principle of construction that Canadian law should be interpreted, as far as possible, consistently with international law. In other words, there is an interpretative presumption, applicable in the context of construing the *Charter*, that Parliament and the legislatures intend to fulfil Canada's international obligations.<sup>277</sup>

This common-law presumption dates back to 1883, when in the case of *Bloxam v. Favre*,<sup>278</sup> it was held that "every statute is to be so interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations or with the established rules of international law."<sup>279</sup> In a more recent case, *Salomon v. Commissioners of Customs & Excise*,<sup>280</sup> Diplock L.J. said: "there is a prima facie presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations."<sup>281</sup> Keith J.'s finding that the functional-constituency scheme violated article 21 despite the reservation in section 13 implied that the United Kingdom was in violation of its international obligation under article 25 of the I.C.C.P.R. He and the Court of Appeal ought to have considered the common-law presumption in favour of international law in interpreting article VII(3) of the *Letters Patent*. This is particularly true where, as in this case, the provision in question (article VII(3)) is ambiguous and amenable to a reading that does not undermine the meaning of the other provision (article VII(5)). The words "functional constituencies" were not explicitly mentioned in article VII(3), and the description that is mentioned — "persons generally or persons of a particular description" — could be narrowly read to include only the potential geographical-constituency electorate. This would ensure article VII(3)'s consistency with the dictates of "universal and equal suffrage" in article 21(b) within the bounds of its plain meaning. The distinction between "persons generally" and "persons of a particular description" would then refer to the

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<sup>277</sup> A.F. Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto: Butterworths, 1992) at 20-21 [references omitted].

<sup>278</sup> (1883), 8 P.D. 101, aff'd. (1884), 9 P.D. 130 (C.A.).

<sup>279</sup> *Ibid.* at 107.

<sup>280</sup> (1966), [1967] 2 Q.B. 116 (C.A.).

<sup>281</sup> *Ibid.* at 143.

Government's continuing prerogative to subdivide the electorate into groups of a particular description. Under this reading, however, the *entire* electorate in the geographical constituencies would have an extra vote in the functional constituencies designed by the Government.

At first blush, it appears from Godfrey J.A.'s decision that he was going to require the Government to justify the functional-constituency legislation on the basis of the inherent limitation clause in article 21, irrespective of article VII(3)'s effect. However, in holding that the law did not make distinctions of status other than those of answering to a particular description, he failed to consider the "effect" of the legislation on particular groups in society. Had he done so, it would have been apparent that the Government's scheme systematically disenfranchised marginal groups such as students, the elderly, women who work at home, the disabled and the unemployed.<sup>282</sup> Whether intended or not, the legislation had a disparate impact on these groups in a way that is repugnant to the values of equality enshrined in the *Bill of Rights* and I.C.C.P.R. Godfrey J.A.'s analysis of the "unreasonable restriction" limitation is equally disappointing. He stated that it was "quite impossible" to hold that the functional-constituency scheme was an unreasonable restriction on the right to vote, essentially because article VII(3) allowed such restrictions. But with respect, Godfrey J.A. ought to have subjected the whole scheme, *including* article VII(3) of the *Letters Patent*, to a rigorous justification test demanding legitimate objective, rational connection and proportionality, as was done in *Lau San-ching*.

## 2. Size of Functional Constituencies

The second challenge to functional constituencies was based on the great disparity in constituency sizes. The concept of "universal and equal suffrage" means that all voters should have equal voting power. Where constituency sizes vary greatly, those in a very small constituency have much more voting power than those in the larger ones.

In both the High Court and the Court of Appeal, the Attorney General tried to argue that the functional constituencies were not impugned by the *Bill of Rights* on the ground that they were reasonable when seen from the perspective of the historical development of representative government in Hong Kong. This contextual argument recognized that different countries were at different stages of political development, and in the case of Hong Kong, functional constituencies were an essential link in a

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<sup>282</sup> The Human Rights Committee adopted the following observation on 1 November 1995:

The Committee considers that the electoral system in Hong Kong does not meet the requirements of article 25, as well as articles 2, 3 and 26 of the Covenant. It underscores in particular that only 20 of 60 seats in the Legislative Council are subject to direct popular election and that the concept of functional constituencies, which gives undue weight to the views of the business community, discriminates among voters on the basis of property and functions. This clearly constitutes a violation of articles 2, paragraph 1, 25(b) and 26" (HRC Observations, *supra* note 209, para. 65).

gradual process of political reform, which was leading gradually to a legislature elected by universal suffrage.

Keith J. was quite willing to defer to the Attorney General's contextual argument. The following passage reveals how he adopted the Government's reading of the history of representative government without, it is respectfully submitted, considering whether the implications of that reading were reasonable:

It may be said that if there are twice as many accountants as engineers, the Accountancy functional constituency should be represented by two members of the Legislative Council rather than one. But I must, I think, bear in mind that representative government is a relatively new phenomenon in Hong Kong, the development of representative government is a gradual process, and the state of political development in Hong Kong is an important factor in construing the rights guaranteed by [article] 21 of the *Bill of Rights*. I do not read [article] 21 of the *Bill of Rights*, in the current state of Hong Kong's political development, as requiring particular groups of professionals or working persons to have greater representation in the Legislative Council simply because there are more of them. In other words, [article] 21 should not, at this embryonic stage in the development of Hong Kong's electoral process, be regarded as requiring sectional interests to be represented in the Legislative Council proportionate to their size.<sup>283</sup>

