

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST NO.28 OF 1999

BETWEEN

TSE KWAN SANG

Applicant

and

PAT HEUNG RURAL COMMITTEE

Respondent

SECRETARY FOR JUSTICE

Intervener

Coram : Hon Cheung J in Court

Dates of hearing : 14th, 16th and 17th June 1999

Date of handing down judgment : 29th June 1999

J U D G M E N T

The facts

The Applicant, Mr Tse Kwan Sang (“Mr Tse”), was born and brought up in the Shek Wu Tong Village, Pat Heung, Yuen Long, New Territories (“the Village”). His parents were brought up in the Village and his own son was also born in the Village.

On 10th November 1998, the Pat Heung Rural Committee (“Rural Committee”) called for voter registrations and announced the rules (“the Election Rules”) for the election of village representatives in the Village. The Rural Committee restricted the right to vote and stand for election to those who were described as indigenous villagers.

After protest by the non-indigenous villagers, a meeting was held in the Village on 21st November 1998 by the Chairman of the Rural Committee and two village representatives of the Village. It was decided that non-indigenous villagers could be registered but only as voters only. Mr Tse and the other non-indigenous villagers, however, insisted that they should be given the right to stand as candidates. This was rejected by the indigenous villagers of the Village in a meeting held on 22nd December 1998. The meeting decided that all the indigenous villagers over the age of 18, irrespective of whether they were male or female, could vote and stand as village representatives. However, married women indigenous villagers, if they had resided in the Village for seven years or above after marriage, could vote but not to stand as candidates.

On 2nd March 1999, the election was held and two new village representatives were elected.

Judicial Review

Mr Tse applies for judicial review and challenges the validity of the election. This is opposed by the Rural Committee. The Secretary for Justice intervened in this proceeding and also opposed the application.

The Election Rules

The Election Rules are as follows :

- “(1) All male and female indigenous villagers aged 18 or over (as at 31st December 1998) must re-register in order to become an eligible voter.
- (2) Married female indigenous villagers must have remained living in this Village for 7 years or over to register as a voter.
- (3) Registration period starts from the date hereof until 1st December 1998.
- (4) Registration forms can be obtained from the Yuen Long District Office, Pat Heung Rural Committee and village representative;

completed forms must be delivered to the Yuen Long District Office before the closing date.

- (5) Overseas villagers can be registered by a nominee but cannot vote by a nominee.
- (6) Information required for registration includes name, Hong Kong Identity Card No. or Passport No., address and date of birth. Application with incomplete information will not be processed.
- (7) All eligible voters have the right to vote and the right to candidacy.
- (8) Any queries please contact our association (telephone No. 2488 6633) or contact Pat Heung Liaison Officer Mr Au Ho Yin of the Yuen Long District Office (telephone No.2470 1141).”

History of Village Representatives

According to Tsui Kwan Ping, David (“Mr Tsui”), the Deputy Secretary for the Home Affairs Bureau, before the New Territories were leased to Britain in 1898, the rural representation system that existed in the New Territories was based on a structure of village elders, village council and general councils at the heung (鄉) level. The village representative system came into existence when Hong Kong was under Japanese occupation from 1941 to 1945. During the earlier years, the village representatives were popularly elected or chosen among the heads of families in the village.

In 1948, Mr John Barrow, the then District Commissioner of New Territories, introduced a set of rules, known as the “Barrow’s Rules” which governed and standardized the procedure for returning village representatives.

In August 1994, the Heung Yee Kuk (“the Kuk”) introduced a set of guidelines known as the Model Rules for the Conduct of Village Representatives Elections (“the Model Rules”). These guidelines, which had been adopted by the overwhelming majority of the villagers provided for, among other things, one person one vote, equal voting rights for men and women and fixed four-year terms for the elected representatives.

Model Rules

The qualifications for a voter and candidate are prescribed by the Model Rules as follows :

4. Qualifications for a voter :
 - (a) *Any indigenous villager, male or female, aged 18 or above; or*
 - (b) *Any person, male or female, aged 18 or above, who is a Hong Kong permanent resident within the meaning of the Immigration Ordinance (Cap 115) whose major place of residence is the village.*
5. Qualifications for nomination as a candidate in an ‘indigenous village’ :

Any indigenous villager, male or female, aged 18 or above.
6. Qualifications for nomination as a candidate in a ‘non-indigenous village’ :

Any person, male or female, aged 18 or above, who is a qualified voter under Rule 4 above and who has ordinarily resided in Hong Kong for the 10 years immediately preceding the date of election.

