

CACV137/1999 & CACV139/1999

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL**

CIVIL APPEAL NO. 137 OF 1999
(ON APPEAL FROM HCAL 112 OF 1998)

BETWEEN

CHAN WAH	Applicant
and	
HANG HAU RURAL COMMITTEE	1st Respondent
SAI KUNG DISTRICT OFFICE	2nd Respondent
CHEUNG KAM CHUEN	Intervener

CACV278/1999 & CACV279/1999

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL**

CIVIL APPEAL NO. 278 OF 1999
(ON APPEAL FROM HCAL 28 OF 1999)

BETWEEN

TSE KWAN SANG	Applicant
and	
PAT HEUNG RURAL COMMITTEE	Respondent
THE SECRETARY FOR JUSTICE	Intervener

Before : Hon Chan CJHC, Nazareth VP and Mayo JA

Dates of Hearing : 17, 21, 22 & 23 December 1999

Date of Judgment : 26 January 2000

J U D G M E N T

Hon Chan CJHC :

Introduction

These are four appeals arising from 2 applications for judicial review. Civil Appeal Nos 137 and 139 of 1999 were lodged by two of the parties in High Court Action No. AL112 of 1998. The other two appeals, Civil Appeal Nos 278 and 279 of 1999, were lodged by two of the parties in High Court Action No. AL28 of 1999. These two sets of appeal involve two aspects of the same issue, that is, the right of non-indigenous villagers to take part in the election of a village representative in the New Territories. These appeals are now consolidated and heard together.

The Parties

In AL112 of 1998, the applicant Mr Chan Wah is a non-indigenous villager of Po Toi O Village in the Hang Hau area. He sought relief by way of judicial review against the 1st respondent (the Hang Hau Rural Committee) and the 2nd respondent (the Sai Kung District Office) for not registering him as a voter in the election of a village representative for Po Toi O Village. Mr Cheung Kam Chuen, an indigenous villager, joined as an intervener to oppose the application. On 12 March 1999, Findlay J granted certain declarations in favour of Mr Chan and ordered the two respondents and the intervener to pay costs. The Sai Kung District Office

and the intervener are appealing against that decision in Civil Appeal Nos.137 and 139 respectively. There is no appeal by the Hang Hau Rural Committee.

In AL 28 of 1999, the applicant Mr Tse Kwan Sang is a non-indigenous villager of Shek Wu Tong Village in the Pat Heung area. He sought relief by way of judicial review against the respondent (the Pat Heung Rural Committee) for not permitting him to stand as a candidate in the election of a village representative for Shek Wu Tong Village. The Secretary for Justice intervened. On 29 June 1999, Cheung J granted certain declarations and orders in favour of the applicant and ordered the Pat Heung Rural Committee and the Secretary for Justice to pay costs. Both are appealing against that decision in Civil Appeal Nos 278 and 279.

On 28 June 1999, the Equal Opportunities Commission filed a memorandum with the court seeking permission to be heard in these appeals as *amicus curiae* on the ground that these appeals involve an issue relating to the provisions of the Sex Discrimination Ordinance, Cap.480 with which the Commission is concerned. That was a time when it was doubtful whether Mr Chan or Mr Tse would be legally represented. Leave was therefore granted for the Commission to participate as an *amicus* in relation to the issues which touch on the provisions of that Ordinance.

Representation

Mr Daniel Fung SC and Mr Johnny Mok appear for the Sai Kung District Office in Civil Appeal Nos 137 and 139 and the Secretary for Justice in Civil Appeal Nos 278 and 279. Mr Clive Grossman SC leading Mr James Colins appear for the intervener in Civil Appeal Nos 137 and 139. The Pat Heung Rural Committee appears by its Chairman Mr Lai Kwok Iu

in Civil Appeal Nos 278 and 279. Mr Philip Dykes SC and Mr Stephen Yam act for the applicants in these appeals. Mr Michael Lunn SC appears for the Equal Opportunities Commission. We are indebted to them for their thorough and helpful submissions.

AL 112 of 1998

Mr Chan Wah is now 67 years old. His parents had lived in Po Toi O Village for some time. He was born in the village and received primary education there. He has been working as a fisherman in a fish farm in Po Toi O. He married an indigenous villager Madam Cheung Mui in 1957. He has lived in the village all his life.

Po Toi O Village is one of the 18 villages in the Hang Hau area which is within the Sai Kung District. Of these villages, 16 are indigenous villages and the remaining 2 are non-indigenous villages. There are to be 26 representatives elected or chosen from these villages to form the Hang Hau Rural Committee. In earlier September 1998, Mr Chan saw a notice posted at the notice board of Po Toi O Village which was issued by the Hang Hau Rural Committee specifying the rules for the election of a village representative. According to rule 4(b) of those rules, he was eligible and so he applied to be registered. His name appeared in the Provisional List of voters which was published by the District Office. There were some objections from indigenous villagers to giving the right to vote to non-indigenous villagers. On 13 November 1998, a vetting committee meeting was held. The village representative, the Chairman and Vice-Chairman of the Hang Hau Rural Committee and 6 indigenous villagers attended. It decided to delete the names of 304 permanent residents from the Provisional List on the ground that they were non-indigenous villagers. On 20 November 1998, Mr Chan noticed from the Final List of

voters that his name had been deleted. On 23 November 1998, the Sai Kung District Office wrote to him informing him that his application for registration was rejected on the ground that he was not an indigenous villager. A total of 292 villagers were not registered in the Final List although they fell within the original rule 4(b) of the election rules and some of them were told by the Sai Kung District Office that they were rejected on the same ground. However, Mr Chan's relative, a Madam Yuen Siu Fan who was a non-indigenous villager but married to an indigenous villager, was registered as a voter. As a result of the present proceedings, no village election has been held.

AL 28 of 1999

Mr Tse Kwan Sang's parents were brought up in Shek Wu Tong Village which is one of the villages in the Pat Heung area of the Yuen Long District. He was born in the village and was brought up there. He and his family have lived in the village for many years.

On 10 November 1998, a notice was issued by Pat Heung Rural Committee announcing the election rules for the election of village representatives which was to be held shortly and calling for the registration of voters. According to rule 1 of those rules, only indigenous villagers over the age of 18 are eligible for registration. Rule 2 provides that married female indigenous villagers must have been living in the village for more than 7 years in order to qualify as voters. Mr Tse said that he was a voter in 1995 but was not qualified to register in the coming election according to the election rules which were published this time. He said that there were about 470 out of nearly 600 villagers in the village who are non-indigenous villagers. And so he and other non-indigenous villagers raised objection with Mr Lai Kwok Yiu, the Chairman of the Pat Heung Rural Committee. A

meeting of the villagers was held on 21 November 1998. About 200 villagers attended. It was resolved at the meeting that non-indigenous villagers would be included in the electoral roll. The reason given was that Shek Wu Tong Village was a branched-off village and that non-indigenous villagers had settled there for quite some time.

A few days later, Mr Tse and other non-indigenous villagers raised with Mr Lai as to why they were not allowed to stand for election. But Mr Lai said that there was no mention at the village meeting of the right to stand as a candidate. So another meeting was held on 22 December 1998 to discuss this matter. This time, only about 40 to 50 villagers attended. At the meeting, the villagers expressed dissatisfaction at this extra request. They resolved that non-indigenous villagers should be denied even the right to vote which was given at the previous meeting. Mr Tse and the others raised objection with the village representatives and the District Office. Finally, on 12 January 1999, the Pat Heung Rural Committee confirmed that non-indigenous villagers would be allowed to vote but not to stand for election.

An election was held in March 1999 without Mr Tse being allowed to stand for election. It is not clear whether the successful candidate had been approved by the Secretary for Home Affairs pursuant to s.3(3) of the Heung Yee Kuk Ordinance, Cap 1097.

Relief sought in these proceedings

One of the grounds of appeal and one of Mr Fung's submissions is that neither the Sai Kung District Office nor the Yuen Long District Office had made any decision against Mr Chan or Mr Tse which can be subject to judicial review. Counsel argues that the Secretary for Home Affairs is only

required to approve the successful candidate after the election pursuant to s.3 of the Heung Yee Kuk Ordinance. When the applications for judicial review were lodged, the Secretary had not given his approval yet. Hence there was no decision to be reviewed and the applications were premature.

In AL 112 of 1998, the subject matter of Mr Chan's complaint was stated in the application for judicial review to be the "decision of the Hang Hau Rural Committee and the Sai Kung District Office". However, the relief sought was for declarations that the arrangements made by the Hang Hau Rural Committee were unlawful. It did not ask for any order quashing the alleged decision. The reasons were apparent from the evidence. While it was the vetting committee which decided that Mr Chan was not entitled to vote, it was the Sai Kung District Office which compiled the list and wrote to Mr Chan telling him that he was not registered as a voter. Further, the status and authority of the vetting committee was rather doubtful. It was not certain, in view of its composition, whether it was a committee of the village (since the present village representative and 6 villagers were present) or that of the Hang Hau Rural Committee (since the Chariman and Vice Chairman of the Rural Committee also attended). Nor were the roles and the involvement of the Hang Hau Rural Committee and the Sai Kung District Office in the election arrangements beyond dispute.

Faced with such uncertainty, counsel for Mr Chan was content to obtain from the court declarations that the election arrangements in question which excluded Mr Chan as a voter were unlawful. Having considered the merits of the application, the trial judge apparently regarded such relief to be appropriate.

In AL28 of 1999, Mr Tse complained against the “decision of the Pat Heung Rural Comitee” in refusing his right to stand as a candidate in the village election in Shek Wu Tong Village. Again the respective roles and involvement of the village, the Rural Committee and the Yuen Long District Office were not entirely clear. It was the Rural Committee which issued the election rules that prohibited Mr Tse and other non-indigenous villagers from registering as voters and running as candidates. It was the villagers of Shek Wu Tong Village which at the first village meeting decided to allow Mr Tse and non-indigenous villagers to vote and which at the second meeting went back on that earlier decision. The status and authority of the village meetings were doubtful. So was the effect of their resolutions. Finally, it was the Rural Committee which confirmed the earlier “village resolution” giving Mr Tse the right to vote but denying him the right to stand for election.