In the Court of Appeal, Bokhary J.A., as we have seen, had no difficulty in rejecting this "growing pains" argument at the outset, calling it "a distraction from the real issue."<sup>284</sup> In his analysis, he first recognized that constituency sizes constituted a "departure from identical treatment", which was sufficient to shift the onus onto the Government to justify "the departure" according to a three-step test. This test was taken from one of Bokhary J.A.'s earlier decisions, in *R. v. Man Wai-keung (No. 2)*,<sup>285</sup> which was a case interpreting the meaning of "equality before the courts" in article 10 of the *Bill of Rights*. Three things had to be shown to justify a departure from literal equality:

that sensible and fair-minded people would recognize a genuine need for some difference of treatment; two, that the difference embodied in the particular departure selected to meet that need is itself rational; and, three, that such departure is proportionate to such need.<sup>286</sup>

In applying this test, Bokhary J.A. had "no hesitation" in finding that sensible and fair-minded people would recognize a need for some difference of treatment because "by their very nature, functional constituencies are bound to vary in size."<sup>287</sup> He held that it would not be feasible to devise groups defined by function and then force an

<sup>283</sup> *Lee Miu-ling*, *supra* note 123 at 192.

<sup>284</sup> *Lee Miu-ling (C.A.)*, *supra* note 123 at 590. While Bokhary J.A. was prepared to decide this issue on the merits, the other two justices had greater difficulty with whether the plaintiffs had sufficient standing to bring the complaint. Given that neither was entitled to vote in the functional constituency, it was held that they had no particular interest in the varying sizes of those constituencies.

<sup>285</sup> (1992) 2 H.K.P.L.R. 164 (C.A.) [hereinafter *Man Wai-keung (No. 2)*].

<sup>286</sup> *Lee Miu-ling (C.A.)*, *supra* note 123 at 591, citing *Man Wai-keung (No. 2)*, *ibid.* at 179.

<sup>287</sup> *Lee Miu-ling (C.A.)*, *ibid.*

equal number of persons into each. With respect to the second and third branches of the test, Bokhary J.A. gave a rather cursory analysis stated mostly in conclusory terms:

Nobody would suggest that if each and every sensible and fair-minded person in Hong Kong were to sit down and draw up the territory's functional constituencies on his or her own, all of them would come up with the same result. It is in the nature of things that the results would be highly diverse.

Would sensible and fair-minded people condemn that arrangement as irrational or disproportionate? The question does not fall to be answered by public opinion poll or by referendum. It falls to be answered by judicial decision. Giving the matter my best consideration, I answer the question in the negative: they would not so condemn it.<sup>288</sup>

A fundamental problem with the decisions from both courts was the failure to understand the purposes underlying article 21(b), having regard to the philosophical values of the right to vote considered within Hong Kong's historical context. Such an understanding would have been particularly appreciated in the Court of Appeal's first decision on the meaning and proper approach to article 21 of the *Bill of Rights*. While Keith J. did refer to Hong Kong's political history in construing article 21, with respect, his characterization and interpretation of that history were problematic. Given the historical and contextual analysis suggested earlier in this paper, it cannot be said that Hong Kong is at an "embryonic stage" of democratic development. Even Cheung J. in *Lau San-ching* presented a different picture of Hong Kong's political past:

One simply has to recognize that there has been great changes [*sic*] in Hong Kong since 1981. There has been greater participation by the population in public affairs in terms of election and standing as candidates in the District Boards, Municipal Councils and Legislative Council elections.<sup>289</sup>

The Court of Appeal was therefore correct to reject Keith J.'s historical characterization. However, it would be wrong to understand Bokhary J.A.'s rejection of the historical argument as suggesting that history and context are irrelevant to article 21 analysis. In fact, what is missing in *Lee Miu-ling* is the comprehensive reading of Hong Kong's political, constitutional and social context necessary to discover the purposes of the right to vote. Having undertaken such a reading in this paper, the dual purposes of self-government and the protection of human rights have emerged. Because of the "explicitness" of the words "equal suffrage" in article 21(b), and for other reasons, it has been argued that absolute equality in constituency size must be the starting point. In accordance with McLachlin J.'s approach in the Canadian jurisprudence, deviation from this standard is permissible so long as it is consistent with the values of self-government and the protection of human rights. While Bokhary J.A. did recognize that absolute equality was the starting point, and that any departures therefrom would have to be justified by the Crown, he then skipped directly to the three-step "reasonableness" test. He missed the intermediate step of considering whether the departure from equality could be justified by the purposes of the right to

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<sup>288</sup> *Ibid.* at 592.

<sup>289</sup> *Lau San-ching*, *supra* note 122 at 67.

vote. In the analysis that follows, this intermediate step will be taken using the framework presented in this paper; Bokhary J.A.'s three-step reasonableness test will also be discussed.

The disparities in the 1995 functional constituencies were inconsistent with values of self-government and the protection of human rights, nor could they be justified on the basis of effective representation. To appreciate the negative consequences of having gross disparities in constituency sizes, it is first important to recognize the two distinct functions performed by elected representatives. According to McLachlin J. in the *Electoral Boundaries Reference*,

[e]ach citizen is entitled to be *represented* in government. Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative; ... elected representatives function in two roles — legislative and what has been termed the "ombudsman role".<sup>290</sup>

In the High Court, Keith J. recognized that functional constituencies had a legitimate objective of giving "different sectional interests a voice of their own in the Legislative Council."<sup>291</sup> Naturally, functional-constituency representatives have a duty to represent their sectional interests in the Legislative Council. At the same time, it should not be forgotten that these same representatives play an "ombudsman role" vis-à-vis the members in their respective constituencies. As the size of a functional constituency increases, the representative's effectiveness in carrying out this role is diminished given an anticipated increase in the number of grievances, inquiries and concerns. Assuming that sectional interests are equally valued, it appears difficult if not impossible to justify the disparity in voting power on the basis of effective representation, as there is no apparent good reason why certain functional constituencies should be afforded more effective representation over others.