Role of Village Representatives

According to Mr Tsui, the village representatives have assumed a consultative and advisory vote in rural affairs. They assist their villagers in the certification of the indigenous status of villagers for the purpose of applying for small house and hillside burials, in witnessing villagers’ applications for succession to estate under the *New Territories Ordinance*. They liaise between the Government and the villagers on village removal, development clearance and other rural affairs. They manage village affairs, including settling of disputes and up-keeping of ancestral halls and village temples.

Relationship with the Rural Committee

There are currently 981 village representatives from 688 villages which basically form the general assemblies of the 27 Rural Committees in the New Territories. The general assemblies would elect among themselves the chairmen and vice chairmen of the respective Rural Committees.

Relationship between the village representatives and the Heung Yee Kuk

The Kuk is governed by the *Heung Yee Kuk Ordinance (Cap.1097)*. The Kuk consists of :

- (a) the chairman and two vice chairmen who are members of the Executive Committee, and are elected by the Full Council;
- (b) a Full Council; and
- (c) an Executive Committee of the Full Council.

The Full Council of the Kuk

The Full Council consists of Ex-Officio, Special Councillors and Co-Opted Councillors. All the Rural Committee chairmen and vice chairmen are Ex-Officio Councillors. Special Councillors are elected by the Ex-Officio Councillors of three districts, namely, Tai Po, Yuen Long and Southern District from among village representatives.

Under s.3(3)(a) of the *Heung Yee Kuk Ordinance*, a village representative means a person elected, or otherwise chosen, to represent a village who is approved by the Secretary for Home Affairs.

Role of the Government in village elections

As can be seen from s.3(3)(a) of the *Heung Yee Kuk Ordinance*, the elected village representatives must be approved by the Secretary for Home Affairs. The power is exercised by the District Officers under the delegated

authority of the Secretary for Home Affairs. To facilitate the organisation of village representative elections, the District Officers provide administrative support to villagers by assisting with the preparation of the voter register, posting notices, advertising the election and with counting the votes casted. The District Office would leave the villagers and the Rural Committee to resolve disputes regarding the village representative election.

The basis of the application

Mr Tse argues that the rule which excludes him from running as a candidate in the election is first, against the provisions of the *International Covenant on Civil and Political Rights* (“*ICCPR*”) as applied to Hong Kong under Article 39 of the *Basic Law* and second, against Article 26 of the *Basic Law*. In other words, this is a challenge on the constitutionality of the exclusionary rule. A further challenge is based on s.35(5) of the *Sex Discrimination Ordinance*.

International Covenant on Civil and Political Rights

Article 39 of the *Basic Law* states that the provisions of the *ICCPR* as applied to Hong Kong remains in force and shall be implemented through the law of Hong Kong. Article 25 of the *ICCPR* provides that :

“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) **To take part in the conduct of public affairs, directly or through freely chosen representatives;**
- (b) To vote and 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 his country.”

The distinction referred to in Article 2 is the distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Mr Tse relies on Articles 25(a) and (b). The *ICCPR* is implemented by the *Hong Kong Bill of Rights Ordinance* (“*Bill of Rights*”). Articles 25 and 2 of the *ICCPR* are Articles 21 and 1 respectively of the *Bill of Rights*.

Article 26 of the *Basic Law*

Article 26 of the *Basic Law* provides that :

“ Permanent residents of the Hong Kong Special Administrative Region shall have the right to vote and the right to stand for election in accordance with law.”

Mr Tse is a permanent resident in Hong Kong.

Participation in the conduct of public affairs

To vote and stand as a candidate in the village representative election is to take part in the conduct of public affairs. Mr Tse is a resident of the Village. He wishes to take an active part in the running of the Village as a village representative. Being a village representative will enable such a person to be a member of the Kuk as well. It is by virtue of the *Heung Yee Kuk Ordinance* that Mr Tse’s right is asserted. The election procedure chosen by the Rural Committee denies Mr Tse of this right and the opportunity to participate in public affairs. On the face of it, the exclusionary rule is contrary to Article 25(a).

Position of the Secretary for Justice

The position of the Secretary for Justice is this. Article 40 of the *Basic Law* expressly protects the lawful traditional rights and interest of the

indigenous inhabitants of the New Territories. The Kuk is an advisory body which historically and, as a matter of fact, represents predominantly the interest of indigenous villagers. It does not represent the interest of the rural population as a whole. There are other avenues open to the rural population to take part in public affairs, namely, through the District Board elections.