Mr Tse sought mainly declaratory relief. This included a declaration that the Pat Heung Rural Committee’s decision refusing him the right of candidacy was unlawful. After the village had held its election in March 1999, he also asked for a declaration that the election was null and void and an order that a re-election be held. The other relief sought was similar to that sought in AL 112 of 1998, i.e., declarations that the election arrangements of the Pat Heung Rural Comitee were unlawful. The trial judge, apart from declaring that those arrangements were unlawful, went further to declare that the March village election was null and void and ordered a re-election.

In my view, while Mr Chan was immediately aggrieved by the decision disallowing him the right to vote and Mr Tse by the decision refusing to give him the right to stand as a candidate at the village elections,

it was in effect the whole election arrangements in these villages which were put into question in these proceedings. There was uncertainty as to which party was responsible for making the respective decisions or which decision is being challenged. Where this cannot be ascertained with any degree of precision, it is not appropriate and sometimes not possible in an action for judicial review to seek an order that such decision be quashed. It would be difficult to identify the party at which the order is to be directed. But that does not mean that the court has no power to grant any other relief if the circumstances demand that the court should do so. This is clearly permissible under Order 53 rule 1. I derive further support from the decision in *R v Secretary of State for Employment, ex part Equal Opportunities Commission and another*, [1995] AC 1. There the House of Lords held among other things that where it had not been demonstrated that there was a decision made by the Employment Secretary which could be quashed, the court could grant declaratory relief on an application for judicial review that the relevant domestic law was incompatible with European law.

In my view, where it is not clear which party made the decision which can be quashed but all the parties are brought before the court, the aggrieved party may seek declaratory relief in relation to the subject matter of the complaint. In the present cases, the real complaints are made against the election arrangements. All those who were or would be involved in the village elections in these two villages are before the court. They would be bound by any declaration which the court sees fit to make. I should think that declaratory relief would be the appropriate remedy in the circumstances of these two cases.

Presence of Government in these proceedings

In his judgment, the trial judge in AL112 of 1998 remarked that no party would take responsibility for making the decision to exclude Mr Chan from the voters list. He criticised the Sai Kung District Office for taking what it called a “neutral stand”. Mr Fung takes exception to such criticism. He points out that at the initial stage, Keith J (as he then was) took the preliminary view that since the decision in question was not made by the Sai Kung District Office, it could drop out of the proceedings. It was only at the trial that Findlay J, being seized of the matter, found it necessary to hear the Sai Kung District Office in view of the issues in dispute. In AL28 of 1999, as a result of Findlay J’s criticism in AL112 of 1998, the Secretary for Justice joined as intervener and addressed the court on the issues in that case.

If the Sai Kung and Yuen Long District Offices were indeed taking a neutral stand in relation to the elections in these two villages, one wonders why the Government wants to appeal against the decisions in both cases. Mr Fung explains that the Government’s position is that there is no breach on the part of the Government of the provisions of the ICCPR and the Basic Law and that the appeals are brought against the two decisions in so far as the declarations and orders may affect the Government. He accepts that in Mr Chan’s case, the election arrangements are unlawful in so far as they are inconsistent with s.35 of the Sex Discrimination Ordinance and there is no appeal against the declaration to this effect.

I find this explanation rather unconvincing. If the Government maintains that village elections are private elections and that the District Offices only play a supporting role, I see no reason why the Government would like to appeal against the declarations and orders in these cases (save the orders for costs) since they only affect the election arrangements which

the Government says were not made by the District Offices but by the villages and the Rural Committees of the respective areas. In my view, the truth of the matter is that the District Offices have played a much more involved role in these village elections than they would like to admit.

Involvement of District Office

Mr Simon Yau Sai Yan, the Sai Kung District Officer, said that the election of village representatives is essentially a private election. The District Office admits that it provides administrative support, prepares the voters' registers, posts up notices relating to the elections, counts the votes and acts as the unofficial returning officer in the village election. (And this would apply to elections in the other districts in the New Territories.) On the other hand, Mr Shing Hon Keung, the present village representative who is an indigenous villager, said that the Hang Hau Rural Committee only facilitates the village election in an advisory capacity and that it is the Sai Kung District Office which is responsible for organising the election and making all the arrangements. The Rural Committee, he said, has no authority to decide whether any person can be registered as a voter. It was the Sai Kung District Office which compiled the electoral register.

While it is accepted, as Mr Simon Yau said, that village elections are strictly not the elections of the District Offices, the evidence shows that they organise and spend public funds in organising these elections for the villages; they recommend the Model Rules to the villages as election rules; they provide active assistance in these elections, including posting up notices, compiling voters registers and acting as returning officer. Although they do not finalise the election rules or make decisions as to who can vote and who can stand as candidates, they provide and accept application forms, receive objections from both indigenous and

non-indigenous villagers, reply to complaints relating to the elections, and write to those who are refused registration as voters. Finally, pursuant to s.3 of the Heung Yee Kuk Ordinance, the Secretary for Home Affairs (through the District Officers) would approve the successful candidates who would be issued special identity cards by the District Offices. It is therefore quite clear that the District Offices are not only interested in the results of these village elections, they also play a crucial part and give the villagers the impression that they are very much involved.

Private or public affairs?

Mr Fung argues that village elections are private elections and that since the ICCPR was incorporated into the laws of Hong Kong through the Hong Kong Bill of Rights Ordinance which by virtue of s.7 thereof is only binding on the Government and not private individuals, the provisions of the ICCPR do not apply to village elections. It is thus important to examine the role and function of village representatives, the selection of village representatives, the involvement of the Government and the relevant legislation in order to see whether such elections are private or public affairs.

Traditional functions of village representatives

The villages in existence in the New Territories in 1898 have been recognised by the Hong Kong Government. The traditional rights and privileges of indigenous villagers have also been accepted and protected by law. When the villages were small and almost all villagers were indigenous, a village representative was the head of the village. His functions were limited. He assisted the villagers in (1) the certification of indigenous status for the purpose of applying for small houses and hillside burials, (2) witnessing villagers' applications for succession to estates under the New Territories Ordinance, (3) liaising between the Government and the villagers

on village removal, development clearance and other Rural affairs, and (4) managing village affairs which included the settlement of disputes, and the keeping of the ancestral house and village temple.

Traditional selection of village representatives

The traditional way of selecting a village representative was, as the Sai Kung District Officer said, essentially a private affair. That was the time when almost all of the villagers were indigenous villagers or their male descendants. According to Mr Lau Koon Wah, who had been a village representative for some 40 years in Po Toi O Village, the village representative (who might be called the head, chief or representative) was selected at the meeting of clan elders. A consensus was reached as to the most suitable person to serve the village. There was hardly any dispute or the need to hold any election. The few non-indigenous villagers living in the village were out-numbered and probably did not bother.

The method of selection of a village representative has undergone several changes through the years. The first stage was pre 1898, when there was practically no system at all. The second stage was the village representative system which came only during Japanese occupation in 1941 to 1945 which was the selection of village elders among heads of families in the village by consensus. The third stage was in 1948. Mr Barrow, a Government official, wanted to standardise the conduct for the returning of village representatives. He compiled a set of election rules which were subsequently known as the Barrow Rules. The next stage was in 1994 when the Heung Yee Kuk, in conjunction with the District Offices, promulgated a set of guidelines for the election of village representatives. This came to be known as the Model Rules. The Government was then advocating a fairer and more open system of returning village representatives.

It can be noted that in the Barrow Rules, no mention was made of indigenous or non-indigenous villagers. On the one hand, it can be argued that the lack of such a reference was indicative of the fact that no distinction was to be drawn between indigenous and non-indigenous villagers. On the other hand, it can be said that the reference was not necessary because most residents in these villages were then indigenous villagers. The Model Rules suggest the principle of “one person one vote”. I shall come back to these rules at a later stage. They are not mandatory but are recommended to the Rural Committees for adoption and use by the villages.

Traditional rights and interests of indigenous villagers

Both Mr Fung and Mr Grossman argue that non-indigenous villagers were traditionally excluded from village elections. They rely heavily on the existence of traditional rights and interests of indigenous villagers in the New Territories and the preservation of such rights and interests by law, in particular Article 40 of the Basic Law. Such rights and interests came from Chinese customary law. They were mainly succession rights. Certain concessions were granted to indigenous villagers in the New Territories by the Hong Kong Government. These concessions had given rise to certain rights and privileges. However, these rights and privileges were related to property rights. They were set out in a confidential paper which was compiled by the Home Affairs Bureau after a thorough study. These included the building of small houses, rates and rent exemptions, burial rights, succession rights, removal rights and compensation and the recognition of the Heung Yee Kuk (“the Kuk”) as a statutory advisory and consultative body on New Territories affairs.

It is important to note that there was no reference to any political right or privilege. In particular, there was no mention of any right or privilege to elect a village representative to the exclusion of non-indigenous villagers. In fact, counsel is unable to refer to any authority which purports to confer such right or privilege. I do not think Article 40 of the Basic Law helps him in any way either. Article 40 preserves the traditional rights and interests of indigenous villagers, but does not confer and cannot be construed as conferring what they have not already got. I am therefore unable to agree that there is a conflict between this article and Article 39 which incorporates ICCPR provisions into the laws of Hong Kong.

It is argued that the recognition of the Heung Yee Kuk as a statutory advisory and consultative body on New Territories affairs indicates that such a right or privilege has existed. In my view, the recognition of the Heung Yee Kuk is far from suggesting, let alone establishing, the existence of such right or privilege. On the contrary, if Heung Yee Kuk is to be a truly advisory and consultative body on New Territories affairs, they should as far as possible represent all the residents rather than any particular group. I shall look at this ordinance again later.