By looking more closely at who exactly is disadvantaged by the legislative scheme, it becomes apparent that the scheme cannot be justified on the basis of, and is indeed inimical to, self-government and the protection of human rights. When Governor Patten arrived in Hong Kong, he introduced nine new functional constituencies without changing the existing ones. With these new constituencies, Governor Patten's intent was to enfranchise 2.7 million people from the working class. But by distributing these people within only nine constituencies, their voting power was considerably weaker than the voting power of the approximately 200,000 electors in the twenty old functional constituencies.<sup>292</sup> Underlying this gross disparity was social and economic inequality. The old functional constituencies, building on those put in place in 1985, represented the elite business, industrial, professional and local-government organizations, while the electors in the new constituencies were working-class people in various economic sectors (see Table 6 in Part I). The 1995 legislative scheme disadvantaged the latter group even though simple working people, compared to professionals and business executives, are less capable of fending for their human rights.

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<sup>290</sup> *Electoral Boundaries Reference*, *supra* note 154 at 183 [emphasis in original].

<sup>291</sup> *Lee Miu-ling*, *supra* note 123 at 192.

<sup>292</sup> Figures taken from *ibid.* at 191.

Similarly, this sector of society will tend to lack the political connections and economic clout to have an effective say in the conduct of public affairs. In most cases, how effectively a representative performs his or her ombudsman role will determine whether the least powerful will have a voice in the political process. A scheme of functional constituencies that gives the least powerful members of society the least effective representation is clearly inconsistent with the values of self-government and the protection of human rights.

Keith J.'s treatment of the "unreasonable restriction" clause was somewhat disappointing and inconsistent with the extensive treatment accorded to it by Cheung J. in *Lau San-ching*. Keith J. failed to give any content to what is meant by "unreasonable restriction", and failed to invoke the concept of proportionality in his reasoning. He stated:

Functional constituencies will by definition vary greatly in size. Thus, if there are, for example, twice as many accountants than engineers, the electorate in the Accountancy functional constituency is going to be twice as large as the electorate in the Engineering functional constituency. If that means that the votes of engineers carry greater weight [than] the votes of accountants, that is merely a function of the existence of more accountants than engineers. To the extent, therefore, that in this example the rights of accountants to equal suffrage with engineers can be said to be restricted, the existence of more accountants than engineers renders that restriction reasonable.<sup>293</sup>

In framing the issue in this manner, it is respectfully submitted that Keith J. took for granted the reasonableness of the Government's decision, first, to establish functional constituencies for accountants and engineers, *per se*, and, second, to assign the same number of representatives to each constituency. It must always be remembered that when a court considers whether the restriction is reasonable, it has already found a *prima facie* violation of the principle of "equal suffrage" and thus of the right to vote. It is for the State to then justify the reasonableness of the impugned scheme by demonstrating that the restrictions are proportionate responses to the achievement of the legitimate objective — in this case, the representation of sectional interests. It is submitted that Keith J. should have measured the infringement against the entire legislative scheme, and asked whether the Government could have designed a system of functional constituencies meeting its legitimate aim of providing representation for sectional interests without causing such a disparity in voting power. The answer to this question must be yes. There were many small constituencies with interests similar enough (*e.g.*, local government bodies) to have been grouped together without injuring the representation of their particular sectional interests. As for the larger groups, it may have been necessary to break them up into separate constituencies or to assign them more representatives in the interests of the constituents' "ombudsman" and "legislative" needs. While Keith J. considered the possibility of increasing the number of representatives for larger constituencies, as argued earlier, his dismissal of this idea in deference to the Government's contextual argument is most unsatisfactory.

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<sup>293</sup> *Ibid.* at 192.

While Bokhary J.A.'s formulation of a limitation test was an improvement over Keith J.'s deferential approach, the former's application of that test was equally disappointing. First, the precise authority for his formulation was unclear. Although his three-step test mimics the limitation tests used in *Lau San-ching* and under the I.C.C.P.R. and the Canadian *Charter*, material differences in both formulation and application appear under close scrutiny. Bokhary J.A. cited *Man Wai-keung (No. 2)* as the authority for his test. In that case the defendant argued that the statutory bar against recovery of costs (where a successful appeal leads only to a new trial) violated the right to equality before the courts guaranteed in article 10 of the *Bill of Rights*.<sup>294</sup> There were three separate decisions and each judge appears to have formulated his own limitation test.<sup>295</sup> Bokhary J.A. invoked the test he would later use in *Lee Miu-ling*, but cited no authority for it. As a result, it is unclear whether the first step of Bokhary J.A.'s test (whether sensible and fair-minded people would see a need for the distinction) is the same as the first step under the I.C.C.P.R. system or the Canadian *Oakes* test (whether the objective of the legislation is pressing and substantial).<sup>296</sup> In the *Oakes* test, the government is forced to articulate the reasons and purposes behind the legislation and to justify their importance. In applying the first step of his test in *Lee Miu-ling*, Bokhary J.A. failed to identify the legitimate objectives behind the scheme of functional constituencies. He simply stated that sensible and fair-minded people would see a need for the distinction because it is inevitable that functional constituencies would be of different sizes. This conclusion of course says nothing about the importance of the legislative objectives. Nor did Bokhary J.A. subject the legislation to rigorous tests of rationality and proportionality; he resolved these issues by simply stating that sensible and fair-minded people would not necessarily agree on how to draw up functional constituencies. But the importance of the purposes of the right to vote demand that the government's limitation of that right be subjected to a more rigorous test of proportionality. Asking whether the state has chosen the means to its legislative objective that minimally impairs the individual right is a much fairer assessment of proportionality than abstract speculation of what sensible and fair-minded people would think. Had Bokhary J.A. taken this further step of assessing minimal impairment, the various possibilities for arranging the functional constituencies so as to ensure equality in constituency size while maintaining representation of

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<sup>294</sup> The opening of art. 10 reads:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law ... (*Bill of Rights, supra* note 2, art. 10).