The Kuk is part of the existing political structure of Hong Kong. Since 1994, the Kuk had become a functional constituency of the Legislative Council (Schedule I, Part I of the *Legislative Council Ordinance, Cap.542*). Article 68 of the *Basic Law* specifically provides for the formation of the Legislative Council as detailed in Annex II. The Hong Kong Government set up a Working Group on Rural Elections in April 1999 to review the arrangements and procedures for rural elections. It will formulate proposals to further improve the framework of rural elections. It has been discussing relevant issues such as whether there would be a need to use legislation to regulate the conduct of village representative elections. As Mr Tse is not challenging the Kuk as a functional constituency, he has no right to challenge the “modality” of the village representative election. It is said that non-indigenous villagers, such as Mr Tse, never had the right to stand as a candidate in village elections and if one wishes to play the game, then one must abide by the rules. The purposive approach in interpreting constitutional instrument adopted by the Court of Final Appeal in **Ng Ka Ling and others v. The Director of Immigration** (1999) 2 HKCFAR 4 is relied upon.

Rules of the election

These are strong arguments. However, on analysis they are not obstacles to the challenge now made by Mr Tse. Let me begin by examining the rules governing the election of village representatives. Despite the fact that the village representatives may become councillors in a statutory body, namely the Kuk, there is no statute governing their election. More fundamentally,

there is no statutory definition of what is an indigenous villager or indigenous village for the purpose of village representative elections.

Who is an indigenous villager?

Some assistance may be gathered from the *Government Rent (Assessment and Collection) Ordinance, Cap. 515* (the “*Rent Ordinance*”), where the term “indigenous villager” is defined as meaning :

“a person who was in 1898 a resident of an established village in Hong Kong or who is descended through the male line from that person;”

An established village means :

“a village that was in existence in Hong Kong in 1898 and about which the Director has satisfied himself under section 5 was then in existence;”

Section 5 states that :

“ (1) The Director may satisfy himself by examining the schedule to a block lease granted by or on behalf of the Governor that a village was in existence in Hong Kong in 1898.

(2) The village about which the Director is satisfied was in existence in 1898 is an established village.”

Section 4 of this *Ordinance*, among other things, exempts an indigenous villager from paying Government rent in respect of land held by him in the New Territories.

There is a definition of “New Territories resident” in the *Rating Ordinance, Cap.116* which states that :

“ ‘New Territories resident’ (新界居民) means any person descended through the male line from a person who was in 1898 a resident of a village or town certified by the Secretary for Home Affairs for the purposes of this section as an established village or town in the New Territories (except New Kowloon);”

Mr Tse is not an indigenous villager in that he is not a descendant of a resident of an established village in 1898.

Is Shek Wu Tong Village an indigenous village?

The Model Rules refer to indigenous and non-indigenous villages. The Rural Committee had taken two different views on the status of the Village. In its letter dated 30th November 1998 to the District Office, it stated that the Village was only established in 1910. Although there are indigenous people of the New Territories living in the Village, it is not an indigenous village of Pat Heung. However, in its letter of 12th January 1999 to the District Office, the Rural Committee stated that the villagers of the Village originally came from Tin Fu Tsai Village (田夫仔村) which is an indigenous village, and for this reason, the Village is also an indigenous village of Pat Heung.

According to Mr Ng Man Fai, the Principal Land Executive of the Village Improvement and Control Section of the Lands Department, in deciding who might qualify as indigenous villagers for the purpose of enjoying certain traditional rights and privileges, the Government has compiled different lists by way of administrative aids for governing villages in the New Territories. One list is the List of Recognised Villages, compiled for implementation of the small house policy, recognised in Annex III to the Sino-British Joint Declaration. Another list is the List of Established Villages, which is compiled for other purposes relevant to the rights of indigenous villagers including their right of exemption from the *Rent Ordinance*.

The list was published by the Kuk in March 1991 in a booklet entitled "List of Established Villages". The booklet specifies two categories of established villages, namely :

- (1) Villages recorded on the Block Government Lease, being those villages which have been in existence since 1898. They are also known as pre-1898 indigenous villages.
- (2) Branched-Off Villages, being those indigenous villages which were branched-off from pre-1898 indigenous villages.

According to the list, the Village is a branched-off village of a pre-1898 indigenous village. Mr Ng stated that :

“It should be noted that since this list is used for Government administrative purposes other than in relation to the Rent Ordinance, the two categories of indigenous villages mentioned above do not and are not intended to conform with the definition of ‘established village’ in such Ordinance. Indeed, the term ‘established village’ was inserted in that Ordinance purely for convenience of reference. Further, the inclusion of category (ii) above accords with the commonly accepted meaning of ‘indigenous villager’ reflected in Annex III to the Joint Declaration as well as the definition of this term in the Rent Ordinance itself, which meaning encompasses descendants from the male line of a resident of a pre-1898 indigenous village.”

The List of Established Villages is compiled for the administrative convenience of the Government. While a branched-off village is considered as an established village because it has descendants from the male line of a resident of a pre-1898 indigenous village, it is a different consideration when it comes to the right to vote and stand as a candidate in the village election. It has not been shown why a branched-off village, which already included non-indigenous villagers when it was established in 1910, and by now the non-indigenous villagers comprise of the overwhelming majority of its members, should nonetheless be considered as an indigenous village so as to exclude non-indigenous villagers to stand as candidates in the village election. 470 out of the nearly 600 villagers in the Village are non-indigenous.