Modern role of village representatives

As a result of urbanisation and other social factors, the number of indigenous villages in the New Territories has reduced. In late 1950s, there were about 900 villages, but there are now only 688. The number of indigenous villagers residing in the New Territories has also reduced, with some of them choosing to reside overseas. On the other hand, the number of non-indigenous villagers has increased substantially over the years.

Whatever the traditional role and function of a village representative has been, it is quite clear that it now has a much more important public and constitutional role to play.

Apart from the change in population structure in the New Territories, there is another more significant change that has taken place as a result of the enactment of the Heung Yee Kuk Ordinance. According to a retired District Officer, Mr Hayes, the Heung Yee Kuk originated from a society founded in 1926 to “defend the rights to land in the face of Government expropriation of village properties in New Kowloon”. Shortly after the war, when a system of village representative was set up in 1948, the Kuk developed as representative of all parts of the indigenous New Territories community. This was de-registered in 1958 when it went into difficulties. It was reconstituted as a statutory body pursuant to the Heung Yee Kuk Ordinance in 1959.

Under the present practice, a village representative becomes automatically a member of the Rural Committee of the area in which the village is situated. Pursuant to the Heung Yee Kuk Ordinance, if he is elected among the village representatives of that area as the Chairman or Vice-Chairman of the Rural Committee, he would automatically be an ex-officio councillor of the Heung Yee Kuk Full Council. He can also be elected by the ex-officio councillors of 3 particular districts, namely Tai Po, Yuen Long and Southern District to be a Special Councillor of the Full Council. If a village representative is the Chairman of the Rural Committee, he is an ex-officio member of the Executive Committee of the Kuk or he may be elected by the Full Council to be a member of that Executive Committee. See sections 2 and 3 of the Heung Yee Kuk Ordinance. Further, as a member of the Full Council, he can be returned to the Legislative

Council either through the Heung Yee Kuk functional constituency or through the Election Committee of which the Kuk is a sector. See section 20(1)(a) and 22(2) of the Legislative Council Ordinance, Cap 542.

Furthermore, under the Basic Law, the Kuk can also nominate its members to the Chief Executive Selection Committee for the purpose of selecting a Chief Executive.

It can be seen that a new political landscape has been created by the Heung Yee Kuk Ordinance and that has changed the role of a village representative. He does not only look after the traditional rights and interests of indigenous villagers. He also participates in the affairs of the village and, through the Rural Committee, in the affairs of the whole area in which his village is situated. He may, if he is the chairman or vice chairman of the Rural Committee, participate through the Heung Yee Kuk in the affairs of the New Territories and through the Legislative Council, in the affairs of the whole of Hong Kong.

Pursuant to s.3(3) of the Heung Yee Kuk Ordinance, the Secretary for Home Affairs (a public officer) has a power to approve the successful candidate in a village election. As mentioned earlier, the District Offices are involved in these elections, spend public money on them and actively assist them.

In my view, given the modern role of village representatives, the involvement of the Government in these village elections and the structure of the Heung Yee Kuk, it is difficult to argue that since at least 1959, the selection of village representatives, be it by election or otherwise, is a process which can still be regarded as private any more. These elections are now very much public elections. The fact that a village representative

can be elected or “otherwise chosen” simply means that in cases where there is no contestant, no election is needed.

SHA’s power and obligation

There is no statutory provision with regard to how a village representative is to be elected or chosen. But the successful candidate has to be approved by the Secretary for Home Affairs (who has delegated such power to the District Officers in the districts). See s.3 (3) of the Heung Yee Kuk Ordinance. If he refuses to approve or withdraws approval of any person as a village representative, such person may appeal by way of petition to the Chief Executive in Council whose decision shall be final. See section 3(3)(d). However, there is no provision in the Heung Yee Kuk Ordinance which gives any guidance as to what the Secretary for Home Affairs has to consider before he gives or refuses his approval. The only provision is contained in s. 35 of the Sex Discrimination Ordinance which provides that the Secretary shall not approve a person as a village representative where that person has been elected or otherwise chosen according to 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. That is to say, if a village representative is elected or chosen according to a procedure which is contrary to s.35 of that Ordinance, the Secretary must not approve the successful candidate. This was accepted by the Secretary and hence there is no appeal in AL112 of 1998 against the declaration that the election arrangements are unlawful on the ground that they contravene that provision.

Application of ICCPR and Basic Law

If a village representative is elected or chosen by a procedure which is contrary to some law other than s.35 of Cap 480, one would expect

that the Secretary should also refuse to give his approval. The reason for this is, in my view, obvious. If the Secretary is conferred by legislation with a power of approval, he has to exercise it responsibly and reasonably. He is thus obliged to ensure not only that the successful candidate is a fit and proper person to be a village representative but also that he is properly elected or chosen and that his election or selection is not in any way contrary to the law or any reasonable and acceptable principles. Such law and principles should include the provisions of the ICCPR and the Basic Law. Just as the Secretary must have regard to the principle against sex discrimination which is now provided in the Sex Discrimination Ordinance before he approves the successful candidate, so should he have regard to the principles under the ICCPR which are enshrined in the Basic Law. Hence, while it is accepted that the provisions of the Bill of Rights Ordinance bind only the Government and public authorities, these provisions are clearly equally applicable as yardsticks in measuring the legality, reasonableness and acceptability of the election process of village representatives to enable the Secretary to exercise his statutory power of approval responsibly and reasonably.

Election arrangements in these two cases

The Model Rules were promulgated by the Heung Yee Kuk and recommended to the Rural Committees by the District Office in May 1994 as guidelines for elections in the villages. It was up to each village to determine the manner of its election according to the customs and traditions of that village. These Model Rules had been adopted for use in previous elections by some of the villages. It must be noted that rule 1 says that all village representatives must be elected according to the principle of “one person one vote”. This would suggest that each villager, whether he is indigenous and non-indigenous, should have the same voting right.

In AL112 of 1998, for the village election in Po Toi O Village, according to the original rule 4(b), any Hong Kong permanent resident, as defined in the Immigration Ordinance (Cap. 115), irrespective of gender, aged 18 or above and has been residing mainly in the corresponding village is entitled to vote. Mr Chan would have qualified, although it can be noted that there is no residential requirement for indigenous villagers. But the vetting committee decided to withdraw this rule and hence Mr Chan and many others were not allowed to register as voters. Further, while a female non-indigenous villager who married an indigenous villager was allowed to register and vote, Mr Chan who married an indigenous villager was not. In this respect, the election rules for Po Toi O Village did not follow the Model Rules. In so far as Mr Chan is excluded from the electorate on the ground that he is not an indigenous villager, this is unacceptable. It is also discriminatory against men who married female indigenous villagers and against single female indigenous villagers because of their marital status. Incidentally, rule 5 of the Model Rules (which was apparently adopted by Po Toi O Village) provides that only indigenous villagers (aged 18 or above, irrespective of gender) are allowed to stand for election. This would also be discriminatory against non-indigenous villagers.

In AL28 of 1999, it is accepted that Shek Wu Tong Village was established in the Pat Heung area since 1991 as a branched-off village from Tin Fu Tsai Mun. The Pat Heung Rural Committee had adopted the guidelines in the Model Rules in 1994 in the previous village election and this was confirmed at a general meeting of the Pat Heung Rural Committee held on 7 November 1998 for this election. According to a resolution at that meeting, it was decided that in principle, non-indigenous villagers over the age of 18, irrespective of gender, who are certified to have been residing in

the village for more than 7 years are eligible as voters but female indigenous villagers who have married other villagers would have lost their eligibility in their original village but can register in the village of their husbands. Despite this resolution, the notice calling for registration as voters only permitted indigenous villagers over the age of 18 to register. It was after various objections and discussions that non-indigenous villagers were allowed to vote but not to stand for election. This is the complaint of Mr Tse. In any event, the election arrangements would also be discriminatory against female indigenous villagers because of the residence requirement.

The question is whether the discriminatory arrangements in these two villages are unlawful.

Exclusion of non-indigenous villagers

Both Mr Fung and Mr Grossman argue that when the Heung Yee Kuk Ordinance was enacted in 1959, the majority of the people in the New Territories were indigenous villagers. At that time village representatives were elected or chosen from among indigenous villagers. That was the method of selecting village representatives. Non-indigenous villagers have always been excluded. It is said that this is also the method anticipated by the Heung Yee Kuk Ordinance. With respect, upon a true construction of that Ordinance, I do not think this submission can be right.

The ordinance was not enacted to freeze the position at the time of its enactment. There is a presumption that “Parliament [the legislature] intends the court to apply to an ongoing Act [ordinance] a construction that continuously updates its wording to allow for changes since the Act [ordinance] was initially framed (an updating construction). While it remains law, it is to be treated as always speaking. This means that in its

application on any dates, the language of the Act [ordinance], though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as current law... Whether an Act [ordinance] is an ongoing or fixed time Act [ordinance] it may be necessary to determine how its meaning was understood at the time it was passed. For this, reference may be made to contemporary sources.” See *Bennion on Statutory Interpretation*, 3rd Edition, at section 288.

It cannot be said from the wording of the Heung Yee Kuk Ordinance that it is a fixed time legislation. It is quite clearly ongoing and it looks into the future. This is clear from the preamble to that ordinance which spells out the intention of legislation. It says:

- “(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 New 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 importance of the Heung Yee Kuk’s role in the past is thus confirmed and recognised. Apart from that, it is also the intention of the legislation (a) to turn the Kuk into a statutory body; (b) that the Kuk should continue to be an advisory body and (c) that the Kuk should as far as possible be truly representative of informed and responsible opinion in the New Territories. If it is to be truly representative, it cannot represent only a section of the residents (i.e. indigenous villagers) of the New Territories.

The objects of the Heung Yee Kuk are set out in section 9 of the Ordinance as follows:

- “(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 interest 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 a public morality; and
- (e) to exercise such functions as they may be invited to from time to time by the Governor.”