<sup>295</sup> Silke V.P. approached the issue by looking at the rationality, the reasonableness and the proportionality of the distinction (see *Man Wai-keung (No. 2)*, *supra* note 285 at 168ff.). Nazareth J.A.'s approach most closely paralleled the approach used in Canadian *Charter* jurisprudence. He first tried to identify the necessary or desirable social objective of the legislation, and then applied the rationality and proportionality tests (see *ibid.* at 177-78). Bokhary J.A.'s decision (see *ibid.* at 178ff.) is discussed in the text.

<sup>296</sup> See *Oakes, supra* note 159.

sectional interests would have been sufficient to ground a finding that the 1995 constituencies were unjustifiable.

One cannot help thinking how much of the reasoning in the Court of Appeal was motivated by perceived consequences of allowing the plaintiffs' appeal within the context of a narrow approach to constitutional remedies. The possibilities of ordering appropriately worded declarations and of editing the legislation by striking out certain words and phrases were completely dismissed as being outside the jurisdiction of the Court. Nor was there any discussion of suspending the operation of a declaration of unconstitutionality, or of withholding the remedy to allow the legislature to address the problems identified, and to effect a remedy only if after some time, the legislature has refused to take the requisite steps (the approach used in *Lau San-ching*).

### 3. Subsidiary Complaints

Finally, the legitimacy and integrity of individual functional constituencies were attacked. These arguments were made in the High Court but later withdrawn at the Court of Appeal. Essentially, the point was that government-established constituencies that were open to manipulation were inconsistent with the democratic values enshrined in article 21. The plaintiffs pointed to the "Rural" and second "Commercial" functional constituencies as examples of constituencies that practiced gender and racial discrimination in the selection of candidates and members. They also pointed to the abuses of corporate voting, and cited the vulnerability of some constituencies to corrupt practices, an evident problem in the 1991 elections.<sup>297</sup>

In dismissing a number of these subsidiary arguments, Keith J. resorted to his earlier comment that "equal voting power" did not mean "absolute equality" in voting power.<sup>298</sup> It appears that Keith J. may have misconceived some of these arguments as bearing only on the principle of equal suffrage, missing the fact that they point more generally to the Government's duty to set up an electoral system that is not susceptible to fraud or manipulation. This principle is fully reflected in article 21, which requires that permanent residents be given the "opportunity" to exercise the right to vote at genuine periodic elections guaranteeing the free expression of the will of the electors. It is also interesting to note how the evidence of gender discrimination in the Rural functional constituency was dealt with.<sup>299</sup> Keith J. again accepted the contextual "growing pains" argument, holding that in light of the "state of political development in Hong Kong ... [and] [i]n view of the progress being made towards the elimination of discriminatory electoral practices in the New Territories," the method of choosing members to the Rural constituency had no impact on whether there had been an in-

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<sup>297</sup> See *Lee Miu-ling*, *supra* note 123 at 193ff. See generally R.Y.F. Kwok, "Government and the Electoral Process: The Need for Review" in *Votes Without Power*, *supra* note 214, 187 at 188.

<sup>298</sup> See *Lee Miu-ling*, *ibid.* at 194.

<sup>299</sup> The electors in the Rural functional constituency were members of the Heung Yee Kuk, comprised almost entirely of male village representatives.

fringement of article 21.<sup>300</sup> In case he erred on any of these points, Keith J. had no difficulty dismissing the plaintiffs' subsidiary complaints for lack of standing.<sup>301</sup>

## V. The Future of the Right to Vote in Hong Kong

### A. Constitutional Impediments

The increasing representativeness of the Legislative Council under the Basic Law represents only one facet of the future of the right to vote in Hong Kong. A comprehensive understanding of the right must take into consideration inevitable legal and political encroachments. There are a number of restrictions on the right to vote contained in the Basic Law. The restrictions affect the right from different angles, and primarily concern the composition and powers of the Legislative Council.

Article 57 specifies that all the Legislative Council members must be permanent residents of the H.K.S.A.R., and eighty percent must be Chinese citizens with no right of abode in any foreign country. This proportional limit poses serious problems of implementation. Under the prescribed system of elections, it seems impossible to guarantee the eighty-percent minimum without discriminating against potential candidates or validly elected members. In light of the implementation problems, it may mean that the twenty percent allowance will be read out of the article and all candidates will have to be Chinese citizens with no right of abode in any foreign country.

A further limit on the Legislative Council's membership is disguised in the power of the President of the Legislative Council to declare any member of the Council no longer qualified for the office.<sup>302</sup> The President shall exercise this power in seven different situations: where a councillor loses the ability to discharge his or her duties, is absent from meetings for three consecutive months without valid reason, loses permanent-residency status, accepts a government appointment, is bankrupt or fails to comply with a court order to repay debts, is convicted and sentenced to imprisonment for one month or more, or is censured for misbehaviour or breach of oath. The last two grounds require a two-thirds majority of all the Legislative Council members present. Overall, these restrictions go much further than those under the *Electoral Provi-*

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<sup>300</sup> See *Lee Miu-ling*, *supra* note 123 at 196.

<sup>301</sup> Though Keith J. may have been correct that the plaintiffs did not have standing to bring these arguments, he did not properly recognize their substance. For example, where it is true that women have been effectively excluded from becoming electors in a functional constituency representing "rural interests", these women have simply not had the right and the "opportunity" to vote and to run for election. Even if it could be shown that private individuals were directly responsible for treating women unfairly at the village level, there was still a positive obligation on the Government to provide the opportunity to vote.