Rules arbitrary and inconsistent

Whatever may be the rules governing the village representative election, they are arbitrary and inconsistent in nature.

The evidence shows that in 1978, Mr Tsang Wai Leung was elected to be the village representative of the Village. He was an non-indigenous villager when he was elected. It was said (see letter of 8th February 1999 from Yuen Long District Office) that Mr Tsang was the only nominee to be the

village representative, hence there was no election and he was automatically elected to be the village representative. Whether he was automatically elected or not is beside the point. The fact is that a non-indigenous villager had been a village representative of the Village in 1978 and he remained in that post until he died.

In the 1995 Voter's List for the election of village representative, Mr Tse who has always been a non-indigenous villager, was included in the List.

When the Election Rules were announced by the Village in 1998, only indigenous villagers were eligible voters who had the right to vote and to stand as candidates. The Model Rules do not exclude non-indigenous villagers from voting. After the protest by Mr Tse and other non-indigenous villagers, they were given the right to vote.

The Barrow's Rules introduced in 1948 did not make a distinction between non-indigenous and indigenous villagers. All that it said is that the representative shall be nominated or elected by the heads of families.

The Rural Committee, the Secretary for Justice and the two elected village representatives had not explained why in 1978 a non-indigenous village representative could be chosen, or why in 1995, non-indigenous villagers, including Mr Tse, were on the Voter's List. It had never been explained why, according to the Election Rules, non-indigenous villagers could not be registered as voters. Nor had it been explained why overseas indigenous villagers could register as voters but not non-indigenous villagers living in the Village.

The same arbitrariness and inconsistency apply to the restrictions on indigenous women voters. It had never been explained why according to

Election Rules married female indigenous villagers must have remained living in the Village for seven years or over before she could register as a voter.

Functions of the village representative discharged by an non-indigenous villager

In my view, many of the functions of a village representative described by Mr Tsui can be exercised by an non-indigenous villager as well. In relation to the certification of the status of an indigenous villager, in order to perform this task properly the village representative has to consult both the indigenous and non-indigenous members of the village. He has to look at the evidence to see whether the claimant in fact is an indigenous villager. In relation to succession on death, someone who has a long association with that village will know whether the applicants are the male descendants of a deceased person in that village. Negotiations with the Government can be performed by either an indigenous or non-indigenous village representative. The resolution of disputes between the villagers, likewise, can be performed by an non-indigenous representative. In relation to the up-keep of ancestral halls and village temples, an non-indigenous village representative obviously has to take heed of the views of the indigenous villagers. I just cannot see that the tasks of a village representative are so onerous or special that they have to be performed by an indigenous villager.

The case of Mr Tsang must be the best example to demolish any argument that only indigenous village representatives could perform the task relevant to indigenous villagers. In my view, Mr Tse has a legitimate complaint that the rules relating to the election of his village were formulated by those who wished to advance their own interest and without any proper basis.

Dr Miners

Mr Fung, SC, Counsel for the Secretary for Justice, referred to *The Government and Politics of Hong Kong* by Dr Norman Miners, 5th Ed., at

page 177, in which the author traced the history of the Kuk : the Kuk was set up in 1926 and it represented only a small section of the inhabitants of the New Territories, the residents in the less developed rural areas who could trace their descent from those living there at the time of the British occupation in 1899. He referred to the development of the District Boards and Area Committees after 1977 which provided the administration with an alternative source of advice and a forum for local consultation which was based on universal suffrage of all the residents of the New Territories, and did not merely present the indigenous villagers.

Mr Hayes

Mr Fung further referred to the affidavit of Mr Hayes who at one time was a District Officer in the New Territories. He discussed the political structures in the New Territories. He stated that the purpose of the Kuk under the *Heung Yee Kuk Ordinance* was to represent the needs of the indigenous rural committee to the New Territories district administration and the Hong Kong Government. This intention and expectation was carried over into the post-ordinance years. In practice, the Kuk has always been considered to be the mouthpiece and legitimate spokesman for the indigenous rural committee, and it has always behaved as such in its dealings with the Hong Kong Government.

The Hansard

When the Colonial Secretary moved for the first reading of the bill relating to the Kuk, he stated that the bill :

“... gives statutory recognition for the first time to the Village Representative and the Rural Committee; it also establishes the Heung Yee Kuk as the apex in the representative pyramid....”