It must be noted that apart from the reference in the preamble that the Kuk should aim at being truly representative, four of the above five objects of the Kuk are in connection with the *people of the New Territories* and this can only mean all the residents in the New Territories and not a section of them. This objective is also clear from the definition of village representative in section 3(3) by which it means “ the person elected or otherwise chosen to represent a village”. The person to be elected or chosen should represent the whole village and not a section of the village, i.e. indigenous villagers only.

In my view, it is quite clearly not the intention of the Heung Yee Kuk Ordinance that the Kuk should represent or serve only indigenous villagers in the New Territories. It cannot be said that the Ordinance anticipates that village elections will continue to be exclusively reserved for indigenous villagers.

It is said that a non-indigenous villager would have a disadvantage in performing some of the traditional functions in relation to indigenous villagers. This may or may not necessarily be the case. It is

accepted that a non-indigenous villager whose family have resided in the village for several generations would be able to discharge such functions equally well. Further if a non-indigenous villager is handicapped in doing these duties, he will simply not be returned as a village representative as the most suitable person. But whatever the argument is on the suitability of a non-indigenous villager to serve as a village representative, the restriction that non-indigenous villagers should not be entitled to vote would certainly have nothing to do with the performance of the traditional functions of a village representative.

Article 39 Basic Law

Mr Fung submits that these appeals turn on the construction of Article 39 of the Basic Law and if the Government has not been proved to be in breach of that Article, this would dispose of these appeals. His arguments can be summarised as follows.

The International Covenant on Civil and Political Rights (ICCPR) as applied to Hong Kong was incorporated into the laws of Hong Kong through the Hong Kong Bill of Rights Ordinance in 1991. But the ratification by the United Kingdom of the ICCPR was subject to the reservation that Article 25(b) in so far as it may require the establishment of an elected Executive or Legislative Council in Hong Kong does not apply. This reservation is reflected in section 13 of the Bill of Rights Ordinance. Furthermore under Article 2(2) of the ICCPR, the Hong Kong Government only undertakes to take necessary steps in accordance with its constitutional processes to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the ICCPR. After the handover in 1997, there is Article 39 of the Basic Law which provides that the provisions of the ICCPR as applied to Hong Kong shall remain in force and shall be

implemented through the laws of the HKSAR. It further provides that the rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless prescribed by law and that such restrictions shall not contravene Article 39. Mr Fung submits that the Government has not been in breach of that article because it has not failed to maintain in force the pre-handover laws which implemented the ICCPR as applied to Hong Kong or to take steps to implement through the laws of Hong Kong so much of the ICCPR as applied to Hong Kong which has not been implemented by pre-handover laws. The Government has also not taken steps to impose any restrictions that contravene the ICCPR as applied to Hong Kong. In any event, the Bill of Rights Ordinance which applies the relevant ICCPR provisions is only binding on the Government and all public authorities. It does not give rise to any complaint by a private citizen against another private citizen as in the present case.

With respect, I do not think Mr Fung's attractive arguments are relevant to the issues in these appeals. It is not alleged that the Government is in breach of Article 39 of the Basic Law. Nor had the trial judges in these two cases made such finding. It is not necessary for this court to hold that there is any breach of Article 39 of the Basic Law either. The main complaints of Mr Chan and Mr Tse and the grounds upon which the declarations in the court below were made are that the election arrangements in the two villages were unlawful because they contravene :

- (1) Article 25(a) and (b) of the ICCPR (which are applied in Hong Kong through Article 21(a) and (b) of the Bill of Rights Ordinance),
- (2) Article 26 of the Basic Law, and
- (3) section 35 of the Sex Discrimination Ordinance.

In the present cases, Article 39 of the Basic Law is only relevant in that it brings the provisions of Article 25 of the ICCPR into the laws of Hong Kong.

Article 25 (a) & (b) of ICCPR (Article 21(a) & (b) of BOR)

Article 25 of the ICCPR were incorporated into the laws of Hong Kong as Article 21 of the Bill of Rights through Article 39 of the Basic Law. Article 21 provides as follows:

“Right to participate in public life

Every permanent resident shall have 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 that 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 elector.”

Government’s arguments

Mr Fung submits that the election arrangements in question are not in breach of either Article 21(a) or (b) of the Bill of Rights. First, he argues that Article 21 of the Bill of Rights has no application to the circumstances of this case because by virtue of section 7 of the BOR Ordinance, the ordinance including Article 21 only binds the Government and all public authorities and that the present cases involved disputes between private individuals. In the earlier parts of this judgment, I have concluded that village elections are public affairs, that the Secretary for Home Affairs is obliged to ensure that they are conducted properly and that

the reasonableness and acceptability of the election process is to be considered in the light of the provisions of the ICCPR and the Basic Law.

Mr Fung's second argument is that there are two distinct levels of participation in public affairs, each attracting the application of different principles and procedures. The first level is the election of representatives to organs of power such as the Legislative Council and the second is the choice of representatives to take part indirectly in consultative or advisory bodies which exercise no real power. Article 21(b) applies to the first level of participation and is subject to the reservation with regard to the Legislative Council and Executive Council and to Article 68 of the Basic Law which provides that the rights under Article 21 of the Bill of Rights should be exercised with reference to the actual situation of Hong Kong and the application of the principle of gradual and orderly progress. Article 21(a) applies to the second level and does not give a person an unconditional right to choose the modalities of participation in different levels of government. It is for the organs of power to determine the precise modalities of participation.

Mr Fung submits that the election of members to the Heung Yee Kuk functional constituency is determined by the first principle whereas the election of village representatives is governed by the second principle. In respect of Article 21(b), it is submitted that this article does not specify which organs of government should be filled by elections. In respect of Article 21(a), he submits that this article is aimed at the lowest common denominator amongst all political traditions. It does not give any right to demand participation in public life at every level of government. Nor does it give any right to demand any particular modality of participation. It is for the state party to determine the level of government which should be open to

the public for participation and what modalities should be adopted. It is submitted that the issue here is whether the complainants, in the absence of direct participation, have been unreasonably deprived of the opportunity to participate indirectly in the conduct of public affairs through representatives. He argues that one has to look at the whole system to see whether a person is provided with the right and opportunity to participate in the conduct of public affairs. In the present cases, non-indigenous villagers like Mr Chan and Mr Tse are not deprived of such right and opportunity because they can take part at other levels of government. First, they can participate in District Board elections and elections to Legislative Council through the geographical constituency. Secondly, under the Heung Yee Kuk Ordinance, they can be co-opted into the Heung Yee Kuk Full Council. This extra avenue of participation was introduced as a balance of the different interests in the New Territories. Non-indigenous villagers are gradually granted the right to take part in the conduct of public affairs and this is consistent with the principle of gradual and orderly progress. The Government has set up a Working Group on Rural Elections which has decided on a time frame for the consultation of the parties concerned in the formulating proposals for further reforms. Counsel also submits that if the court alters this balance of interest, it is seeking to re-write the constitution of the Heung Yee Kuk which can only be done by the legislature.

Mr Fung further submits that the principle of margin of appreciation is also applicable in the present situation (and not just confined to the international context as the judge in AL28 said). He argues that as the system in Hong Kong is incomplete and undergoing a process of reform, the margin of appreciation should be even greater and wider. The courts should defer to the opinion of the legislature in relation to the progress of reform. It

is the legislature which has a better idea of the social, economic and political conditions in Hong Kong to decide on the type and timetable of reform.

Whether consistent with Article 21(a) & (b)

Article 21(a) confers upon a permanent resident a general right to participate in public affairs. It also provides that he be given the opportunity to do so. Although it does not specify the means of participation, it clearly covers direct participation by actually taking part and indirect participation through elected representatives who take part in public affairs. It does not specify the level of participation. But since the Bill of Rights is to be given a purposive and generous construction (see *R v Sin Yau Ming* (1991) 1 HKPLR 88) and *A-G v Lee Kwong Kut* (1993) 3 HKPLR 72), I should think that it covers both “organs of power” as well as “consultative and advisory bodies”. I am supported in this view by the comments of the Human Rights Committee on Article 25 of the ICCPR, (the same as Article 21), which says in paragraph 5: “It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels.”

Article 21(a) does not confer any unconditional right to choose the modalities of participation in the conduct of public affairs. (See *Marshall v Canada* (No 205/1986).) But for persons within a category covered by the same modality of participation, they should have equal rights. “There is a breach if a person is arbitrarily denied of an equal right to participate in public affairs.” See Harris and Joseph, paragraph 20.535.

While Article 21(a) confers a general right of participation in public affairs, Article 21(b) refers to one particular method of participation, i.e the right to vote in and to stand for elections. It does not specify the types

of election in which a citizen should have such rights. But from the context of this article, particularly the reference to universal suffrage, it would seem that it applies to public elections. This article is subject to the reservation by the state party that it does not apply in so far as it requires the establishment of an elected Executive and Legislative Council. In relation to Legislative Council, Article 68 of the Basic Law applies. Hence, in my view, if Article 21(b) is to apply in Hong Kong at all, it would have to cover public elections at the regional and local levels. In that case, it would be construed to require that all persons within the same class or group to which a particular public election relates should have equal rights to vote in and to stand for such election. According to the preamble, Article 21(b) may also be subject to reasonable restrictions. The usual types of restriction are those on age and residence.

According to the present law, a permanent resident in Hong Kong may have more than one opportunity to take part in the conduct of public affairs, such as through the District Board, the former Urban Council and Regional Council and the Legislative Council. Certain categories of permanent residents have more opportunities than others to take part in the Legislative Council elections. For instance, some professional people may have an additional vote if they fall within a particular functional constituency. This is permissible and is provided in the Basic Law (Article 68 and Annex II) and the Legislative Council Ordinance. See also *Lee Miu Ling and another v Attorney General (No.2)* (1995) 5 HKPLR 181 and [1996] 1 HKC 125.