<sup>302</sup> See Basic Law, *supra* note 4, art. 79. Article 71 provides that the President is to be elected from among the members of the Legislative Council; however, he or she must be a Chinese citizen of not less than 40 years of age, "who is a permanent resident with no right of abode in any foreign country and has ordinarily resided in Hong Kong for a continuous period of not less than 20 years."

sions Ordinance, leaving the Legislative Council's elected President with a significant degree of power.

One of the significant changes in the operation of the Legislative Council since it acquired democratically minded members in 1991 had been the increase in the number of private member's bills.<sup>303</sup> It was a means to focus public attention on important issues, and forced the Government to become more accountable to the Hong Kong people. The Basic Law appears to reverse this democratic trend, pushing towards more of an executive-led system. Article 74 declares that Legislative Council members may introduce private member's bills "which do not relate to public expenditure or political structure or the operation of the government." It goes on to say that bills relating to "government policies" require the consent of the Chief Executive before they may be introduced. Depending on how this section is interpreted, it appears that greater restrictions now exist on the power to introduce private member's bills.

Another important restriction on the law-making powers of the Legislative Council is contained in Annex II, under the heading "Procedures for Voting on Bills and Motions". Government bills require only a simple majority of all members of the Legislative Council to pass. However, motions, bills or amendments to government bills introduced by individual members of the Legislative Council require a simple majority in two separate groupings of the Legislative Council: (1) members returned by functional constituencies; and (2) members returned by geographical constituencies through direct elections and by the Election Committee. From 1991 it was already apparent that the functional-constituency membership and the directly elected members had opposing interests. The former group had strong economic interests and were more conservative in their decision-making, while the latter group, consisting primarily of outspoken members of the Democratic Party, had no hesitation in criticizing the Hong Kong and Chinese Governments on issues of human rights and democracy. The method of voting in the Basic Law seems to take advantage of this polarization to reduce the power of all Legislative Council members to criticize and alter the Government's legislative programme.

These impediments become a greater cause for concern when the prescribed rules for interpreting and amending the Basic Law are considered. Unlike all other common-law jurisdictions, where the courts are the guardians of the constitution,<sup>304</sup> article 158 vests the power of interpretation of the Basic Law in the Standing Committee of the National People's Congress. In certain situations, the courts in the H.K.S.A.R. must seek an official interpretation from the Standing Committee, such as dealing with a provision of the Basic Law concerning affairs that are the responsibility of the Central People's Government or concerning the relationship between the Central Authorities and the Region. In light of China's resistance to Governor Patten's democratic reforms, anticipated encroachments on the right to vote can only be aggravated by reserving the final interpretation of the Basic Law to a political body of the People's Republic of China.

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<sup>303</sup> See C. Yeung, "Warning over private bills" *South China Morning Post* (5 August 1995) 4, for the concerns of one Government official about this recent trend.

<sup>304</sup> See e.g. U.S. Const. art. III, §2: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution ..."

Finally, article 159 provides that the power of amendment shall be vested in the National People's Congress. The H.K.S.A.R. may propose bills to amend the Basic Law, but it must first receive the consent of two-thirds of the deputies of the Region in the National People's Congress, two-thirds of all the members of the Legislative Council and the consent of the Chief Executive. Above all, no proposed amendment shall contravene the established basic policies of the People's Republic of China regarding Hong Kong. Once proposed, the final decision is in the hands of the National People's Congress. The difficulties of amending the Basic Law only go to entrench its encroachments on the right to vote.

### **B. Real and Anticipated Encroachments**

Political encroachments become legal ones when the words and actions behind the former become translated into laws of general application. Chinese political encroachments on the right to vote in Hong Kong intensified steadily after the breakdown in diplomatic talks over the 1994-95 electoral arrangements. To the chagrin of many in Hong Kong and around the world, the Chinese political threats have slowly materialized into actual laws and institutions in the period leading up to and after the transfer of sovereignty. A review of some of the more significant encroachments in this period follows.

#### 1. The Provisional Legislature: Democracy in Reverse

The provisional legislature is China's political response to the implementation of Governor Patten's democratic reforms. It is probably true that when the Basic Law was promulgated, there was an honest intention on the part of China to permit some if not all of the 1995 Legislative Council members to continue to sit into the second half of 1997. Of course, this was under the assumption that China could dictate the manner of elections in 1995 and that Britain would defer to the incoming sovereign. But this was not to be, and relations between the two countries became unsettled with Governor Patten's arrival. China was not pleased with the content of his opening address to the Legislative Council in October 1992; they were equally infuriated with the fact that the Governor went straight to Hong Kong with his proposals without first consulting and meeting with the future masters.<sup>305</sup> Although Governor Patten had fully intended to negotiate with China before implementing his proposals, his entrance did not set a pleasant tone for the subsequent negotiations. After seventeen rounds of talks, the parties were unable to reach an agreement. In February 1994, Britain unilaterally issued a *White Paper* on representative government in Hong Kong explaining why the talks had failed and why it had to go ahead with legislation to implement the Governor's original proposal.<sup>306</sup> This action did not please the Chinese authorities, who responded with their own paper blaming the failure to reach an agreement on the British.<sup>307</sup>

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<sup>305</sup> See J.M.M. Chan, *supra* note 225 at 15.

<sup>306</sup> See 1994 *White Paper*, *supra* note 63.

<sup>307</sup> See *Facts about Sino-British Talks*, *supra* note 78.