He further stated that :

“... there is a need for some organization to carry out the Heung Yee Kuk’s traditional functions, that is to say to co-ordinate purely

localized opinion and to present, in relation to matters that affect the New Territories at large, as opposed to matters that are of only local significance, a consolidated and truly representative statement of responsible New Territories opinion. The object of the Bill at present before Council is to set up the Kuk for this purpose as a statutory body.”

1959 Hansard, pages 252-255.

Mr Fung further relied on the *1988 Hansard*, pages 975 to 977 and 1297 to 1299. In 1988, the Secretary for District Administration moved the amendment to the *Heung Yee Kuk Ordinance*, so as to include 15 Co-Opted members to the Full Council of the Board. He stated that :

“ It has always been the Kuk’s intention to widen their representation and recruit more talents so as to enhance their capability and efficiency. They have therefore suggested to the Administration that the constitution be amended to allow for the recruitment of 15 more members who need not be selected from amongst the indigenous New Territories population. ...”

Interest of New Territories at large

Mr Dykes, SC, Counsel for Mr Tse, does not dispute the work of Dr Miners and Mr Hayes. As a matter of fact, he accepts the work of Mr Hayes to be extremely useful. The only reservation he has is that Mr Hayes is not in a position to deal with the intention of the *Heung Yee Kuk Ordinance*.

It is clear from the *1959 Hansard* that the intention of establishing the Kuk as a statutory body is that it should be dealing, apart from matters of only local significance, those affecting the New Territories at large as well. This being the position, I just cannot see how it can be argued that the intention of the *Heung Yee Kuk Ordinance* is to ensure that the Kuk is only to look after the interest of the indigenous population.

The long title of the *Heung Yee Kuk Ordinance* states that it is to “provide for the establishment and functions of an advisory and consultative body for the New Territories and for purposes connected therewith”. The preamble states that :

“WHEREAS —

- (a) the HEUNG YEE KUK has in the past served as a valuable advisory body to the Government on New Territories affairs and has been a forum where leaders of opinion in the Territories have been able to exchange views; and
- (b) it is now considered desirable that the HEUNG YEE KUK should become a statutory advisory body with a constitution so framed as to ensure that it will as far as possible be truly representative of informed and responsible opinion in the New Territories.”

The object of the Kuk is set out in s.9 of the *Heung Yee Kuk Ordinance* as follows :

“The objects of the Kuk shall be —

- (a) to promote and develop mutual co-operation and understanding among the people of the New Territories;
- (b) to promote and develop co-operation and understanding between the Government and the people of the New Territories;
- (c) to advise the Government on social and economic developments in the interests of the welfare and prosperity of the people of the New Territories;
- (d) to encourage the observance of all such customs and traditional usages of the people of the New Territories as are conducive to their welfare and to the preservation of public morality; and
- (e) to exercise such functions as they may be invited to from time to time by the Governor.”

These objects do not show that the Kuk should only represent the interest of indigenous residents.

The Kuk is not comprised exclusively of indigenous population

While the 1988 amendment was to broaden the basis of representation of the Kuk, there is no indication in the *Ordinance* itself that its membership would comprise of exclusively indigenous residents. While as a matter of fact, the membership of the Kuk is dominated by indigenous residents, the evidence shows that non-indigenous residents are also present in the Kuk :

	<u>Number of Indigenous Inhabitants</u>	<u>Number of Non-indigenous Inhabitants</u>	<u>Total</u>
Ex-officio Councillors (being Chairmen and Vice-chairmen of Rural Committees)	64	10	74
Special Councillors elected by ex-officio Councillors	15	6	21
Co-opted Councillors (members of Rural Committees not eligible); nominated by Executive Committee and approved by Secretary for Home Affairs	4	11	15

Villages in the New Territories

There are 688 villages. 603 are indigenous villages and 74 are non-indigenous villages. The remaining 11 being chambers of commerce, kai-fong associations and fishermen groups but grouped under the heading of villages :

	<u>Number of Villages</u>		<u>Number of VR Involved</u>	
	Indigenous Villages	603	(87.6%)	792
Non-Indigenous Villages	74	(10.8%)	114	(11.5%)
Others (i.e. chamber of commerce, kai-fong and fishermen groups)	11	(1.6%)	90	(9%)
Total	688	(100%)	996	(100%)

If non-indigenous village representatives were already entitled to participate in the affairs of the rural committees and also in the Kuk, even before the 15 Co-Opted members were introduced in 1988, the Rural Committee and the Secretary for Justice must show some legitimate basis for excluding Mr Tse from standing as a candidate in the Village election. In this Village, non-indigenous villagers are the majority.

Modality of the election

Mr Fung relies heavily on the case of **Mikmaq Tribe Society v. Canada** (No.205/1986 United Nation Human Rights Committee). The actual decision was not referred to by Counsel who only relied on the commentaries of this case by Harris and Joseph in *“The International Covenant on Civil and Political Rights and United Kingdom Law”*, 1995 Ed., pages 535 to 539 and also Nowak on *“UN Covenant on Civil and Political Rights CCPR Commentary”*, pages 442 to 443.