But this is not the issue here. That is why in my view, Mr Fung's arguments fail to address the real complaints which are made in these cases. Mr Chan and Mr Tse are not complaining that they have no

opportunity to participate in public affairs at all. They are not complaining that some people have more opportunities than they have to participate in the Legislative Council elections. Nor do they insist on having a say in the modalities of participation in public affairs. They are complaining that they have no right to take part in the election of a representative in their respective villages, the villages in which they reside and to which they belong.

In respect of other types of election, the relevant constituencies are usually defined by law either by way of inclusion or exclusion. It is usually not difficult to determine whether a person is within the constituency or not. But there is no definition in any law, whether inclusive or exclusive, of the “constituency” for the purpose of a village election. There is no law governing village elections. What is more, there is no law which says that the election for a representative can be chosen by and from indigenous villagers only and that any other category of residents in the village can be excluded.

That being the case, one can reasonably expect that if a person is to be elected or chosen within the village to represent the residents of the village, then all the residents in that village should be entitled to take part. There should not be any distinction between different groups of residents within the same village. As I have concluded in the earlier part of this judgment, there is no established right or privilege which indigenous villagers can claim to have over non-indigenous villagers. Both Mr Chan and Mr Tse are residents of their respective villages as much as indigenous villagers are residents of those villages. An election of a representative of the village is an affair which concerns all the residents in the village. All of them should have the same and equal right and opportunity to take part in the conduct of the public affairs with regard to their village. That participation involves, in the present context, the right to vote and the right to stand as a

candidate. If Mr Chan and Mr Tse are to be excluded from taking part in the election of a representative in the villages in which they live, there must be a valid reason for such exclusion. If there is no lawful justification for it (and there is none in these cases), this would be contrary to Article 21(a) and (b). Since there is no statutory provision regarding village elections, the court, in granting a declaration that the election arrangements are inconsistent with the ICCPR, is not seeking to rewrite the statute.

I do not think Mr Fung's submissions would assist his case. We are dealing with whether all residents within the same village can take part in the public affairs of that village. We are not concerned with different people falling within different constituencies. It would be a breach of Article 21(a) if non-indigenous villagers are denied by indigenous villagers the right and opportunity to take part in the public affairs of the village (and also the whole rural district). It would also be a breach of Article 21(b) if they are denied the right to vote and to stand as candidates in village elections. The Secretary should not approve the successful candidate who is returned by means of an election process which is inconsistent with Article 21(a) and (b).

Balance of Interest

Both Mr Fung and Mr Grossman argue that the exclusion of non-indigenous villagers from village elections does not offend the ICCPR or the Basic Law. This is because hitherto, only indigenous villagers could be elected as village representatives and become members of the Rural Committee or even the Heung Yee Kuk Full Council. As a result of the amendment to section 3(2) of the Ordinance in 1988, non-indigenous villagers can now be co-opted and take part in the affairs of the Heung Yee Kuk. It is suggested that by way of a gradual and orderly process, the

Government intends to introduce a balance of interest by allowing non-indigenous villagers to participate in public affairs.

I have some doubts as to whether the legislative intention was to create a balance of interest by the introduction of co-opted councillors. This is far from clear from a construction of the Ordinance. There are several categories of members of the Full Council who can be residents in the New Territories other than indigenous villagers. Hence, non-indigenous villagers are eligible. But so is any person. Under section 3(2)(a), a New Territories justice of the peace can become an ex-officio councillor. It is open to the Government to appoint any justice of the peace as a New Territories justice of the peace and he need not be a non-indigenous villager. Under section 3(2)(b), 21 special councillors may be elected by the ex-officio councillors of 3 districts from amongst village representatives or such other person as may be approved by the Secretary for Home Affairs. This category of councillors need not be non-indigenous villagers. Under section 3(2)(c), 15 co-opted councillors may be appointed or elected. The only criterion is that they must not be Rural Committee members. But they need not be non-indigenous villagers. It is therefore arguable that the avenues to become a member of the Full Council through these categories are not open only to non-indigenous villagers. They are open to any person, even indigenous villagers. As a matter of fact, of the 15 co-opted councillors, 11 are non-indigenous villagers and 4 are indigenous villagers. It is accepted that after the 1988 amendment, non-indigenous villagers can be opted. But so can any person. Further, if the councillors are to be nominated by the Executive Committee of the Full Council or elected by the Ex-officio Councillors and be confirmed by the Full Council, it can be said that non-indigenous villagers do not necessarily have any advantage. It is also interesting to note that of all the village representatives in the district,

although the great majority are indigenous villagers, there are some who are non-indigenous villagers.

It would seem that the “gradual and orderly progress” argument in relation to participation of non-indigenous villagers in public affairs through the Heung Yee Kuk is not sustainable. At least, the avowed intention (as stated publicly by the Secretary for Home Affairs in the Legislative Council) was to introduce a greater variety of talents to take part in the Heung Yee Kuk rather than to bring in more non-indigenous villagers. The Secretary was reported to have said in the Legislative Council:

“It has always been the Kuk’s intention to *widen their representation and recruit more talents* so as to enhance their capacity 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. However, the Kuk would take care in identifying personalities who have long-standing connections with the New Territories and are thus capable of contributing to the well-being of the New Territories residents.” (emphasis added)

Margin of appreciation

For the reasons which I have discussed above, in the light of the real issues in these cases, there is no question of applying the principle of margin of appreciation. I do not find it necessary to deal with Mr Fung’s submission on this point.

Article 26 of Basic Law

Article 26 of the Basic Law provides as follows :

“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.”

This is a general statement of principle which guarantees the political right of permanent residents to take part in elections. Two points have to be noted. First, it gives no specifics and does not refer to any particular type of election. However, it is clearly not referring to every type of election. It can only cover elections of a public nature or elections to positions performing public duties or functions. This is a constitutional right and has nothing to do with private rights conferred by contracts between individuals or the constitutions of private organisations. Secondly, the right guaranteed by this article is subject to it being provided by law. Thus it has to be considered in the light of other articles of the Basic Law and statutory provisions which relate to public elections.

Since there is no law governing village elections, it may be argued that Article 26 does not apply and there is no right to vote or to stand for election in relation to these elections. I do not think this argument can be sustained. These are elections of a public nature. The Secretary for Home Affairs has an obligation to ensure that the successful candidates in these elections are properly elected. That being the case, he has to ensure that the election process is consistent with the provisions of the ICCPR, i.e. Article 21(a) and (b). These provisions are the governing criteria which the law imposes. As the election arrangements are, for the reasons which I have discussed earlier, inconsistent with these articles of the ICCPR which have become the laws of Hong Kong, they are also contrary to Article 26 of the Basic Law.

Section 35 of Sex Discrimination Ordinance

Section 35(3)(a) of this Ordinance provides that it shall be unlawful for a person to discriminate against another person in determining the eligibility of a person to stand for election to a relevant body or relevant

position, or to be selected for a relevant position. By s.35(2), this provision applies to the position of village representative or member or office holder of a Rural Committee within the meaning of the Heung Yee Kuk Ordinance. Section 35(5) prohibits the Secretary for Home Affairs from approving a person as a village representative where that person or member 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.

Section 5(1) provides that a person discriminates against a woman if on the ground of her sex, he treats her less favourably than he treats or would treat a man. By virtue of s.6(1), s.5(1) and s.35 (3) apply also to discrimination against men. Section 7(1) (a) provides that a person discriminates against a person of either sex on the ground of his or her marital status, if he treats that person less favourably than he treats or would treat a person of the same sex with a different marital status.

In AL112, there are two complaints in relation to s.35. First, while non-indigenous females married to indigenous villagers are included in the list of voters, non-indigenous males married to indigenous villagers are excluded and this contravenes s.6(1) and 35(3). Second, in so far as single non-indigenous females are treated differently from married non-indigenous females, this is contrary to s.7(1)(a) and s.35(3). In AL28, there are also two complaints. First, the requirement that married female indigenous villagers must have resided in the village for 7 years while there is no such requirement for married male indigenous villagers is contrary to s.5(1), s.7(1)(a) and s.35(3). Second, the exclusion of female indigenous villagers from standing as candidates with no such prohibition against male indigenous villagers is also contrary to those provisions. It would seem that

these complaints do show differential treatments to different categories of persons. The question is whether they are less favourable treatments and whether they are based on sex or marital status.

Mr Grossman put forth a number of arguments in answer to these complaints. First, he submits that the qualifications imposed by the villages are not part of the procedure as envisaged by s.35(5). I do not agree. Section 35(5) must be read in conjunction with the rest of the section. Section 35(3) sets out a number of circumstances in which there must not be any discrimination. They include eligibility to take part in elections. Hence eligibility must be part of the procedure governed by s.35(5).

Secondly, counsel submits that s.35 was specifically designed to protect women and not men because as a general rule, when women marry, they move to their husbands' families and hence may lose their right to vote whereas men after marriage do not move into their wives' villages. The answer to this submission is that whatever the reason behind it, while this particular provision may be worded to afford protection to women, s.6 clearly provides that s.5 and the provisions of Part III and IV (which includes s.35) relating to sex discrimination against women shall apply equally to men. The intention of the legislation must be to prohibit any form of sex discrimination, be it against women or men.

Counsel's third argument is that there is nothing in the Heung Yee Kuk Ordinance which discriminates against men, requiring protection for them in terms of s.35(5) and that the ordinance itself is completely gender neutral. As I have said, that Ordinance does not make provision as to who is entitled to take part in village elections. There is therefore no question of any sex discrimination arising from the provisions of that

ordinance. It is the election arrangements which are alleged to have the effect of discriminating against married male non-indigenous villagers, married female indigenous villagers and single female indigenous villagers. It is those arrangements which are under attack.

Counsel's fourth and main submission is that the election procedure adopted by these villages does not discriminate against women or men in favour of the other sex. The procedure in question is determined by the operation of the patrilineal descent test and not a consequence of discrimination directed against either sex. In other words, the deciding factor in that procedure is whether a person is an indigenous villager or whether in the case of a married person, that person marries into the family of an indigenous villager. With respect, I cannot agree with this submission.