China had always held that Patten's proposals were in violation of the *Joint Declaration* and the Basic Law; hence, in the course of negotiation, they were only willing to accept one of Patten's proposals, namely the lowering of the voting age. In response to Governor Patten's unilateral action, the Chinese authorities stated that there would be no "through train" for the 1994-95 three-tier political system; the system would be dismantled and they would set up their own political bodies in accordance with the Basic Law in or prior to 1997.<sup>308</sup> One such body was the Preparatory Working Committee, set up in June 1993, approximately two-and-a-half years before the official Preparatory Committee was to be established according to the Basic Law.<sup>309</sup> China's explanation for this early intrusion was the need for preparation, yet it clearly showed their willingness to interfere with the political affairs of Hong Kong.

The announcement of a provisional legislature was made around the time that negotiations broke down between China and Britain.<sup>310</sup> If China was going to reassemble the Legislative Council in 1997 according to the Basic Law, then presumably this would be by elections, similar to what was done in 1995. However, China argued that a newly elected Legislative Council could not immediately be assembled on 1 July 1997; to prevent a vacuum, it was necessary to have some kind of interim legislature while preparations for the eventual elected one were taking place. In July 1995, it was reported that this "provisional legislature" would be established as early as July 1996.<sup>311</sup> China justified this intrusion by claiming that a legislature was needed to endorse the appointment of judges to the Court of Final Appeal (to be established on the date of transfer) and to pass laws — required by the Basic Law — that had to be in place after 1997.<sup>312</sup>

On 21 December 1996, 130 candidates were considered by a China-appointed 400-member selection committee for the sixty-seat Provisional Legislative Council. Most of the pro-democracy legislators, including the members of the Democratic Party, refused to be involved in this selection process.<sup>313</sup> After its establishment in December 1996, the provisional legislature stationed itself on the mainland and began the process of drafting laws, which, according to China and the designated H.K.S.A.R. authorities, had to be in place on or shortly after 1 July 1997 in order to

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<sup>308</sup> See *ibid.* at 55; J.M.M. Chan, *supra* note 225 at 20-21; "U.K.-China Relations", *supra* note 78 at xlix.

<sup>309</sup> See J.M.M. Chan, *ibid.* at 23.

<sup>310</sup> See Y. Ghai, "Back to Basics: The Provisional Legislature and the Basic Law" (1995) 25 H.K.L.J. 2 at 2.

<sup>311</sup> See C. Yeung & K.Y. No, "Concerns on parallel legislature" *South China Morning Post* (17 July 1995) 1.

<sup>312</sup> See *ibid.*

<sup>313</sup> See Mickleburgh, *supra* note 106. It also appears that the Hong Kong public in general did not approve of the provisional legislature. In a survey published in March 1997, 48 percent said the 1995 elected Legislative Council was the best body to protect their interests; only four percent cited the provisional legislature. Fifty-eight percent said the latter was less representative of their views (see R. Mickleburgh, "Hong Kong upbeat, poll shows" *The [Toronto] Globe & Mail* (15 March 1997) A9).

avoid a legal vacuum.<sup>314</sup> On the date of the handover, the provisional legislature was officially sworn in, taking over the chamber of the Hong Kong Legislative Council building. A decision by the Preparatory Committee on 24 March 1996 indicated that the provisional legislature would cease to operate after the first legislature was formed, which was to occur no later than 30 June 1998.<sup>315</sup> H.K.S.A.R. officials have already promised elections in accordance with the Basic Law in May 1998.<sup>316</sup>

The provisional legislature is the most profound denial of the right to vote in Hong Kong. Its presence prior to the handover undermined the legitimacy and authority of the 1995 democratically elected Legislative Council. And the right to vote became a mockery once the provisional legislature overshadowed the 1995 body. Now, after 1 July 1997, the provisional legislature is the highest law-making body in the S.A.R., yet is accountable to no one (other than perhaps its sovereign creator). The large proportion of pro-democracy legislators elected in 1995 was criticized by the Chinese Government; it is now clear that the provisional legislature is an instrument for dismantling Governor Patten's broad electoral reforms lest the results of the 1995 election are repeated.<sup>317</sup> In mid-May 1997, the Preparatory Committee proposed changes to the electoral laws used to elect the 1995 Legislative Council. It was proposed that Chief Executive Tung would have to choose either a "multiple seat, single vote" method, or a system of proportional representation; in any case, the "one seat, one vote"/"first-past-the-post" system, which allowed the Democrats to win the vast majority of the directly elected seats, was to be replaced for a system that would effectively guarantee pro-Beijing representation.<sup>318</sup> On 8 July 1997, at the end of its first week in power, the Tung government confirmed its plans for a proportional-

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<sup>314</sup> A recent challenge to the provisional legislature's authority to pass legislation for Hong Kong prior to 1 July 1997 was dismissed by the Hong Kong High Court (Sears J.). While the decision appears to rest on the Court's lack of jurisdiction over the actions of the body in Shenzhen, the Court also added that even if the conduct was occurring in Hong Kong, it would not be unlawful (see C. Buddle & C. Yeung, "Judge halts bid to challenge handover body" *South China Morning Post, International Edition* (21 June 1997); see also L. Choy & A. Li, "'Innovative' legislature faces challenge in courts" *South China Morning Post* (12 April 1997) 1). On 29 July 1997, the Court of Appeal confirmed that the Provisional Legislative Council was a legal body. Martin Lee, chairman of the Democratic Party, said that "[the decision] raised 'very serious implications for the future of Hong Kong's rule of law and autonomy'" (C. Parsons, "Legislature left open to attack" *South China Morning Post* (30 July 1997) 1 at 1).

<sup>315</sup> Decision of the Preparatory Committee on the Establishment of a Provisional Legislature of the H.K.S.A.R., para. 7 cited in A.H.Y. Chen, "Comment: The Provisional Legislative Council of the SAR" (1997) 27 H.K.L.J. 1 at 11.