In this case, the aboriginal Mikmaq Band in Canada alleged that the Government of Canada had violated Article 25(a) because it had refused to allow them to be represented at Special Constitutional Conferences convened for the purpose of identifying and clarifying aboriginal rights. The Human Rights Committee of the United Nation concluded that this constitutional

conferences constituted a conduct of public affairs within the meaning of Article 25(a), but it stated that :

“Surely, it cannot be the meaning of Article 25(a) of the Covenant that every citizen may determine either to take part directly in the conduct of public affairs or to leave it to freely chosen representatives. It is for the legal and constitutional representatives of the State party to provide for the modalities of such participation.

It must be beyond dispute that the conduct of public affairs in a democratic state is the task of representatives of the people, elected for that purpose, and public officials appointed in accordance with the law. Invariably, the conduct of public affairs affects the interest of large segments of the population or even the population as a whole, while in other instances it affects more directly the interest of more specific groups of society. Although prior consultations, such as public hearings or consultations with the most interested groups may often be envisaged by law or have evolved as public policy in the conduct of public affairs, article 25(a) cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in the conduct of public affairs. That, in fact, would be an extrapolation of the right to direct participation by the citizens, far beyond the scope of article 25(a).”

While Nowak stated that the Committee regarded the failure of the Canadian Government to invite the Mikmaq as not being an unreasonable restriction and was justified, Harris and Joseph, on the other hand, stated that :

“The Committee added: ‘moreover, the participation and representation at these conferences have not been subjected to unreasonable restrictions’. The addition by the Committee of this rider may indicate that failure to invite any aboriginal representatives would have breached the Covenant. However, such a conclusion, in view of the above quotations, seems tenuous.”

Harris and Joseph further stated that :

“ In conclusion, Article 25(a) seems to outline a right to participate in public affairs, only to the extent that public affairs are open to the public. A clear-cut breach of Article 25(a) occurs when a state party arbitrarily denies a person or persons an equal right to participate in public affairs. It does not seem to guarantee an autonomous minimum level of political participation beyond the guarantees in paragraphs (b) and (c), which are discussed below. As seen in *Mikmaq*, paragraph (a) in no way guarantees avenues of direct

participation. Mandatory provision of indirect participation has never been expressed to go beyond the guarantee in Article 25(b). Thus, it seems that perfect compliance with Article 25(b) and (c) may result in compliance with Article 25(a). Only if a state party's constitutional structure offers more opportunities for participation than those required under paragraphs (b) and (c) would the possibility of a separate breach of (a) arise; those opportunities would have to be available to all without unreasonable restrictions."

It is difficult to understand the argument that because Mr Tse does not challenge the Kuk as a functional constituency, therefore his challenge to the decision which precludes him from standing as a candidate in the village election is bound to fail. The exclusionary rule prevents him from participating in the affairs of the Kuk. The **Mikmaq** decision is surely not an authority for the proposition that if the "modality" of the election happens to be unlawful or unconstitutional, nonetheless it cannot be challenged.

Far from assisting the Rural Committee and the Secretary for Justice, the **Mikmaq** decision in fact shows that the minimum level of political participation envisaged by Article 25(a) are those guaranteed in paragraphs (b) and (c). The constitutional conference referred to in **Mikmaq** is a different level of participation in public affairs beyond those relating to voting and to stand as candidates in elections. While mandatory provision of indirect participation has never been expressed to go beyond the guarantee in Article 25(b), the corollary is that, at a minimum, Article 25(b) must be satisfied. In this case Mr Tse is deprived of the right to stand as a candidate.

Is the village election a private election?

The Secretary for Justice argues that Article 21 of the *Bills of Rights* (Article 25 ICCPR) has no application to the village election because under s.3(3)(a) of the *Heung Yee Kuk Ordinance*, it provides for a two-stage process. The first stage is where a village representative is elected or otherwise chosen, and the second stage is where that person is approved by the

Secretary for Home Affairs. The Government makes no decision in this process until the second stage. It is argued that the *Bill of Rights* expressly provides that it only binds the Government and all public authorities and persons acting on their behalf, it does not bind the individuals, i.e. the villagers themselves. Therefore, it has no application to decisions of villagers in the election of village representative at the first stage of the process.

In my view, a village representative has a role to play in the village level and also at the Kuk level. The status of an Ex-Officio or Special Councillor of the Kuk is based on his position as a village representative. The election of a village representative is not simply a private election. It is as public as one can perceive.