Both a male married non-indigenous villager who takes a wife into his family and a female married non-indigenous villager who marries into her husband's family are still residents of the same village. Both would be part of their respective families. But a female married non-indigenous villager is obviously being treated more favourably than a male married non-indigenous villager, apparently because of where she actually lives. This must be discrimination against the male married non-indigenous villager.

In considering whether a particular arrangement is sex discriminatory or not, it is not only the intention of the arrangement but also its consequence which must be borne in mind. The intention or motive to discriminate is not a necessary condition, although it is a relevant consideration. *See R v Birmingham City Council ex part Equal Opportunities Commission* [1989] IRLR 173. A prima facie case of

discrimination arises when a particular arrangement has the effect of favouring some persons because of his or her sex or marital status. In determining whether the arrangement is discriminatory or not, the test is that stated by Lord Woolf in that case at paragraph 13:

“ There is discrimination under the statute if there is less favourable treatment on the ground of sex, in other words if the relevant girl or girls would have received the same treatment as the boys but for their sex. The intention or motive of the defendant to discriminate, though it may be relevant so far as remedies are concerned ... is not a necessary condition to liability; it is perfectly possible to envisage cases where the defendant had no such motive and yet did in fact discriminate on the ground of sex.”

The “but for” test was approved by the House of Lords in *James v Eastleigh Borough Council* [1990] IRLR 288. I would adopt the same test to these cases. Applying such test to the facts here, it is quite clear that the 4 complaints are well founded in that under the election arrangements, different categories of residents in the same village are treated less favourably than others as alleged. This is contrary to the provisions of s.35 of the Sex Discrimination Ordinance.

Counsel argues that in these cases, it is the married female non-indigenous villagers who are given an additional right and not the married male non-indigenous villagers who are denied of any right, both types not being entitled to such right in any event. He says that in fact all that needs to be done is to take away the right which has been unduly favourably given to the married female non-indigenous villagers. I do not think this argument can be sustained. The answer must be : why then are the married male non-indigenous villagers not also given this unduly favourable right? Is this not another form of less favourable treatment to them?

Other points

In view of the reasons which I have discussed above and the conclusions which I have reached, I do not think I need to deal with the other criticisms on the judgments in the court below. These criticisms include the treatment of the statistics of the Heung Yee Kuk, the status of Shek Wu Tong Village as a branched-off village and the status of a former village representative, Mr Tsang Wai Leung, whether he is an indigenous villager or not. These issues do not affect my conclusions on the main issues in these appeals.

Conclusion

For the reasons which I have set out in this judgment, I am of the opinion that the appeals in Civil Appeal Nos 137 and 139 should be dismissed. In Civil Appeal Nos 278 and 279, I have come to a similar view that they should be dismissed except for the order that there should be a re election in Shek Wu Tong Village. I doubt whether the judge had the power to make that order. Mr Dykes does not insist on retaining it. In the circumstances, I would order that in these two appeals, this particular order be set aside. I would also make an order *nisi* that the appellants should pay the costs of these appeals respectively.

Hon Nazareth VP:

Introduction

I agree with the judgment of the Chief Judge. However, given the importance of the matters concerned, it is appropriate that I should, without undue repetition, also give my main reasons for dismissing the appeals. In doing so, I adopt the account of the facts and submissions given by my Lord.

The elections — whether public or private

The conclusion that the elections concerned were public affairs within the scope of ICCPR Article 25(a) seems to me to follow also from the following two matters.

(a) The role of village representatives

It is clear that traditionally there were no village representatives as such and that it was apparently the village elders who attended to the affairs of villages. If some or even all of the village elders' traditional role has now been taken over by village representatives, and it seems that some has, that would not be inconsistent with their having additional functions of a public as opposed to private nature. The public functions, unless wholly insignificant, which they are not, would, in my view, require the offices to be classified as public offices and the elections to them as public affairs for the purposes for ICCPR Article 25(a) and Basic Law Article 26.

(b) The involvement of the Government

All the indications are that upon the ending of the Japanese occupation, it was the Government that imbued the office of village representative with substance by making it the conduit for consultation with villagers, setting up rural councils with membership constituted by village representatives who were also given access to membership of other public bodies in particular of the Council of the Heung Yee Kuk as the body representing indigenous interests. Furthermore, the Government ultimately established the Heung Yee Kuk as a functional constituency for the purpose of Legislative Council elections, making village representatives the lowest tier from which some of the members of the Council of the Heung Yee Kuk were indirectly drawn. For the purpose of the election of village

representatives, who previously were chosen or selected by villagers in their own ways, the Government produced for voluntary adoption the Barrow Rules and the Model Rules, besides providing through District Offices substantial logistical and manpower resources for carrying out the elections.

Finally, under the Heung Yee Kuk Ordinance, the election of a village representative is not effective until approved by the Secretary for Home Affairs. Moreover, it would seem that currently the only real justification for the continued existence of the office of village representative is the use the Government makes of it.

Against this, Mr Daniel Fung SC for the District Offices and the Secretary for Justice, argues that indigenous villagers themselves see to the entire election. It may well be that they do so to some degree under the benevolent eye of the District Office, and that they sometimes decline the advice or guidance of the District Offices. But the foregoing features and considerations, in my view, leave no room for any conclusions other than the Government was responsible for the official nature of the “office” of village representatives and played a critical part in the elections.

The material involvement of the Government also bears upon another aspect of the appeal, i.e. that it warrants the District Offices being brought into the proceedings, a matter upon which I do not find it necessary to add anything.

The ICCPR and Basic Law Articles 26 and 39

The general application of the ICCPR provided for by Article 39 of the Basic Law is not in question. The reservation with reference to an elected Legislative Council made when that Covenant was originally

acceded to in respect of Hong Kong, in my view, plainly does not inhibit the application of the Covenant to elections of village representatives, even though village representatives are part of the first tier, albeit somewhat discreet of the elective or selective pyramid of which the Council of the Heung Yee Kuk is the apex.

It is convenient to mention here that in an associated submission, it was urged that the Legislative Council was fully aware of the village representatives election system when it constituted the Heung Yee Kuk as one of the functional constituencies of Legislative Council elections and must be taken to have thereby endorsed or approved it. For my part, I cannot accept that the legislature would deny non-indigenous villagers their right to participate in elections of representatives to represent them, in so oblique a manner without any reference to indigenous or non-indigenous villagers. The point also led to argument as to the statutory construction of the Heung Yee Kuk Ordinance in particular as to whether it was a “fixed time” statute or an “always speaking” one. I have not derived any assistance from those submissions and the counter submissions made with much learning from section 288 of the Third Edition of Bennion’s *Statutory Interpretation*. The effect of the Heung Yee Kuk Ordinance seems in the present context to be quite clear. It is the Heung Yee Kuk that is made a functional constituency. I am unable to see in that any endorsement of the then current exclusion of non-indigenous village representatives from participation in elections for village representatives, *a fortiori* exclusion for all time as if that Ordinance were a “fixed time” statute.

Such a right on the part of non-indigenous villagers who are permanent residents (the equivalent of “citizens”) is both consistent with and

reinforced by Article 26 of the Basic Law, albeit in general terms of principle.

Traditional rights and interests

It was sought to invoke the traditional rights and interests of indigenous villagers and inhabitants of the New Territories in defence of the exclusion of non-indigenous villagers. The submission relied upon a number of different factors and considerations. Before turning to these, it is necessary to point out that none of the traditional rights or interests referred to related to participation in elections or to such being confined to indigenous inhabitants; neither the Legislative Council elections legislation nor the Heung Yee Kuk Ordinance provides for or supports such exclusion of non-indigenous villagers; and the Model or New Rules for elections of village representatives likewise do not sanction or even remotely offer comfort for such exclusion.

Basic Law Article 40

This provides that “The lawful traditional rights and interests of the indigenous inhabitants of the ‘New Territories’ shall be protected by the Hong Kong Special Administrative Region”.

It is contended that such protection of indigenous minority interests is provided and recognised in many jurisdictions, including common law jurisdictions. That is not disputed. Moreover, I think it is fair to say that it would be widely if not universally accepted that indigenous minority interests merit reasonable protection. However, it is difficult to see how that general proposition warrants the exclusion of non-indigenous villagers from participation in the election of village representatives to represent those very non-indigenous villagers who, incidentally,

increasingly outnumber the indigenous villagers. In any case, what is at stake is not an attempt to deny indigenous villagers the right to manage their own affairs. These, to indicate their nature, include the certification of the indigenous status of villagers for the purpose of applying for small house and hillside burials, in the witnessing of such villagers' applications for succession to estates under the New Territories Ordinance, in liaison between the Government and such villagers on village removal, development clearance and other rural affairs, and in managing village affairs including the settling of disputes, upkeep of ancestral halls and village temples where these are the preserve of indigenous villagers as is usual. But public affairs that do not involve the exclusive traditions, customs and the rights of indigenous villagers, and particularly the representation of non-indigenous villagers, are plainly not matters within the ambit of protection of indigenous traditions and interests.

The mismatch of management of indigenous interests and representation of non-indigenous villagers in the role of village representatives has apparently resulted from the adoption by Government for public administrative purposes, of a system originally designed and intended for the selection of representatives for the management of indigenous villagers' own private affairs. One would have thought it not too difficult to segregate the disparate roles with their potentially conflicting objectives. I particularly mention the latter as it has a bearing upon the next submissions to which I shall now turn.

Gradual and orderly progress

Article 68 of the Basic Law provides *inter alia* for the Legislative Council to be formed in accordance with the principle of gradual and orderly progress with the ultimate aim as the election of all members of

the Legislative Council by universal suffrage. Upon essentially that provision, Mr Fung has constructed an impressive and powerful, if elaborate, submission for gradual progress to a fully elected Legislative Council. However, it has to be said at once, what these appeals are concerned with are the elections of village representatives, which as I have already mentioned, are far removed from Legislative Council elections. Even if the election of village representatives were regarded as an inherent part of Legislative Council elections (which, in my view, they are plainly not), I am not able to see how the exclusion from participation of non-indigenous villagers could be justified. The progress that it seems could quickly be made but is absent is the separation of the public affairs including non-indigenous affairs and roles from the indigenous private roles. And if something of that nature turned out to be the critical step in gradual progress, I find it difficult to believe that it could not have been resolved earlier.