<sup>316</sup> See R. Mickleburgh, "Foreign money flowing in as Hong Kong's hopes soar" *The [Toronto] Globe & Mail* (24 May 1997) A17; J. Manthorpe, "Hong Kong democrats to be barred from vote" *The [Montreal] Gazette* (11 July 1997) A12.

<sup>317</sup> See C. Yeung, "Poll result raises fear of mainland backlash" *South China Morning Post* (19 September 1995) 1.

<sup>318</sup> See "Hong Kong protest: Governor assails China over new election laws that undercut democracy" *The [Montreal] Gazette* (27 May 97) B7; "Hong Kong gets election promise" *The [Montreal] Gazette* (24 May 97) A22; "Hong Kong: How reassuring" *The Economist* (24 May 1997) 38; C. Yeung, "The polls that point the way to the future" *South China Morning Post* (1 March 1997) 19.

representation system for the 1998 elections.<sup>319</sup> Clearly, the establishment of an unelected, unaccountable, unrepresentative provisional legislature wielding power, even if only for a period of a year, does not bode well for the future of the right to vote and of other fundamental human rights.

## 2. Abolition of the *Hong Kong Bill of Rights Ordinance*

When the B.O.R.O. was being considered by the Legislative Council, several senior Chinese officials criticized the move and expressed doubt as to whether the Ordinance would exist after 1997.<sup>320</sup> One such official was particularly concerned about entrenching the *Bill of Rights*, since this would be creating a new class of statute law which the Basic Law did not recognize.<sup>321</sup> Even up to and after the handover, the Chinese authorities (and eventually the H.K.S.A.R. authorities) continued to complain about this elevated or entrenched status of the *Bill of Rights*.<sup>322</sup> The provisional legislature is now the vehicle for realizing "roll-backs" of the significant human-rights protections gained during the last seven years of British administration. The Chinese cite article 160 of the Basic Law as their authority for carrying out this plan. The article provides that the laws of "British" Hong Kong must go through an "adoption" process to become laws of the H.K.S.A.R. The Standing Committee of the National People's Congress may prevent the continuation of a law where it declares the law "in contravention of [the Basic] Law."

Some academics have argued that the Basic Law and the *Bill of Rights* are consistent and should co-exist after 1997.<sup>323</sup> Their arguments point directly to article 39,

<sup>319</sup> *The Economist* reported the decision as follows:

Mr. Tung and his allies want to reduce the already small democratic element to a minimum: the previous 20 geographical constituencies [see Table 7 in Part I above] are to be merged into five, each with three to five members. This is intended to ensure that the strength of political parties with a broad base will be substantially diluted. Martin Lee, the leader of the Democratic Party, which dominated the disbanded legislature but is completely unrepresented in the provisional legislature, says that the proposals put forward by Mr. Tung mark the start of the "Singaporisation" of Hong Kong ("Typhoon Tung starts sweeping" *The Economist* (12 July 1997) 36 at 36).

<sup>320</sup> See N. Jayawickrama, "The Hong Kong Bill of Rights: A Critique" in Chan & Ghai, eds., *supra* note 171, 55 at 56-57.

<sup>321</sup> See Jayawickrama, *supra* note 108 at 74-75, citing Lu Ping, deputy secretary-general of the Basic Law Drafting Committee.

<sup>322</sup> See "PWC asks China to bury Bill of Rights" *South China Morning Post* (18 October 1995) 1; "China backs proposal to remove statute's power to 'override' legislation" *South China Morning Post* (19 October 1995); P. Wesley-Smith, "Maintenance of the Bill of Rights" (1997) 27 H.K.L.J. 15; R. Mushkat, "Scrapping Hong Kong Legislation: An International Perspective" (1997) 27 H.K.L.J. 12.

<sup>323</sup> See Y. Ghai, "The Bill of Rights and the Basic Law: Inconsistent or Complementary?" in G. Edwards & A. Byrnes, eds., *Hong Kong's Bill of Rights: 1991-1994 and Beyond* (Hong Kong: Faculty of Law, University of Hong Kong, 1995) 53 [hereinafter Ghai 1995]; Byrnes & Chan, eds., *supra* note 12 at 215; Y. Ghai, "Compatibility of the Bill of Rights and the Basic Law" in G. Edwards & J. Chan, eds., *Hong Kong's Bill of Rights: Two Years Before 1997* (Hong Kong: Faculty of Law, University of Hong Kong, 1995) [hereinafter *Two Years Before 1997*] 125; J.M.M. Chan, *supra* note 225 at 3. For a diverse selection of views on this issue, see appendices A-E in *Two Years Before 1997*,

which specifies that the I.C.C.P.R. as applied to Hong Kong shall remain in force and shall be implemented through the laws of the H.K.S.A.R. Professor Yash Ghai has noted that it would be absurd to repeal the B.O.R.O. under article 160, when the legislature would have to turn around to pass essentially the same law under the authority of article 39.<sup>324</sup>

If, notwithstanding, the B.O.R.O. is repealed in its entirety after 1997, a detrimental effect on the right to vote is quite possible. Hong Kong would lose the elaborate expression of this right contained in article 21 of the *Bill of Rights*, and it is uncertain whether the courts of the H.K.S.A.R. would adopt the article 21 jurisprudence in interpreting the right to vote in the Basic Law, which is expressed in much simpler terms. In that event, it appears that article 39 would provide a good basis for doing so.