In order to become a village representative, a person has to go through the process of being elected by the villagers and then being approved by the Secretary for Home Affairs. The two steps are an integral part of the process by which a person becomes a village representative. A person has to be elected or chosen before he can be approved as a village representative. This is too obvious to require any explanation. To describe this process as a two-stage process is a distinction without any real meaning.

The *Basic Law* has received the *ICCPR*. The principles embodied in the *ICCPR* are not some hollow, high-sounding principles. Its preamble refers to the “inherent dignity, equal and inalienable rights of human beings” and that “the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created, whereby everyone may enjoy his civil and political rights”. Let us not be cynical and construe or apply the *ICCPR* in such a way as to render it totally meaningless.

Traditional rights and customs

Article 40 of the *Basic Law* expressly preserves the traditional rights and interest of the indigenous inhabitants. A Government Working Group on the *New Territories Ordinance* was formed to review the application of Chinese customs and customary rights relevant to land in the New Territories. It produced a report in April 1988.

The report was not produced as evidence at the hearing, but according to Mr Dykes, who was supplied with a copy of the report by the Secretary for Justice, it confirmed that the customary rights of the indigenous villagers relate to specific personal and property rights only. These are the right of a man to build a small house under the Small House Policy; funeral and burial rights, exemption from rates and symbolic payment of rental for village lots. The right to vote in village elections leading to the selection of a member in the Legislation Council is not a traditional right of the indigenous inhabitants.

In the paper prepared by the Home Affairs Bureau, the privileges enjoyed by indigenous villagers are said to include :

“(e) recognition of Heung Yee Kuk as a statutory advisory and consultative body on New Territories affairs;”

In considering the application of Article 40, one must not confuse the traditional customs and rights and the privileges referred to in the Government paper. Under the Convention of Peking 1898 which leased the New Territories to the United Kingdom, the only provision relating to the rights of the population of the New Territories was on land :

“ It is further understood that there will be no expropriation or expulsion of the inhabitants of the district included within the extension, and that if land is required for public offices, fortifications, or the like official purposes, it shall be bought at a fair price.”

The New Territories Order in Council simply provided that :

“2. It shall be competent for the Governor of Hong Kong, by and with the advice and consent of the Legislative Council of the said Colony, to make laws for the peace, order, and good government of the said territories as part of the Colony.”

The two government proclamations of 1899 which promised that the property rights of the inhabitants of the New Territories would be respected did not have the force of law : **Winfat Enterprises (H.K.) Co. Ltd. v. A.G.** [1984] HKLR 32 (Decision of Court of Appeal, affirmed on appeal to Privy Council).

The Kuk was only established in 1926, which was almost 30 years after the British occupation of the New Territories. Clearly, the right to participate in the affairs of the Kuk was not available to the indigenous population in 1899 because such a right simply did not exist. The village representative system only came into existence during the Japanese occupation between 1941 to 1945. If Mr Tse is given the right to stand as a candidate in the village election, there is no question of any traditional right of the indigenous villagers to vote and stand as candidates as village representatives being eroded. They simply do not have such a right.

Canadian case on tribal election

Mr Fung refers to the case of **Issac v. Davey**, 51 DLR (3D) 170. The Ontario Court of Appeal, following the Supreme Court of Canada's decision in **AG of Canada v. Lavell**, 38 DLR (3D) 481, held that provisions in the *Indian Act* for the election of aboriginal councillors in reserve land and for government of the Band by the elected council were not rendered inoperative by the anti-discrimination provision of the *Canadian Bill of Rights*.

In my view, the rights of the aborigines in Canada should be considered in the context of Canada. Their rights are governed by treaties and

the decision of **Issac** is not helpful as a general proposition that election of village representatives in the New Territories cannot be challenged.

Margin of appreciation

Mr Fung states that a margin of appreciation must be given to the local bodies when they devised the rules for the village election. As pointed out by Mr Dykes, this principle of “margin of appreciation” is only relevant when international monitoring bodies are examining whether the deeds of a country have contravened the international Covenants. When it comes to domestic courts, the test to be applied is one of proportionality. The House of Lords in *Ex parte Brind* [1991] 1 AC 696 recognised this as a principle in judicial review relating to Wednesbury unreasonableness. In the present case, the exclusionary rule just cannot be justified under the principle of proportionality.

Gradual approach

Article 68 of the *Basic Law* provides for the election of the Legislative Council in accordance with Annex II thereof. Mr Fung argued that the electoral system in the New Territories must be evolved gradually.