In the latter respect, we were told that a Working Group on Rural Elections had in fact submitted its report which is now being considered by the Administration. I cannot, for my part, see that this development warrants any reconsideration of my foregoing conclusion that the specific exclusion of indigenous villagers could have been resolved earlier.

In reaching that conclusion, I have not overlooked the contention that the present position reflects a delicate balance of interests arrived at over a long period since the coming into force of the Heung Yee Kuk Ordinance in December 1959. The balance of interests being between ex-officio and special councillors of the Heung Yee Kuk who are predominantly indigenous villagers and the co-opted councillors who are predominantly non-indigenous villagers. As I have indicated, the election of

village representatives in that context, and the exclusion from participation of non-indigenous is a matter that properly falls to be considered as a matter discreet from the Legislative Council elections even that part of them that concerns the Heung Yee Kuk as a separate functional constituency. Upon that basis, I also reject the submission that the judgments of Findlay and Cheung JJ have the effect of judicially rewriting the constitution of the Heung Yee Kuk functional constituency.

Modalities of participation

The contention here was that it is upon such authorities, as there are, the mode of participation in public affairs is to be determined by the Legislative Council and not for the individual to select. Likewise, it is contended upon a Canadian authority (*Marshall v Canada*) that the court should not concern itself with “micro-management” of public affairs. I simply do not see the scope for application of such principles. With respect to the former, it cannot be said that there is any mode of participation provided to non-indigenous villagers in elections from which they are excluded. Similarly, it would be a travesty of justice and good sense if the court were to refuse to redress such exclusion on the ground that it would be a matter of micro-management. On the contrary, it is a matter of denial of a fundamental right.

Wide margin of appreciation

The submission here was that the doctrine of margin of appreciation, as recognised by the European Court of Human Rights, lends strong support to the submissions I have mentioned or touched upon. The relevant principles which govern the rights to participate in public life, it is submitted, are that these rights are not absolute and that there is room for implied limitations; that the state is accorded a wide margin of appreciation;

that it is for the courts to determine in the last resort whether the relevant requirements have been complied with; and that the margin of appreciation is all the greater when the system is incomplete and provisional.

I cannot see that these principles in isolation, or cumulatively with all the other matters submitted, could justify the exclusion of non-indigenous villagers in the narrow and discreet context in which the participation in public life arises, particularly when the matter is apparently open to simple and expeditious resolution. Reliance was also placed upon the observations of the Privy Council in *AG v Lee Kwong Kut* [1993] AC 951 at 975B-D that the Hong Kong Judiciary while zealous in upholding individual rights under the Bill of Rights Ordinance should ensure that disputes as to the effect of the Bill are not allowed to get out of hand, that such issues should be approached with realism and good sense and kept in proportion and that it should be remembered that questions of policy remain primarily the responsibility of the legislature. These views are now reflected in developing jurisprudence in Hong Kong. I do not see that any of those views would be disregarded in the conclusions I have reached.

This concludes the points raised by Mr Fung, and I turn to the complaints of discrimination contravening the Sex Discrimination Ordinance.

The Sex Discrimination Ordinance (cap. 480)

There is little I have to add to what has been said by the Chief Judge. Female non-indigenous villagers married to indigenous villagers are plainly accorded favourable treatment in the elections of village representatives. As to the suggestion, which I would regard as perverse, that the matter may be rectified by simply withdrawing the “favourable

treatment”, those who seek to do so may be well advised to ponder the implications of our judgments for any exclusion of female villagers who are permanent residents.

Conclusion

In the result, it follows that the exclusion of non-indigenous villagers from participation in the elections of village representatives, is on its face and upon mature consideration, a denial of their fundamental rights under ICCPR Article 26. That Article which remains in force in Hong Kong under Article 39 of Chapter III of the Basic Law, and provides for the fundamental right in question should be given a generous interpretation (see *Ng Ka Ling v Director of Immigration* [1999] 1 HKC 326C-E). And it seems to me that denial of the right conferred ought not to be lightly countenanced by the courts. The several submissions made by Mr Fung do not, either individually or cumulatively, justify such exclusion.

I accordingly agree that the appeals should be dismissed, save in regard to Cheung J’s order directing the Pat Heung Rural Committee to hold a re-election of the village representative of Shek Wu Tong Village.

Hon Mayo JA:

These are consolidated appeals. They both relate to elections of village representatives. In CACV 137/99 and CACV 139/99 the applicant Chan Wah a non-indigenous villager was not permitted to vote in the Po Toi O Village election. In CACV 278/1999 and CACV 279/99 the applicant Mr Tse Kwan-sang who is also a non-indigenous villager was not

allowed to stand for election in the Shek Wu Tong Village election. The first election was not completed. The second was.

Mr Chan Wah was born in Po Toi O Village in 1932 and has lived there all his life. However he is not regarded as being an indigenous villager (IV) as he is not descended through the male line from a person resident in the New Territories in 1898. He is married to an IV.

Mr Tse Kwan-sang was born and brought up in Shek Wu Tong Village as was his son.

Both applicants considered that they were fully entitled to participate in the village elections. They considered these to be public affairs.

Both applicants sought relief by way of Judicial Review. Mr Chan Wah's application was heard by Findlay J and Mr Tse's was heard by Cheung J.

Findlay J made declarations:

1. that the election was unlawful as the provisions of s 35(3) of the Sex Discrimination Ordinance, Cap. 480 had been contravened;
2. that the election was inconsistent with the provisions contained in Article 26 of the Basic Law; and
3. that the election was inconsistent with Article 25 of the International Covenant on Civil and Political Rights (ICCPR) which was applied to Hong Kong by Article 39 of the Basic Law.

Cheung J made similar declarations and in addition declared that the Shek Wu Tong Village Representative election was null and void and ordered that there be a re-election and that Mr Tse should be allowed to register as a candidate.

It is these declarations and orders which are the subject of the instant appeals.

Mr Fung SC represented the 2nd respondent in the first appeal and the intervener in the second. He made it clear however that he was not seeking to oppose the first declaration made by Findlay J relating to sexual discrimination. Indeed he informed us that the Secretary for Justice would not have approved the election on the ground that the provisions contained in the Sex Discrimination Ordinance had not been complied with.

As regards the other declarations and orders he submitted that it should be possible to dispose of these appeals on a short point. This was that there had been no contravention of Article 39 of the Basic Law. Article 39 provides:

“Article 39

The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.”

When the U.K. ratified the ICCPR in 1976 it had expressly made a reservation that the rights conferred by Article 25(b) of the ICCPR did not apply inasmuch as it may require the establishment of an elected Executive or Legislative Council. This reservation was passed on to Hong Kong when the U.K. ratified the ICCPR.

Article 25 provides:

“Article 25

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.”

In addition to this he went on to argue that village elections were private affairs not public ones. This was on account of the fact that Rural Committees were not organs of power. Their role was mainly advisory. This was in accordance with the main purposes of the Heung Yee Kuk.

Mr Fung also argued that it was apparent from the evidence which had been filed that the Government was using its best endeavours to bring about an orderly transition in the New Territories and there was a working party in existence which would be making recommendations to that end.

It was however an evolutionary process and that the Government was entitled to what has been referred to as “a margin of appreciation”.

Mr Fung made the further point that the Government had not been directly involved in the village elections. Although model rules had been provided it was for the villagers themselves to decide upon the extent to which they should be adopted.

In addition to this it had been the villagers themselves who had drawn up the electors list. When focusing upon the decision or order the subject of the Review on the first appeal it was evident that the decision in question was the refusal to register Mr Chan Wah as a voter for the Hang Hau Po Toi O Village Representative Election in 1999. Our attention was also drawn to the procedural skirmishes which proceeded the second Judicial Review where similar issues were ventilated.

Partly as a consequence of criticisms made by Findlay J on the neutral stance adopted by the Secretary for Justice on the first Judicial Review the Secretary for Justice applied successfully to intervene in the second Judicial Review.

All of this brought about a consideration of the role which had been assumed by the Government in these elections and indeed upon Mr Fung’s status in the present appeals. This was a matter of some importance as this would have a bearing upon the nature of the orders which should properly be made.

Mr Dykes SC who with Mr Yam represented the applicants contended that it was clear that the District Office had actively participated in the elections. In support of this contention he referred to the letter which the District Office sent to Mr Chan Wah informing him that his name could not be included in the register of electors.

“(Informal Translation)

Reference: () in SKCA31/11/21

Telephone: 27924455 Ext. 43

Ground Floor, 9 Po Toi O Village

Mr. Chan Wah,

Hang Hau Po Toi O Village
Village Representative Election – Electorate Registration

You have submitted to our Department the application form in respect of the above registration. Based on the following reason(s), our Department cannot admit your application to register as a qualified voter:-

- You are not an indigenous villager.
- You are not aged 18 or above on 31st December, 1998.
- others _____

You are informed that your name will not be entered in the formal electorate list.

(To Wai Man)
for
Sai Kung Home Affairs Officer

23rd November, 1998”

In my view there can be no doubt that the District Office was fully involved in these elections. Mr Dykes then took us through the various

constitutional arrangements for the New Territories. In my opinion it is not necessary for the purposes of these appeals to consider in detail the more formal arrangements for the essentially built up areas. It is however necessary to consider in outline those relating to Rural Committees and village representatives.

Perhaps the most striking element in these arrangements is the role played by the Heung Yee Kuk.