### 3. Implementing Article 23 of the Basic Law: Restrictions on Expression and Assembly

If the right to vote is to flourish in Hong Kong, the political and social atmosphere must encourage its exercise. Unfortunately, article 23 of the Basic Law is inimical to the creation of this atmosphere.<sup>325</sup> It provides that the H.K.S.A.R. shall enact laws to prohibit any act of treason, secession, sedition or subversion against the Central People's Government. Furthermore, there is to be a prohibition against foreign political organizations from conducting political activities in the Region, and against political organizations of the Region from establishing ties with foreign political bodies. Expansive interpretations of this section would seriously undermine the fundamental freedoms of expression and assembly. The laws could create a chilling effect on the right to vote and jeopardize the possibility of having completely free and open elections.

The H.K.S.A.R. administration has already taken a number of steps to resurrect old sections of the *Societies Ordinance*<sup>326</sup> and *Public Order Ordinance*,<sup>327</sup> which were originally repealed because of their inconsistency with the *Bill of Rights*.<sup>328</sup> Amidst public outrage against the roll-back of human rights, the S.A.R. administration issued a consultation paper and then held extensive consultations with the public over a three-week period in April 1997.<sup>329</sup> While it appears the administration took the con-

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*ibid.*, where one finds, respectively, the opinions of the Preliminary Working Committee, the Judiciary (on behalf of the chief justice, Sir Ti Liang Yang (as he then was)), the Hong Kong Government (per the Attorney General's Chambers), Mr. Justice Benjamin Liu, and the Hong Kong Bar Association.

<sup>324</sup> See Ghai 1995, *ibid.* at 63.

<sup>325</sup> See generally D. Clark, "Sedition and Article 23" in P. Wesley-Smith, ed., *supra* note 218, 31.

<sup>326</sup> Cap 151.

<sup>327</sup> Cap 245.

<sup>328</sup> See Mushkat, *supra* note 322; Wesley-Smith, *supra* note 322.

<sup>329</sup> See A. Li, "Academics alert Tung to liberties risk" *South China Morning Post* (30 April 1997) 6; C. Yeung, "Tung invited to discuss rights row with Qian" *South China Morning Post* (6 May 1997) 6; C. Yeung, "Feedback on proposed curbs 'not surprising'" *South China Morning Post* (8 May 1997) 9; K.Y. No & L. Choy, "I won't silence my critics — Tung" *South China Morning Post* (8 May 1997) 1.

sultations seriously and reconsidered a number of its initial proposals,<sup>330</sup> some restrictions on the rights of assembly and expression, so as to implement article 23, are certain. When these restrictions come to be scrutinized in the context of the right to vote, it is hoped that the judiciary will be mindful of the following statements from the Human Rights Committee's "General Comment No. 25":

25. In order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. It requires the full enjoyment and respect for the rights guaranteed in articles 19, 21 and 22 of the Covenant, including freedom to engage in political activity individually or through political parties and other organizations, freedom to debate public affairs, to hold peaceful demonstrations and meetings, to criticize and oppose, to publish political material, to campaign for election and to advertise political ideas.

26. The right to freedom of association, including the right to form and join organizations and associations concerned with political and public affairs, is an essential adjunct to the rights protected by article 25. Political parties and membership in parties play a significant role in the conduct of public affairs and the election process. States should ensure that, in their internal management, political parties respect the applicable provisions of article 25 in order to enable citizens to exercise their rights thereunder.<sup>331</sup>

## Conclusion

One must admit that the right to vote in Hong Kong has had a short but fascinating history. Born in 1982, elevated to the status of a constitutional and human right in 1991, bestowed upon the widest-ever Hong Kong electorate in 1994-95, dismantled in 1997 — the right to vote appears to have come full circle within only fifteen years. Such is the fickleness and indeterminacy of the right to vote's political reality. Fortunately, Hong Kong is a place where the law is not lacking. The legal reality of the right to vote is supported by a framework consisting of the *Joint Declaration*, the Basic Law, the B.O.R.O., the I.C.C.P.R., and international norms that bind all countries. The continued existence of this legal reality means that the courts of Hong Kong will go on interpreting and applying the right to vote as new cases come along.

It has been argued in this article that the meaning of the right to vote in Hong Kong is informed by the purposes of self-government and the protection of human rights. The right to vote necessarily includes the concept of "universal and equal suffrage". It has been submitted that where this concept is invoked as a result of an inequality in voting power, a *prima facie* breach of the right to vote occurs when there has been a deviation from absolute equality that cannot be justified on the basis of self-government or the protection of human rights. It is contemplated that this allow-

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<sup>330</sup> See Mickleburgh, *supra* note 316; "Hong Kong: How reassuring", *supra* note 318 at 39.

<sup>331</sup> *Supra* note 180.

ance from absolute equality permits the government to ameliorate the human-rights conditions of disadvantaged groups, by giving them a greater degree of voting power and political representation, without violating the spirit and letter of the right to vote. Once a breach is established, it can be justified by the government if it is shown that the restriction has a legitimate objective, is rationally connected and a proportional response to the objective, and does not discriminate on any of the enumerated grounds listed in article 1(1) of the *Bill of Rights*. Recognition of the dual fundamental purposes of the right to vote requires that the impugned government scheme be subjected to a rigorous limitations test and not simply accepted out of blind deference for the status quo.

As set out in the introduction, another important objective of this article was to convey a methodology for determining the meaning of the right to vote, or any other human right contained in a constitutional document such as the Basic Law. One of the central problems with the decisions in *Lee Miu-ling* was that they failed to assess critically the legislative scheme against a conception of the right to vote that takes into consideration the historical, social, political and constitutional context of Hong Kong. *Lau San-ching*, however, was certainly an optimistic first step in lending a broad meaning to article 21(b). Future cases should follow in the development of that precedent. In accordance with the “living tree” metaphor, the meaning of the right to vote in Hong Kong will likely evolve. It is hoped that such evolution takes place in accordance with the principles of interpretation set down in this article — according to the rule of law. It would be a tragedy for all concerned if the tree were abandoned to die.

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