This is very much akin to the growing pains argument rejected by Bokhary JA (as he then was) in **Lee Miu Ling v. AG** [1996] 1 HKC 124. The real concern is on the issue of constitutionality and not how the system may evolve in future. And unlike the applicants in **Lee Miu Ling** who had no vote in the functional constituency which they sought to challenge, Mr Tse has a right to vote in the Village. The right to stand as a candidate is an integral part of the electoral system. Although there may be some legitimate qualifications imposed on a candidate, such as residential requirement, to exclude someone on the basis that he is not a descendant of a male villager that existed in 1898 cannot be a legitimate basis at all.

Election Rules not compatible with the ICCPR

In my view, the exclusionary rule is incompatible with Article 25(a) of the *ICCPR*. Having decided this, it is not necessary for me to express a further view on Article 25(b) of the *ICCPR* or Article 26 of the *Basic Law*.

Sex Discrimination Ordinance

Section 35(5) of the *Sex Discrimination Ordinance* provides that :

“ Notwithstanding anything in the Heung Yee Kuk Ordinance (Cap.1097) or in any other Ordinance, the Secretary for Home Affairs shall not —

- (a) approve a person as a Village Representative;
- (b) issue a certificate recognizing a body as a Rural Committee;
- (c) approve a person as a Special or Co-opted Councillor,

where that person or body (or any of its members) has been elected or otherwise chosen by a procedure in which women have not been able to participate on equal terms with men, whether as candidates, nominees, electors or in some other relevant capacity.”

Under the Election Rules, a married female indigenous villager must have lived in the village for seven years before she is eligible to register as a voter. A voter has the right to vote and candidacy. Under this procedure, women indigenous villagers would not be able to participate on equal terms with men in the election because of the residential requirement.

The District Office had by a letter of 18th December 1998 informed the Rural Committee of the provisions of s.35(5). However, in the meeting of 22nd December 1998 held by the indigenous villagers of the Village, it was further resolved that the right of married female indigenous villagers would be further restricted in that those who have lived in the Village for seven years could only have the right to vote but not the right to run for election. This is a further discrimination against women.

According to Mr Tsang Ah Loi, who is one of the two elected village representatives of the Village, that after the meeting of 22nd December 1998, they decided to adopt the Government's position on non-discrimination. The letter of 18th December 1998 was posted on the notice board of the village office. The village representatives had allowed all married female indigenous villagers to register as voters. Of the 476 registered voters for the village representative election, 6 were married female indigenous villagers, of which 5 had casted their votes in the election. They had not turned down any female indigenous villagers who requested to register to vote in the election.

The short point is this : under the Election Rules, all the indigenous villagers must re-register in order to become an eligible voter. While the Village Representatives might have posted up the letter of 18th December 1998, there was no notice that the Election Rules or the decision of the meeting of 22nd December 1998 had been rescinded and that the female indigenous villagers had the right to stand as candidates as well. Without actually announcing a new set of election rules which has no gender discrimination, there is a real risk that eligible women voters might choose not to re-register because of the published Election Rules and the resolution of the meeting of 22nd December 1998. To allow registration of all women voters who chose to re-register is not a complete answer to the complaint.

In my view the procedure adopted for the election offends the *Sex Discrimination Ordinance*.

Chan Wah v. the Hang Hau Rural Committee & Others

In **Chan Wah v. the Hang Hau Rural Committee & Others** (HCAL No.112 of 1998), Findlay J was dealing with a decision to bar a non-indigenous villager to be registered as a qualified voter. He found the decision was unlawful. This case further demonstrates the arbitrariness and

inconsistency of village representative election rules. I respectfully agree with the conclusion and the reasoning of the learned Judge.

Conclusion

I will accordingly grant the following relief :

- (1) A declaration that the arrangements made by the Pat Heung Rural Committee for the Village Representative Election of Shek Wu Tong Village held on 2nd March 1999 (“the Election”) are inconsistent with the provision of Article 25(a) of the *International Covenant on Civil and Political Rights* as applied to Hong Kong and received by Article 39 of *Basic Law*.
- (2) A declaration that the procedure for the Election offends s.35(5) of the *Sex Discrimination Ordinance*.
- (3) A declaration that the Election is null and void.
- (4) An order directing Pat Heung Rural Committee to hold a re-election of Village Representatives for Shek Wu Tong Village.
- (5) An order of *mandamus* directing Pat Heung Rural Committee to allow the Applicant to register as a candidate for the Re-Election of Shek Wu Tong Village Representative.

I will order costs *nisi* of the application to be borne by the Pat Heung Rural Committee and the Secretary for Justice.

(P. Cheung)
Judge of the Court of First Instance,
High Court

Mr Philip Dykes, S.C., leading Mr Stephen Yam, inst'd by
M/s Yuen & Partners, for the Applicant

Mr Lai Kwok Iu, Chairman of the Respondent, representing the Respondent,
in person

Mr Daniel Fung, S.C., leading Mr Johnny Mok, inst'd by
Department of Justice, for the Intervener