There can be no doubt whatever that the Heung Yee Kuk assumes an important role in public affairs in the New Territories. One aspect of the way in which the Heung Yee Kuk operates is that membership is open to some of the members of Rural Committees. This means that the Heung Yee Kuk can be regarded as a channel for advancement for village representatives who wish to participate in public affairs. There can potentially be further advancement to the Legislative Council from the Heung Yee Kuk for village representatives.

Although both Mr Fung and Mr Grossman SC who was acting for an intervener in the first appeal emphasised the fact that traditionally the Heung Yee Kuk represented the interests of IVs this fact is not borne out by the Heung Yee Kuk Ordinance, Cap. 1097 which was enacted in 1959. The preamble to the Ordinance provides:

“Preamble

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.”

More significantly there is no reference to IVs in the Ordinance.

What is however clear from the Ordinance and the constitutional arrangements for the New Territories is that village representatives are performing a public function and in my view Mr Fung’s contention that the powers they exercise are of a private nature is untenable.

If there is any doubt on this further confirmation is forthcoming by virtue of the fact that s 3(3) of the Heung Yee Kuk Ordinance requires the appointment of a village representative to be sanctioned by the Secretary for Home Affairs thus clearly implicating the Government in the election process.

Having established that the election is a public election the next question to be considered is the nature of the functions exercised by the District Office which is the delegated authority of the Secretary for Home Affairs.

We are informed that it is the practice of the District Office to consult with leaders in villages on how elections are to be conducted. The District Office provides model rules.

However if the people consulted in the villages choose not to follow the model that is a matter for them.

As to who the people are who are consulted by the District Office we were informed that reliance is placed upon traditional practices. This varies from village to village but for the most part the people who are consulted consist of IVs.

According to Mr Grossman reliance is placed on Article 40 of the Basic law which provides that the lawful traditional rights and interests of the indigenous inhabitants of the New Territories shall be protected by the HKSAR.

It is however the case that these lawful traditional rights and interests cannot encompass a right to vote. Authority for this can be derived from a passage from the judgment of Deputy High Court Judge Tang QC (as he then was) in *Kan Fat-tat v. Kan Yin-tat* [1987] HKLR 516 at 541:

“Mr. Wei argues that custom must have four characteristics:

- (1) it must be immemorial;
- (2) it must be reasonable;
- (3) it must be certain in respect of its nature generally, as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect;
- (4) it must have continued without interruption since its immemorial origin.

I agree such characteristics would be required to prove a custom as a matter of English law.

But as for Chinese custom in the present context, I believe reasonableness does not come into it. As for immemorial origin, no doubt one cannot trace it back to the year 1189, the commencement of the reign of Richard I. That is obviously inapplicable. However, I have no doubt that such custom must be certain.

But, Mr. Dicks says in paragraph 21 of his draft affidavit:

‘It follows that it is not possible to depose to any established rules of traditional Chinese law or custom as to the manner in which the property of a *Tso* should be divided amongst the male descendants of the common ancestor. At the same time it is in my view possible to identify with *reasonable certainty* the general legal and customary principles underlying the institution of common ancestral property which would necessarily govern the distribution of such property if the question were to arise under traditional Chinese law. These principles are, first and foremost, the principles of law and custom which govern the ordinary devolution of family property, and secondly the principles, largely customary in nature, which govern internal relationships within the common descent group, including the particular rules for the employment of distribution of the income from the property in question. I shall endeavour to explain further the interrelationship of these two principles as follows.’

Is the custom contended for by Mr. Dicks sufficiently certain for this purpose?

Although Mr. Dicks greatly expanded on this thesis in his evidence, his evidence can be summarised as follows.

- (1) As a matter of Chinese customary law, the invariable and only correct way of division of family property is *per stirpes*.
- (2) Ideally even family property was supposed to be held undivided in perpetuity. However, such was obviously not the case and as a matter of Chinese customary law, one may demand a division on the death of one’s father (if he is head of the family) though as a matter of courtesy, indeed even of law, division may not take place until after the death of the principal wife. In the case of a head of family being a collateral senior, his collateral juniors may require partition at any time.
- (3) As *Tso* property had their origin in family property, although it is intended to be perpetual and inalienable, (however, as is the case with all human endeavours, nothing is perpetual), if it should be divided, such division should follow the mode of division of family property.”

As might be expected there is nothing in this passage which would suggest that a right to vote can be included in traditional rights and interests in the New Territories.

This leads onto a consideration of who the District Officer should be communicating with. I can see no justification for according priority to IVs. It is apparent from a perusal of the Heung Yee Kuk Ordinance that the matters coming within the remit of village representative extends beyond the limited sphere of activities relating to traditional rights, see the affidavit of David Tsui the Deputy Secretary of the Home Affairs Bureau.

“Role of VRs

4. VRs have been assuming a consultative and advisory role in rural affairs. VRs, though receiving no official emoluments, assist their respective 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 estates under the NT Ordinance and in liaison between the Government and villagers on village removal, development clearance and other rural affairs. Moreover, VRs manage village affairs, including settling of disputes, upkeep of ancestral halls and village temples. However, such functions are only administrative in nature and do not have any statutory status. A non-indigenous is at a disadvantage in that he would not be able to perform some of the functions and duties in relation to indigenous villagers.”

Even more important than the question of who the District Office choose to consult with is the question of how the District Officer should discharge his duties.

What is immediately apparent is that there is no law governing village elections. It is however necessary for a public officer such as a District Officer to act in accordance with the law.

In the absence of any domestic law on the subject the District Officer should comply with the Article 39 of Basic Law which has already been cited in this judgment and Articles 25 and 26 of the ICCPR. Article 25 has also previously been cited and Article 26 reads:

“Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

He should also comply with Article 26 of the Basic Law which provides that permanent residents of the HKSAR shall have the right to vote and stand for election in accordance with the law.

Mr. Dykes referred us to Appendix E of the February 1997 issue of the Bill of Rights Bulletin which contains a commentary of the Human Rights Committee of the United Nations on Article 25.

Paragraphs 4, 5, 6 and 15 would all appear to be germane to the circumstances of these appeals:

“4. Any conditions which apply to the exercise of the rights protected by article 25 should be based on objective and reasonable criteria. For example, it may be reasonable to require a higher age for election or appointment to particular offices than for exercising the right to vote, which should be available to every adult citizen. The exercise of these rights by citizens may not be suspended or excluded except on grounds which are established by law and which are objective and reasonable. For example, established mental incapacity may be a ground for denying a person the right to vote or to hold office.

5. 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.

6. Citizens participate directly in the conduct of public affairs when they exercise power as members of legislative bodies or by holding executive office. This right of direct participation is supported by paragraph (b). Citizens also participate directly in the conduct of public affairs when they choose or change their constitution or decide public issues through a referendum or other electoral process conducted in accordance with paragraph (b). Citizens may participate directly by taking part in popular assemblies which have the power to make decisions about local issues or about the affairs of a particular community and in bodies established to represent citizens in consultation with government. Where a mode of direct participation by citizens is established, no distinction should be made between citizens as regards their participation on the grounds mentioned in article 25 and no unreasonable restrictions should be imposed.”

“15. 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 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. No person should suffer discrimination or disadvantage of any kind because of their candidacy. States parties should indicate and explain the legislative provisions which exclude any group or category of persons from elective office. The grounds for such execution should be reasonable and objective.”

In my view there has to be a genuine justification for departing from these principles.

I do not consider that any of the submissions advanced by Mr Fung meet this essential point.

The fact that there were reservations upon the application of Article 25(b) to HKSAR does not seem to me to be relevant.

Nor do I consider there to be any merit in the submission that the Article should not apply to elections such as village elections as it does not spell out the modalities of participation at lower levels of Government.

The fact that there may be a working party which is considering this subject is also not to the point. I can see no justification for the arbitrary imposition of a requirement that a voter in village elections has to be an IV.

The facts of these appeals all militate against this. There is evidence that many of the villagers do permit non-IVs to vote and stand as candidates. This does not appear to have created any problems.

I would also add that the fears of upheaval outlined by Mr Grossman would not appear to be justified. There is a clear distinction between the situation he outlined in relation to various functional constituencies where he argued that the criteria for voting appeared to lack any logical basis. The answer to this is that the legislature specifically provided for the way in which there should be participation in the various functional constituencies. There is no such legislation relating to IVs.

The only other matter I would refer to shortly is the question of sexual discrimination. In this respect I accept the validity of the submissions made by the Amicus Curiae Mr Lunn SC that it has been demonstrated that

in both elections there have been contraventions of the Sex Discrimination Ordinance.

So far as relief is concerned Mr Dykes conceded that only the declarations should be permitted to stand. This was sufficient for his purposes.

Subject to the Judge's orders being modified to reflect this in my view these appeals should be dismissed.

Hon Chan CJHC :

The appeals in Civil Appeal Nos.137 and 139 of 1999 are dismissed. The appeals in Civil Appeal Nos.278 and 279 of 1999 are also dismissed except that the order for re-election is set aside. There will be an order nisi that the appellants do bear the costs of the respective appeals and that those parties who are on legal aid shall have their own costs taxed in accordance with the Legal Aid Regulations.

(Patrick Chan)
Chief Judge, High Court

(G P Nazareth)
Vice President

(Simon Mayo)
Justice of Appeal

Mr Daniel Fung SC and Mr Johnny Mok for the Department of Justice
(Sai Kung District Office) 2nd Respondent/Appellant

Mr C S Grossman SC and Mr James Collins instructed by
Messrs Clarke & Liu for Cheung Kam Chuen (Intervener/Appellant)

Respondent (Appellant) : Mr Lai Kwok Iu, Chairman of Pat Heung Rural
Committee

Mr Philip J Dykes SC and Mr Stephen Yam instructed by Messrs Yuen &
Partners for Chan Wah (Applicant/Respondent) and assigned by DLA
for Tse Kwan Sang (Applicant/Respondent)

Mr Michael Lunn SC for Equal Opportunities Committee as Amicus Curiae

1st Respondent : Hang Hau Rural Committee, in person (absent)